SOHONI'S COMMENTARIES

ON

The Code of Criminal Procedure,

BEING

ACT V OF 1898

(AS AMENDED BY ACTS XII AND XVIII OF 1923 AND OTHER ACTS UP TO THE [illegible] OF 1930.)

TOGETHER WITH AN APPENDIX CONTAINING SEVERAL OTHER ACTS OF IMPORTANCE.

THIRTEENTH EDITION.

Revised and brought up to January, 1931,

BY

G. H. KARMARKAR, B.A., LL.B.
Advocate, High Court, Bombay.

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ICE TO THE THIRTEENTH EDITION.

ition to publish this edition in January, 1931, but for various work could not be finished before that time. The extra time ent on the work was due also to the other intention of making useful as possible, both to the Bench and the Bar. No pains l in acting up to that intention and it is our hope that the the needs of all those who want correct references and up-to- on questions of Criminal Procedure.

ns of the commentary which have become redundant in view of he law in recent years, have been deleted and yet the bulk of ot be reduced owing to the additions that had to be made.

G. H KARMARKAR, LL.B.

Advocate.

CONTENTS.

ABBREVIATIONS.

A	Indian Law Reports Allahabad Series from 1876
Abb Pr	Abbott s Practice Reports 1854—85
A C.	Appeal Cases Law Reports from 1875
A. H C. Bk. Cir	Allahabad High Court Book Circular
A L. J	Allahabad Law Journal Reports from 1904
A I R	All India Reporter
A W N	Allahabad Weekly Notes Reports from 1881
Ad and E	Adolphus and Ellis from 1834—40 New Series 1841—52.
Agra	Agra High Court Reports.
Agra Niz. Ad.	Agra Nizamut Adawlat Reports
Alison s Cr L.	Alison s Criminal Law of Scotland
All H Cr	Allahabad High Court
All R and O	Allahabad High Court Criminal Rules and Orders
All Unrep.	Allahabad Unreported Cases.
Am. Rep	American Reports.
Appx	Appendix.
Archibold Arch	Archibold s Criminal Law
Art.	Article.
Atkyn s	Atkyn s Reports Ch 1733-34
Atty-Gen	Attorney General
B.	Indian Law Reports Bombay Series from 1876
B and A	Barnwell and Alderson s Reports from 1817—22 K B
B and Ad.	Bardwell and Adolphus Reports from 1830—34 K B
B C	Bengal Code and Bengal Council.
B and C. •	Barnwell and Creswell s Reports from 1822—30 K.B.
B and S	Best and Smith s Queen s Bench Reports from 1861—69
B L R	Bengal Law Reports from 1868—75
B L. R Appx	Bengal Law Reports Appendix
B L. R Ap Cri (Cr).	Bengal Law Reports Appellate Criminal Jurisdiction.
B. L. R. O C	Bengal Law Reports Original Civil Jurisdiction
B L. R or Cri (Cr)	Bengal Law Reports Original Criminal Jurisdiction
B L. R S N	Bengal Law Reports Short Notes of Cases
B L. R Sup Vol	Bengal Law Reports Supplemental Volume of Full Bench Decisions.
B H C. R	Bombay High Court Reports from 1862—75
B H C. R Ap Cr	Bombay High Court Reports Appellate Criminal Jurisdiction
B H C. R Cr Ca	Bombay High Court Reports Crown Cases.
Baro	Barbour s Supreme Court Report (American) from 1847—75
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Bell	Bell s Crown Cases Reserved from 1858—60
Beng S D	Decisions of the Bengal Sudder Court.
Bing	Bingham s Cases from 1822 23 C. P
Bing N C	Bingham s New Cases 1834—40 C P
Bish	Bishop s Criminal Law
Bom L. R	Bombay Law Reporter from 1899
Bom Cr Ca.	Bombay Criminal Cases
Bom H C. Cr Cir	Bombay High Court Criminal Circular
Bom H C Cr Rul	Bombay High Court Criminal Ruling
Bosw	Bosworth s Reports from 1857—63
Boul	Boulnoe s Reports 1862—75 Calcutta
Bott	Bott s Supplemental Cases from 1761—1827
Bur	Burma Law Reports
Bur Gaz.	Burma Gazette.
Bur L. R	Burma Law Reports
Bur S R	Burma Session Reports
Burr	Burrow s Reports from 1756—72 K B
C	Indian Law Reports Calcutta Series from 1876
C H Cr Cir	Calcutta High Court Criminal Circular
C J	Chief Justice
C L. J	Calcutta Law Journal Report from 1905
C. L. R	Calcutta Law Reports from 1878—83
C. and P	Carrington and Payne from 1823—41 N P
C and K	Carrington and Kirwan s Nisi Prius Reports 1843—49
C and M	Carrington and Marsham s Nisi Prius Reports 1840—43
C P Cr	Central Provinces Criminal
C P Cir	Central Provinces Circulars
C P L R	Central Provinces Law Reports
C P Pol Man	Central Provinces Police Manual.

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C P Cir	Central Provinces Circulars
C. P L. R	Central Provinces Law Reports
C P Pol Man	Central Provinces Police Manual.

C. W. N. ... Calcutta Weekly Notes Reports from 1896.
Cal. Unrep. .. Calcutta High Court Unreported Cases.
Cal. H. C. Cr. Rev. ... Calcutta High Court Criminal Revision.
Cal. H. C. Cr. Ref. ... Calcutta High Court Criminal Reference.
Camp. .. Campbell's Reports from 1807—16, N. P.
Can. R. ... Canadian Reports.
Can. Law Jour. ... Canadian Law Journal.
Car. and Kir. ... Carrington and Kirwan's Report, N. P., from 1843—53.
Chap. ... Chapter.
Civ. P. C. ... Civil Procedure Code Act XIV of 1882, now Act V of 1908.
Cl. ... Clause
Cl. and Fin. ... Clark Finnelly's Reports, H. L., 1834—36.
Cox C. C. ... Cox's Criminal Cases from 1843—95.
Cowp. ... Cowper's Reports, 1774—78.
Cr. ... Criminal.
Cr. A. ... Criminal Appeal.
Cr. L. J. ... Criminal Law Journal of India from 1905.
Cr. L. R. ... Criminal Law Reporter.
Crl. P. C. ... Criminal Procedure Code.
D. and B. ... Dearsley and Bell's Crown Cases, from 1856—58.
D. and P. ... Dearsley and Pearce's Crown Cases, 1852—56.
Dears. ... Dearsley's Crown Cases from 1852—56.
Den. C. ... Denison's Crown Cases.
Doug. ... Douglas' Reports from 1778—85, K. B.
Duer. .. Duer's Reports from 1852—57.
E. and B. ... Ellis and Blackburn's Reports, Q. B., from 1852—57.
E. B. and E. .. Ellis Blackburn and Ellis' Reports, Q. B., 1858.
East P. C. ... East's Pleas of the Crown.
Ex. D. ... Exchequer Division, Law Reports from 1875—90.
F. B. ... Full Bench.
F. and F. ... Foster and Finlayson from 1856—67, N. P.
F. M. P. ... Foujdary Miscellaneous Petition, Madras.
F. U. ... Foujdary Udalat, Madras.
Folld. ... Followed.
Fost. ... Foster's Reports, Crown Law, 1746
G. I. Noti. ... Government of India Notification.
G. O. ... Government Order.
Gaz. of Ind. ... Gazette of India.
Genl. Cl. Act. ... General Clauses Act X of 1897.
H. C. ... High Court.
H. L. ... House of Lords Cases from 1847—66
H. and N. ... Hurdstone and Norman's Reports, 1856—61.
Hale P. C. ... Hale's Pleas of the Crown.
Haw. P. C. ... Hawkins's Pleas of the Court.
Hay ... Hay's Reports from 1862—63, Calcutta.
Hill ... Hill's Reports (American) from 1841—44.
How. Pr. ... Howard's Practice Reports from 1844.
Hun. ... Hunt's New York Supreme Court.
Hyde ... Hyde's Reports from 1862—64, Calcutta.
I. A. ... Indian Appeals.
In. Ca. ... Indian Cases from 1909.
I. E. Act ... Indian Evidence Act I of 1872.
Ibid. ... The same reference.
Ind. Jur. N. S. ... Indian Jurist, New Series, from 1866—67, Calcutta Old Series, 1862, Calcutta.
J. ... Justice.
J. C. Oud. C. ... Cases decided by the Judicial Commissioner of Oudh.
J. P. ... Justice of the Peace from 1836.
John.'s Ca. ... Johnson's Cases, 1799—1803.
Jud. Act. ... Judicature Act.
Jur. ... English Jurist.
Jur. N. S. ... Jurist, New Series.
K. L. R. ... Kathiawar Law Reports.
Knapp ... Knapp's Privy Council Reports from 1829—36.
L. B. R. ... Lower Burma Rulings.
L. and C. Leigh and Cave's Crown Cases Reserved from 1861—65.
L. J. Q. B. .. Law Journal, Queen's Bench.
L. R. ... Law Reports.
L. R. C. C. ... English Law Reports Crown Cases from 1865.
L. R. I. A. ... Law Reports, Indian Appeals.
L. R. H. L. ... House of Lords Cases from 1865.
L. R. K. B ... Law Report King's Bench.
L. R. P. C. ... Law Reports Privy Council.
L. R. Q. B. ... Queen's Bench from 1865.
L. T. ... Law Times Reports from 1845—58.
L. T. N. S. .. Law Times Reports, New Series, from 1859.
L. W. ... Law Weekly.
Leg. Rem. ... Legal Remembrancer Reports.
M. ... Indian Law Reports, Madras Series, from 1876.

M Dig	Morley's Digest Calcutta
H H C R	Madras High Court Reports from 1802—75
M H C R Appx.	Madras High Court Reports Appendix.
M H C Rul	Madras High Court Ruling
M I A	Moore s Indian Appeals from 1836—82 P C.
M L J	Madras Law Journal Reports from 1891
M L T	Madras Law Times Reports
M P O	Madras Police Order
Mad F U	Madras Foujdary Udalat
Mad Jur	Madras Jurist 1866—75
Mad H C Cr Rev	Madras High Court Criminal Revision
Mad H C Pro	Madras High Court Proceedings
Mad Pol Man	Madras Police Manual
Mad Rev Reg	Madras Revenue Register 1867—71
Mad S D	Madras Sudder Court Decisions from 1847—62
M W N	Madras Weekly Notes Reports
Marshall	Marshall s Reports Calcutta
Mood C C	Moody s Crown Cases Reserved from 1824—44
Moore Cr Ca	Moore s Crown Cases
Moore P C C	Moore s Privy Council Cases.
N A	Nizamut Adawlat Reports Bengal
N C C	Nizamut Adawlat Cases Bengal
N L R	Nagpur Law Reports
N W P H C R	North West Provinces High Court Reports from 1862—45
N Y Cri P C	New York Criminal Procedure Code
N Y Cr Rep	New York Criminal Reports
Oud Cr Dig	Oudh Criminal Digest
Oudh S C	Oudh Sessions Cases
Oudh Ca	Cases decided by the Judicial Commissioner of Oudh
P C	Privy Council Pleas of the Crown
P D	English Law Reports Probate Division
Pat L J	Patna Law Journal
P L R	Punjab Law Reporter from 1900
P J	Printed Judgments Bombay High Court from 1869—98
P R Punj Rec	Punjab Record from 1662
P R Cr J No	Punjab Record Criminal Judgment Number
Perry O C.	Perry s Oriental Cases
Pro M S C	Proceedings of the Madras Sudder Court
Punj Cir	Punjab Circulars
Q B	Queen s Bench Reports
Q B D	English Law Reports Queens Bench Division
R J and P	Revenue Judicial and Police Journal Calcutta
R R	Revised Reports
R Rep	Reports or Reporter
Ratanlal	Ratanlal s Unreported Criminal Cases of the Bombay High Court from 1662—88
Reg	Regulation
Reg & Ord N W P	Regulations and Orders North Western Provinces
Reg & Ord Punj	Regulations and Orders Punjab
Roscoe	Roscoe s Criminal Evidence
Russ	Russell on Crime and Misdemeanours
Russ and R	Russell and Ryan s Crown Cases Reserved
S	Section
S F A R	Sudder Foujdary Adawlat Reports
Salk	Salkeld s Reports King s Bench 1689—1711
Sch	Schedule
Sel Com Rep.	Select Committee s Report
Sel Dec.	Select Decision of the Madras Sudder Court from 1805—47
Stark Cr	Starkie s Criminal Pleading
St Tr	State Trials
Step Com	Stephen s Commentaries of the Laws of England
Sup Court	Supreme Court
T R	Term Reports (Durnford and East) K. B
Taunt	Taunton s Reports Common Pleas
Tay	Taylor s Law of Evidence
U B R	Upper Burma Rulings
U B R (Cr P C)	Upper Burma Rulings Criminal Procedure Code
W R	Sutherland s Weekly Reporter from 1862—75 Calcutta
W R 1864	Sutherland s Weekly Reporter Special Number or Gap Number
W R Cr	Weekly Reporter Criminal Ruling
W R Cr App Cr	Weekly Reporter Appellate Criminal Ruling
W R Cr Let	Weekly Reporter Criminal Letters
W R F B	Weekly Reporter Full Bench Ruling
Weir I	Weir s Law of Offences Vol. I
Weir II	Weir s Law of Offence Vol II
Wilkins Wend	Wendell s Reports American from 1362—41
Wym	Wyman s Revenue Civil Criminal Reporter
Wym. Cir	Wyman s Circular Letters.
Wym Cr Rul	Wyman s Criminal Ruling

= Same Case

Clause 8.—We accept the amendments proposed by this clause, but, as a matter of drafting, have substituted the words "in which" for the words "to which."

Clauses 9 *and* 10.—Some of our non-official members deprecated any extension of the scope of section 44, and on the whole, in view of the fact that prosecution for contravention of the provisions of the section are rare, we thought that the matter was not one of great importance. We have, therefore, deleted clause 9.

We are agreed, however, that the same considerations do not apply to section 45 where the obligation to give information to the police is laid on a restricted class of persons, and we have maintained the additions made to clause (*e*) of sub-section (1). We think that, in the cases referred to in clause (*d*), the obligation to give information should only arise when a reasonable suspicion exists that a non-bailable offence has been committed. We have made an amendment in sub-section (3), to meet a difficulty pointed out by the Central Provinces Government.

Clause 11.—We think that the amendment of section 54, as drafted, might lead to the interpretation that a requisition could only be issued in cases where arrest was lawful under the first clause of sub-section (1). We do not think that this was the intention, and we would therefore, add a separate clause for arrest on requisition. We agree with those critics who desire that some safeguard should be provided, and we have, therefore, proposed to lay down that the requisition shall reveal the offence or other cause for which the arrest is to be made, so that the arresting officer can satisfy himself that the arrest could lawfully have been made without warrant by the officer issuing the requisition.

Clause 13.—We think that the words "without unnecessary delay" should govern all that follows, and we have made a slight drafting change to effect this.

Clause 14.—The sub-sections which the Bill adds to section 88 imply that the Court which issues an order of attachment or endorses the same under sub-section (2) is to investigate and determine a claim or objection. We think that a limited power to transfer claims and objections for disposal to subordinate Magistrates would be useful, and we have, therefore, provided that District Magistrates may transfer such cases to Magistrates not below the rank of second-class Magistrates, and that Chief Presidency Magistrates may likewise transfer cases to Presidency Magistrates subordinate to them. The other amendments that we have made in this clause are consequential upon this.

Clause 15.—We consider that the words "if necessary," add nothing to the section and that they may cause difficulty in that a person charged with an offence under sub-section (5) of section 103 might raise the defence that there was no necessity for an order in writing. We have, therefore, deleted them. We also think that a prosecution should not be launched under sub-section (5) unless the order in writing has been delivered or tendered to the person to whom it is addressed.

Clause 16.—We agree generally that convictions for offences under Chapter VIII of the Indian Penal Code should justify action under section 106; but we have made an exception in the case of section 153-A of the Indian Penal Code.

Clause 18.—In view of the recent amendments made in the Press and Registration of Books Act, 1867 regulating the editing of newspapers, we have made a consequential amendment here. We also think that the protection given by the last clause of section 108 should only extend to newspapers which are edited, printed and published in conformity with the Act.

Clause 19 —We notice that clause (*d*) of section 110, as re-drafted by the Bill, omits the reference to the counterfeiting of currency notes which appears in the present law We have therefore, included offences under sections 489-A to 489-D of the Indian Penal Code in the clause We have also included abetment.

We considered a suggestion that clause (*f*) of section 110 should be deleted on the ground that it should be possible to bring every case under clause (*f*) within the remaining clauses of the section We decided by a majority to retain the clause

Clause 20 —In view of the numerous objections to the addition proposed by sub-clause (*i*) to sub-section (2) of section 117, we are doubtful of the wisdom of the addition and we have, therefore omitted it

We approve of the principle of new sub-section (3) of section 117 which as an alternative to the immediate arrest allowed by the proviso to section 114 enables a Magistrate to make an interim order for security But we see no reason why the interim order should not be in certain cases one for security for good behaviour, provided that an order of this nature is not made in proceedings under section 107 We have also re-drafted the proviso to new sub-section (3) in the hope of making its intention clearer

We decided in favour of maintaining the amendment of present sub-section (3) which will enable the fact that a person is " so desperate and dangerous as to render his being at large without security hazardous to the community to be proved by evidence of general repute Our colleague Saiyad Raza Ali dissents from this view On the other hand we think that the deletion of the words " or otherwise would be a mistake as the Courts might hold that some change in the law was intended by their omission, and that the sub-section was intended to be exhaustive of the methods of proof

Clause 21 —We have adopted the suggestion that the provisions of new section 122 should be elaborated so as to enable a Magistrate to reject a surety previously accepted by him or his predecessor This involves a few consequential amendments in the section which we have made We think that the procedure set out in sub-sections (2) and (3) of section 126 should apply in the case of a surety subsequenty rejected, and we have added a new clause which makes the necessary amendments in section 126 We have also laid down the grounds on which a Magistrate will be justified in rejecting a surety as an unfit person for the purposes of the bond The three points which we have included are the only points that have been considered by the High Courts

Clause 22 —We accept the amendments made in section 123 by this clause We have added another amendment to provide that sub-section (6) of section 123 as it stands shall apply only to cases for security under section 110 We think that in cases under sections 108 and 109 imprisonment in default of furnishing security should be simple

It has been pointed out that, though the object of new sub-section (3-A) is to avoid differences of opinion in a single case between the Magistrate and the Sessions Judge yet the amendment proposed by clause 106 in section 406 may have this very result inasmuch as in a single case one accused person may appeal to the District Magistrate, while the case of another accused person will be referred to the Sessions Judge The Bombay Government have suggested that, where the case of one accused has to be referred to the Sessions Judge under section 123, the case of all should be referred whether they have given security or not We have adopted this suggestion

Clause 25 —The principal question in connection with this clause is whether, as provided in the Bill, questions of title in relation to rights of way and the like should, for the purposes of

the Chapter, be finally decided by the Magistrate, or whether the almost uniform decisions of the High Courts, which lay down that the Magistrate must stay proceedings if he is satisfied that the question has been raised *bona fide*, should be followed. We prefer to accept the latter view as laid down in Manipurdey *v.* Bidhu Bhushan Sircar, I. L. R., 42 Cal. 158; and, as the case will not arise in all proceedings under this section, and more especially as we incline to the opinion that the proposed re-drafting of section 135 is not altogether satisfactory, we have provided for it as a special case in a new section 139-A. Our proposals involve the necessity of laying down clearly that the Magistrate only is competent to inquire into a claim relating to title. In view of section 142 and of the fact that in a case of any importance either the person against whom the order was originally made or some member of the public will bring the matter before a Civil Court, we do not think it necessary to lay down that the Magistrate may resume the proceedings upon the failure by the person against whom the order was made to institute civil proceedings within a reasonable time.

Clause 26.—We accept the amendment made in section 144 by this clause. It was suggested to us that section 144 should be elaborated so as to enable a person aggrieved by an order made under the section to require the Magistrate to make a judicial inquiry regarding the truth of the information on which he had acted, and thereby to bring in the revisional powers of the High Court. With the exception of Saiyad Raza Ali we think this proposal goes too far, and that it is necessary to maintain the executive character of proceedings under section 144. We are, however, prepared—and we have proposed an amendment to this effect—to lay down that a person aggrieved shall be entitled to apply to the Magistrate and show cause against the order, and that the Magistrate shall give him an opportunity to be heard in person or by pleader and shall record an order in writing on the application giving his reasons where he rejects it.

Clauses 27 *to* 30.—In view of the objections of the Bengal Government, we do not think sections 145, 147 and 148 should apply to the Presidency towns. We have, therefore, omitted the first amendment made by clause 27, and the references to 'Presidency Magistrate' and 'Chief Presidency Magistrate,' respectively, in clauses 29 and 30.

In order to meet certain difficulties which have arisen in connection with the words "receive the evidence produced by them" in section 145 (4), we have made an amendment adopting the phraseology of section 244 (1), and have also added a new sub-section (8-A) on the lines of section 244 (2). We have made an addition to the first amendment made in sub-section (6) of section 145 to make the intention clearer. We have introduced a new clause which, by an amendment of section 146, will enable a District Magistrate to withdraw the attachment of property at any time when he is satisfied that there is no longer any likelihood of a breach of the peace.

Doubts have been expressed as to the procedure to be followed in cases under section 147 and we have introduced amendments here to make it clear that the procedure is to be that laid down by section 145.

Clause 31.—In view of the general objection to the amendment which confines investigations to officers not below the rank of Sub-Inspector, we have made an amendment which enables Local Governments to specify a lower rank. We recognise that police work in some Provinces might be severely hampered by the first amendment made by the Bill in section 157.

With regard to the second amendment, we observe that investigations are made under section 157 "from information received or otherwise." There will not necessarily, therefore, always be an informant, and we have inserted the words "if any" after the word "informant."

Clause 33.—We discussed the provisions of the proposed new section 162 at length and considered in detail the opinions received in connection with it. We recognise the force of some of the criticisms directed against the section but we do not think that power should be given to contradict by means of police diaries a prosecution witness who has turned hostile and still less should power be given in respect of a defence witness. We have therefore left the clause unaltered.

Clause 34.—The intention of the Bill was to leave the position in regard to statements made under section 164 unaltered but to confine the recording of confessions under that section to superior Magistrates. We approve the Bill in so far as it deals with confessions and we think that statements also should not be recorded under the section by third-class Magistrates at all or by second-class Magistrates unless specially empowered.

We consider that a statutory obligation should be laid on a Magistrate acting under the section to warn an accused person about to make a confession that the same may be used against him and we think that the certificate prescribed by sub-section (3) should record the fact that the warning had been given.

Clause 35.—Suggestions have been made that section 165 as re-drafted by the Bill goes too far and that it should only permit a search to be made for something specified. We think the utility of the section would be largely impaired if effect were given to these suggestions but we have provided a safeguard by requiring that an officer acting under sub-section (1) or sub-section (3) shall record in writing his reasons for making a search or requiring a search to be made.

Clause 36.—In the Bill as introduced an investigating officer could not be below the rank of Sub-Inspector. We have proposed to some extent to remove this restriction but we are inclined to think that the powers conferred by section 166 should not be exercised by a police-officer making an investigation who is below the rank of Sub-Inspector. We realise however that there may be administrative difficulties in this connection and if such difficulties are pointed out by Local Government we should be prepared to retain clause 36 unamended.

Clause 37.—In section 167 however which confers a power to ask for a remand we would confine the operation to investigating officers not below the rank of Sub-Inspector.

We consider that the Bill does not go far enough in its restriction of the Magistrates who should be authorised to remand to police custody. We would confine the power to first-class Magistrates and second-class Magistrates specially empowered.

Clause 38.—We see no cogent reason for the first amendment of sections 169 and 170 which substitutes the words "upon the completion of an investigation" for "upon an investigation". In the case of 169, we agree that the power contemplated by the section should be exercisable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub-Inspector. With regard to section 170, however, we consider that the direct responsibility for sending up a case should rest with the officer in charge of the police-station. Section 168 undoubtedly contemplates that the officer in charge is to assume responsibility and to enable all investigating officers to send up cases under section 170 without reference to the officer in charge would tend to make section 168 of no effect.

We considered whether the power to admit to bail in bailable cases should not be extended to investigating officers but on the whole we are inclined to confine this power also to the officer in charge of the police-station.

Clause 39.—We have deleted this clause as we think that the power to send a witness to the Court in custody should only be exercisable by the officer in charge of the police-station.

of the Court, make a complaint We think this was probably an oversight. We have, therefore, removed the case of absence from the proviso and have provided in the main section for the leave of the Court in the case where the husband is absent

Clause 52—We have adopted the suggestion that the new section 199-A should apply to lunatics as well as to minors We note that there has been some criticism of the drafting of the new section, and we have re-drafted a portion of it so as to provide that, where the person applying for leave to make a complaint has not been declared by competent authority to be the guardian of the person of the minor or lunatic, and where the Court is satisfied that such guardian has been appointed, the Court shall give such guardian a reasonable opportunity of objecting to the application.

Clause 53—We have re-drafted the new proviso to section 200 to bring it more into line with the existing provisos and also to remove the idea that when the complainant is a Court there is any possibility of examining the complainant.

Clause 54—We approve the alterations made by this clause in section 202 subject to the following remarks The words "where such examination is prescribed by this Code" cover the case of a Presidency Magistrate referred to in proviso (*b*) to section 200. We consider that Presidency Magistrates should be required to examine the complainant and to record his statement in cases where the Court intends to postpone issue of process and order an inquiry under section 202 (1)

Clause 55—We see no force in the introduction of the word "previous," and we have deleted it. We have also made a slight drafting alteration in this clause

Clause 58—We have given effect to the suggestion of the Calcutta High Court that powers under section 219 should only be exercised by Magistrates who are empowered to commit for trial.

Clause 63—We consider that the re-draft of section 237 proposed by this clause is a great improvement on the existing section We have discussed the various criticisms which have been levelled against the clause and have not seen our way to make any amendment of substance We think it would be dangerous, if not impossible, to attempt any definition of the phrase "in the course of the same transaction" An exhaustive definition is not feasible, and if the phraseology is altered, the Courts would be deprived of the guidance which they now have from a long series of rulings on the point We do not find that there has been any pronounced conflict of opinion, the reason being that the Courts, instead of attempting to lay down general principles, as a rule discuss each case on its merits We have adopted a suggestion to substitute the words "is alleged to have been transferred" for the words 'has been transferred" in clause (*e*)

Clause 65—We have introduced an amendment in section 244 to provide for the case when a complaint is made by a Court and we have introduced a new clause 67 A in the Bill making a similar amendment in section 252

Clause 66—We are doubtful whether a Magistrate acting under section 349 records a finding All that the section requires him to do is to record his opinion We have, therefore, proposed a re-draft of this clause

Clause 67—We think that the words "or to a Magistrate" near the beginning of this clause were left out on the ground that information to a Magistrate from any person other than a police-officer must be a complaint. We think that this view overlooks the words "with a view to his taking action under this Code" which occur in the definion of "complaint." We also think that there is some force in the fact pointed out by the Calcutta High Court that section 190 (1) (*c*) seems to draw a distinction between information received and a complaint. We have therefore, restored the words "or to a Magistrate '

Sub-section (1) as re-drafted does not provide for the case where the complainant is absent at the time judgment is delivered, and we think power should be given in such a case to summon him to appear and show cause.

We think that there is some anomaly in enabling a Magistrate who cannot impose a fine of more than Rs. 50 to award compensation up to Rs. 100 and we have, therefore, proposed to reduce the amount of compensation which third-class Magistrates can award to Rs. 50.

In view of section 547, we do not see any necessity to provide in the new sub-section (2-A) that compensation should be recoverable as if it were a fine.

We have re-drafted the proposed addition to sub-section (4) to make the intention clearer.

We discussed at some length the various merits of the phrases—"frivolous or vexatious" as in the present Code, "false and either frivolous or vexatious" as in the Bill, and "false or vexatious, to the knowledge of the party" as in Act IX of 1922 recently passed to provide for compensatory costs in respect of false claims and defences. On the whole, we are in favour of the Bill as drafted. We do not think that the procedure of section 250 should be used in every false case unless the case is also either frivolous or vexatious. In more serious cases it is desirable that the Magistrate should act under section 476 with a view to the institution of a prosecution.

Clause 68.—It was suggested to us that the new section 255-A is unnecessary, on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the Jury or the Assessors from being prejudiced by anything they may hear as to the accused's previous record, yet in warrant cases the same considerations do not apply. On the whole, however, we think the new section may serve a useful purpose and we have retained it.

Clause 69.—The criticisms of the amendment introduced by this clause go to two extremes. On the one hand it is suggested that the accused should have a right to postpone his decision as to the cross-examination of the prosecution witnesses till the commencement of the next hearing of the case. On the other hand it has been suggested that this provision is likely to be grossly abused for purposes of the defence, and that the introduction of the words "if the Magistrate thinks fit" is an inadequate safeguard. We think that the amendment proposed by the clause is a reasonable compromise between these divergent views and we therefore propose no change.

Clause 70.—We have re-drafted this clause for the reason referred to in our remarks under clause 66.

Clause 71—The amendment proposed by the Bill would give the Magistrate discretion to discharge the accused when the complainant was absent in any case instituted upon complaint. We are inclined to think that this went too far, and we think it is sufficient to extend the application of the section to cases of non-cognisable offences.

Clause 72.—On the whole, we are not satisfied that it is desirable to make offences under section 309 of the Indian Penal Code triable summarily, and we have, therefore, deleted this clause.

Clause 76.—We think the amendments proposed in section 288 effect a considerable improvement; but we would lay down that the evidence of a witness before the committing Magistrate can only be treated as evidence for all purposes "subject to the provisions of the Indian Evidence Act." We considered the suggestion that the power conferred by this section should be exercisable by Appellate and Revisional Courts when the lower Court had refrained from exercising it, but, on the whole, we were of opinion that no provision should be made in this respect.

Clause 77 —We do not think this clause can stand as it is As pointed out in some of the opinions on the Bill, it does not meet the case where the accused states that he intends to produce documentary evidence only In that case the prosecutor has no right to sum up under section 289 (2), and no right of reply under section 292 We have provided that when the accused adduces oral evidence the prosecutor shall have a right of reply, but when the accused produces documentary evidence only, which is proved by the prosecution witnesses only or which does not require proof, then the prosecutor shall sum up and the defence shall have the right of reply

Clause 80 —We think there are two defects in this clause as drafted in the Bill In the first place, we consider that it should be clearly laid down as in the present section, that each assessor should state his opinion separately Secondly, the amendment made in the Bill did not necessitate the recording of the opinions We have re-drafted the clause so as to remove these defects

Clause 85 —After considerable discussion of the provisions of section 337 and examination of the large body of opinions on this clause we have unanimously come to the following decisions —

(*a*) Instead of including all offences punishable with imprisonment for a term which may extend to seven years we have made the limit ten years and have added as special cases, sections 211, 216 A 369, 401, 435 and 477 A of the Indian Penal Code

(*b*) The Magistrates who should be allowed to tender a pardon should in our opinion, be Magistrates of the first class who are inquiring into the offence and any District Magistrate, Presidency Magistrate Sub-Divisional Magistrate or with the sanction of the District Magistrate, a Magistrate of the first class having jurisdiction in any place where the offence might be inquired into or tried

(*c*) The power to tender a pardon should be exercisable during an investigation as well as after a magisterial inquiry has begun

(*d*) We have deleted the words "other than a Presidency Magistrate We see no reason why Presidency Magistrates should not record their reasons for tendering a pardon

(*e*) We do not agree with the Committee of 1916 that it should not be necessary to produce as a witness in the Sessions Court an accused person who has accepted a pardon

(*f*) We think all cases in which there is an approver should be committed for trial and we have deleted the provision which enabled cases to be transferred to section 30—Magistrates

Clause 86 —We accept clause 86 so far as it goes except that we would substitute a certificate by the Public Prosecutor for an allegation by the prosecution as the basis of the prosecution of a person who has accepted a tender of pardon We consider, however, that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-section (1) The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it and difficulties of procedure may obviously arise with reference to sections 255, 271 (2) and 272. We, therefore, propose a new section to be added after section 339, which lays down that when a person to whom a pardon is tendered is being tried under that section, he shall at the commencement of the proceedings be asked whether he raises the plea that he has complied with

the conditions on which the pardon was granted, and, if he does so plead, the Court shall record a finding on the point and, if it finds that the conditions have been complied with, shall acquit the accused. This provision we have inserted as a new clause 86-A in the Bill.

Clause 88.—We have added offences under 417, 418, 419, 420, 482, 483, 486 and 494 of the Indian Penal Code to the offences which may be compounded with the permission of the Court.

We understand that an amendment of sub-section (4) of section 345 is necessitated by the fact that its provisions have at times been grossly abused where the person competent to contract has compounded an offence in which he was to some extent implicated himself. We think, however, that the new sub-section (3-A) which the Bill introduces is likely to create great difficulties. The reference to section 198 is unsuitable because that section deals with a very small class of offences, whereas sub-section (4) as it stands applies to all cases which are lawfully compoundable. Further, the words "may be compounded by any other person who would be competent to file a complaint on his or her behalf" lead to nothing definite because under section 198 any person will be competent who obtains the leave of the Court. In cases other than those referred to in sections 198 and 199, any person is competent to file complaints, and in such cases the Bill would enable any person to compound an offence. We think the most satisfactory solution is to retain sub-section (4) as it is, but to make the permission of the Court necessary. We have substituted the words "under the age of 18 years" for the words "a minor." We have further provided by a new sub-section that a High Court acting in the exercise of its powers of revision may allow offences to be compounded.

Clause 90.—We have introduced a small amendment into section 348 to make it clear that the section does not empower the Magistrate to pass sentence in a case which he is not competent to try.

Clause 92.—Our colleague, Sir B. C. Mitter, pointed out that in regard to sections 346 and 350 the general principle is recognised that a Court which convicts an accused should ordinarily act only on evidence heard by itself, and suggested the advisability of applying the same principle to cases coming under section 349. The official members of the Joint Committee were of opinion that a distinction could be drawn in the case of section 349 inasmuch as under that section a Magistrate who is competent to try the offence has heard the whole of the prosecution evidence and has formed his opinion thereon, whereas under section 346 a Magistrate who finds that he had not jurisdiction has only heard part of the evidence. The official members also thought that, if the provisions of section 350 were to be applied to cases under section 349, the latter would probably become inoperative as Magistrates would prefer to dispose of cases themselves and pass what in their opinion was an inadequate sentence rather than run the risk of having the cases re-heard. The non-official members were of opinion that in those circumstances section 349 might be repealed. The Committee, however, as a whole agreed that they would not be justified in making such a drastic alteration in the Code until the point had been specifically put to Local Governments and their opinions had been invited. Clause 92 has, therefore, in this respect been left unaltered.

We think, however, that the new sub-section (4) which has been introduced in the Bill to deal with the case of Benches goes somewhat too far, and we have substituted for it a new section after section 350 which in our opinion gives effect to the law as laid down by the High Courts. Briefly, it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment and the judgment is passed by Magistrates all of whom have heard the proceedings throughout.

Clause 94 —We are inclined to agree with those critics who point out that the re-draft proposed by sub-clause (*i*) in sub-section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case We do not see how this difficulty can be got rid of, but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 264, and we would, therefore, retain this sub-clause

In order to meet difficulties that have arisen, we have introduced a sub-section laying down that Presidency Magistrates in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub-section (4) of section 364

The non official members, who constituted a majority in the Committee, expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates, and in particular with regard to this clause would have liked to see Presidency Magistrates required, in warrant cases at all events, to keep as full a record as any other Magistrate. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status, power and procedure We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small Committee to undertake this investigation

Clause 95 —In view of the objections taken by the Judges of the High Courts to the amendment of section 365, we have modified the clause in such a way as to provide that rules shall be made prescribing the manner in which the evidence shall be taken down in cases coming before the Courts, and that the evidence shall be taken down in accordance with those rules We do not think it necessary that the Judges of the Court should take down the evidence themselves, but we are of opinion that there should certainly be some record

Clause 96 —We do not see any necessity to limit the privilege of dictating judgments in the manner provided by the Bill, and we have, therefore, re-drafted this clause We think it desirable to lay down that orders under sections 118 and 123 (3) should be deemed to be judgments for the purposes of the section

Clause 97 —The proposal to repeal the words "other than a High Court was intended to remove the possibility of reading section 369 as if it gave High Courts unlimited powers of altering or reviewing their judgments But there are cases other than those referred to in sections 395 and 484 in which a review of judgment is possible We would refer to section 434 and also to clause 26 of the Letters Patent of the Presidency High Courts The Indian Legislature has power to amend the Letters Patent of the High Courts, and the amendment introduced by clause 27 might be interpreted as an intention to amend the Letters Patent in this respect We have, therefore, re-drafted the amendment so as to provide that no Court shall alter or review its judgment save as provided by or under any law from the time being in force or, in the case of a High Court, in its Letters Patent.

Clause 98 —This amendment of section 378 has been condemned by a majority of the Judges who have expressed an opinion on the Bill In view of the fact that the difficulty which the amendment is intended to meet is probably of rare occurrence, and that the second portion of the proviso will be inapplicable in the case of Judicial Commissioners Courts which do not at present consist of five Judges, we prefer to leave the law as it is, and we have deleted this clause

Act, 1912. We do not consider that a power is required to vary the order in any other respect in view of the provisions of sections 473, 474 and 475 of the Code, which appear to provide for all contingencies including absolute release or release on security. We would, therefore, omit proviso (*b*) to section 466 (2) and sub-section (2) of section 471 and would retain in section 474 the words "section 466 or" which clause 124 of the Bill proposes to remove. We see no reason why the provisions of section 474 should not apply to cases coming under section 466. We would, however, draw attention to the fact that the word "detain" is in the Code being substituted for the word "confine," and would recommend that an opportunity should be taken to make a corresponding amendment in section 35 of the Indian Lunacy Act.

With regard to the first proposed proviso to sub-section (1) of section 471, we note that the Local Government has power under section 475 to deliver lunatics to relatives after an order has been passed under section 471, and the Local Government only exercises its powers under that section on receipt of expert advice. We do not think it desirable to enable a Court, to exercise the same power on its own responsibility, and we would point out that the Committee of 1916 itself expressed the opinion that once a person has been ordered by a Court to be detained as a lunatic, provision for his care, periodical examination, release, etc., should be a matter for the Local Government and not for the Courts. The inclusion of the proviso which we have referred to is inconsistent with this opinion, and for these reasons we have deleted it.

Clause 126.—The changes that we have made in the proposed section 476 are not of great importance. We have provided that a Court can act on application made to it or *suo motu* and after such preliminary inquiry, if any, as it thinks necessary. For the words "committed before it or brought under its notice in the course of a judicial proceeding" we have substituted the phraseology used in the proposed new section 195. We have substituted "may make a complaint" for "shall make a complaint" and, in view of the criticism of the words "nearest first-class Magistrate" we have provided that a complaint should be sent to a first-class Magistrate having jurisdiction. For the words "if he thinks expedient in the interests of justice," which we think might hamper a Magistrate in the exercise of his powers of adjournment, we have substituted "if he thinks fit." In order to give effect to the decision arrived at in our consideration of clause 114 that proceedings under section 476, etc., should be subject to revision, we have introduced words which will make it necessary for the Court to record an order.

We have entirely re-drafted sections 476-A and 476-B. Section 476-A in our re-draft is now confined to the case where a superior Court takes action after no action whatever has been taken under section 476 in an inferior Court. Section 476-B provides specifically for an appeal against the making of a complaint or against a refusal to make a complaint.

Section 477 is inconsistent with section 476 as proposed by the Bill because the latter n made it obligatory on the Court to make a complaint and send it to a first-class Magis- . This defect has been removed by one of the amendments we have made in section 476, we are doubtful whether section 477 should stand. We considered a proposal to enable a Court Session to try a case committed to it after a complaint had been made by itself, but we do not think it desirable that a Court which has instituted the proceedings should dispose of the case itself, and we have, therefore, introduced a clause into the Bill repealing section 477.

Clause 127.—We notice that the original Bill proposed to raise from Rs. 50 to Rs. 100 the amount awardable as maintenance under section 488. This proposal was rejected by the Committee of 1916, but, in view of the passing of the Maintenance Orders Enforcement Act, 1921, which enables

our Courts to enforce summary orders up to an amount of £2 a week, we think the limit in our own law might well be raised to Rs 100 This involves a consequential amendment in section 489

Clause 128 —We do not consider that the addition made by this clause to section 491 is particularly necessary or desirable It is true that in respect of extradition proceedings an alternative procedure is laid down in section 3 of the Indian Extradition Act, 1903 but, having regard to the view taken by the Calcutta High Court in I L R, 39 Cal 164 as to the scope of its functions under the section, we think this clause might well be deleted

Clause 129 —We are doubtful whether the second amdendment made by the Bill in section 492 really effects what was intended In some places there are special Police Acts and they do not invariably give the Local Government power to delegate to Assistant Superintendents the powers of a District Superintendent. Moreover, there is a variety of nomenclature and we think it better to leave it the Local Governments to prescribe the rank of police-officers who may be appointed Public Prosecutors for the purposes of a particular case

Clause 132 —It was pressed upon us that the provisions as to bail in non bailable cases are much too stringent One suggestion made to us was that in section 497 we should delete all words after "may be released on bail" in sub-section (1) and the whole of sub-section (2) The result would have been to give all Courts full discretion in the matter of allowing bail in non bailable cases, and we felt generally that this was going too far What we have done is to allow the Court or police-officer to release on bail in a non bailable case unless there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or transportation, and as some safeguard against this we have provided for a review by the Sessions Court or the High Court of any order admitting to bail in a non bailable case Some of us—including all the official members of the Joint Committee—are of opinion that this decision goes too far and that in the end it will not tend towards the administration of justice

Clause 135—We note that preference has been expressed for the draft of sub-section (7) as contained in the original Bill and, on the whole, we have preferred to restore the original draft It provides that in proceedings against a surety a certified copy of the judgment may be used to prove the commission of the offences which constituted a breach of the bond but that this proof may be rebutted It was indeed suggested to us that we should make a certified copy of the judgment conclusive proof, but we are inclined to think that this would go too far

Clause 139 —We have extended the scope of the proposed sub-section (3) of section 522 to Courts of confirmation and reference

Clause 141 —We have found section 526 somewhat difficult to deal with One class of opinions presses for greater safeguards against frivolous, vexatious or dilatory applications for transfer Another class deprecates any measures which makes a transfer more difficult to obtain We think it is unavoidable to retain in the Code some provision for the compulsory adjournment of a case when an intention to apply for a transfer has been notified But we recognise that the provisions of the section as they stand, have lent themselves to gross abuse, and, therefore, we feel that greater safeguards are necessary For these reasons, in the first place we maintain the principle of the new sub-section (6-A) which enables the High Court to award costs in dismissing an application We have, however modified it to this extent, that it will enable the High Court, in cases where it is of opinion that the application was frivolous or vexatious, to award such amount by way of reasonable costs in the High Court and the Court below as it thinks fit We think the last sentence of new sub-section (6-A) was superfluous in view of the provisions of section 547

We consider that the new sub-section (8) proposed by the Bill was unsatisfactory in serveral respects. The opening words of the sub-section contemplated notification at any stage of the case provided that it was made before the commencement of a day's hearing. But words occurring later in the sub-section indicated that its application was confined to a notification made before the accused was called upon to enter on his defence. The proviso, therefore, which dealt with an intention to apply for a transfer formed after the accused had entered on his defence was not a true proviso to the sub-section. We considered whether sub-section (8) should not refer to another application made at any stage and whether in such case discretion as to an adjournment should not be left with the Court except when the applicant gave secutity, in which case the adjournment should be compulsory, on the whole, however, we have decided in favour of rejecting the proposal to provide for a bond. Apart from other objections we think it was calculated to enhance the delays already involved by section 526. Our amendment of the Bill, therefore, provides for a compulsory adjournment at any stage of the case except that a Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed.

It was suggested to us that we should add a new clause to section 526 providing for a transfer of a case when the accused has reasonable ground for apprehending that he will not get a fair and impartial trial. We think, however, that the rulings of the High Courts are quite clear on the point and that it would be a mistake to amend the section.

Clause 143.—We think that some of the powers which the new sub-section (4) proposes to confer are already provided for by sub-section (2) of section 192. We also think that this new sub-section goes too far in providing unnecessary powers of transfer of cases within the district and actually in enabling a District Magistrate to confer on a Subordinate Magistrate powers which he does not himself possess. We think it sufficient to provide first-class Magistrates with a power to withdraw cases or recall cases made over to Magistrates subordinate to them under section (2) of section 192, and we think it unnecessary to confer any further power in respect the transfer of cases upon Presidency Magistrates.

Our colleague, Saiyad Raza Ali, would remove altogether the power of District Magistrates Sub-Divisional Magistrates to transfer cases under section 528, and would place the power of nsfer in the hands of the Sessions Courts. This proposal met with little or no support. We think the whole that it would cause administrative difficulties and would hamper applications for ansfer in view of the fact that there are many districts in which there is no resident Sessions Judge.

Clause 146.—We have omitted the proviso contained in sub-section (1) of the proposed new section 539 providing that an accused person shall not be compelled to make an affidavit, as in the first place it will be extremely difficult to say what the expression "accused person" means, and, secondly, the proviso is in conflict with the provisions of sub-section (4) of section 526. In view, however, of the opposition manifested in certain quarters, we think that sub-section (3) of the proposed new section 539-A might be omitted.

We think it desirable to provide that the copy of the memorandum referred to in sub-section (2) of the new section 539-B shall be given free of cost.

Clause 148.—In the new sub-clause (*c*) to be added to section 545 we have added a reference to the offence specified in section 414 of the Indian Penal Code.

Clause 149.—We think the Court should not be bound to exercise the power conferred by the new section 546-A in trivial cases, and have accordingly substituted the word "may" for the word "shall" in sub-section (1) of the proposed new sub-section with consequential alterations in sub-section (2).

Clause 151 —It would appear that the retention of section 559 in the Code of Criminal Procedure, 1898 was accidental its provisions being covered by those of section 14 of the General Clauses Act, 1897 We have accordingly inserted the new section 559 A proposed by the Bill as section 559 in place of the present section

Clause 152 —We have slightly elaborated the provisions of this clause We understand that a High Court has recently held that it had no power to direct the expunction of objectionable matter from a record We think it desirable that it should be made clear that this clause is intended to meet such a case

Clause 153 —We are of opinion that the salutary provisions of section 562 of the Code are capable of extension—more especially in view of the provisions of sub-section (3) of the new section proposed by the Bill We have accordingly provided that any offender who is over the age of 21 years may be bound over on conviction of any offence not punishable with imprisonment exceeding seven years, and that all women and all persons under the age of 21 may be so bound over when convicted of offences not punishable with death or transportation for life We have altered the proviso to sub-section (3) We think that the High Court should in no case inflict a more severe sentence than could have been inflicted by the Courts which tried the case

Clause 154 —We think that the penal provision introduced by this clause is out of place in a Code of Procedure We have proposed an alteration which in part meets this objection

Clause 155 —We approve generally the changes made in Schedule II We have made certain further amendments consequent upon the changes we have made in the clause which amends section 345 of the Code and the amendments made in the Indian Penal Code by Act XVI of 1921

Clauses 156 *and* 157 —We have made the necessary changes in Schedules III and IV of the Code to bring them into line with the amendments which we have made in the body of the Bill

Clause 158 —In view of our proposals with regard to section 526 we have deleted the form of the bond originally referred to in that section We have added a form of bond under section 388

2 The Bill of 1917 was circulated for opinion as a result of a motion in the Indian Legislative Council on 26th September, 1917 The present Bill contains a few additions to the Bill of 1917 We understand that these deal with defects in the Code brought to light after the Bill of 1917 had been circulated, and that for the most part the opinions of Local Governments and High Courts on these additions were invited by the Government of India It is we presume for these reasons that the Legislature did not direct circulation of the present Bill, and we do not think that the Bill has now been so altered as to require republication We recommend that it be passed as now amended

TEJ BAHADUR SAPRU
W H VINCENT
M B DADABHOY
S RAZA ALI
J CHAUDHURI
C S SUBRAMANYAM
H MONCRIEFF SMITH
B C MITTER
ZULFIQAR ALI KHAN

SIMLA 26*th June*, 1922
B

To

HIS EXCELLENCY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

1. In accordance with the instructions contained in the Home Department Resolution No. F. 105, Judicial, dated the 27th December, 1921, we, the members of the Committee appointed by the Government of India to consider the existing racial distinctions in the criminal procedure applicable to Indians and non-Indians, and to report to the Government of India the modifications of the law which we recommend should be adopted, have the honour to report for the information of Government our conclusions on the questions requiring examination.

2. In the second Session of the Legislative Assembly, in September, 1921, Mr. N. M. Samarth moved a resolution on the subject. The resolution, after amendment, was passed in the following form :—

"That, in order to remove all racial distinctions between Indians and Europeans in the matter of their trial and punishment for offences, a Committee be appointed to consider what amendments should be made in those provisions in the Code of Criminal Procedure, 1898, which differentiate between Indians and European British subjects, Americans and Europeans who are not British subjects, in criminal trials and proceedings and to report on the best methods of giving effect to their proposals."

3. Accordingly the Government of India issued a resolution, which, after detailing the resolution passed by the Assembly, proceeded as follows :—

"The Governor-General in Council has already accepted the principle that it is desirable that there should be equality of status for all people in this country in the matter of criminal trials and proceedings, and has decided to appoint a Committee to consider the existing racial distinctions in the criminal procedure applicable to Indians and non-Indians, and to report to the Government of India the modifications of the law which they recommend should be adopted.

The Hon'ble Dr. Tej Bahadur Sapru, LL.D., Law Member of the Governor-General's Council, has consented to preside over the Committee, and the following have agreed to serve as members :—

1. The Hon'ble Sir William Vincent, *Kt.*, K.C.S.I., Home Member of the Governor-General's Council.
2. Mr. S. R. Das, Standing Counsel, Bengal.
3. The Hon'ble Mr. Justice Shah, *Kt.*, Judge of the High Court of Judicature, Bombay.
4. Mr. P. E. Percival, I.C.S., M.L.A.
5. Rao Bahadur Tiruvenkata Rangachariar, M.L.A.
6. Mr. Narayan Madhav Samarth, M.L.A.
7. Mr. W. L. Carey, a Member of the Bengal Legislative Council.
8. Mr. Abdul Kasim, M.L.A.
9. Dr. H. S. Gour, M.L.A.
10. Mr. Saiyid Sultan Ahmad, Government Advocate, Bihar and Orissa.
11. Rai Bahadur Lalit Mohan Banarji, Government Advocate, Allahabad.
12. Mr. E. Stuart Roffey, Solicitor, Dibrugarh, Assam.
13. Mr. W. Muir Masson, Punjab.
14. Mr. F. McCarthy, M.L.A.
15. Lieut.-Col. H. A. J. Gidney, M.L.A.

Mr. Percival will, in addition to his duties as a Member of the Committee, act as Secretary.

The Committee, which will submit its report to the Government of India, will assemble at Delhi, on the 5th January, 1922. It will conduct its enquiries in public, but any part of its proceedings may be conducted *in camera* if the President considers such a course desirable in the public interest. Persons who desire to be called as witnesses should apply in writing to the Secretary, care of Home Department, Government of

India Delhi giving their full names and addresses together with a brief memorandum of the points in regard to which they desire to give evidence. It will of course rest with the Committee to decide what evidence they will hear

Mr T C P Gibbons K C Barrister at Law Advocate-General Bengal, was subsequently added as a Member of the Committee

4 The origin of the privileges in question can probably be traced to the jealousy with which in the eighteenth century and later the jurisdiction of the Courts of the Hon ble East India Company over Europeans was regarded For a long time the Courts of the Company exercised no such jurisdiction at all the administration of civil and criminal justice in India being confined in such cases to the Courts of the Presidency towns The system was undoubtedly based on the idea that the Crown from the earliest introduction of its subjects into India provided for the administration of justice among them a system analogous to that which existed in England Moreover previous to 1833 British subjects not in the service of the Crown or Company were not allowed to reside at a distance of more than ten miles from a Presidency town without special permission On the repeal of this provision the Court of Directors in 1834 gave instructions that British born subjects should be subjected to the same tribunals as Indians They observed that—

> The 85th clause of the Charter Act of 1833 after reciting that the removal of restriction on the intercourse of Europeans with the country will render it necessary to provide against any mischiefs or dangers that may thence arise proceeds to direct that you shall make laws for the protection of the Natives from insult and outrage—an obligation which in our view you cannot possibly fulfil unless you render both Natives and Europeans subject to the same judicial control. There can be no equality of protection where justice is not equally and on equal terms accessible to all

Accordingly Europeans were made amenable to the Civil Courts outside the Presidency towns in 1836 by an Act associated with the name of Lord Macaulay The question of the trial of Europeans by all the Criminal Courts outside the Presidency towns was raised in 1849 by the Government of Lord Dalhousie and again in 1857 It was decided however to await the introduction of the revised Criminal Law in such areas The previous procedure therefore continued until 1861 that is to say European British subjects resident outside the Presidency towns were tried by the Supreme Courts which were stationed in the Presidency towns except in respect of certain minor offences for wh ch they were triable by European Justices of the Peace In 1861 the Supreme and Sudder Courts were combined into the High Courts of Judicature English Judges were then enabled to go up-country and try cases against Europeans Even up to 1872 however the general principle was that criminal jurisdiction over European British subjects was exercised only by Courts established by the Crown and not by the Courts of the country

5 In 1872 when Sir James Stephen was Law Member the jurisdiction of the ordinary Criminal Courts was definitely extended to Europeans but at the same time special forms of procedure based on English law and limitations of the powers of the Courts were framed for their trial

6 In 1883 the well known Ilbert Bill was introduced with the object of giving jurisdiction to Indian Sessions Judges and certain Indian Magistrates to try European British subjects Owing to the feeling aroused by the Bill its scope was reduced and a compromise was effected a fresh Bill being introduced and passed as Act III of 1884 The main effect of the compromise was that while Indian Sessions Judges and District Magistrates were enabled to try European British subjects the rights to claim a mixed jury that is a jury consisting of not less than half Europeans was allowed in all sessions cases (not merely in those triable by jury in the case of Indians) and also before District Magistrates The provisions contained in that Act are still in force

7. In the Presidency towns European British subjects have had and have no privileges before the Presidency Magistrates, but they can claim a mixed jury before the High Court.

8. It is interesting to note that, whereas, at the time of the Ilbert Bill controversy, the question was whether Indian Judges and Magistrates should try Europeans or not, the subject which excites most interest at the present moment is the right of an European British subject to claim a mixed jury.

9. Prior to 1882 the law provided that in the case of Europeans (not being European British subjects) and Americans in any trial before the Court of Session the accused had the right to be tried by a jury of which not less than half should consist of Europeans or Americans, if such a jury could be procured. By the Code of 1882 this right was retained only in respect of sessions cases normally triable by jury; while in cases triable with the aid of assessors it was provided that half the number of assessors, if practicable and if claimed, should be Europeans or Americans. This provision is still in force.

10. In anticipation of the examination of witnesses who appeared to give evidence before the Committee, the Government of India consulted Local Governments on the question under examination. The Committee have also received and studied a large amount of important documentary evidence including memoranda from all the chief European, Anglo-Indian and Indian Associations. Chambers of Commerce and other leading Associations in India. Appendix A to this report gives the names of the witnesses who gave evidence before the Committee, and also of those who were invited to give evidence before the Committee but who were unable to do so. We examined at considerable length the twenty-six witnesses, some of whom came from distant places at much personal inconvenience. They were from the following provinces: six from the United Provinces, four from Bengal, including one who also represented non-official Europeans in Assam, four from Madras, three each from Bombay, Bihar and Orissa and the Central Provinces, two from the Punjab and one from Burma. They were distributed as follows: thirteen Hindus, seven Europeans, four Muhammadans, one Parsi and one Anglo-Indian. The witnesses were mostly leading members of the legal profession, who practise either in the High Courts or in the Mofussil, and we have had the benefit of their valuable experience. Every endeavour was made to ascertain public opinion, and in order to secure the most competent witnesses in the country, invitations to give evidence were issued by the Government of India on three occasions, that is, in October, December and January last. A statement of all the evidence placed before the Committee is given in Appendix B.

11. The most important provisions requiring examination are those contained in the Criminal Procedure Code, especially Chapter XXXIII and sections 4, 22, 111, 188, 275, 408, 416, 418 and 491 of that Code, together with section 65 (3) of the Government of India Act, section 56 of the Indian Penal Code, the Penal Servitude Act XXIV of 1855 and the European Vagrancy Act IX of 1874.

12-*A*. The principal distinctions between the provisions relating to Indians and those relating to European British subjects are as follows:—

(*i*) By virtue of the provisions of section 443 of the Criminal Procedure Code, European British subjects are not triable by a second or a third-class Magistrate and are only triable by a Magistrate of the first class if he is a Justice of the Peace and save in the case of District and Presidency Magistrates, an European British subject.

(*ii*) The jurisdiction of Additional and Assistant Sessions Judges over European British subjects is restricted by section 444 of the Code to cases where they are themselves European British subjects and in the case of Assistant Sessions Judges to those who have been Assistant Sessions Judges for at least three years and have been specially empowered in this behalf by the Local Government

(*iii*) The sentences that may be awarded by first class Magistrates, District Magistrates and Courts of Session in the case of European British subjects are limited by sections 446 and 449 of the Code to three months' imprisonment and a fine of Rs 1,000, six months' imprisonment and a fine of Rs 2,000 and one year's imprisonment and unlimited fine, respectively

(*iv*) In the case of trials before a High Court, Court of Session or District Magistrate European British subjects are entitled by sections 450 and 451 of the Code to be tried by jury, of which not less than half shall be Europeans or Americans

(*v*) Section 456 of the Code gives to European British subjects remedies in the nature of *habeas corpus* which are more extensive than those provided for Indians by Chapter XXXVII

(*vi*) Under the provisions of sections 408 and 416 of the Code European British subjects have more extensive rights of appeal in criminal cases than Indians in that they may appeal against sentences in which an appeal would not ordinarily lie, and they also have the option of appealing in the alternative to the High Court or to the Court of Session

(*vii*) Under section 111 the provisions of the Code regarding the taking of security for good behaviour in sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act of 1874, and

(*viii*) The definition of High Court is not so wide in the case of European British subjects as it is in the case of Indians

B The only distinction between the provisions relating to Indians and those relating to Europeans (not being European British subjects) and Americans is that under the provision of section 460 of the Code in every case triable by jury or with the aid of assessors, in which an European (not being an European British subject) or an American is an accused person not less than half the number of jurors or assessors must, if practicable and if claimed, be Europeans or Americans

13 To turn to the particular changes which are proposed

The first one is the *amendment of the definition of European British subject in section 4 (1) (i) of the Code*—It is generally admitted that this is not a satisfactory definition, for instance it includes a non European domiciled in Natal but not an European domiciled in East Africa Having regard to all the facts we recommend that the definition of European British subject should be amended by striking out all the words in clause (*i*) of section 4 (1) (*i*) after the word Ireland, thus omitting all reference to the British Possessions or Dominions outside Great Britain and Ireland If this alteration is made, there will still be a

difference between the definition of European British subject in the Criminal Procedure Code and the wording of section 65 (3) of the Government of India Act, which runs as follows :—

"The Indian Legislature has not power, without the previous approval of the Secretary of State in Council, to make any law empowering any Court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects, born in Europe or the children of such subjects, or abolishing any High Court."

We are of opinion, however, that the definition of European British subject should not be assimilated to this description in the Government of India Act. We recommend two additions to our proposed definition. The first is that subjects of His Majesty born, naturalised or domiciled in any of the European, American or Australian Possessions or Dominions of His Majesty or in New Zealand or in the Union of South Africa should be classed as European British subjects when they are actually serving in India in His Majesty's British Army, Navy or Air Force. The reason for this addition is that when such persons are transferred to India, they have no option. They are not in the same position as those who of their own free choice come to reside in India. The second addition that we recommend is that subjects of His Majesty born, naturalised or domiciled in any of the European, American or Australian Possessions or Dominions of His Majesty or in New Zealand or in the Union of South Africa who at the date of the adoption of our proposals are in His Majesty's Indian Army, Royal Indian Marine or Indian Air Force should be classed as European British subjects.

Both the proposed additions will affect only a comparatively small number of men. A minority of the Committee, including the Government members, are of opinion that no distinctions should be made between persons serving in the British Forces and those serving in the Indian Forces.

14. The next question is *the definition of High Court in section* 4 (1) (*j*) *of the Code.*— We recommend that the definition of High Court should be the same in the case of Europeans as in the case of Indians, the Secretary of State in Council being requested to give his previous approval to this change, having regard to the provisions of section 65 (3) of the Government of India Act. We are, however, of opinion that in regard to certain sections of the Criminal Procedure Code, only the Chartered High Courts, the Chief Court of Lower Burma and the Courts of the Judicial Commissioners of the Central Provinces, Oudh, Sindh and Upper Burma should be included in the term "High Court."

Justices of the Peace for the Mofussil.

15. *Section* 22.—We do not think it necessary to express any opinion on the question whether Justices of the Peace should be retained outside the Presidency towns. We are, however, of opinion that whether the title is retained or not, it should not be a qualification for the trial of an European British subject. We are also of opinion that such appointment outside the Presidency towns should not be restricted to Europeans. In regard to the trial of European British subjects generally we consider that outside the Presidency towns the only distinction should be that the Magistrate in question, if the accused so desires, should not be below the rank of a first-class Magistrate. We recognise that in this respect a slight distinction will still remain between European British subjects and Indians; but we believe that no objection will be taken on that account so far as offences punishable with imprisonment are concerned. We recommend, however, that offences punishable with fine not exceeding Rs. 50 only (and no other punishment) in respect of which an European is accused may be tried by any Magistrate having jurisdiction normally in respect of such offences.

16. *Section* 111 —We consider that this section should be repealed, and that sections 109 and 110 should apply equally to Europeans and Indians But at the same time we recommend that the European Vagrancy Act IX of 1874, should be retained, as it is required in connection with the deportation of undesirable Europeans

Proviso as to European Vagrants.

The majority of the members of the Committee consider that an examination should be made of the question whether the period of three years prescribed in section 110, as the period for which imprisonment may be ordered in default of the production of suitable security, is not excessive. We are of opinion that the subject is one that deserves the attention of Government and we venture to suggest that Local Governments and High Courts should be consulted thereon

Liability of British subjects for offences committed out of British India.

17 *Section* 188 —This section is in accordance with the provisions of the Government of India Act, no change is proposed

Person charged outside Presidency towns jointly with European British subjects

Section 214 —Amendments consequential on our proposals will be necessary

Jury for trial of persons not Europeans or Americans before Court of Session

Section 275 —The provision contained in this section should be extended to trials before the High Court—*vide* paragraph 24 below Consequential amendments will be necessary

Right of European British subjects to appeal to High Court or Court of Session.

18 *Section* 408, *proviso* (*a*)—We are of opinion that this proviso should be repealed

Saving of restrictions on appeals from sentences on European British subjects.

19 *Sections* 413, 414, 415 *and* 416 —We recommend the repeal of section 416 We consider, however, that outside the Presidency towns in the case of all persons, both European and Indian, there should be an appeal against any sentence of imprisonment passed by a Magistrate This involves a substantial modification of the general law of the land, and will, to a certain extent, increase the work of the Sessions Courts. Nevertheless we are of opinion, on general grounds and apart from the particular case of the European British subject, that an appeal should lie against any such sentence It is to be noted that short sentences of imprisonment should, where possible, be avoided, and the number of sentences of one month and under passed by District Magistrates and first class Magistrates should not, as far as we can judge, be very large In the case of a sentence passed in a trial by a Court of Session we would allow no appeal in respect of a sentence of one month or under The question of an appeal in the case of sentences of imprisonment raises some difficulty in the case of summary trials It has been suggested that, in order to meet this difficulty, all summary trials should be abolished We are not, however, prepared to recommend such a serious change in the law of the land We recommend instead that an appeal should lie against any sentence of imprisonment passed by a Magistrate trying a case summarily Appeals lie even at present in certain cases against sentences passed in a summary trial, and section 264 of the Criminal Procedure Code deals with the record in such cases Dr Sapru and Sir William Vincent observe that the Government of India will ultimately be guided in a great measure by the opinions of Local Governments and High Courts on the proposal to extend the right of appeal in the cases mentioned in this and in the next sub-paragraphs, as it may involve much increase in judicial labour

Sentences which may be passed by provincial Magistrates.

22 *Section* 446—In our opinion District Magistrates and first-class Magistrates (whether empowered under section 30 or not) should not be allowed to pass on European British subjects any sentence other than a sentence of imprisonment which may extend to two years, including such solitary confinement as is authorised by law, or of fine which may extend to Rs 1,000 It will be observed that these are the limits of the ordinary powers of a District or first class Magistrate with the exception that they do not include a sentence of whipping. This is subject to our previous observations in paragraph 19 The majority of the Committee are of opinion that sections 30 and 34 should be repealed, on the ground that a sentence of more than two years' imprisonment should not be passed without the assistance of a jury or assessors.

Dr Sapru and Sir William Vincent consider that the Government of India must ultimately be guided in a large measure by the opinions of the Local Governments and the High Courts on the question whether it is practicable to repeal those sections Some members of the Committee are of opinion that, if after enquiry it is decided to retain these sections, they should apply equally to Europeans and to Indians

Commitment to be to the High Court in certain cases.

23 *Sections* 447 *and* 448—These sections should be repealed

Sentences which may be passed by a Court of Session.

24 *Section* 449—We are of opinion that Sessions Courts should have power to pass the same sentences on Europeans as on Indians Accordingly Sessions Judges and Additional Sessions Judges should have power to pass sentences of death, in the case of Europeans and Indians alike, subject as usual to confirmation by the High Court This provision is to be read together with our proposal that there should be a mixed jury, that is, a jury of not less than half Europeans or Indians, as the case may be, in trials before the High Court and Sessions Court In the very limited number of cases in the Sessions Court in which Europeans will be tried without a jury, they will be tried with European assessors We develop this point later We adopt the principle that a Sessions Judge or Magistrate should have power to pass the same sentence in the case of an European as of an Indian, and that safeguards should be obtained by other methods than by restricting the punishment which the presiding Judge or Magistrate can inflict We recommend therefore that the Secretary of State in Council be requested to give his previous approval in accordance with section 65 (3) of the Government of India Act to this change in the law As in the case of Magistrates, we make an exception in respect of the punishment of whipping

Jury or assessors before High Court or Court of Session

25 *Section* 450—The most difficult question for the Committee to decide is that of the trial by jury of European British subjects This is the point on which non-official European opinion is most emphatic, namely, that it is essential that a mixed jury should be retained We have decided accordingly that the mixed jury should remain both in the High Court and in the Sessions Court in all cases which are to be tried by jury under our proposals, subject, however, to certain provisions and safeguards namely,—

I The same law as to the composition of the jury shall apply to Indians as to Europeans that is to say the majority of the jury, if an Indian accused so desires shall consist of persons who are not Europeans or Americans This is already the law in Sessions Courts and section 275 should be so amended as to make it apply to the High Court also

34 To put our main proposals, in respect of the modifications of the Criminal Procedure Code, into tabular form, their effect will be—

For European British subjects	*For Indians*
I An appeal will lie against any sentence of imprisonment passed by a Magistrate There will also be a right of appeal against any sentence of fine exceeding Rs. 50	The same
II In every case before the High Court and Sessions Court in which he is tried by a jury, the accused will be entitled to claim a mixed jury, that is a jury consisting of not less than half of the nationality of the accused, subject to—	
(*a*) An appeal on facts as well on law in the case both of conviction and acquittal, when the jury are not unanimous, or when the jury are unanimous but the Judge does not agree with them.	
(*b*) A probable increase in the number of Indians in the Special Jury List.	
(*c*) A provision that the jury shall be not less than five and in all murder cases, if practicable, nine	The same
III The accused in the Sessions Court will be entitled to claim to be tried by jury in any class of case which is normally triable with assessors if racial considerations are involved	The same
This provision is in addition to the right of trial by jury in all cases in the High Court and also in Sessions Courts where such a method of trial is prescribed under section 269 of the Criminal Procedure Code	
IV In any class of case in the Sessions Court which is normally triable with assessors and where no racial considerations are involved, he will be tried with assessors who will not be less than three in number, and who, if the accused so claims, will all be of his own nationality	The same
V In a warrant-case in which racial considerations are involved the accused and the complainant will each be entitled to claim the committal of the case to the Sessions Court for trial by a jury	The same
VI In a summons-case where racial considerations are involved and where a sentence of imprisonment can be passed, the accused and the complainant will each be entitled to claim that the case shall be tried by a Bench of two first-class Magistrates, one Indian and one European, reference in case of disagreement being to the Sessions Judge	The same
VII In any other case triable by a Magistrate, if the accused so desires the trial will be by a first-class Magistrate, except in cases punishable with fine of not more than Rs 50 only	It is not practicable to extend this to Indians
VIII Judges and Magistrates, outside Presidency towns, will have power to pass all sentences which they are authorised by law to pass, except whipping and sentences under section 34 of the Criminal Procedure Code on which subjects inquiry is proposed	The existing arrangements continue pending the result of the proposed inquiry

Note —Clauses I, IV, V, VI, VII and VIII apply only outside Presidency towns

We also propose the repeal of section 460 which provides for a special procedure in the case of Europeans (not being British subjects) and Americans.

35. We regret that one member of the Committee, Mr. Stuart Roffey, a representative of the non-official Europeans of Assam, owing to private and personal reasons, was unable to attend the meetings of the Committee and had to resign his seat thereon.

Some members of the Committee were unable to attend our final meetings.

36. In conclusion, we desire to place on record our deep sense of obligation to our colleague, Mr. Percival, I.C.S., M.L.A., who has, throughout the proceedings of this Committee, acted as Secretary and brought to bear upon the work infinite patience and great industry which has been of great assistance to us in the preparation of this report. We also desire to express our acknowledgments to Mr. Tonkinson, Joint Secretary in the Home Department, for the assistance he has given us generally.

TEJ BAHADUR SAPRU, *Chairman.*
W. H. VINCENT.
ABDUL KASIM.
L. M. BANARJI.
N. M. SAMARTH.
T. RANGACHARIAR.
S. R. DAS.
H. GIDNEY.
W. L. CAREY.
P. E. PERCIVAL.

SIMLA,
The 14*th June*, 1922.

THOMAS C. P. GIBBONS.

CALCUTTA,
The 24*th June*, 1922.

S. SULTAN AHMAD.

PATNA,
The 10*th July*, 1922.

L. A. SHAH.

BOMBAY,
The 25*th July*, 1922.

H. S. GOUR.

NAGPUR,
The 29*th July*, 1922.

LIST OF CASES CITED.

Note I—All the cases referred to under the Code and the Minor Acts are noted in this list.

II—**The parallel references to cases reported in the I L R Series are not as a rule, given in the body of the book, but they are all noted and indexed in this list The pages of this book against these parallel references will appear under the corresponding I L R Cases The references to the latest cases will appear under one or other of the parallel references**

III—The cases are noted in the following order —

(i) **Privy Council Cases—**
Knapp Moore s Indian Appeals Indian Appeals

(ii) **Allahabad Cases—**
Agra N W P High Court Reports I L R Allahabad Series Allahabad Weekly Notes Allahabad Law Journal, A I R, Allahabad Series

(iii) **Bombay Cases—**
Bombay High Court Reports I L R Bombay Series, Ratanlal s Unreported Criminal Cases, Bombay Law Reporter Bombay Criminal Cases A I R Bombay Series.

(iv) **Calcutta Cases—**
Hyde s Reports Marshall s Reports Sutherland s Weekly Reporter Indian Jurist Bengal Law Reports I L R, Calcutta Series Calcutta Law Reporter, Calcutta Weekly Notes Calcutta Law Journal A I R Calcutta Series

(v) **Madras Cases—**
Madras High Court Reports I L R Madras Series Weir's Criminal Rulings Madras Law Journal, Madras Law Times Madras Weekly Notes, Madras Law Weekly A I R Madras Series

(vi) **Punjab Cases—**
Punjab Record Punjab Weekly Reporter Punjab Law Reporter

(vii) **Central Provinces Cases—**
Cen P R Nagpur Law Reports

(viii) **Oudh Cases—**
Oudh Sessions Cases Oudh Cases

(ix) **Kathiawar Cases—**
K L R

(x) **Sindh Cases—**
Sindh Law Reporter

(xi) **Burma Cases—**
Burma Sessions Reports Lower Burma Rulings Upper Burma Rulings Burma Law Reporter Burma Law Times I L R Rangoon Series

(xii) **Patna Cases—**
Patna Law Journal I L R Patna Series A I R Patna Series

(xiii) **Lahore Cases—**
I L R, Lahore Series A I R Lahore Series

(xiv) **English and American Cases—**

PAGE OF REPORT — PAGE OF THIS BOOK

PRIVY COUNCIL.

3 Knapp, 1835.

348 Pooneakhoty Modelliar 705

2 Moore's Indian Appeals, 1837—41.

293 John Calder 840, 1149
428 Morgan 215

6 Moore's Indian Appeals, 1854—57.

134 1152

7 Moore's Indian Appeals, 1857—60.

18 Chuoturya = 4 W. R. 132 1033

13 Moore's Indian Appeals, 1869-70.

77 = 12 W. R. (P.C.) 32 1153

L. R. 3 Indian Appeals, 1876.

259 Hurpurshad 1212

L. R. 5 Indian Appeals.

178 Burah = 4 C. 172 ii

L. R. 7 Indian Appeals, 1878-79.

196 Sophia Orde *v.* Alexander Skinner = 3 A. 91 ... ...

L. R. 8 Indian Appeals, 1880-81.

123 Mungah Pershad 282

L. R. 10 Indian Appeals, 1882-83.

171 Surendranath = 10 C. 109 15, 29, iii

L. R. 11 Indian Appeals, 1883-84.

37 Ram Kerpal 282
186 Madho Pershad *v.* Gajudhar = 11 C. 111 ... ... 103, 110

L. R. 13 Indian Appeals, 1885-86.

134 Ledguard = 9 A. 191... ... 1115, 1144

L. R. 24 Indian Appeals, 1896-97.

137 Mahomed Yusufuddin = 2 C. W. N. 1 = 25 C. 20 ... ... 86, 87, 117, 406

L. R. 28 Indian Appeals, 1900-01.

257 N. A. Subramaniayer = 25 M. 61 = 11 M. L. J. 233 = 5 C. W. N. 866 = 3 Bom. L. R. 540. [*See* 35 M. for pages]

L. R. 29 Indian Appeals.

196 Gokul Mandar *v.* Padmanund 873, 1170

1911.

Birch = 8 A. L. J. 147 = 13 Bom. L. R. 9 = 13 C. L. J. 129 = 15 C. W. N. lxi = 9 M. L. T. 200 = 21 M. L. J. 374 = (1911) 2 M. W. N. 159 = 12 Cr. L. J. 100 = 9 In. Ca. 581 ix

1912.

O. Clarke *v.* Brojendro = 39 I. A. 163 = 10 A. L. J. 193 = 14 Bom. L. R. 717 = 39 C. 953 = 16 C. W. N. 865 = 16 C. L. J. 231 = 22 M. L. J. 32 = 12 M. L. T. 171 = (1912) M. W. N. 760 = 13 Cr. L. J. 693 = 16 In. Ca. 501. [*See* 39 C. 953 for pages]

PAGE OF REPORT — PAGE OF THIS BOOK

PRIVY COUNCIL—(*contd.*)

1913.

Vaithianatha Pillai = 36 M. 501 = 11 A. L. J. 881 = 15 Bom. L. R. 910 = 2 Bom. Cr. Ca. 123 = 17 C. W. N. 1110 = 18 C. L. J. 365 = 25 M. L. J. 518 = 14 M. L. T. 263 = (1913) M. W. N. 806 = 14 Cr. L. J. 577 = 21 In. Ca. 369 ...x, xi

Clifford = 40 Ind. App. 241 = 41 C. 568 = 12 A. L. J. 75 = 16 Bom. L. R. 1 = 2 Bom. Cr. Ca. 173 = 18 C. W. N. 374 = 19 C. L. J. 107 = 15 M. L. T. 84 = (1914) M. W. N. 11 = 7 Bur. L. T. 37 = 155 Cr. L. J. 144 = 22 In. Ca. 496 ...x, xi

Louis Edouard Lanier = 1914 A.C. 221 = 18 C. W. N. 98 = 26 M. L. J. 1 = 15 Cr. L. J. 305 = 23 In. Ca. 657 ... ...x, xi

1914.

Channing Arnold = 1914 Ap. Ca. 644 = 41 In. Ap. 149 = 41 C. 1023 = 12 A. L. J. 1042 = 16 Bom. L. R. 544 = 2 Bom. Cr. Ca. 207 = 18 C. W. N. 785 = 20 C. L. J. 161 = 26 M. L. J. 621 = 16 M. L. T. 79 = (1914) M. W. N. 506 = 7 Bur. L. T. 167 = 15 Cr. L. J. 309 = 23 In. Ca. 661... x
Ibrahim = 1914 A. C. 599 = 15 Cr. L. J. 326 = 18 C. W. N. 705 = 23 In. Ca. 678 331, x, xi

1915.

Balmokund = 1915 A. C. 629 = 42 In. Ap. 133 = 42 C. 739 = 17 Bom. L. R. 487 = 3 Bom. Cr. Ca. 56 = 19 C. W. N. 674 = 21 C. L. J. 522 = 17 M. L. T. 441 = 16 Cr. L. J. 494 = 29 In. Ca. 334. [*See* 17 Bom. L. R. for pages]

ALLAHABAD CASES.

6 Agra Sudder Reports.

36 412
46 412
136 412

Agra Nizamut, Adawlat, 1862.

1 1077
122 1076
127 301
318 501

1 Agra High Court Reports, 1866.

1 cxxiii
17 817
23 248
24 cxxii
67 560

2 Agra High Court Reports, 1867.

356 687

3 Agra High Court Reports.

85 664

ALLAHABAD CASES—(contd.)

PAGE OF REPORT — PAGE OF THIS BOOK

ALLAHABAD CASES—(*contd.*)

I. L. R. 20 Allahabad Series, 1898—(*contd.*)

I. L. R. 21 Allahabad Series, 1899.

I. L. R. 22 Allahabad Series, 1900.

I. L. R. 23 Allahabad Series, 1901.

I. L. R. 24 Allahabad Series, 1902.

I. L. R. 25 Allahabad Series, 1903.

PAGE OF REPORT — PAGE OF THIS BOOK

ALLAHABAD CASES—(*contd.*)

I. L. R. 25 Allahabad Series, 1903—(*contd.*)

I. L. R. 26 Allahabad Series, 1904.

I. L. R. 27 Allahabad Series, 1905.

PAGE OF REPORT — PAGE OF THIS BOOK

ALLAHABAD CASES—(*contd*)

I. L. R 27 Allahabad Series 1905—(*contd.*)

I. L. R 28 Allahabad Series, 1905.

I. L. R. 29 Allahabad Series, 1907.

ALLAHABAD CASES—(*contd*)

I. L R 29 Allahabad Series, 1907—(*contd*)

I. L. R 30 Allahabad Series, 1908.

I. L. R 31 Allahabad Series, 1909.

I L. R 32 Allahabad Series, 1910.

PAGE OF REPORT — PAGE OF THIS BOOK

ALLAHABAD CASES—(*contd.*)

I. L. R. 32 Allahabad Series, 1910—(*contd.*)

132 = 7 A. L. J. 53 = 11 Cr. L. J. 141 = 5 In. Ca. 471 ... 273, 1165
158 = 7 A. L. J. 103 = 11 Cr. L. J. 203 = 5 In. Ca. 696 .. ... 780, 910, 969
219 = 7 A. L. J. 225 = 11 Cr. L. J. 285 = 5 In. Ca 896 ... ... 567, 569, 574
397 = 7 A. L. J. 319 = 11 Cr. L. J. 372 = 6 In. Ca. 563 ... 410, 412, 419, 421, 1144
571 = 7 A. L. J. 649 = 11 Cr. L. J. 355 = 6 In. Ca. 454 152
635 = 7 A. L. J. 749 = 11 Cr. L. J. 447 = 7 In. Ca. 414 ... ... 1200, 1203
642 = 7 A. L. J. 813 = 11 Cr. L. J. 412 = 6 In. Ca. 874 .. ... 202, 1116, 1120

I. L. R. 33 Allahabad Series, 1911.

36 = 7 A. L. J. 897 = 11 Cr. L. J. 442 = 7 In Ca. 186 ... ... 550, 551, 573
48 = 7 A. L. J. 910 = 11 Cr. L. J. 480 = 7 In. Ca. 412 ... ... 148, 910
385 = 8 A. L. J. 182 = 12 Cr. L. J 46 = 9 In. Ca. 278 K ... ...
396 = 8 A. L. J. 240 = 12 Cr. L. J. 93 = 9 In. Ca. 497 1003
510 = 8 A. L. J. 524 = 12 Cr. L. J. 389 = 11 In. Ca. 253 ... ... 873, 878
512 = 8 A. L. J. 429 = 12 Cr. L. J. 174 = 9 In. Ca. 982 ... ...
514 = 8 A. L. J. 525 = 12 Cr. L. J. 359 = 10 In. Ca. 959 ... ... 428, 561
578 = 8 A. L. J. 630 = 12 Cr. L. J. 401 = 11 In. Ca. 5 ... ... 15, 408
583 = 12 Cr. L. J. 654 = 12 In. Ca. 652 ...1124
624 = 8 A. L. J. 658 = 12 Cr. L. J. 480 ... 202
771 = 8 A. L. J. 925 = 12 Cr. L. J. 405 = 11 In. Ca. 589 146
775 = 13 Cr. L. J. 170 = 13 In. Ca. 922 151, 152

I. L. R. 34 Allahabad Series, 1912.

115 = 8 A. L. J. 1239 = 12 Cr. L. J. 572 ... 903
118 = 9 A. L. J. 51 = 13 Cr. L. J. 169 = 13 In. Ca. 921 ... ... 15, 870
197 = 9 A. L. J. 124 = 13 Cr. L. J. 44 = 13 In. Ca. 284 ... ...
203 = 13 Cr. L. J. 203 = 9 A. L. J. 448 = 14 In. Ca. 203 1144
244 = 9 A. L. J. 260 = 13 Cr. L. J. 273 = 14 In. Ca. 657 ... ...
267 = 9 A. L. J. 231 = 13 Cr. L. J. 141 = 13 In. Ca. 829 ... ... 1007, 1008
345 = 9 A. L. J. 335 = 13 Cr. L. J. 183 = 13 In. Ca. 999 218
354 = 9 A. L. J. 308 = 13 Cr. L. J. 247 = 14 In. Ca. 599 624
393 = 9 A. L. J. 481 = 13 Cr. L. J. 302 = 14 In. Ca. 766 ... ... 997, 1000, 1014
449 = 9 A. L. J. 582 = 13 Cr. L. J. 526 = 15 In. Ca. 798 ... ... 153, 254
451 = 9 A. L. J. 696 = 13 Cr. L. J. 575 = 15 In. Ca. 991 408

ALLAHABAD CASES—(*contd.*)

I. L. R. 34 Allahabad Series, 1912—(*contd.*)

487 = 10 A. L. J. 45 = 13 Cr. L. J. 479 = 15 In. Ca. 319 .. 412, 418, 419 420,
522 = 10 A. L. J. 61 = 13 Cr. L. J. 702 = 16 In. Ca. 510 ... ... 455, 476
533 = 10 A. L. J. 27 = 13 Cr. L. J. 452 = 15 In. Ca. 84 ... 252, 285, 1115, 1117
602 = 10 A. L. J. 174 = 13 Cr. L. J. 717 = 16 In. Ca. 525 ... ...
654 = 10 A. L. J. 294 = 13 Cr. L. J. 863 = 17 In. Ca. 799 ... ... 453, 45

I. L. R. 35 Allahabad Series, 1913.

1 = 10 A. L. J. 355 = 13 Cr. L. J. 832 = 17 In Ca. 576 111
5 = 10 A. L. J. 357 = 13 Cr. L. J. 823 = 17 In. Ca. 567 .. ... 1118, 1126
8 = 10 A. L J. 361 = 13 Cr. L. J. 829 = 17 In. Ca. 573 ... ... 19, 453
29 = 10 A. L. J. 431 = 13 Cr. L. J. 856 = 17 In. Ca. 792 ... ... 412, 419, 420
58 = 10 A. L. J. 462 = 13 Cr. L. J. 769 = 17 In. Ca. 401 ... ... 466, 474
63 = 10 A. L. J. 473 = 13 Cr. L. J. 861 = 17 In. Ca. 797 ... ... 692, 795
78 = 10 A. L. J. 531 = 14 Cr. L. J. 2 = 18 In. Ca. 146 939
90 = 11 A. L J 11 = 14 Cr. L. J. 47 = 18 In. Ca. 271 ... ...
102 = 11 A. L. J. 15 = 14 Cr. L. J. 56 = 18 In. Ca. 344 ... ... 18, 19, 24
103 = 11 A. L. J 6 = 14 Cr. L J. 63 = 18 In. Ca. 251 207
109 = 11 A. L. J. 55 = 14 Cr. L. J. 144 = 18 In. Ca. 896 ... ... 927, 1014
136 = 11 A. L. J. 92 = 14 Cr. L. J. 122 = 18 In. Ca. 682 650
154 = 11 A. L. J. 111 = 14 Cr. L. J. 119 = 18 In. Ca. 679 70
173 = 11 A. L. J. 196 = 14 Cr. L. J. 105 = 16 In. Ca. 665 ... .. 59, 648, 649, 652, 976
260 = 11 A. L. J. 286 = 14 Cr. L. J. 211 = 19 In. Ca. 307 ... ... 680, 684, 814
358 = 11 A. L. J. 286 = 14 Cr. L. J. 211 = In. Ca. 332 1156
374 = 11 A. L. J. 452 = 14 Cr. L. J. 526 = 20 In. Ca. 1006 1100
407 = 11 A. L. J. 596 = 14 Cr. L. J. 618 = 21 In. Ca. 666 92
570 = 11 A. L. J. 930 = 14 Cr. L. J. 654 = 21 In. Ca. 894 673
575 = 11 A. L. J. 933 = 15 Cr. L. J. 19 = 22 In. Ca 163 1156

I. L. R. 36 Allahabad Series, 1914.

4 = 11 A. L. J. 959 = 15 Cr. L. J. 64 = 22 In. Ca. 336 ... ... 865, 866
6 = 11 A. L. J. 957 = 15 Cr. L. J. 179 = 22 In. Ca. 755 89
13 = 11 A. L. J. 986 = 15 Cr. L. J. 164 22 In. Ca. 740 ... ...610, 1168, 1170

PAGE OF REPORT | PAGE OF THIS BOOK

ALLAHABAD CASES—(*contd.*)

I L R 36 Allahabad Series 1914—(*contd*)

I L R 37 Allahabad Series, 1915

PAGE OF REPORT | PAGE OF THIS BOOK

ALLAHABAD CASES—(*contd*)

I L R 37 Allahabad Series 1915—(*contd*)

I L R 38 Allahabad Series, 1916

I L R 39 Allahabad Series, 1917

I L R. 40 Allahabad Series, 1918

PAGE OF REPORT	PAGE OF THIS BOOK

ALLAHABAD CASES—(contd.)

3 Allahabad Law Journal, 1906

4 Allahabad Law Journal 1907

5 Allahabad Law Journal, 1908

6 Allahabad Law Journal, 1909

ALLAHABAD CASES—(contd.)

6 Allahabad Law Journal, 1909—(contd.)

7 Allahabad Law Journal, 1910

8 Allahabad Law Journal 1911

9 Allahabad Law Journal, 1912

ALLAHABAD CASES—(*contd.*)

13 Allahabad Law Journal, 1915—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
630 = 37 A 419	
709 = 16 Cr L. J 524 = 29 In. Ca. 540	
719 = 37 A 471	
840 = 37 A. 678	500
932 = 37 A. 654	282
979 = 38 A 14	350
1043 = 38 A. 29	
1046 = 16 Cr L. J 805 = 31 In. Ca 821	
1050 = 38 A 32	
1055 = 16 Cr L. J 810 = 31 In Ca 826	
1059 = 38 A. 42	552 583
1067 = 16 Cr L. J 825 = 31 In. Ca. 1001	414
1077	329
1111 = 16 Cr L. J 817 = 31 In. Ca 993	467 468

14 Allahabad Law Journal, 1916

PAGE OF REPORT	PAGE OF THIS BOOK
61 = 38 A 134	828 829 954, 955
156	963
215	203
233 = 38 A 276	494
247 = 38 A 284	
268 = 17 Cr L. J 165 = 33 In. Ca. 645	182 1165
279 = 17 Cr L. J 167 = 33 In Ca 647	917
327	916
344 = 38 A 311	1160
412 = 38 A 354	
430	151 183
518	874 877
587	587
688	718
731	115
769	150 184
794	163 192
814	1009
851	967
1074	160
1077	1014

15 Allahabad Law Journal, 1917

PAGE OF REPORT	PAGE OF THIS BOOK
136	877
239	985
291	813
463	37
467	780
469	208
627	639
642	502 503 505
654	996
756	537
805	1019
822	169
841	484

16 Allahabad Law Journal, 1918.

PAGE OF REPORT	PAGE OF THIS BOOK
30	515
41	687
217	794
263	163
279	150 152
280	*155 156*
298	939
325	899
432	1027
458	967
486	532

ALLAHABAD CASES—(*contd*)

16 Allahabad Law Journal 1918—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
490	1124
499	620
567	152
662	20
864	36
902	1080

17 Allahabad Law Journal, 1919

PAGE OF REPORT	PAGE OF THIS BOOK
48	1123
147	151 166
165	620
432	159
434	258 292
450	423
503	128
614	580
800	962
867	860
891	159
1054	453
1080	455
1146	802

18 Allahabad Law Journal, 1920

PAGE OF REPORT	PAGE OF THIS BOOK
169	74
300	146
321	159
324	198
381	471
442	659
466	620
631	551 1086
673	164
846	973 974
1114	353
1149	127

19 Allahabad Law Journal, 1921

PAGE OF REPORT	PAGE OF THIS BOOK
1	1155 1164
56	1007 1008
69	412
77	34
133	148
310	*66 88*
355	336
392	579
589	974
610	604
651	622
796	596
813	859
815	604 1153
856	796
887	839
915	604 1153
945	641
946	1123
951	762
985	203

20 Allahabad Law Journal, 1922

PAGE OF REPORT	PAGE OF THIS BOOK
49	161
203	288
215	445
276	958

BOMBAY CASES—(*contd.*)

I. L. R. 17 Bombay Series, 1893—(*contd.*)

PAGE OF REPORT	PAGE OF THSI BOOK
369	406, 560, 591, 594, xix
485	329, 335
573	493, 772
731	24, 648
748	1092, 1094, 1096, 1099, 1108, 1109

I. L. R. 18 Bombay Series, 1894.

PAGE OF REPORT	PAGE OF THSI BOOK
97	653, 801
290	1031
364	691
377 (F.B.)	589
380 (F.B.)	103, 1025, 1026, 1027, 1125
400	25, 62
442	1204
468	19, 1030, 1036
581	479, 541, 967, 993, 994, 1006, 1015, 1019
636	109, 110, 111, 1054, 1055
648	1043
693	242, 249
751	908

I. L. R. 19 Bombay Series, 1895.

PAGE OF REPORT	PAGE OF THSI BOOK
51 (68)	18, 430, 488, 490, 591, 894, 896
72	91
105	416
195	662, 663, 771, lxxxviii
362	468
363	329, 708, 750
608	1207
612	15, 79, cliv
668	1110
714	921
717	477
728	343, 679, 789
732	514, 827, 828, 888, 921, 923, 954
735	718, 719, 722, 724
737	cxliii
749	550, 713, 716, 882, 913, 1070, 1072, 1075

I. L. R. 20 Bombay Series, 1896.

PAGE OF REPORT	PAGE OF THSI BOOK
145	873
165	331
215	594, 719, 720, 722, 723, 727, 731, 732
394	cxliv
502	1208
540	817, 883
543	204, 441, 518, 958, 966, ii

I. L. R. 21 Bombay Series, 1897.

PAGE OF REPORT	PAGE OF THSI BOOK
279	459, 930
495	15, 304, 333, 341, 811, 812, 1146
536	17, 435

I. L. R. 22 Bombay Series, 1898.

PAGE OF REPORT	PAGE OF THSI BOOK
112 (150)	17, 18, 480, 481, 489, 923, v
170	cxlv
235	16, 336
438	1187
549	446, 1135
596	325, 326, 327, 475, 500
636	45
711	615, 643, 859, 867
714	223

BOMBAY CASES—(*contd.*)

I. L. R. 22 Bombay Series, 1898—(*contd.*)

PAGE OF REPORT	PAGE OF THIS BOOK
717	1185, 1186
742	cxxxix
746	cxlii
759	876
760	906, 907
766	59
844	84, 1092, 1094, 1096, 1097, 1100, 1101, 1102
889	82, 780
933	209, lxii
934	622
936	24, 457, 459, 466, 507
949 (956)	19, 129, 133, 134, 257, 514, 826, 827
970	cliv
988	216, 217, 218

I. L. R. 23 Bombay Series, 1899.

PAGE OF REPORT	PAGE OF THIS BOOK
32	154, 161, 352, 353, 354, 773
50	466, 921, 923, 954
213	527, 688, 750, 770, 771, 772, 1059
221	341, 342, 812, 813, 814, 1146, 1148, 1149
316	343, 663, 698, 708
439	907, 908
484	1033, 1034, 1048
493	448, 540, 749, 757
494	1105, 1106, 1107, 1108
696 = 1 Bom. L. R. 116	658, 729, 882
706 (B) = 1 Bom. L. R. 142	65, 66, 67, 68, 576, 585

I. L. R. 24 Bombay Series, 1900.

PAGE OF REPORT	PAGE OF THIS BOOK
287 = 1 Bom. L. R. 678	428, 1143
471	14, ii, 955,
527 = 2 Bom. L. R. 84	259, 263, 264, 271, 272, 954, 957, 1116, iii

I. L. R. 25 Bombay Series, 1901.

PAGE OF REPORT	PAGE OF THIS BOOK
45 = 2 Bom. L. R. 331	330
48 = 2 Bom. L. R. 339	25, 190, 205, 620
90 = 2 Bom. L. R. 653	457, 482, 526, 529, 557, 584
151 = (F.B.) = 2 Bom. L. R. 695	492, 493, 780
168 = 2 Bom. L. R. 761	340, 344, 832
176	1031
179 = 2 Bom. L. R. 775	202, 205, 252, 253, 267, 268, 285, 1029, 1116, 1117, 1118, 1133
422 = 2 Bom. L. R. 1095	615, 751, 772, 1059
543 = 3 Bom. L. R. 122	337, 340
636 = 3 Bom. L. R. 253	14, 45, 46, 52
667	15
675 = 3 Bom. L. R. 271	540, 748, 755, 757, 758
680 (F.B.) = 3 Bom. L. R. 278	658, 729, 882, 1151, 1155
694 = 3 Bom. L. R. 274	656, 664, 672, 673
702 = 3 Bom. L. R. 392	1097

I. L. R. 26 Bombay Series, 1902.

PAGE OF REPORT	PAGE OF THIS BOOK
50 = 3 Bom. L. R. 558	692, 774, 957, 1154
150 (F.B.) = 3 Bom. L. R. 586;	18, 20, 311, 437, 500, 622
193	751
353 = 3 Bom. L. R. 319	282, 288
418 = 4 Bom. L. R. 38	180, 640
533 = 4 Bom. L. R. 271	23, 1060, 1153
552 = 4 Bom. L. R. 276	511, 518, 1092, 1094, 1110
785 = 4 Bom. L. R. 618,	470, 927, 969, 994, 1012, 1015

PAGE OF REPORT — PAGE OF THIS BOOK

BOMBAY CASES—(*contd*)

I. L. R. 27 Bombay Series, 1903.

I. L. R. 28 Bombay Series, 1904.

I. L. R. 29 Bombay Series, 1905.

I. L. R. 30 Bombay Series, 1906.

I. L. R. 31 Bombay Series, 1907.

I. L. R. 32 Bombay Series, 1908.

I. L. R. 33 Bombay Series, 1909.

BOMBAY CASES—(*contd*)

I. L. R 33 Bombay Series, 1909—(*contd*)

I. L. R. 34 Bombay Series, 1910.

I. L R. 35 Bombay Series, 1911.

I. L. R. 36 Bombay Series, 1912.

I. L. R. 37 Bombay Series, 1913.

I. L. R. 38 Bombay Series, 1914.

PAGE OF REPORT	PAGE OF THIS BOOK

BOMBAY CASES—(contd.)

I. L. R. 38 Bombay Series, 1914—(contd.)

642 = 16 Bom. L. R. 445 = 2 Bom. Cr. C. 180 = 15 Cr. L. J. 581 = 25 In. Ca. 888 (F.B.) ... 458, 459, 924, 927, 988

718 = 16 Bom. L. R. 588 = 2 Bom. Cr. C. 229 = 16 Cr. L. J. 279 = 28 In. Ca. 821 ... 790, 792, 1188, 1148

I. L. R. 39 Bombay Series, 1915.

58 = 16 Bom. L. R. 808 = 2 Bom. Cr. C. 284 = 15 Cr. L. J. 680 = 26 In. Ca. 180 ... 822, 824, 826, 827

510 = 18 Bom. L. R. 678 = 2 Bom. Cr. C. 248 = 16 Cr. L. J. 88 = 27 In. Ca. 147 ... 458, 1146

528 548

I. L. R. 40 Bombay Series, 1916.

87 = 17 Bom. L. R. 881 = 8 Bom. Cr. C. 86 = 16 Cr. L. J. 785 = 81 In. Ca. 881 ... 882, 884, 887, 1148

202 = 17 Bom. L. R. 978 1109

321 = 17 Bom. L. R. 1088 = 8 Bom. Cr. C. 188 = 17 Cr. L. J. 188 = 88 In. Ca. 809 ... 778

I. L. R. 41 Bombay Series, 1917.

[illegible] 818
[illegible] 927
[illegible] 974
[illegible] 429

I. L. R. 42 Bombay Series, 1918.

[illegible] 480
[illegible] 424
[illegible] 828
[illegible] 578
[illegible] 1088
[illegible] 1101, 1103

I. L. R. 43 Bombay Series, 1919.

134 880
147 ... ... 458, 1146
[illegible] 1000, 1201
[illegible] 143
[illegible] 928, 968

I. L. R. 44 Bombay Series, 1920.

42 457
[illegible] 188
420 88
438 821

I. L. R. 45 Bombay Series, 1921.

[illegible] cxlviii
[illegible] 788
[illegible] 886
[illegible] 788
[illegible] 888, 473

I. L. R. 46 Bombay Series, 1922.

58 ... ... 878, 807, lxvii
67 747
441 788
471 412
[illegible] 1188, 1189
[illegible] 1029

BOMBAY CASES—(contd.)

I. L. R. 47 Bombay Series, 1923.

81 ... ... 782, 1154
71 cxivi
88 ... ... 216, 227, 234, 1154
486 157
907 ... ... 426, 427

I. L. R. 48 Bombay Series, 1924.

88 = 26 Bom. L. R. 188 510
477 1018
512 288
518 16

I. L. R. 49 Bombay Series, 1925.

[illegible] 1188
458 ... ... 823, 908, 973
[illegible] 1041
[illegible] 456, 1000
[illegible] 1149
[illegible] 888
738 = 27 Bom. L. R. 1008 478
[illegible] 880, 771
906 = 27 Bom. L. R. 68 1048
916 ... ... 64, 68

I. L. R. 50 Bombay Series, 1926.

42 = 27 Bom. L. R. 1878 788
58 lxxvi
111 ... ... 888, lxxvi
182 772
[illegible] 87, 820, 868
344 = 28 Bom. L. R. 272 17
[illegible] 883
741 787
788 978

I. L. R. 51 Bombay Series.

101 ... ... 412, 418
[illegible] 20, 484
[illegible] 789
[illegible] ... ... Appd. xiii, page cxxxiv
[illegible] ... ... Appd. xv, page cl

I. L. R. 52 Bombay Series.

131 967
[illegible] 1088
[illegible] 1226
[illegible] 1148
[illegible] 887
[illegible] 454, 474
448 872
[illegible] 918
[illegible] 488

I. L. R. 53 Bombay Series.

62 889
[illegible] 878
478 ... ... 889, 781, 1170
524 974
578 928
611 787
[illegible] 724
716 ... ... 1209, 1212
781 1031

BOMBAY CASES—(*contd*)

Ratanlal's Unreported Cases—(*contd*)

PAGE OF REPORT		PAGE OF THIS BOOK
516	Vithal	248 iii
518	Annia	321 589
518	Purshottam	xl
519		783 858 863
520		lxvii
521		362 936
522		943
523		71 849
524		630 644
525		934
529		547 563
530	Ladkya—Manganlal	711 899
531		495
532		661
534	*In re* Borku—Budhu	342 lxxviii
536		1092 1110
537	Hanma	lxxxvi
537	Palu Nasir	845
539	Taja	922
539	Toulman	646
539		398 609 611 627 808
540	Kaji Sultan	930 cxliii
540	John Paul	406
544		509 519
545		818 907 916
547		1086
548		296
549		512 1076
550		clvi
551		clvi
552		848
554	Shivram—Purshottam	19 433 785 786
555		cxxxvii
556		181 598
562		512
564		64 xxxiii
577		963
581		676
584	Ganoo	191 434 495
585	Galiba	181 182 183 598 cxxxvii
588		474 947 948
590		1134
593		529 886
594		641
597	(F B) Mahomed	65
600	Devu—Bhavdya	650 657 729 882
601		926
602		lxii
608		1187
610		clvi
611		625
612		748
614	Balwantra	29 364 clv
617		620
618		906 908
619	Usuphkhan	321
622		147
623		926
624		clvi
625	Janki	497 765 1186
626		731
629		471
631	Vishnu	1205

PAGE OF REPORT		PAGE OF THIS BOOK
631	Rama	1101 1189
632	Bhula	lxix
633		812
634		626 976
636		792
638		922
639		185 187 188
642		188
644		699 732
652		433 794 927 963
655	Alibax	874 1135
659		550 551
668		191
669		507 512
670		647
671		199 1082
674		75 321
677		134
679		335 767
685		1120
687		813
688	Gulab	61
688	Beera	1093 1186
691		732
692		930 cxliii
695		674
696		762
698		661
699		781
700		619
701		1007 1162 lxxx
703		886
704	Ganpat—Gaudasing	476 789
705	*In re* Bat Jadav	469
708	Vishwanath	242 cxlii cxlviii clvii
710		678 719 765 831
720		335 695 765
723	Purshottam	639
723	Kala	158
725	Manik—Hussain	654
726	Gopala	623 xl xlvi
728		680
730		701 882
734		619
736		705 721
738		cxlviii
740		364 clxv
746	Berkia Mankia—Vaja Raiji	531 723
748		698 714
750		753
763		55 1188
765		191
766		712 715
768		640 651
772		688
774		191 205 846
778		649 653
779		688
783		79
784		78 649
791		828 829
792		803 clv
794		959

BOMBAY CASES—(*contd*)

1 Bombay Law Reporter, 1899—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
686	996
782	631 638 1115
783	227 228
784	709 711
852	942
856	760
857	1219

2 Bombay Law Reporter, 1900

PAGE OF REPORT	PAGE OF THIS BOOK
54	843
57	187
84 = 24 B 527	257 272
111	848
112	1218 1219
322	734
323	734
329	684
331 = 25 B 45	
334	712 959 961
335	968 lxvii
337	407 417 426
339 = 25 B 48	
342	446
394	410 1126 1144
536	73 873
542	636
571	760
586	938 939 942 943
589	1083 1088
611	611 751
653 = 25 B 90	
663	1206
668 (F B) = 25 B 151	
700	1044
702	1219
707	1081
751	660
755 = 25 B 179	
768	1095
801	lxxx lxxxiv
817	911 1216
818	218 229
1079	485 487
1092	313
1095 = 25 B 422	
Journal p 157	340

3 Bombay Law Reporter, 1901

PAGE OF REPORT	PAGE OF THIS BOOK
121	1115
185	1010
187	566
269	183 187
278 = (F B.) = 25 B 680	
319 = 26 B 353	
371	762
416	286 295 298
437	771
439	659
441	343
449	1098 1101 1188
539	65
540 (P C) = 25 M 61	
558 = 26 B 50	

BOMBAY CASES—(*contd*)

3 Bombay Law Reporter 1901—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
562	26 761
584	973
586 (F B) = 26 B 150	623
675	581 633
677	931 932 951 970
703	938 939
764	1101 1188
777	623
841	622 910

4 Bombay Law Reporter, 1902

PAGE OF REPORT	PAGE OF THIS BOOK
12	970 1110
38 = 26 B 418	568 641
53	568 598 601
55	1066
78	146
79	99
85	520 522 532 633
167 (P C)	282
177	548
267	1143
268	453 455
271 = 26 B 533	
276 = 26 B 552	
296	763
433	552 573 574
436	843 xxxv
438	254 263 296
440	573
461	641 770 810
575	866
582	244
609	497 1196
618 = 26 B 785	
683 = 27 B 644	699
686	923 956 961
687	217 218
718	782
720	68
750	471 1009
778	1006
779 = 27 B 84	868
785	331 341 342
789	581
825	762
826	757
876	64 192 848
877	1185
878	772 773 777
882	218 219
929	64 843 xxxiii
934	191
939	672 688 692 774
940 = 27 B 130	
942	566
970	997

5 Bombay Law Reporter, 1903

PAGE OF REPORT	PAGE OF THIS BOOK
25	1107 1108
26	64 192 848
27	205 354
28	1134
125	866

PAGE OF REPORT	PAGE OF THIS BOOK
BOMBAY CASES—(*contd.*)	
5 Bombay Law Reporter, 1903—(*contd.*)	
126	1185
205	lxiv
207	698
312	329
542	1202, 1205
551	cx
597	96
599 = 27 B. 626	700
614	1036, 1037
704	884
805 = 28 B. 129	...
869	1115, 1128
873	14
877	939
976	1185, 1186
978	131, 135
980	129, 130, 134, 135
999	608
1032	134
1034	549
6 Bombay Law Reporter, 1904.	
31 = 1 Cr. L. J. 1	695, 699
34 = 1 Cr. L. J. 3	182, 188
91 = 1 Cr. L. J. 102	507
94 = 1 Cr. L. J. 105	768
46 = 1 Cr. L. J. 256	259
55 = 33 B. 22	15, lxxvii, lxxxv, lxxxvii
58 = 1 Cr. L. J. 265	705, 721, 722, 724
4 = 28 B. 479	...
8 = 1 Cr. L. J. 328	215
= 1 Cr. L. J. 329	827
= 28 B. 412	599, 600, 604
...	752
= 1 Cr. L. J. 588	939
= 1 Cr. L. J. 589	1115
= 1 Cr. L. J. 584	599
= 1 Cr. L. J. 586	728
= 1 Cr. L. J. 599	1041
...	831
...	1020
1 Cr. L. J. 607	61
1 Cr. L. J. 609	xlvii
1 Cr. L. J. 743	728, 729
Cr. L. J. 750	499
Cr. L. J. 755	151, 152, 760, 1161
Cr. L. J. 772	662
Cr. L. J. 832	290
Cr. L. J. 834	567, 603
Cr. L. J. 931	420
r. L. J. 934	1125, 1135
r. L. J. 939	634, 660
r. L. J. 940	151, 172
. L. J. 969	469, 816
. L. J. 1108	1125, 1206
L. J. 1111	957
L. J. 1114	192, 848
L. J. 1115	927
Bombay Law Reporter, 1905.	
J. 28	267, 290
J. 54	1004, 1007, 1013
J. 58	886

PAGE OF REPORT	PAGE OF THIS BOOK
BOMBAY CASES—(*contd.*)	
7 Bombay Law Reporter, 1905—(*contd.*)	
104 = 29 B. 575	1114, 1115 vi
457 = 2 Cr. L. J. 432	522, 538, 564, 597
463 = 2 Cr. L. J. 439	90, 91, 957, xix, xxii
472 = 2 Cr. L. J. 448	1122
637 = 2 Cr. L. J. 582	440, 444, 599, 1126
723 = 2 Cr. L. J. 601	535
731 = 2 Cr. L. J. 609	660, 734
732 = 2 Cr. L. J. 611	467, 468, 470
833 = 2 Cr. L. J. 770	45, 47
969 = 3 Cr. L. J. 33	751
978 = 3 Cr. L. J. 41	377, 656, 692, 726, 1164
998 = 3 Cr. L. J. 88	622
8 Bombay Law Reporter, 1906.	
19	cx
22 = 30 B. 348	ccvi
32 = 3 Cr. L. J. 227	461
35 = 30 B. 537	...
118	clvi
120 = 3 Cr. L. J. 240	588, 591, 594
240 = 3 Cr. L. J. 337	662
420 = 3 Cr. L. J. 499	1063
421 = 30 B. 421	...
477 = 4 Cr. L. J. 34	453, 996
507 = 4 Cr. L. J. 49	428, xxi
513 = 4 Cr. L. J. 54	412, 419, 428
538 = 4 Cr. L. J. 89	565, 1162
589 = 4 Cr. L. J. 183	24, 311, 313, 339, 1008
599 = 4 Cr. L. J. 192	729
694 = 4 Cr. L. J. 329	939
740 = 30 B. 611	...
847 = 4 Cr. L. J. 423	623, 624
849 = 4 Cr. L. J. 444	650, 763
851 = 4 Cr. L. J. 446	958
855 = 4 Cr. L. J. 450	67
947 = 5 Cr. L. J. 2	1201, 1206
950 = 5 Cr. L. J. 4	338
9 Bombay Law Reporter, 1907.	
30 = 5 Cr. L. J. 97	221, 226
33 = 31 B. 204	477
148 = 31 B. 218	...
153 = 5 Cr. L. J. 168	713
156 = 5 Cr. L. J. 171	973
164 = 5 Cr. L. J. 171	162, 171, 187, 188
212 = 5 Cr. L. J. 202	435, 440, 457, 1019
225 = 5 Cr. L. J. 213	530, 533, 540
244 = 5 Cr. L. J. 249	161
250 = 5 Cr. L. J. 255	514, 631, 816, 827
353 = 5 Cr. L. J. 329	1173, 1175
356 = 5 Cr. L. J. 332	765, 957
359 = 1 Cr. L. J. 334	1036, 1037
362 = 5 Cr. L. J. 337	v
366 = 5 Cr. L. J. 353	325, 1161
681 = 31 B. 480	...
695 = 31 B. 438	...
706 = 6 Cr. L. J. 70	959, 961
730 = 6 Cr. L. J. 74	765
735 = 6 Cr. L. J. 78	478
742 = 6 Cr. L. J. 85	511
789 (F.B.) = 32 B. 111	...
893 = 6 Cr. L. J. 221	869
895 = 6 Cr. L. J. 224	

PAGE OF REPORT — PAGE OF THIS BOOK

BOMBAY CASES—(contd.)

9 Bombay Law Reporter, 1907—(contd.)

896 = 6 Cr L. J 225 — 997
967 = 31 B 611
1057 = 6 Cr L. J 236 — 658 729
1059 = 32 C 10
1160 = 6 Cr L. J 326 — 994 995 1008
1285 = 6 Cr L. J 385 — 1069
1346 — 634
1347 = 6 Cr L. J 425 — 927 928
1385 = 7 Cr L. J 24 — 179 961

10 Bombay Law Reporter, 1908

28 = 32 B 184
93 = 32 B 162
95 = 32 B 203
173 = 7 Cr L. J 192 — 729 732
201 = 7 Cr L J 194 — 47, 765 808 1117
553 = 32 B 449
563 = 8 Cr L. J 33 — 217, 218
565 = 8 Cr L. J 35 — 912
628 = 8 Cr L J 139 — 612
630 = 8 Cr L. J 141 — 1136 vi cliii clv
632 = 8 Cr L. J 143 — 731 732
759 = 33 B 33
801 = 33 B. 77
973 = 33 B 221 — ix
1040 = 33 B 240
1047 = 8 Cr L. J 431 — 242 248
1053 = 9 Cr L. J 183
1056 = 9 Cr L J 186 — 619 783
1126 = 33 B 25
92 — clxxxv

11 Bombay Law Reporter, 1909

16 = 9 Cr L. J 162 = 1 In. Ca. 103 — 1092 1095
18 = 9 Cr L. J 163 = 1 In. Ca 104 — 533 539
75 = 9 Cr L. J 214 — 1054
177 = 9 Cr L. J 284 = 1 In Ca 280 — 689
332 = 10 Cr L. J 65 = 2 In Ca. 517 — 701
350 = 33 B 423
372 = 2 In Ca 494 — cxli
377 = 10 Cr L. J 64 = 2 In Ca 513 — 263 282
544 = 10 Cr L. J 250 = 3 In Ca 171 — 70
740 = 10 Cr L. J 375 = 3 In Ca 774 — 165 182 203 564 872
743 = 10 Cr L. J 379 = 3 In. Ca. 776 — 157
855 = 34 B 88
858 = 10 Cr L. J 433 = 3 In. Ca 963 — 960
1153 = 10 Cr L J 530 = 4 In Ca 268 — 629 635 749
1162 = 10 Cr L. J 538 = 4 In Ca 273 — 677
1164 = 10 Cr L. J 539 = 4 In Ca 273 — 468, 471

12 Bombay Law Reporter, 1910

21 = 34 B 378 — 959
129 = 34 B 326
130 = 34 B 316
226 = 11 Cr L J 337 = 5 In Ca. 970 — 550 551 569 573 576 865 973
229 = 11 Cr L J 338 = 5 In Ca 971 — 475
232 = 11 Cr L. J 339 = 5 In Ca 972 — 1108 1109
383 = 11 Cr L. J 368 = 6 In Ca 529 — 456
521 = 11 Cr L. J 486 = 7 In Ca 450 — 534 536
667 = 11 Cr L J 543 = 7 In. Ca 934 — 428
891 = 11 Cr L. J 687 = 8 In Ca. 618 — *1053 1054*
901 = 35 B 137
923 = 11 Cr L. J 692 = 8 In Ca 631 — 530 536
1029 = 11 Cr L. J 705 = 8 In Ca 747 — 930 cxli

PAGE OF REPORT — PAGE OF THIS BOOK

BOMBAY CASES—(contd.)

13 Bombay Law Reporter, 1911

131 = 35 B 253
200 = 12 Cr L. J 241 = 10 In Ca 769 — 68 848
201 = 12 Cr L. J 256 = 10 In Ca 802 — 539
203 = 35 B. 271
296 = 35 B 225
503 = 12 Cr L. J 402 = 11 In Ca 586 — 878
505 = 35 B 401 — 937
550 = 35 B 418
635 = 12 Cr L. J 457 = 11 In. Ca 903 — 818
1185 = 12 Cr L. J 604 = 12 In Ca 980 — 976

14 Bombay Law Reporter, 1912

41 = 1 Bom Cr Ca 72 = 13 Cr L J 137 = 13 In Ca 825 — 581
141 = 1 Bom Cr Ca 82 = 13 Cr L. J 287 = 14 In Ca 671 — 19 434 435 494 495
144 = 1 Bom Cr Ca 85 = 13 Cr L. J 288 = 14 In. Ca 672 — 817
147 = 36 B 524 — 408 413 415
158 = 36 B 504 — cxli
163 = 1 Bom Cr Ca 104 = 13 Cr L J 293 = 14 In Ca. 757 — 121 124
166 (misprint for 1166)
231 = 1 Bom Cr Ca 106 = 13 Cr L. J 461 = 15 In Ca 93 — 1022
236 = 1 Bom Cr Ca 111 = 13 Cr L. J 464 = 15 In. Ca 96 — 799 800
304 = 1 Bom Cr Ca 113 = 13 Cr L. J 503 = 15 In Ca 647 — cxlvi
360 = 1 Bom Cr Ca 123 = 13 Cr L. J 523 = 15 In Ca 795 — 641
362 = 1 Bom Cr Ca. 125 = 13 Cr L. J 527 = 15 In Ca 799 — 455
377 = 1 Bom Cr Ca 140 = 13 Cr L. J 537 = 15 In. Ca 809 — 428 429 xxi
499 = 1 Bom Cr Ca. 144 = 13 Cr L. J 513 = 15 In Ca 785 — cxxx
587 = 1 Bom Cr Ca. 154 = 13 Cr L. J 689 = 16 In Ca 497 — 468 471, 1007
710 = 1 Bom Cr Ca 159 = 13 Cr L. J 677 = 16 In Ca. 325 — 656 701, 735
713 = 1 Bom Cr Ca 162 = 13 Cr L. J 748 = 17 In Ca 60 — 181, 202
715 = 1 Bom Cr Ca 164 = 13 Cr L. J 751 = 17 In Ca 63 — 454
876 = 1 Bom Cr Ca 172 — 14
889 = 1 Bom. Cr Ca 185 = 13 Cr L. J 796 = 17 In Ca 540 — 120 160 161 165
947 — 97
965 = 37 B 178
968 = 1 Bom Cr Ca 212 = 13 Cr L. J 848 = 17 In Ca. 720 — 993 994 1001 1015
970 = 1 Bom Cr Ca 214 = 13 Cr L. J 845 = 17 In Ca 717 — 927 996
972 = 1 Bom Cr Ca. 216 = 13 Cr L. J 833 = 17 In Ca 705 — 568 578 602
1160 = 1 Bom Cr Ca 231 = 13 Cr L. J 904 = 17 In Ca 1000 — 476
1166 = 1 Bom Cr Ca 237 = 14 Cr L. J 1 = 18 In Ca 145 — 19 435 621, 1012

15 Bombay Law Reporter, 1913

45 = 37 B 365 — 457
49 = 37 B 376

PAGE OF REPORT

BOMBAY CASES—contd.

30 Bombay Law Reporter—contd.

[illegible]

31 Bombay Law Reporter.

[illegible]

A. I. R. Bombay, 1927.

[illegible]

A. I. R. Bombay, 1928.

[illegible]

A. I. R. Bombay, 1929.

[illegible]

CALCUTTA CASES.

...land's Weekly Reporter, Sup. Vol., 1864.

[illegible]

PAGE OF THIS BOOK | PAGE OF REPORT

CALCUTTA CASES—contd.

1 Sutherland's Weekly Reporter, 1864.

[illegible]

2 Sutherland's Weekly Reporter, 1865.

[illegible]

3 Sutherland's Weekly Reporter, 1865.

[illegible]

PAGE OF THIS BOOK

[illegible]

AGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(contd)

3 Sutherland s Weekly Reporter, 1865—(contd)

4 Sutherland s Weekly Reporter, 1865

5 Sutherland s Weekly Reporter, 1866

6 Sutherland s Weekly Reporter, 1866

PAGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(contd.)

6 Sutherland s Weekly Reporter, 1866—(contd)

7 Sutherland s Weekly Reporter, 1867

8 Sutherland s Weekly Reporter, 1867

CALCUTTA CASES—(*contd.*)

13 Sutherland's Weekly Reporter, 1870

PAGE OF REPORT		PAGE OF THIS BOOK
1	*In re* Mohesh	125 441 806 xc
15	Assanoollah	687
16	Goluck Chunder	66
17	Hossein Sirdar	447 807 cviii
18	Ramchandar Sircar	659 677
19	Gonda	1044
19	Radhakishore	240, 245
24	Rojoni Kant	178
27	Nobin Roy	100 110 112 114 439
34	Dwarakanath Sen	698
36	Shamkishore	687 1164
40	Purmessur Singh	794 800
42	Shahabut Sheikh	68 576 859 926
45	Madhub Chunder	1010
50	Mahomed Ali	820 884
51	Madho Churn	296
52	Lutpottee	1033
53	Mewa Lall	1086
60	Mookta Singh	692 1208
63	Sheik Mehar Chand	678
63	Ameer Chand Nohatta	609
69	Nitogopal Palit	885
72	Mohun Sirdar	243
72	Uttam Chander Chatterjee	240
75	Assan Shurreff	66
209	(Civil)	817

14 Sutherland's Weekly Reporter, 1870

PAGE OF REPORT		PAGE OF THIS BOOK
3	Kopil Nath Sahi	786 794
7	Ruttun Bewa	64 844
9	Misser Sheikh	679
10	Petumbar Dhobee	540
12	Nobocoomar Banerjee	1134
16	Kishto Doba	526 531 532 769
17	Rai Luchmeeput	240
19	Joyah Mohun	66
20	Sutherland	103 127 798
25	Chooramoni	926 947 968
27	Greene *v* Delaney	772
28	*In re* Bhoiro Mundal	294 298
29		897
36	Ameer Mahomed	436 498
46	Abbas Ali	234 243
46	Dassee Mosulmany	696
51	Ranee Surutsoondree	977
59	Hurry Prosad	717 718 721
63	Niamutulla	510
65	Ramjoy Mazumdar	441 868
69	Shamkant Bundopadhya	231 232
76	*In re* Chedee Koonjra	610
77	*In re* Sheeb Pershad	970 1190

15 Sutherland's Weekly Reporter, 1871

PAGE OF REPORT		PAGE OF THIS BOOK
2	*In re* Chutoorbhooj	1021
3	Bhugwan Lall	735
3	(Cr Let) 396 19th May 1871	811
4	Bidhoomookhee	110
5	Chota Hurry	1020
7	Ram Sahie	534 544
7	Bunda Ali	907
9	Roopun Rai	613 619 626

CALCUTTA CASES—(*contd.*)

15 Sutherland's Weekly Reporter, 1871—(*contd.*)

PAGE OF REPORT		PAGE OF THIS BOOK
15	Mohima Chunder	535
16	*Reference (Gopal)*	687
17	Kalichurn Dass	705 913 cxxii
18	*In re* Kalinath Biswas	174
25	Ameeruddeen	733 807
33	Dhunobur	920
34	Ishan Dutt	677 687 688
43	Koonjbehary	178
46	Bahar Ali	726 882
49	Bishumbur	1078
53	Tuki Mahomed	528 1079
56	*In re* Gobind Sooboodhee	145
63	Bikharee	814
64	Buktear	920
66	Panhee Aurut	821
67	*In re* Bechram Bhattacharjee	217
69	Ameer Khan	1120 1124 1126 vii
71	(*n*) Nobodeep Chunder	338 vii
82	Khoodie	1084
83	Messrs Watson & Co	968
86	Bharat Chunder Bose	961
87	*In re* Notobur Bera	609 1083 1085
88	Taraprosad	1011
279	(Civil) *In re* Nomay Mollah	xliv

16 Sutherland's Weekly Reporter, 1871

PAGE OF REPORT		PAGE OF THIS BOOK
1	Boron	33
3	Kaptan	862
6	Munl Coms Calcutta	219
13	Kali Chundro	277
14	Rajcoomar	536
19	Rutton Dass	664 686 697 882
20	*In re* Huroo Shaha	686 715
21	*In re* Dinno Ray	612 768 774
23	Dinonath Chuckerbutty	230 232
24	Rai Mohun Roy	258
36	Zoolkar	804
37	Mahomed Hossein	468
40	Grish Chunder	1136
44	Gour Mohun Singh	474 476 1005
47	Moharaj	553 601
53	Dila Mundul	608
58	Nilmoney	498 612
61	(71) Mudun Mundle	807
62	Pachoo	1041
63	(Mehar Dowaia)	550
67	(77) Bishoo Barik	1005
69	(79) Messrs Macdonald	33 957 1154

17 Sutherland's Weekly Reporter, 1872

PAGE OF REPORT		PAGE OF THIS BOOK
2	Krishna Churn	499 788 954
3	Messrs Watson & Co	511
3	Shibu Manjee	283
9	Ramrunginee Dassee	274
10	*In re* Chunder Bhon Singh	124 125
12	Dinnonath	cxxxiii
15 = 9 B L R 36		413 415
33		253
34	Radhoo Singh	cxxiii
35		176
39	Heeralal Das	1201
46	Sheebpershad	

CALCUTTA CASES—(*contd.*)

17 Sutherland's Weekly Reporter, 1872—(*contd.*)

PAGE OF REPORT		PAGE OF THIS BOOK
49	Meiselback	...1042
49	Kazim	... 27
51	*In re* Thakoor Dyal Sen ...	637, 641
54	Ram Coomar	155, 172
54	Gunga Ram	465, 473
55	Muthoora Nath	... 775
57	Pittambur Dey	... 248
59	Goomanee	... 895

18 Sutherland's Weekly Reporter, 1872.

PAGE OF REPORT		PAGE OF THIS BOOK
2	Noor Mahomed	173, 178
4	Mukhoda	... 290
5	Sookhan	...1110
7	Shaik Oodla	950, 959, 968
11	Sutherland	190, 267, 277
18	Bhugobut	446, 1060
20	Rajnarain	688, 692
22	Lalla	... 243
27	Kallee Churn	26, 283
31	Woodoychand	.. 919
33	= 9 B. L. R. 342	... 954
34	Seetaram Sahoe	... 268
36	Ramrunginee	254, 262
39	Jint Sahoo	... 947
39	Ramdhun	868, 950, 959
41	Messrs. Angelo Brothers ...	... 217
44	(*Footnote*) Love	... 59
44	Komodinee	... 174
47	(F.B.) Bykuntram	239, 241, 242
54	Gobind Chunder	... 265
57	Gooroo Dass Roy	199, 807
59	Norkoo	...1151
61	*In re* Isree Pershad	189, 199
63	Haran Chunder	199, 1087
64	Shama Sunker	276, 277

19 Sutherland's Weekly Reporter, 1873.

PAGE OF REPORT		PAGE OF THIS BOOK
1	Nil Madhub	175, 1089, 1090
1	Chand Manal	... 972
3	Rash Mohun	...1094
6	*In re* Nil Komul	... 245
7	Bolaki Lall	84, cxxiii
10	Kishoree Mohun Roy ...	... 257
12	*In re* Ram Kishore	120, 124
15	Bheekoo	... 985
16	Mohesh Biswas	... 344
28	Raghoo Parirah ...	509, 794, 796, 953, 1136
30	Tarick Nath	946, 968
33	Grish Chunder	... 460
36	Basooram Dass ...	83, 100, 116, 117, 354
37	*In re* Doobri Hulwai ...	... 762
38	Oottum Dhoba	... 730
39	Gogun	... 962
41	Rajcoomar Bose	549, 790
43	Bipro Dass	448, 540
45	Doorjodhun Samonto ...	731, 985, 990
47	Kashi	151, 155, 172, 184
48	Zearuddin	199, 751, 1087
53	Belilious	636, 973
55	Luchi Behara	858, 879
57	Jaffir Ali	706, 832, 883, 962, 967, 968
67	Belat Ali	... 344

19 Sutherland's Weekly Reporter, 1873—(*contd.*)

PAGE OF REPORT		PAGE OF THIS BOOK
71	Rajcoomar	698, 705, 716
73	Nepoor Aurut ...	1040, 1047, 1049
426	(Civil) Probhoo	... 225

20 Sutherland's Weekly Reporter, 1873.

PAGE OF REPORT		PAGE OF THIS BOOK
5	Sabidali	... 713
12	... ...	.. 287
13	Kheraj Mullah	654, 896
14	Khettromony	... 802
17	Abheen Parrida	646, 649
18	Isree Pershad	179, 183
19	Ramsodoy	750, 832, cviii
22	Hurnath Singh	... 975
23	Abdool Kadir	106, 353, 518, 523, 628, 776, 965, 966, 1068, 1128
33	Ramchurn ...	332, 730, 731, 893
36	Gunga Singh	... 175
37	Jhapoo	... 146
38	Gunsha	...
40	Nibarun Chunder	... 949
40	Debichurn Biswas	953, 961
41	Nimchand	... 321
46	Hari Singh	631, 868
47	Kistoram	631, 868
50	Lucky Narain Dutt	722, 811, 949
51	Pirthiram	270, 271
53	Bholanath Bose	239, 243
57	Abdool Huq ...	145, 150, 184, 256
58	Subad Domni	1032, 1033
67	Soondur Luker (misprinted as 27)	... 630
70	Nobin Chunder	729, 848, 987
72	Hur Chandra	842, 843
73	Sham Bagdee	... 728
73	Udya Changa	730, 731
76	Hurro Chunder ...	... 318, 1134, 1206
316	(Civil)	... 287

21 Sutherland's Weekly Reporter, 1874.

PAGE OF REPORT		PAGE OF THIS BOOK
1	Sustiram Mandal	722, 724
4	Haroo Manjhee	... 731
5	Nussuruddin	679, 682
6	Ramkishore ...	150, 176, 177, 183, 185, 189
10	Kashi Chunder	219, 231
12	Bebheki Pathak ...	146, 651, 684, 685
12	(Rules, etc.)	1038, 1080
21	Hatoo Khan	936, 974
22	Arzanoollah	.. 248
26	Banee Madhub Ghose	239, 240, 243, 300
29	Amiruddin	... 637
30	Syed Futteh	cxxvi
31	Tarinee Churn	cviii, cx
37	Sahebdi	145, 1142, 1143, 1145, 1146
38	Shakur Mahomed	.. 648
40	Esan Chunder Dey	548, 715, 790
41	Joykurn	... 946
43	Shatyanundo Ghosal ...	... 230
44	Ramkant Sirkar	... 504
47	Ramdoyal Mahara	736, 795, 976
49	Amanullah	683, 684
54	Sheik Nozumuddy	... 231
55	Mudhoosoodun Shaha ...	279, 281, 300

CALCUTTA CASES—(*contd*)

CALCUTTA CASES—(*contd.*)

25 Sutherland's Weekly Reporter, 1876.

PAGE OF REPORT		PAGE OF THIS BOOK
2	Puddomonee Dossee	254, 257
4	Petamber Jugi	211, 217, 223, 231
5	Ramaotar Paure	648, 717
6	Kristodhone	59, 654
8	Zuhuruddeen	776
10	Syed Nissar Hossein	305, 474
16	Must. Anuragee	263, 268
17	Ramdhone	534
18	Nobin Chunder	263
19	Ram Chunder	646, 649, 1143
20	Golam Arabee	cxxxiii
21	(Shondoo)	925
23	Sonaoollah	634, 661
24	Kassim	269
25	Wuzir Mundul	731
27	*In re* Zuhiruddin (F.B.) = 1 C. 219	1128
30	Mohesh	942
31	Nakori	868
32	Nobin Chand	641, 694
33	Ramrunjum Bhandari	454, 476
36	Gokool = 1 C. 207	882, 923
43	Baijoo Chowdhry	751
45	Abdul Ali...	422
46	Udit Singh	549
48	Ramkishan Halwai	637
50	Abdool Bari	189
54	Chunder Kumar	697
57	Bholanath Sein = 2 C. 23	29, 39, 44, 526, 768, 957, 1205
64	Zuhoorul Huq	615
65	Issur Chunder	649, 819
68	Kalikishore Roy	292
69	Pran Nath	... ...
72	Hadjee Muzhur	220, 226
74	Sheikh Munglo	254, 260 271, 294
79	...	267
81	...	271

26 Sutherland's Weekly Reporter, 1877.

PAGE OF REPORT		PAGE OF THIS BOOK
7	Nimae Churn Dey	221, 228
8	Grish Chunder	cxxi

27 Sutherland's Weekly Reporter,

PAGE OF REPORT		PAGE OF THIS BOOK
659	...	1203

Bengal Law Reports, Sup. Vol., 1862—68.

PAGE OF REPORT		PAGE OF THIS BOOK
426	...	970, 1006, 1015
443	(F.B.) = 5 W. R. Cr. 45	961
459	(F.B.) = 5 W. R. 80	716, 752, 898, 913
750	= 8 W. R. 47 (which *see*)	... ...
951	= 9 W. R. 41 (which *see*)	... ...

1 Bengal Law Reports, 1868.

PAGE OF REPORT		PAGE OF THIS BOOK
1	(Ap. Cr.) = 10 W. R. 4	1079
7	(Ap. Cr.)	1066
15	= 15 W. R. 71 (*n*)	vii
20	(Ap. Cr.)	239, 240
15	(O. Cr.)	331, 1127
37	(„)	800
41	(„)	59, 234
16	(„)	767
26	(„) = 10 W. R. 34	1064
27	(„)	245
13	(Appx.)	553

CALCUTTA CASES—(*contd.*)

2 Bengal Law Reports, 1869.

PAGE OF REPORT		PAGE OF THIS BOOK
7	(Ap. Cr.)	178
11	(„)	200
23	(F.B.) = 10 W. R. 43	663
25	(F.B.) = 10 W. R. 45	vii
27	(A.C.)	259, 263
1	(S.N.)	286
15	(„)	225, 609
28	(Appx.)	164, 177, 184

3 Bengal Law Reports, 1869.

PAGE OF REPORT		PAGE OF THIS BOOK
4	(Ap. Cr.)	240
6	(„)	459
9	(„)	470
13	(„)	282
20	(„) = 12 W. R. 3	604, 800, 957
45	(„)	243
47	(„)	1012
50	(„)	57, 835, 848, 919
53	(„)	510
62	(„)	920
76	(„)	271
43	(Appx.)	225
149	(„)	248
151	(„)	446, 1136
155	(„)	1084
145	(Civil)	1171

4 Bengal Law Reports, 1869.

PAGE OF REPORT		PAGE OF THIS BOOK
24	(F.B.)	225
46	(F.B.)	176, 185, 190
97	(F.B.)	cx
9	(Ap. Cr.) = 12 W. R. 9	1002
14	= 13 W. R. 60	1208
15	(Ap. Cr.)	445, 1207
51	(O. Civ.)	xc
1	(Appx.) = 13 W. R. 1	110, 113, 116, 127, 441, 535, 776, 806, 860, 1056, 1064, 1128
50	(„)	748
77	(„)	609
101	(„)	634, 662
686	(„)	958

5 Bengal Law Reports, 1869-70.

PAGE OF REPORT		PAGE OF THIS BOOK
131	...	239, 240
274	= 13 W. R. 27	100, 112, 439, 441
382	...	123
386	...	123
45	(Appx.) = 14 W. R. 12	1134
70	(„)	760, 977

6 Bengal Law Reports, 1870-71.

PAGE OF REPORT		PAGE OF THIS BOOK
296	...	613, 619, 626
392	...	657
459	...	657
483	= 15 W. R. 33	920
698	(F.B.) = 15 W. R. 64	920
6	(Appx.)	510
46	(„)	977
65	(„)	534, 544, 640
67	(„)	441
78	(„)	535, 640

CALCUTTA CASES—(*contd*)

6 Bengal Law Reports, 1870-71—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
86 (Appx.)	705 723
88 („) = 15 W R 34	687, 688 692
95 („)	... 907
122 („)	1078
129 („)	110
151 („) = 15 W R 53	737, 1079

7 Bengal Law Reports, 1871.

PAGE OF REPORT	PAGE OF THIS BOOK
63	733
165	xxxii
240 (Appx)	1120, 1124, 1126, vii
244 (250 *n*) = 15 W R. 60	11
322	276
329	257, 276, 298
449	224
499	219
513	1136
516	224
564	641
25 (Appx) = 16 W R 3	862
37 („)	1084
57 („)	230
62 („)	811
66 („)	549, 553 601

8 Bengal Law Reports, 1872.

PAGE OF REPORT	PAGE OF THIS BOOK
422 (F B)	*445, 1204, 1207, 1208*
557	721
1 (Appx.)	lxv
19 („)	1037
21 („) = 16 W R 36	804
47 („)	837
58 („) = 17 W R 12	cxvii, cxxiii
60 („) = 17 W R 34	cxxiii
63 („)	681

9 Bengal Law Reports, 1872.

PAGE OF REPORT	PAGE OF THIS BOOK
229 = 18 W R 11	267
342 = 18 W R 33	954
354 = 17 W R 55	775
417	217, 224
30 (Appx) = 18 W R 44	174
31 ( ) = 18 W R 31	919
36 („)	243
39 („)	265

10 Bengal Law Reports, 1873.

PAGE OF REPORT	PAGE OF THIS BOOK
2 (Appx)	328
285 = 19 W R 30	522 946 968
332	679
434 = 18 W R 47	239 241 242
441 = 19 W R 47	*151, 155 172, 184*
453 = 19 W R 67	44
455*n* = 19 W R 16	44
4 (Appx.)	cxix, cxx, clx1

CALCUTTA CASES—(*contd*)

10 Bengal Law Reports, 1873—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
10 („)	985
14 („) = 19 W R 12	120 124
26 („)	509
29 („)	1136
33 („) = 19 W R 73	1040 1049
36 („) = 19 W R 71	549, 698, 705 716

11 Bengal Law Reports, 1873.

PAGE OF REPORT	PAGE OF THIS BOOK
14	727 832
33	654 896
5 (Appx)	802
8 („) = 20 W R 23	628 776, 965 1064 1068 1128
347 (F B) = 20 W R 5	713

12 Bengal Law Reports, 1874

PAGE OF REPORT	PAGE OF THIS BOOK
249 = 20 W R 61	959
15 (Appx) = *21* W R 49	683
22 („) = 21 W R 21	974

13 Bengal Law Reports, 1874.

PAGE OF REPORT	PAGE OF THIS BOOK
324 (F B) = 21 W R 72	567 589 714
4 (Appx) = 21 W R 66	422 1144 1145
19 („)	730, 731
20 („)	731 987
40 („) = 12 W R 10	–

14 Bengal Law Reports, 1875

PAGE OF REPORT	PAGE OF THIS BOOK
54 = 22 W R 14	1158 cxviii
106	21
294 (F B)	cviii cix, cx
295*n*	cviii, cxi
2 (Appx.) = 21 W R 4	731

I. L. R. 1 Calcutta Series, 1876.

PAGE OF REPORT	PAGE OF THIS BOOK
207 = 25 W R 36	329 335 716 887 913 923 vi
219 = 25 W R 27	1128
281	881
282 = 25 W R 30	868 942
450	453 467 1004 1005 1008 1009

I. L R. 2 Calcutta Series, 1877.

PAGE OF REPORT	PAGE OF THIS BOOK
23 = 25 W R 57	37 40, 445 604, 957 1140 1155 1199 1200 1205
110	171, 175 527 953, 961, 968 969
117	73
225	16
273	879 881
278	1123
290	1115
293	ii iii
356	986
334 = 1 C. L. R 95	175
405	868, 946 1208
436 (F B)	879

I. L. R. 3 Calcutta Series, 1878.

PAGE OF REPORT	PAGE OF THIS BOOK
20 (F B.)	249
189	595, 720, 723 731 732
320	266, 267

PAGE OF REPORT	PAGE OF THIS BOOK

CALCUTTA CASES—(contd.)

I. L. R. 13 Calcutta Series, 1886.—(contd.)

275	 231
304	 lxv
305	 793
334	.. ... 435, 499, 500, 504

I. L. R. 14 Calcutta Series, 1887.

42 (F.B.)	... 788, 828, 829, 921, 929, 954, 955, 973
60	.. .. 225, 229
128	... ... 566, 570
141	... 497, 503, 506, 507, 508, 509, 511, 513
164	... ... 704, 705, 711, 913
169	... ... 259, 268, 968
174	 880
175	 lxvi
245	. 524, 609, 629, 677, 689, 690, 1056, 1170
276	.. 1032, 1033, 1034, 1046, 1049
335	... ... 792, 793
353	... 181, 537, 588, 601, 1158, 1159
361	... . 253, 268, 961
395	... ... 68, 570, 600, 602
539	... ... 341 342, 811, 812
556	... ... 26, 27
653	... ... 474, 1168, cviii
707 (F.B.)	... 17, 18, 78, 430, 436, 438, 468, 474, 475, 476, 494, 500, 511, 1005, 1008
721	 738
834	... ... 84, 1095, 1101, 1102, 1108
887	 962

I. L. R. 15 Calcutta Series, 1888.

31	... ... 279, 1165
109	... ... 129, 130, 132, 134, 135
184	 cxxii
254	 772
289	 731
386	1222
455	... 1062, 1119, 1129, 1130, 1131
460 (F.B.)	 225
511	 865
527	... ... 262, 267
564	... ... 217, 218, 222, 226
595 (F.B.)	15, 304, 333, 341, 811, 812, 1147
608 (F.B.)	23, 515, 614, 644, 853, 862, 924, 934, 935, 938, 939, 940, 941, 943, 944, 945, 947, 948, 953, 958, 967, 968, x
621	... ... 537, 958
712	... ... 870, lxiv, lxvi
775	... ... 1044, 1071

I. L. R. 16 Calcutta Series, 1889.

9	.. ... 222, 226, 243, 248, 254
80	... ... 240, 245, ii, iii
121	... ... 22, 444, 1026, 1125
159	 lxiv
238	... ... 14, 1072, 1075
281	 267
310	 897
349	... ... 321, 323
442 (F.B.)	... ... 65, 68, 576
487	... ... 140, 1196

CALCUTTA CASES—(contd.)

I. L. R. 16 Calcutta Series, 1889—(contd.)

513	... 262, 266, 267, 276, 279, 280, 1165
610	 328
661	... ... 469, 472, 474, 477
667	... ... 14, 407, 421, 869, 1144
715	 647
725	... ... 66, 68
730	... ... 467, 1005, 1009, 1013
766 (F.B.)	. 1010, 1011, 1026, 1125, 1206
779	.. .. 145, 969
781	... ... 19, 761, 1030
799	... ... 808, 876

I. L. R. 17 Calcutta Series, 1890.

485	... ... 880, 893, 896, 897
562	... ... 216, 217, 218, 226
642	... ... 706, 716, 923, 1167, vi
862	... .. 340, 341, 812, 1147, 1148
872	... ... 457, 994, 997
930	... ... 677, 689, 690

I. L. R. 18 Calcutta Series, 1891.

75	... ... 920, 939, 946
129	... ... 807, 1076
186	... ... 926, 927, 934, 951
247	... ... 22, 1114, 1118, 1119
549	... 341, 342, 812, 814, 1148, 1149

I. L. R. 19 Calcutta Series, 1892.

35	 481
52	... ... 129, 130, 131, 134, 135, 966
84	1037
105	... ... 66, 67
113	... ... 675, 1070 1072, 1075
127	... ... 240, 245, iii
201	 106
345	.. .. 470, 1007
355	 cx
380	... ... 922, 977
544	 261
646	 285
963	 1211

I. L. R. 20 Calcutta Series, 1893.

316	... ... 75, 79
349	.. 467, 470, 1004, 1005, 1006, 1009, 1013
351	... ... 649, 801
353	... 818, 822, 823, 917, 960, 1161
358	 103
413	 566
469	... ... 636, 638, 639
474	461, 470, 471, 475, 1004, 1007, 1008, 1009
478	 839
481	... ... 17, 19, 435, 621
483	... ... 495, 594, 723, 732
518	.. 255, 256, 257, 272, 294, 1135
520	240, 252, 255, 257, 261, 266, 271, 272, 276, 285, 294
537	... ... 537, 570, 601, 1159
633	... ... 527, 880, 936, 946, 968
642	... ... 328, 860
670	 clxxi
675	... ... 25, 59, 66

CALCUTTA CASES—(*contd.*)

I. L. R. 20 Calcutta Series, 1893—(*contd.*)

PAGE OF REPORT	PAGE OF THIS BOOK
687	877, 908
719	24, cviii
724	24, 466 cviii cxiii
729	19, 25, 284 474, 938
857	319, 508 1120, 1163, 1201 1202, 1205, 1206 1208, 1211, 1212
870	36, 37, 39, 48, 795

I. L. R. 21 Calcutta Series, 1894.

PAGE OF REPORT	PAGE OF THIS BOOK
29	257, 263, 265, 275, 277, 283
92	822, 887
97	558 559 664
103	615 781 782 783
121	816 817, 818 823
262	856
328	750, 898
392	1024
401	641, 688
404	265 278 282
588	519 1044
609	301
622	148, 791 910
634	1031
642	522, 525, 636 681, 769, 812, 1056 1173
727	294, 295, 297
782	14
827	552, 969
915	263 264
920	1126, 1134, 1208, 1211, 1212
931	953
955	1 588, 713, 714, 716, 723 822, 882, 898 911, 913
979	621

I. L. R. 22 Calcutta Series, 1895.

PAGE OF REPORT	PAGE OF THIS BOOK
50	447, 448, 540 681 752, 756 901
131	204 430, 474, 518 931 957 966, ii
139	625, 837, lxvi lxvii
164	343 880
176	212, 540 570 1153
241	823, 915, 916
276	547, 552, 556, 713, 822 913 916
291	1045, 1046 1047, 1050
297	267 270, 281
377	588 717, 855, 860, 863 901, 902 903, 913 915
384	301
387	301
391	547, 550 556 969
573	926, 934 940 944
586	625, 626, 627, 1010
596	1156
638	565 579
759	1156
761	1110
817	812, 989
898	23, 201, 202, 252 278 284 285 445 1133
935	839 840, 971
998	870 958 960
1004	*456 471, 478, 994 1001, 1019*
1006	495 591 593 594 732

I. L. R. 23 Calcutta Series, 1896.

PAGE OF REPORT	PAGE OF THIS BOOK
37	301
44	22, 444 894, 1201, 1203 1205
55	296, 298, 421
80	269
174	576, 586, 588, 864
194	36, 37, 794, 795
241	25
248	620 lxv
249	170, 926, 949
250	926, 949
252	686 694 715, 732, 912 1054
290	
300	15, 445, lxv
328	508, 871, 1155 1199, 1200, 1201, 1203 1205, 1206
347	880 896, 964
350	900 902 967
361	361 680 684 750
372	1092
420	823 917
442	445, 1155, lxv
493	169 176 180 203 205 225 508, 519 761 938
495	1118 1119
499	218, 230
502	818
532	467 470 1005 1006 1009
557	255 256 257 294 296
604	852, 989
610	970, 1006 1013, 1015, iii
621	169 186, 188
731	286
867	772
896	110 115, 116 136
975	444, 588, 592, 855, 899 902 903, 904 974
983 = 1 C W N 57	512 514, 631, 632, 867 936 1153, 1154

I. L. R. 24 Calcutta Series, 1897.

PAGE OF REPORT	PAGE OF THIS BOOK
53 = 1 C W N 17	619
55 (F B) = 1 C W N 3	263 265
155	23 170
167	508, 1170, 1206
193	550
286 = 1 C W N 185	514 632, 867 936
288	677 1171
316	906 907 908
317 (Note)	907
320 = 1 C W N 154	103, 112 113, 320
344 = 1 C W N 129	154
391 = 1 C W N 393	252 258, 284
395 = 1 C W N 217	221, 228, 938
429 = 1 C W N 414	54, 522, 532, 533 539, 541, 610 633, 787
449	261
499 = 1 C W N 435	445, 810, 1091, 1092, 1096 1206
528 = 1 C W N 370	631, 879, 936
551 = 1 C W N 333	1071 1072, iii
638 = 1 C W N 577	1031 1048
691	17, 24 350
755	cxviii
757	301

I. L. R 25 Calcutta Series, 1898.

PAGE OF REPORT	PAGE OF THIS BOOK
20 (P C) = L R 24 I A 137	14, 117
207	590

CALCUTTA CASES—(*contd.*)

I. L. R. 25 Calcutta Series, 1898—(*contd.*)

PAGE OF REPORT	PAGE OF THIS BOOK
230	698, 713, 716, 882, 898, 913
233	518, 957, 966, 967, ii
236	1025
278	216, 217, 218, 219, 226, 234
291	1045, 1046
333	16, 850, xxxix, xli, xlv, xlvi, xlvii, xlviii, l
413 = 2 C. W. N. 257	329, 770
423	264
425 = 2 C. W. N. 113	218, 220, 223, 938
434 = 2 C. W. N. 305	1104, 1105
440	24, 1084, 1085, 1087, 1088
555	658, 727, 729, 730, 882
557	68
559	153, 238, 254
561	694, 704, 913
628 = 3 C. W. N. 18	145, 147, 162
630 = 2 C. W. N. 225	870, 910, 969
637	16
711 = 2 C. W. N. 369	705, 709, 711, 712, 713, 716, 882, 913
727 = 2 C. W. N. 65	445, 1118, 1126, 1127
736 = 2 C. W. N. 484	26, 702, 704, 711, 761, 824
798	152, 153, 189, 192, 204, 938, 964
852 = 2 C. W. N. 593	245, 247, 954
858 = 2 C. W. N. 577	34, 35, 421
863 = 2 C. W. N. 465	22, 786, 797, 901

I. L. R. 26 Calcutta Series, 1899.

PAGE OF REPORT	PAGE OF THIS BOOK
49 = 3 C. W. N. 36	49, 526, 686, 737, 767, 769, 771, 915, 1079, ii
101	106
181	626, 627, 1010
188 = 3 C. W. N. 49	261, 263, 953, 957, ii, iii
336	493
359	454, 455
560 = 3 C. W. N. 412	550, 552, 559, 560, 573, 1159
569 = 3 C. W. N. 393	329
576	147
625 = 3 C. W. N. 461	253, 255, 258, 259, 260, 954, ii
746 = 3 C. W. N. 598	414, 419, 515, 879, 898, 934, 947, 967
748 = 3 C. W. N. 741	115, 116
786 = 3 C. W. N. 491	431, 434, 454, 476, 518, 966, 967, ii, iii
852	321, 485, 487, 488, : 71
863 = 3 C. W. N. 653	903, 907
869	217, 222, 226, 230, 231
874 = 3 C. W. N. 564	14, 955, ii
993	160

I. L. R. 27 Calcutta Series, 1900.

PAGE OF REPORT	PAGE OF THIS BOOK
126 = 3 C. W. N. 601	30, 515, 527, 879, 898, 934, 947, 956, 957, 966, 967, ii, iii
131 = 4 C. W. N. 201	15, 649, 830
133	xlvi, xlviii, lix
137	758, 1166
139	738
144	17, 24, 750
172 = 4 C. W. N. 166	592, 855, 899, 900, 902, 903, 967, 1208

CALCUTTA CASES—(*contd.*)

I. L. R. 27 Calcutta Series, 1900—(*contd.*)

PAGE OF REPORT	PAGE OF THIS BOOK
174 = 4 C. W. N. 307	1104, 1105
175	907, 908
259 = 4 C. W. N. 420	261, 262, 267, 269, 288
262	*772*
295 = 4 C. W. N. 129	304, 323, 325, 338, 342, 343, 344, 361, 656, 678, 681, 682, 684, 729, 752, 1077
320 = 4 C. W. N. 311	95, 116, 969, 974
366 = 4 C. W. N. 252	86, 98
368 = 4 C. W. N. 421	762, 763, 990
370 = 4 C. W. N. 462	632, 636, 637, 640
372	920
450	653, 911
452 = 4 C. W. N. 594	460, 1026, 1124, 1202, cxvi
455 = 4 C. W. N. 249	339, 441, 589, cviii, cxviii
457 = 4 C. W. N. 822	106, 115
461 = 4 C. W. N. 467	893
501	920
565	59
566	68, 95
654	14, 875, ii
655	cxxv
656	170, 176, 189, 203, 519, 761, 937
658	513, 936, 937
660	904, 905, 906, 969
662 = 6 C. W. N. 163	19, 25, 169, 203, 205, 761, 856, 933, 938
692 = 4 C. W. N. 750	*347*
781 = 4 C. W. N. 531	168, 171, 181, 185
785 = 4 C. W. N. 562	238, 270, 271, 289, 290
798	433, 445, 446, 503, 505, 509, 510, 931
820	430, 450, 458, 461, 964, 996
839 (F.B.) = 4 C. W. N.	656, 560, 570, 599, 1152, 1153
892 = 4 C. W. N.	613, 255, 257, 263, 264, 265, 267 282, 920, 954, 956, ii
918	245, 247, 254, 255, 256, 954, iii
921	474, 475, 499, 500, 503, 511, 1002
979 = 4 C. W. N. 827	433, 446, 505, 513, 517, *519, 931, 937, 1136*
981	255, 256, 257, 271, 272, 273
983 = 4 C. W. N. 795	65, 147, 149, 648, 785, 1143
985 = 5 C. W. N. 131	18, 106, 519
990 = 5 C. W. N. 31	556, 906
962	lxvi
993 = 5 C. W. N. 29	160
1041 (F.B.) = 4 C. W. N. 645	420, 580

I. L. R. 28 Calcutta Series, 1901.

PAGE OF REPORT	PAGE OF THIS BOOK
7	570, 599
10	567, 570, 599
63 = 5 C. W. N. 819	562, 900
86 = 5 C. W. N. 160	287
102	644, 925, 933, 935
104	592, 600, 604, 900
164	625, 837
211 (F.B.) = 5 C. W. N. 169	511, 615, 631, 868, 923, 936, 947
217 = 5 C. W. N. 291	458
251	625, 649
297	1118, 1119, 1120, 1208

CALCUTTA CASES—(*contd*)

I. L. R. 28 Calcutta Series, 1901—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
302 = 5 C. W N 291	301
339 = 5 C. W N 517	136, 706, 751
348	325, 326, 328
397 = 5 C. W N 574	527 945
399 = 5 C W N 413	111, 136
411 = 5 C W N 134	95, 136 cxx
416	255, 257, 272, 274, 932, 954, iii
423 = 5 C W N 211	xlviii
434 = 5 C W N 609	
446 = 5 C W N 428	255, 264, 265, 284
471	458
504	78
540 = 6 C. W N 175	125
594	637, 641
652 (F B) = 5 C. W N 557	441, 514, 527, 614, 632, 644, 816, 826, 827 868 933, 934, 936, 947
689 = 5 C W N 670	344, 679, 686 701, 737, 769, 771, 1079
709 = 5 C. W N 749	23, 202 205, 252, 285, 411, 445, 772, 954, 956, 1029 1115 1116, 1118 1133, ii, iii
794 = 5 C W N 804	321, 493

I. L. R. 29 Calcutta Series, 1902.

PAGE OF REPORT	PAGE OF THIS BOOK
128	730 731, 732
187 (P C.) = 6 C W N 386	250, *286*, 287
208 = 6 C W N 38	253, 258
211 = 6 C W N 251	1119, 1129, 1131
242 = 6 C W N 290	284
286 (F B.) = 6 C W N 254	286, 732, 835, 836 1055, 1173, iv, v, vii
379 = 6 C. W N 292	704, 705, 711, 713
382 = 6 C W. N 469	
385 = 6 C W N 468	568, 570, 602
387 = 6 C. W N 550	567, 568 641, 1171
389 = 6 C W N 552	34, 155, 205, 410, 445
392 = 6 C W N 595	*177, 205 206, 284, 441, 444, 445, 1200*
393 = 6 C W N 678	147, 148
409 = 6 C W N 713	646, 647, 785, 1143
410 =	435 438, 500 503, 512, 517
412 = 6 C W N 640	*859, 900, 1142*
415 = 6 C W N 677	492, 494, 495 560, 594
417 = 6 C W N 680	121, 123, 437
455 = 6 C W N 291	206 *207*
457 = 6 C. W N 638	513, 937, 939
479	*626*
481 = 6 C W N 599	557, 562, 608, 627, 633
483 = 6 C W N 596	34, 37, 325, 336, 344
491	928
724 = 6 C. W N 713	870, 910
726 (F B) = 6 C W N 633	*441, 514, 527, 632,* 644, 745, 816, 826, 827, 862, 868, 887, 933, 936, 947
779	183 186, 187
782 = 6 C W N 553	706, 709 716, 751, 913
885 = 6 C W N 378	253
887 = 6 C W N 112	478

I. L. R. 30 Calcutta Series, 1903.

PAGE OF REPORT	PAGE OF THIS BOOK
93 = 6 C W N 471	146
101 = 6 C. W N *422*	148, 910

CALCUTTA CASES—(*contd*)

I. L. R. 30 Calcutta Series, 1903—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
107 = 6 C W N 885	1086
110	262, 263, 291
112 = 6 C W. N 417	252, 253, 277, 284
121	610, 938
123 (F B) = 6 C W N 799	613, 618, 619, 1010
155 (F B) = 6 C W N 737	253, 255, 256 263, 265, 271, 273, *279, 280, 285, 298, 1165*
285	19, 452
288	563, 905
366	162
394 = 7 C W N 114	
415	*18, 19, 434, 470, 475, 477*
443 = 7 C W N 174	255, 271, 273
449	433, 446, 505, 509, 513, 517, 931, 937, 1136
485	719
508 = 7 C. W N 404	179 275, 277, 801, 802
593 = 7 C W N 390	265
690 = 7 C W N 634	84, 1092, 1096, 1101, 1102, 1108
693	631, 1134
721	265
822	568, 583, 603, 694 700, 713, 716 913
905 = 7 C W N 494	479, 488, 561
910 (F B) = 8 C. W N 17 = 1 Cr L. J 25	17, *19 494, 495, 594*
918 = 7 C W N 510	277, 297
923 = 7 C W N 525	313, 319 497, 498 499 504, 509
927 = 7 C W N 750	485, 487

I. L. R. 31 Calcutta Series, 1904.

PAGE OF REPORT	PAGE OF THIS BOOK
1 = 7 C W N 889 = 1 Cr L. J 13	14 46 521 537 1067, lxxii, lxxvii, lxxviii
48 (F B) = 7 C W N 625 = 1 Cr L J 49	264 297
142 (F B) = 1 Cr L. J 86	681
350 = 1 Cr L. J 344	154 171, 201, 205, 285, 445, 1116, 1133
419 = 1 Cr L. J 438	*161, 188*
424 = 1 Cr L. J 442	1156
557 = 7 C W N 661 = 1 Cr L J 535	25, 28, 80, 87, 93, 158, 159, 406
664 = 8 C W N 586 = 1 Cr L. J 525	1012
685 = 1 Cr L J 774	*276*
691 (F B) = 8 C W N 583 = 1 Cr L. J	455 911, 1104
710 = 1 Cr L. J 797	899, 920, 964
715 = 8 C W N 910 = 1 Cr L. J 804	1119, 1125, 1130, 1131
783 = 8 C W N 909 = 1 Cr L. J 801	*174*
811 = 1 Cr L. J 850	938, 964
858 = 1 Cr L J 852	541, 970, 1015, iii
928 = 8 C W N 807 = 1 Cr L. J 791	551
979 = 9 C W N 72 = 1 Cr L J 11	218 222, 226
983 = 8 C W N 839 = 1 Cr L J 839	653, 808, 830
990 = 8 C W N 781 = 1 Cr L. J 778	240, 241 243, 245, 248
1007 = 8 C W N 717 = 1 Cr L. J 714	600, 864
1050 = 8 C. W N 528 = 1 Cr L. J 451	690
1053 = 8 C W N 715 = 1 Cr L. J 713	603

PAGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(contd.)

I. L. R. 37 Calcutta Series, 1910—(contd.)

358 = 6 In. Ca. 857 516
412 = 14 C. W. N. 512 = 11 Cr. L. J. 247
= 6 In. Ca. 8 ... ... 430, 1067
439 = 14 C. W. N. 516 = 11 Cr. L. J. 219
= 6 In. Ca. 10 1067
446 = 14 C. W. N. 666 = 11 Cr. L. J. 392
= 6 In. Ca. 668 196
467 = 14 C. W. N. 1114 = 11 Cr. L. J. 453
= 7 In. Ca. 359 ... 18, 329, 334, 335, 336, 338, 480, 481, 482, 489, 508, 581, 657, 764, 810, 814, 1139
578 = 14 C. W. N. 611 = 12 C. L. J. 22
= 11 Cr. L. J. 292 = 6 In. Ca. 182 ... 262, 295, 296
604 = 14 C. W. N. 839 = 12 C. L. J. 15
= 11 Cr. L. J. 325 = 6 In. Ca. 352 ... 568, 584
618 = 14 C. W. N. 767 = 11 Cr. L. J. 360
= 6 In. Ca. 476 473
642 = 14 C. W. N. 799 = 12 C. L. J. 45
= 11 Cr. L. J. 407 = 6 In. Ca. 891 ... 24, 987, 988, 989, 1008
680 = 11 Cr. L. J. 541 = 7 In. Ca. 932 ... 856
714 = 14 C. W. N. 806 = 11 Cr. L. J. 357
= 6 In. Ca. 473 470
812 = 11 Cr. L. J. 440 = 7 In. Ca. 54 ... 252, 285, 794
845 (F.B.) = 15 C. W. N. 25 = 11 Cr. L. J. 702
= 8 In. Ca. 721 ... ... 757, 758

I. L. R. 38 Calcutta Series, 1911.

24 = 11 Cr. L. J. 530 = 7 In. Ca. 798 ... 277
68 = 13 C. L. J. 43
= 11 Cr. J. L. 525 = 7 In. Ca. 747 135, 502, 504, 518, 966
156 = 15 C. W. N. 366 = 12 Cr. L. J. 164
= 9 In. Ca. 916 ... 161, 172, 174, 188, 190
202 = 12 C. L. J. 294 = 11 Cr. L. J. 515
= 7 In. Ca. 641 920
214 = 12 Cr. L. J. 348 = 10 In. Ca. 948 ... 875
293 905
302 = 16 C. L. J. 425 = 12 Cr. L. J. 6
= 9 In. Ca. 45 624
304 = 13 C. L. J. 639 = 15 C. W. N. 343
= 12 Cr. L. J. 8 = 9 In. Ca. 64 129, 130, 136, 350
307 = 12 Cr. L. J. 9 = 9 In. Ca. 65 ... 887, 893
387 = 13 C. L. J. 445 = 12 Cr. L. J. 3
= 9 In. Ca. 6 ... 262, 263, 280, 285, 295
453 = 15 C. W. N. 463 = 12 Cr. L. J. 106
= 9 In. Ca. 618 ... ... 576, 585, 596
488 = 15 C. W. N. 409 = 13 C. L. J. 635
= 12 Cr. L. J. 111 = 9 In. Ca. 664 ... 27, 28, 759, 760, 761
547 = 15 C. W. N. 737 = 12 Cr. L. J. 322
= 10 In. Ca. 618 ... ... 930, xvi
550 (Footnote) = 15 C. W. N. 735
= 12 Cr. L. J. 346 = 10 In. Ca. 946... 1117, xvi, xvii
559 = 15 C. W. N. 98 = 12 Cr. L. J. 2
= 8 In. Ca. 1059 ... 480, 555, 854, cxii
786 = 12 Cr. L. J. 609 = 12 In. Ca. 985... 894, 974
789 = 15 C. W. N. 1001 = 12 Cr. L. J. 409
= 11 In. Ca. 593 127
828 = 13 Cr. L. J. 120 = 13 In. Ca. 776... 630, 828
876 = 13 Cr. L. J. 126 = 13 In. Ca. 782... 239, 240
880 (888) = 15 C. W. N. 917
= 11 In. Ca. 311 ... 501, 507, 516, 772, 1127
889 = 12 Cr. L. J. 408 = 11 In. Ca. 592... 264, 270

I. L. R. 39 Calcutta Series, 1912.

119 = 13 Cr. L. J. 433 = 15 In. Ca. 65 ... 450, 11[illegible]
150 (F.B.) = 16 C. W. N. 83 = 14 C. L. J. 429
= 12 Cr. L. J. 569 = 12 In. Ca. 833... 153, 155, 2[illegible]
157 (F.B.) = 16 C. W. N. 10 = 14 C. L. J. 437
= 12 Cr. L. J. 529 = 12 In. Ca. 297... 623, 892, 9[illegible] 911, 1[illegible]
164 = 15 C. W. N. 1053 = 14 C. L. J. 375
= 12 Cr. L. J. 505 = 12 In. Ca. 273 1053, 1054, 10[illegible] xvi, xv[illegible]
238 = 13 Cr. L. J. 304 = 14 In. Ca. 768 .. 937, 9[illegible]
403 ... 134, 136, 138, 1[illegible]
455 = 16 C. W. N. 489 = 15 C. L. J. 396
= 13 Cr. L. J. 161 = 13 In. Ca. 913... 158, 1[illegible]
463 = 16 C. W. N. 623 = 15 C. L. J. 509
= 13 Cr. L. J. 201 = 14 In. Ca. 201, 462, 463, 464, 4[illegible]
489 = 16 C. W. N. 384 = 13 Cr. L. J. 142
= 13 In. Ca. 820 ... ... 153, 1[illegible]
560 = 13 Cr. L. J. 184 = 13 In. Ca. 1000... 288, 2[illegible]
781 = 13 Cr. L. J. 218 = 14 In. Ca. 314... 552, 6[illegible] 784, 11[illegible]
885 = 16 C. W. N. 1155 = 13 Cr. L. J. 774
= 17 In. Ca. 406 ... 525, 534, 5[illegible]
931 = 16 C. W. N. 984 = 13 Cr. L. J. 759
= 17 In. Ca. 71 ... ... 653, 973, 9[illegible]
953 (P.C.) = 16 C. W. N. 865 = 16 C. L. J. 231
= 13 Cr. L. J. 693 = 16 In. Ca. 501... 30, 129, 13[illegible] 134, 136, 143, 8[illegible]
1041 = 16 C. W. N. 885 = 13 Cr. L. J. 484
= 15 In. Ca. 484 ... ... 498, 504, 5[illegible]
1050 = 16 C. W. N. 811 = 13 Cr. L. J. 608
= 16 In. Ca. 176 ... 910, 911, 1100, 1106, 11[illegible]

I. L. R. 40 Calcutta Series, 1913.

41 = 13 Cr. L. J. 482 = 5 In. Ca. 482 ... 465, 5[illegible] 511, 5[illegible]
71 = 16 C. W. N. 883 = 13 Cr. L. J. 488
= 15 In. Ca. 488 ... ... 4[illegible]
91 ... ... 7[illegible]
105 = 16 C. W. N. 1052 = 13 Cr. L. J. 486
= 15 In. Ca. 486 ... ... 289, 2[illegible]
163 = 13 Cr. L. J. 497 = 15 In. Ca. 641 733, 734, 735, 8[illegible]
168 = 13 Cr. L. J. 593 = 16 In. Ca. 161... 556, 592, 11[illegible]
318 = 14 Cr. L. J. 428 = 20 In. Ca. 412 565, 573, 5[illegible]
360 = 13 Cr. L. J. 826 = 17 In. Ca. 570 17, [illegible]
367 = 13 Cr. L. J. 821 = 17 In. Ca. 565 695, 7[illegible]
376 = 14 Cr. L. J. 419 = 20 In. Ca. 403 823, 8[illegible]
423 = 14 Cr. L. J. 572 = 21 In. Ca. 172 22, 461, 46[illegible] 8[illegible]
433 = 17 C. W. N. 297 = 14 Cr. L. J. 100
= 18 In. Ca. 660 ... ... 771, 772, 11[illegible]
441 = 17 C. W. N. 449 = 14 Cr. L. J. 61
= 18 In. Ca. 349 ... ... 771, 7[illegible]
444 = 17 C. W. N. 290 = 14 Cr. L. J. 57
= 18 In. Ca. 345 ... 468, 503, 507, 508, 10[illegible] 10[illegible]
465 = 17 C. W. N. 571 = 14 Cr. L. J. 139
= 18 In. Ca. 891 ... ... 9[illegible]
470 = 17 C. W. N. 505 = 14 Cr. L. J. 125
= 18 In. Ca. 685 ... ...
477 (F.B.) = 17 C. W. N. 647 = 17 C. L. J. 245
= 14 Cr. L. J. 197 = 19 In. Ca. 197 .. 924, 92[illegible] 953, 1014,
511 = 14 Cr. L. J. 66 = 18 In. Ca. 402—66 ... [illegible]

PAGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(contd)

I. L. R. 40 Calcutta Series, 1913—(contd)

70
2
= 20 In Ca 216 720, 860
702 = 17 C W N 883 = 14 Cr L J 452 = 20 In Ca 612 159
846 = 17 C W N 827 = 14 Cr L J 449 = 20 In Ca 609 564
854 = 17 C W N 1004 = 14 Cr L J 297 = 19 In Ca 953 502 967
862 = 17 C W N 1070 = 20 In Ca 269 268
873 = 15 Cr L J 25 = 22 In Ca 169 338, 342, 679
982 = 17 C W N 944 = 14 Cr L J 269 = 19 In Ca 541 253, 269 270

I. L. R. 41 Calcutta Series, 1914.

14 = 10 C W N 976 = 14 Cr L J 292 = 19 In Ca 948
17 = 17 C W N 978 = 14 Cr L J 494 = 20 In Ca 750 86, 98
66 = 18 C W N 183 = 15 Cr L J 224 565, 570, 572
78 1046
2 1022, iv
05 130, 134 350
677, 692, 775
305 = 17 C W N 1207 = 15 Cr L J 48 = 20 In Ca 192 419, 423
350 = 18 C W N 498 = 15 Cr L J 385 = 23 In Ca 985 82 142, 688, 718, 735
400 = 18 C W N 869 = 14 Cr L J 673 = 21 In Ca 993 xx, xxiii
406 = 18 C W N 147 = 18 C L J 582 = 14 Cr L J 485 = 20 In Ca 741 702, 889 cx
425 = 18 C W N 279 = 18 C L J 519 = 15 Cr L J 46 = 22 In Ca 190 879
446 = 15 Cr L J 49 = 22 In Ca 321 462, 467, 468, 472, 955
537 = 18 C W N 309 = 18 C L J 514 = 15 Cr L J 4 = 22 In Ca 148 592
568 = Clifford (P C)
601 = 15 Cr L J 713 = 26 In Ca 161 329, 685
621 = 14 Cr L J 660 = 21 In Ca 900 728, 731, 982
662 563 595, 705, 728, 730, 732
682 = 18 C W N 668 = 15 Cr L J 155 = 22 In Ca 731 592
694 = 18 C W N 486 = 19 C L J 53 = 15 Cr L J 73 = 22 In Ca 425 564, 580, 870
719 = 18 C W N 274 = 15 Cr L J 171 = 22 In Ca 747 202, 205, 1116
722 = 18 C W N 1152 = 15 Cr L J 153 = 22 In Ca 729 551, 552 566, 570, 573, 583, 1159
734 = 19 C W N 593 = 15 Cr L J 52 = 22 In Ca 324 870, 955 viii
743 = 18 C W N 1247 = 15 Cr L J 190 = 22 In Ca 766 557, 654, 765, 1157
754 = 18 C W N 580 = 15 Cr L J 402 = 23 In Ca 1002 718, 732 856

CALCUTTA CASES—(contd)

I. L. R. 41 Calcutta Series, 1914—(contd)

764 = 15 Cr L J 169 = 22 In Ca 745 195, 196, 198
808 = 15 Cr L J 353 = 23 In Ca 721 180
1013 = 18 C W N 921 = 15 Cr L J 546 = 24 In Ca 954 17, 431, 432, 446
1023 (1028) Channing Arnold (P C) 716, 1166, ix
1072 = 18 C W N 723 = 15 Cr L J 460 = 24 In Ca 340 661 723, 733 745 854, 855 856 858 864

I. L. R. 42 Calcutta Series, 1915.

19 = 18 C W N 1020 = 15 Cr L J 348 = 23 In Ca 700 498 1071
25 = 16 Cr L J 215 = 27 In Ca 839 1066
158 = 18 C W N 1086 = 15 Cr L J 698 = 26 In
240 = 18 C W = 24 In
365 = 18 C W = 27 In Ca 212
374 = Reported under 18 C W N 1215 = 15 Cr L J 686 = 26 In Ca 134
381 = 19 C W N 124 = 16 Cr L J 192 = 27 In Ca 672 278, 801 802
422 = 19 C W N 28 = 16 Cr L J 170 = 27 In Ca 554 675, 1056
608 = 19 C W N 335 = 16 Cr L J 415 = 28 In Ca 799 524 539
612 = 19 C W N 184 = 21 C L J 53 = 16 Cr L J 122 = 27 In Ca 186 972, 973, 974
687 = 16 Cr L J 695 = 30 In Ca 743 464
685 748
702 = 19 C W N 332 = 16 Cr L J 415 = 28 In Ca 799 222, 228
706 = 19 C W N 220 = 16 Cr L J 327 = 28 In Ca 663 194
708 = 19 C W N 224 = 16 Cr L J 336 = 28 In Ca 672 103, 110
756 = 19 C W N 179 = 16 Cr L J 120 = 27 In Ca 184 757
760 = 19 C W N 181 = 16 Cr L J 120 582
729
965, 1055
856 = 19 C W N 295 = 16 Cr L J 65 = 26 In Ca 657 715 748 755 757, 758
957 = 19 C W N 676 = 21 C L J 231 = 16 Cr L J 497 = 29 In Ca 513 482 484 547, 548 550, 555 557, 565 579, 582 596, 675, 678, 768, 770, 804, 1056
1094 = 19 C W N 1239 905
1153 = Reported under 19 C W N 706 = 21 C L J 201 = 16 Cr L J 9 = 26 In Ca 313

I. L. R. 43 Calcutta Series, 1916.

13 = 19 C W N 557 572
173 = 20 C W N 63 1006
542 1010, 1011
591 = 20 C W N 199 157
671 146
1024 163
1029 970

CALCUTTA CASES—(*contd.*)

I. L. R. 44 Calcutta Series, 1917.

Page of Report	Page of this Book
76	87, 1054
477	vi
595	423, 424
703	949
848	...
912	413, 419, 420
970	478
1002	456, 479

I. L. R. 45 Calcutta Series, 1918.

Page of Report	Page of this Book
585	457
727	862
816	784
905	140

I. L. R. 46 Calcutta Series, 1919.

Page of Report	Page of this Book
31	xvii
52	1052, 1055
60	828, 829
215	161
307	717
411	766
544	879
700	1060
712	582, 604
741	582
807	437
854	502
867	613
1056	277

I. L. R. 47 Calcutta Series, 1920.

Page of Report	Page of this Book
147	46, 613
154	160, 571, 1058
164	136
597	134
741	471
758	688
974	301, 827

I. L. R. 48 Calcutta Series, 1921.

Page of Report	Page of this Book
78	864
173	1167
218	652
280	801
328	xiv
388	772, 864
522	247, 285, 924
534	962
874	33
1086	453, 997
1105	1058

I. L. R. 49 Calcutta Series, 1922.

Page of Report	Page of this Book
45	clviii
167	334
177	266
182	774
187	280, 816
277	677
353	330

I. L. R. 49 Calcutta Series, 1922—(*contd.*)

Page of Report	Page of this Book
551	484
565	600
573	484, 582
682	217
871	266
1075	766

I. L. R. 50 Calcutta Series, 1923.

Page of Report	Page of this Book
135	482
159	601
223	765, 767
308	765
318	212, 701
367	737
461	484
482	430
518	765
585	1067
632	865
664	34, 794
867	1036
872	733
939	765
969	1065
972	893
985	22, 767

I. L. R. 51 Calcutta Series, 1924.

Page of Report	Page of this Book
1 = 27 C. W. N. 857	805
79	65, 68
418	729
460	954
488	550
584	986
652	451, 993
820 = 28 C. W. N. 903	46
827	986
924	765
933	765
1049	641

I. L. R. 52 Calcutta Series, 1925.

Page of Report	Page of this Book
67	333
112	701
148	1163
159	805
229	712
253 = 29 C. W. N. 738	602
319 = 29 C. W. N. 98	91, 1052, 1054, 1055
347	982, 1138
403	814
437	806
446	814
463	1220
470	180, 206, 805
478	1009, 1018
499	805
522	769
590	745
615	97

CALCUTTA CASES—(*contd*)

I L. R 52 Calcutta Series, 1925—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
632	180 206 805
636	982
668	206 805 1011
670	965
721	806
959	295
987 = 29 C W N 173	330
1009	1017

I L R 53 Calcutta Series, 1926

PAGE OF REPORT	PAGE OF THIS BOOK
46	1163 1169
129	805 806
157	712
181	683 684
192	*901*
345 = 30 C W N 380	158
471	823
645	945
746	983
824	4 6
827	1017
831	116
96	930 954
969	858 891
980	701

I L R 54 Calcutta Series, 1927

PAGE OF REPORT	PAGE OF THIS BOOK
52	8 9
°63	1096
286	66
303	497
307	3°8
355	1016
757	105°
1041	*55*

I L R 55 Calcutta Series 1928

PAGE OF REPORT	PAGE OF THIS BOOK
65	1142
371	667
836	1017
879	547 732
1077	*243*
1190	780
1274	*433*
1277	1016

I L R 56 Calcutta Series, 1929

PAGE OF REPORT	PAGE OF THIS BOOK
564	873
566	731
785	538
824	1018 1155
835	666
840	328
932	1009 1018
1023	747 964 1058
1032	671 957

1 Calcutta Law Reports, 1877 78

PAGE OF REPORT	PAGE OF THIS BOOK
1 (F B) = 8 C 618 (Footnote)	341 811
21	329

CALCUTTA CASES—(*contd*)

1 Calcutta Law Reports, 1877 78—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
48	150 179
58	239
62	*695 704*
83	942 944
86	
89	1032
93	947
95 = 2 C 384	175 194
130	178 179 193 1061 1064
134	200 1088
136	283
143	691
268	171 175
273	259 290
275	722 728 731 733
339 = 3 C 379	870 1101
352	972
434	648 785 1143
436	526 768
442 (F B) = 3 C 366	648
478 — 3 C *540*	572
486	224
523	492 493 494 495

2 Calcutta Law Reports, 1878

PAGE OF REPORT	PAGE OF THIS BOOK
1	729
62 = 3 C 573	268 283 288 543
215	*821*
263 = 3 C 754	22 252
304 = 3 C 623	729
315	474 1005 1007
317	802
344	lxv
348	37
374	647 648
389	474 973
408 = 3 C 757	972 1089 1090
507	lxv lxvi
509	226 °29
511	653
518	731
520 = 3 C 758	486

3 Calcutta Law Reports, 1878 79

PAGE OF REPORT	PAGE OF THIS BOOK
44 — 4 C 18	648 785 1143
59 = 3 C 742	14 406 xciv
72	145 150 179
93 = 4 C °0	964 1071
94	259 264 267 290
131	643 1157
134	*277 278 301*
270 (F B) = 4 C 483	344
280	150 155
404	951 1186
406	200 1088
511	877
551 = 4 C 650	265 2 2
559 = 4 C 5 0	*1027*

4 Calcutta Law Reports, 1879

PAGE OF REPORT	PAGE OF THIS BOOK
134	474 499 504 1005
154	1030
243 (F B) = 4 C 865	200 1084

CALCUTTA CASES—(*contd.*)

4 Calcutta Law Reports, 1879—(*contd.*)

PAGE OF REPORT	PAGE OF THIS BOOK
305 = 5 C. 121	327
309 (F.B.) = 5 C. 7	239, 247
324 = 5 C. 194	…
338	686, 688, 1157
405	658, 729, 882
410	243
413 = 4 C. 869	476
432 = 5 C. 124	409, 1195
452	181, 203, 205, 761, 795, 936
488	255, 294

5 Calcutta Law Reports, 1879-80.

PAGE OF REPORT	PAGE OF THIS BOOK
21 = 5 C. 558	1035
200	259
209	342
287	263
359	643, 859
364 = 5 C. 614	1171
366	190
372	886, 893
458 = 5 C. 536	761, 1046

6 Calcutta Law Reports, 1880.

PAGE OF REPORT	PAGE OF THIS BOOK
47	325
53	680
93	286
128 = 6 C. 14	174, 175
193	264
206	260
245	567, 599, 879, 926, 929, 974
273	653
276	792
279	1120, 1202
297 (F.B.) = 5 C. 954	342
349 = 5 C. 871	720, 723, 727, 731, 732, 881
353 = 5 C. 958	342, 814
379 = 5 C. 875	217, 230, 231
390	681
427	886, 893, 905
431	526, 731, 768, 811
463 = 6 C. 83	1139
521 = 6 C. 96	525, 526, 601, 664, 768, 1155

7 Calcutta Law Reports, 1880.

PAGE OF REPORT	PAGE OF THIS BOOK
66	679, 681, 752
74 = 6 C. 247	882
142	974
148	558
193	561, 704, 797
291	282
330 = 6 C. 440	463, 470, 1007
352	151, 171, 255, 256, 294, 300
382	474, 1005
385	526, 709, 768, 1170
393	806, 835
411 = 6 C. 307	416, 418
433 = 6 C. 291	225
467 = 6 C. 496	806, 474, 511, 1009
516	259
541 = 6 C. 530	329

8 Calcutta Law Reports, 1880-81.

PAGE OF REPORT	PAGE OF THIS BOOK
56 = 6 C. 625	cxxiii
70 = 6 C. 714	543, 545, 642
72	972, 1089
148	1006, 1007
217 = 6 C. 835	258, 270, 272
231	216, 245
236	321
245 = 7 C. 46	268, 272
250 = 6 C. 575	62, 876
254	..
255 = 6 C. 582	306, 476
265 = 6 C. 584	474
267 = 7 C. 208	474
289	306, 474, 1005
300 (F.B.) = 7 C. 121	321
352	344, 771
387 = 7 C. 87	306, 474
390 = 6 C. 718	585
399	217
431	221, 228
449 = 7 C. 263	882
471 = 7 C. 96	634, 660
514 = 7 C. 385	255
542	[illegible] 1065, [illegible] 893, 22, 767

9 Calcutta Law Reports, 1881-82.

PAGE OF REPORT	PAGE OF THIS BOOK
193 = 7 C. 322	…

10 Calcutta Law Reports, 1881-82.

PAGE OF REPORT	PAGE OF THIS BOOK
4	46, 805
8 = 7 C. 662	947, 1146, [illegible]
11 = 8 C. 211	330, [illegible]
14	[illegible]
46 = 8 C. 435	1162
51 = 8 C. 154	309, 325, 361
54	526, 538
57	887, 889
151 = 8 C. 121	676, 688, 1056
190 = 8 C. 166	831, 1190
193	230, 234
239 = 8 C. 393	446, 1135
335	181
369 = 8 C. 560	755
421 = 8 C. 450	559, 567
480	154, 155
466 = 8 C. 634	567
521	cxxii
523	280
553	750, 761, 771, 1059
571	1084, 1089

11 Calcutta Law Reports, 1882.

PAGE OF REPORT	PAGE OF THIS BOOK
25	880, 895
55	521, 1143, 1146
122	286
169 = 9 C. 53	722, 731
285 = 8 C. 883	224
237 = 8 C. 736	1030
423 = 9 C. 96	873
464	clxxvi
522 = 9 C. 371	587
569 = 9 C. 455	325, 892, 1077

CALCUTTA CASES—(contd)

12 Calcutta Law Reports, 1882 83.

PAGE OF REPORT	PAGE OF THIS BOOK
120	342 538, 541 774 811 1080 1146
226	748 755 756
231	222 225
233 = 8 C. 789	704 1076 1077 1155
451 = 9 C 847	950
490 = 9 C 363	1163 1210
500 = 9 C. 513	58 8 0
506 = 9 C 875	733
535	736 737

13 Calcutta Law Reports, 1882 83

PAGE OF REPORT	PAGE OF THIS BOOK
110	737
212	36 37
2 5	564 771 956 1158 1159
303	613 643
326	681 752
336	clxxvi clxxvii
358 = 10 C 140	687 689 722 768
375 — 10 C 85	56 529
408 = 10 C. 67	630 643
410 = 10 C 78	256

1 Calcutta Weekly Notes, 1896 97

PAGE OF REPORT	PAGE OF THIS BOOK
96	
969 24 C 55	
960 24 C 53	
	641
	1079
5	567 568 599
49	514 614 631 860 868 947 11
57 = 23 C. 983	630 933
105	430 431 798
129 = 24 C 344	
146	738
154 = 24 C 320	
169	819 915
185 — 24 C 286	
186	147
217 = 24 C 395	
313	640
333 = 24 C. 551	
394	206 208 1068
400	467 477 479
426	1124 1127 1206
452	474 475
529	472 477
548	524
561	1096 1108
650	112 113 936 943
(cxvi Sarat) 116	102 105 744
(cclvi) 256	1105

2 Calcutta Weekly Notes, 1897 98

PAGE OF REPORT	PAGE OF THIS BOOK
1 (P C) = 25 C. 20 = L R 24 In. A 137	
49	832 883
55	706
65 = 25 C 727	
70	245
71	86
81	420 964 968
113 = 25 C 425	
125	1061

CALCUTTA CASES—(contd)

2 Calcutta Weekly Notes, 1897 98—(contd)

PAGE OF REPORT	PAGE OF THIS BOOK
196	939
225 = 25 C 630	
257 = 25 C 413	
290	513 936 943
305 = 29 C 434	
333 (n) = cccxxxiii	139
341	550
422	240
450 = 25 C 639	421
465 — 25 C 863	
481	671 726 745 1199
496	1130
498	113 967 1122
519	1066
534	217 218
572	240 243 111
577 = 25 C. 858	
593 = 25 C 852	932
637	343
639	1122 1207
670	264 294 297 298
672	706 960
702	325 326 334 335 341 525 629 768 813 876 1146 1169
747	239 240
749	344 663 679
(cxxv)	340
(clxix) 169	1024
(clxxxvii) 187	1105
(cci) 201	690
(ccxliv) 244	460 996 1023
(cclvi) 256	880 911
(cclxi)	47
(cccv)	32
(cccxxiii) 323	1054

3 Calcutta Weekly Notes, 1898 99

PAGE OF REPORT	PAGE OF THIS BOOK
3	461 462 463 468
17	490 499 504 506 510
18 = 25 C 628	
33	464 476
36 — 26 C 49	
49 = 26 C 188	932
65	439
81	472 589
148	261 296 407 421
174	68
249	939
279	430
281	652 653
297	145 153
299 (n) = ccxcix	153
307	106
322	615 782
329	263 265 266 282 292
332	898
345	217 218 222 226 261
367	905 993
387	338 342 769 814 1146
393 = 26 C. 569	
412 = 26 C. 507	
461 = 26 C 625	

CALCUTTA CASES—(contd.)

3 Calcutta Weekly Notes, 1898-99—(contd.)

PAGE OF REPORT	PAGE OF THIS BOOK
463	145, 152, 153, 254, 256
490	433, 464, 468, 475, 504, 1136
491 = 26 C. 786	455
548	615, 782
564 = 26 C. 871	
576	xlvi, xlviii
598 = 26 C. 746	
601 = 27 C. 126	
605	552
607	1210, 1212, 1213
653 = 26 C. 868	869
758	468, 474, 475, 511, 1131
760	614
761	88
883	[illegible]
(ciii) 103	358, 1149
(clxv) 165	203
(cclxii) 262	439
(cclxxvii) 277	[illegible]
(cclxxviii) 278	1121, 1124
(cclxxix) 279	431, 452, 455, 445, 788
(cclxxxv) 285	510, 1165
(cccxxxi) 331	650
(cccxlvi) 346	1025

4 Calcutta Weekly Notes, 1899-1900.

PAGE OF REPORT	PAGE OF THIS BOOK
26	614, 630, 644, 827, 868, 915, 933
46	650, 868
49	304, 338, 357, 681, 682, 1076, 1077
57	257, 272, 1108
85	112
97	183, 738
100	808, 809, 913
121	167, 191, 1088
129 = 27 C. 288	
166 = 27 C. 172	
193	685, 700, 704
196	547, 698, 700, 713
201 = 27 C. 181	25, 649
223	xxxix
226	245, 248
239	1134
241	608, 633, 641
242	433, 446, 505, 508, 513, 517, 630, 866, 867, 945
245	68, 869
249 = 27 C. 455	473, 589
252 = 27 C. 366	
253	28, 620, 880
305	468, 475, 489, 500, 504, 505, 1002
308	1106
346	614, 856, 858, 866, 887, 888
347	457
351	316, 319, 686
366	24, 465, 466, 507, 1002
367	481, 482, 483
417	274
428	266, 268, 269
438	923
560	482, 446, 517, 541
576	688, 710, 716, 801, 913
594 = 27 C. 452	

CALCUTTA CASES—(contd.)

4 Calcutta Weekly Notes 1899-1900—(contd.)

PAGE OF REPORT	PAGE OF THIS BOOK
596	217, 222, 223
597 (P.C.)	257
604	508, 1170, 1206
613 = 27 C. 882	253
645 = 27 C. 1041	429
656 (F.B.) = 27 C. 839	
688	725, 728, 827
748	253, 255, [illegible]
753	284, 285
779	256, 277, 284, 285, 286, 288, 882
793 = 27 C. 963	
797	789
821	[illegible], 252, 284, 444, 445, 1141
824	
825	440
827 = 27 C. 878	
lxxxiii = 83 (Note)	285, 512
(cxvi) 116	522
(cxxix) 129	577
(ccxxi) 221	18, 456, 506
(ccxxiii) 223	285
(ccxliii) 243	1239

5 Calcutta Weekly Notes, 1900-01.

PAGE OF REPORT	PAGE OF THIS BOOK
28	188
44	873, 1115
67	285, 286, 288, 286, 288, 289
71	274, 275, 277, 882
72	884, 887
105	282, 289, 291, 292
106	18, 468, 474, 475, 494, 1001, 1005, 1006
110	118, 522, 528, 534, 536, 537, 541, 682, 647, 867, 1122, 1150
134 = 28 C. 411	
168 = 28 C. 211	514, 541, 547
173	221, 222, 224
210	xl, xlviii
211 = 28 C. 428	xlviii
213	
214	822
248	182, 188, 188
250	147, 1165, 1167
252	847, 1148
254	18, 23, 468, 475, 506
259 = 28 C. 258	1165
291 { 28 C. 802 (Prokash Chandra) } { 28 C. 217 (Sunder Dossee) }	1168
293	
294	568, 573, 574
329	241
330	868, 869
332	868, 869
335	286, 289
370	821
372	848, 1217
374	1118
411	389
415	1118
432	811, 1164
447	102, 112
488	425, 446, 857, 1164

CALCUTTA CASES—(*contd*)

5 Calcutta Weekly Notes, 1900-01—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
544	265, 279, 1165
563	258, 260, 261, 270, 273 1165
566	220
630	1010
686	285, 300, 445, 1133, 1141
710	281
749 = 28 C 709	
804 = 28 C. 794	
819 = 28 C. 63	
864	338 768 769 1121 1207
900	253, 265, 266, 271, 272
(xc) 90	715

6 Calcutta Weekly Notes, 1901-02.

PAGE OF REPORT	PAGE OF THIS BOOK
35	464
37	461, 469
38 = 29 C. 208	258
40	653
72	330, 501 559, 561
73	560
98	592, 595 1077 1170
101	255 263, 265
104	266, 282
112 = 29 C 887	
161	258
163 = 27 C *662*	*19*
175 = 28 C. 540	
202	432 435 443 591
206	264 265, 279, 1165
251 = 29 C 211	
253	648
254 = (F B.) = 29 C. 286	lxxxiii
290 = 29 C 242	938
291 = 29 C. 455	
292 = 29 C 379	
295	470, 475, 476, 510, 511, 1007, 1008
337	98
340	257
378 = *29 C 885*	
380 (misprinted as 80)	340
386 (P C) = 29 C 187	287
417 = 30 C 112	274
422 = 30 C 101	910
424	637, 910
466	243
469 = 29 C 382	970
471 = 30 C. 93	
548	102, 221 229, 543, 610, 629 641
550 = 29 C 387	567, 568
553 — 29 C 782	
593	196 964
595 = 29 C. 392	
599 = 29 C. 481	
633 (F B) = 29 C. 726	614
638 = 29 C 457	934
640 = 29 C. 412	
677 = 29 C. 415	
678 = 29 C 393	
680 = 29 C. 417	
713 = 29 C. 409 (Bishu Sheikh)	
713 = 29 C 724 (Gourhari Gope)	1092 1100

CALCUTTA CASES—(*contd*)

6 Calcutta Weekly Notes, 1901-02—(*contd.*)

PAGE OF REPORT	PAGE OF THIS BOOK
715	656 672 673, 674, 1130
717	1130, 1131
737 (F B) = 30 C 155	
799 (F B) = 30 C 123	
840	473 498
841	259
843	498 509
882	252 262
883	153 254
885 = 30 C 107	
886	218 226 231
887	744
921	305 330
923	271, 272, 273 274 275, 284
926	18 19 434
927	106 1005
(xlvi) 46	1153
(lix) 59	520
(cix) 109	278
(ccliv) 254	1216
(cccliii) 353	690

7 Calcutta Weekly Notes, 1902-03.

PAGE OF REPORT	PAGE OF THIS BOOK
11 (misprint for ii)	1056
25	147
29	153 254
30	823, 917
32	151 152, 176
74	562
77	527, 531 946
80	890, 948, 964
112	478
114 (Ajodhya Lal)	1135
117	217, 218
118	260 268
135	722 728, 732
140	239, 247
142	153, 154 238 254
143	496
174 = 30 C 443	254 271
176	783
188	666, 668 689, 743
206	621
208	264
220	325 342
249	458 996
301	562, 899
327	527, 537 947 968
345	304 338, 344 682 683 729 769
351	276 297
390 = 30 C 593	
423	24
457	57 353, 521 785, 789
461	279
462	269, 280, 281
493	614, 856 858 936
521	515, 633 898, 934, 968
522	*131, 135, 1092, 1098, 1138*
524	27
527	47
556	562
558	256 280

CALCUTTA CASES—(*contd.*)

7 Calcutta Weekly Notes, 1902-03—(*contd.*)

8 Calcutta Weekly Notes, 1903-04.

CALCUTTA CASES—(*contd.*)

8 Calcutta Weekly Notes, 1903-04—(*contd.*)

9 Calcutta Weekly Notes, 1904-05.

CALCUTTA CASES—(*contd*)

10 Calcutta Weekly Notes, 1905 06

11 Calcutta Weekly Notes, 1906 07

CALCUTTA CASES—(*contd*)

11 Calcutta Weekly Notes, 1906 07—(*contd*)

CALCUTTA CASES—(contd.)

13 Calcutta Weekly Notes, 1907-08.

CALCUTTA CASES—(contd.)

13 Calcutta Weekly Notes, 1908-09.

PAGE OF REPORT	PAGE OF THIS BOOK

CALCUTTA CASES—(*contd.*)

16 Calcutta Weekly Notes, 1911-12.

10 (F.B.) = 39 C. 157	...
46 = 13 Cr. L. J. 26 = 13 In. Ca. 218...	700, 704
83 (F.B.) = 39 C. 150	...
143 = 13 Cr. L. J. 125 = 13 In. Ca. 781	500, 510
145 = 13 Cr. L. J. 65 = 13 In. Ca. 721...	304, 305, 353, 354, 361
336 = 13 Cr. L. J. 186 = 13 In. Ca. 1002	135, 136, 138, 140
384 = 39 C. 469	... 154
426 = 15 C. L. J. 403 = 13 Cr. L. J. 156 = 13 In. Ca. 844 ...	1163, 1210, 1211, 1212
431 = 13 Cr. L. J. 445 = 15 In. Ca. 77...	... 684
499 = 39 C. 456...	... 158
549	... 81
550 = 13 Cr. L. J. 592 = 15 In. Ca. 1008	...1087
600 = 13 Cr. L. J. 506 = 15 In. Ca. 650...	550, 552, 605
645 = 39 C. 774...	...
669 = 13 Cr. L. J. 571 = 15 In. Ca. 987	679, 751
696 = 13 Cr. L. J. 224 = 14 In. Ca. 320...	... 646
811 = 39 C. 1050	...
865 = 39 C. 953 (P.C.)	...
885 = 39 C. 1041	465, 1141
909 = 13 Cr. L. J. 715 = 16 In. Ca. 523	710, 717, 718, 901, 915
983 = 13 Cr. L. J. 488 = 40 C. 71 ...	868, 938
984 = 39 C. 931	...
1031 = 13 Cr. L. J. 766 = 17 In. Ca. 78 ...	1122, 1130
1049 = 13 Cr. L. J. 691 = 16 In. Ca. 499	311, 438
1052 = 13 Cr. L. J. 486 = 40 C. 105 ...	...
1077 = 13 Cr. L. J. 502 = 15 In. Ca. 646 ...	562, 592, 595, 732, 1157
1078 = 13 Cr L. J. 764 = 17 In. Ca. 76...	130, 134, 350, 940
1105 = 15 C. L. J. 517 = 13 Cr. L. J. 609 = 16 In. Ca. 257	... 343, 481, 555, 581, 600, 750
1155 = 39 C. 885	...

17 Calcutta Weekly Notes, 1911-12.

... ...	... 913
... ...	... 260
. = 13 Cr. L. J. 449 = 15 In. Ca. 81 ...	... 478
44 = 17 C. L. J. 610 = 14 Cr. L. J. 40 = 18 In. Ca. 264	275, 277
205 = 17 Cr. L. J. 387 = 13 Cr. L. J. 789 = 17 In. Ca. 533 ...	238, 265, 266, 269
230 = 14 Cr. L. J. 70 = 18 In. Ca. 406 ...	684, 685
238 = 16 C. L. J. 467 = 14 Cr. L. J. 5 = 18 In. Ca. 149	174, 203, 957
290 = 40 C. 444...	...
294 = 14 Cr. L. J. 120 = 18 In. Ca. 680...	... 960
297 = 40 C. 433	...
331 = 13 Cr. L. J. 784 = 17 In. Ca. 416...	... 185
354 = 14 Cr. L. J. 129 = 18 In. Ca. 881	526, 550, 768, 769
379 = 16 C. L. J. 453 = 13 Cr. L. J. 897 = 17 In. Ca. 993	...
419 = 14 Cr. L. J. 212 = 19 In. Ca. 308	547, 562, 603
448 = 14 Cr. L. J. 76 = 18 In. Ca. 412 ...	19, 499
449 = 40 C. 441	...1127
451 = 14 Cr. L. J. 123 = 17 C. L. J. 608 = 18 In. Ca. 683	513, 925, 926, 934, 1133
479 = 14 Cr. L. J. 219 = 19 In. Ca. 315...	552, 566, 899, 1158

17 Calcutta Weekly Notes, 1911-12—(*contd.*)

505 = 14 Cr. L. J. 125 = 18 In. Ca. 685	...
536 = 14 Cr. L. J. 382 = 20 In. Ca. 142	202, 1116, 1127, 1130
571 = 40 C. 465	clxxxi
761 = 14 Cr. L. J. 398 = 20 In. Ca. 222	423, iii
787 = 40 C. 693	...
793 = 14 Cr. L. J. 391 = 20 In. Ca. 215	... 283
795 = 14 Cr. L. J. 425 = 20 In. Ca. 409	430, 502
824 = 14 Cr. L. J. 387 = 20 In. Ca. 211	319, 502
825 = 40 C. 631	...
827 = 40 C. 846	...
863 = 40 C. 702	...
937 = 14 Cr. L. J. 289 = 19 In. Ca. 945	454, 474
944 = 40 C. 982	... 253
948 = 14 Cr. L. J. 458 = 29 In. Ca. 618	... 783
976 = 41 C. 14	... 461
978 = 14 Cr. L. J. 494 = 20 In. Ca. 750	... 98
980 = 14 Cr. L. J. 462	18, 20
1004 = 40 C. 854	... 363
1070 = 40 C. 862	...
1077 = 14 Cr. L. J. 556 = 21 In. Ca. 156	699, 732
1110 = 36 M. 501 (P.C.)	...
1130 = 41 C. 88	...
1207 = 41 C. 305	...
1209 = 41 C. 261	...
1213 = 14 Cr. L. J. 642 = 21 In. Ca. 882	304, 305, 833
1245 = 15 Cr. L. J. 145	... 965
1248 = 15 Cr. L. J. 281	519, 537, 1123
1253 = 41 C. 173	... iv
(xii) 12	...1213
(xx) 20	... 185
(lvi) 56	... 260
(lxiii) 63	592, 595
(cxi) 111	...1207
(cxviii) 118	... x
(cxx) 110	... 196
(cxxxi) 131	... 278
(cxlvii) 147	... 564
(clix) 159	... 612

18 Calcutta Weekly Notes, 1913-14.

1 = 14 Cr. L. J. 497 = 20 In. Ca. 977	... 965
94 = 15 Cr. L. J. 79 = 22 In. Ca. 431.	277, 1165
95 = 15 Cr. L. J. 70 = 22 In. Ca. 422	500, 505
98 (P.C.) = 26 M. L. J. 1	870, x, xi
147 = 41 C. 406	...
180 = 15 Cr. L. J. 147 = 22 In. Ca. 723	698, 699, 1078
183 = 41 C. 66	... 564
309 = 41 C. 537	... 969
374 = 41 C. 568 (P.C.)	ix, x
393 = 15 Cr. L. J. 359 = 23 In. Ca. 727	285, 1116
399 = 15 Cr. L. J. 302 = 23 In. Ca. 510	...1106
550 = 15 Cr. L. J. 438 = 24 In. Ca. 174	... 751
584 = 15 Cr. L. J. 163 = 22 In. Ca. 739	... 613
615 = 18 C. L. J. 522 = 15 Cr. L. J. 31 = 22 In. Ca. 175	... 731
646 = 15 Cr. L. J. 473 = 24 In. Ca. 561	... 958
666 = 15 Cr. L. J. 160 = 22 In. Ca. 736	... 897
658 = 41 C. 662	...1157
700 = 19 C. L. J. 356 = 15 Cr. L. J. 202 = 22 In. Ca. 986	268, 1165
702 = 15 Cr. L. J. 150 = 22 In. Ca. 726	... 624
705 = Ibrahim (P.C.)	331, 716, xi

CALCUTTA CASES—(*contd.*)

18 Calcutta Weekly Notes, 1913-14—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
785 = Channing Arnold (P C)	x xi
869 = 41 C 400	
910 = (misprint)	1124
959 = 15 Cr L. J 184 = 22 In Ca 760	910 1096 1100 1103
992 = 15 Cr L. J 188 = 22 In Ca 764	594
1020 = 42 C 19	
1088 = 15 Cr L. J 700 = 26 In Ca 148	261
1146 = 15 Cr L J 175 = 22 In Ca. 751	1092 1104
1147 — 15 Cr L. J 222 = 22 In. Ca 1006	1100 1107
1148 = 19 C L. J 631 = 15 Cr L. J 515 = 24 In Ca. 603	217 221 222 226 231
1150 = 15 Cr L J 720 = 6 In Ca 168	1105
1152 = 41 C 722	
1178 = 15 Cr L. J 537 = 24 In Ca 945	407 416 421
1180 = 42 C 365	612 614
1211 — 15 Cr L. J 726 = 2 In Ca 174	514 612
1212 = 15 Cr L. J 728 = 26 In. Ca. 176	969
1213 = 15 Cr L. J 693 = 26 In Ca 141	750 1059
1215 — 42 C 374	895
1242 = 42 C 240	
1244	974
1247 = 41 C. 743	
1271 — 15 Cr L. J 697 = 26 In Ca. 145	
1274 = 16 Cr L. J 42 = 26 In. Ca. 634	562
12 6 = 15 Cr L. J 704 = 26 In. Ca 152	562 592 905
1277 = 15 Cr L. J 707 = 26 In Ca 155	623
1323 = 16 Cr L J 151 = 27 In Ca. 215	24 459 469 cxviii cxx

19 Calcutta Weekly Notes, 1914 15

PAGE OF REPORT	PAGE OF THIS BOOK
28 = 42 C. 422	
72 = 16 Cr L. J 41	547
121 = 16 Cr L. J 348 = 28 In. Ca 732	596 597
123 = 16 Cr L J 315 = 28 In. Ca 651	268
124 = 42 C. 381	
125 = 16 Cr L J 389 = 28 In Ca 645	479 1002 1006 1015
127 = 16 Cr L J 320 = 28 In. Ca 656	1005 1013
179 = 42 C 756	758
181 = 12 C. 760	
184 = 42 C 612	
217 — 16 Cr L J 313 = 28 In Ca 649	321
220 = 42 C 706	
221 = 42 C 793	xv xvi xix xx
223 = 16 Cr L J 312 — 28 In Ca 648	174 189
224 = 42 C 708	
248 = 13 Cr L J 511 = 15 In Ca 655	243
295 = 42 C 856	
332 = 42 C 702	
334 = 16 Cr L. J 322 = 28 In. Ca 658	612
335 — 42 C. 608	
447 = 21 C L. J 198 = 16 Cr L J 286 = 29 In Ca 334	927
556 = 21 C. L J 495 — 16 Cr L. J 481 = 29 In. Ca 321	832
557 — 43 C 13	572
584 = 42 C 789	
593 — 41 C 734	
653 = 21 C L. J 377 = 16 Cr L. J 561 = *30 In Ca 113 (F B)*	*686 695 696 697 712* 715 724

CALCUTTA CASES—(*contd*)

19 Calcutta Weekly Notes, 1914 15—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
672 = 21 C L. J 195 = 16 Cr L J 3 = 26 In. Ca 307	579 582 596 597
676 = 42 C. 957	
706 = 42 C 1153	600
923 = 21 C L. J 396 = 16 Cr L J 576 = 30 In Ca. 128	768
959 = 16 Cr L. J 590 = 30 In Ca 142	262 264 269 273 281
972 = 16 Cr L J 641 = 30 In. Ca 465	562 564 565 570 571 1140 1153
990 = 16 Cr L. J 607 = 30 In Ca 159	970
1043 = 16 Cr L J 724 = 31 In Ca 164	766 768 770 772
1239 = 42 C 1094	905

20 Calcutta Weekly Notes, 1915 16

PAGE OF REPORT	PAGE OF THIS BOOK
62 = 17 Cr L. J 128 = 33 In Ca 304	407 421
63 = 43 C 173	505
128 = 17 Cr L. J 9 = 32 In. Ca. 137	896
166 = 23 C. L J 333 = 17 Cr L. J 4 — 33 In Ca. 132	579 587
199 — 23 C L. J 105 = 43 C 591	157
408	160
512 = 23 C L. J 447 = 17 Cr L. J 188 = 33 In Ca 828	331 708
518 = 17 Cr L. J 251 = 34 In Ca 971	270
672 = 17 Cr L J 224 = 34 In Ca 336	571
698 — 17 Cr L J 193 = 34 In Ca. 305	630
725	162 174 184
732 = 17 Cr L. J 202 = 34 In Ca 314	531
750	247
758 = 17 Cr L. J 200 = 34 In Ca 312	248 1165
796 = 23 C L. J 555 = 17 Cr L J 182 = 33 In Ca 822	259
862	612
862	973
978	264 265
981	240 248
1075	550 593
1128	934
1133	194 196
1171	221 228
1209	616
1212	647
1265	476
1296	916
1302	1096
1347	455 476

21 Calcutta Weekly Notes, 1916-17

PAGE OF REPORT	PAGE OF THIS BOOK
344	826
435	730
753	468
755	1003
756	568
812	1031
926	228
950	1001
1111	572

22 Calcutta Weekly Notes, 1917-18

PAGE OF REPORT	PAGE OF THIS BOOK
69	1058
552	283

CALCUTTA CASES—(contd)

31 Calcutta Weekly Notes, 1926-27.

AGE OF REPORT	PAGE OF THIS BOOK
121	475
195	863
340	248
393	1159
593	1052
960	976
963	228
102	666

32 Calcutta Weekly Notes

221	667
345	832
477	152
574	267
673	730 912
702	832
731	708
872	704
035	487
173	256 266
245	704

33 Calcutta Weekly Notes

55	697
257	329
260	855
369	135
509	255
535	525
599	977
605	977
664	1104
692	665
861	622
918	692
969	1015
974	948
1002	282
1054	743
1058	487
1112	702
1121	704

1 Calcutta Law Journal, 1905.

102 = 2 Cr L. J 159	1044 1048
159 = 2 Cr L. J 157	704
214 = 2 Cr L. J 213	1032
331 = 9 C. W N 887	246 291, 300 302
334 = 2 Cr L. J 411	422
385 = 2 Cr L. J 311	699 714
432 = 32 C. 552	271
434 = 2 Cr L. J 349	217, 224
455 = 2 Cr L. J 393	592
616 = 9 C W N 898 — 2 Cr L J 554	171 181 182
632 = 2 Cr L. J 658	154

2 Calcutta Law Journal, 1905

46 = 2 Cr L. J 383	539
48 = 2 Cr L. J 386	728
105 = 32 C. 756	
147 = 2 Cr L. J 572	258
149 = 9 C W N 127 = 2 C L J 15 = 2 Cr L. J 575	225, 770 cviii

L 5

CALCUTTA CASES—(contd)

2 Calcutta Law Journal, 1905—(contd)

PAGE OF REPORT	PAGE OF THIS BOOK
241 (F B) = 33 C. 68	
259 = 33 C 352	
271 = 33 C 33	
280 = 32 C 1093	
516 = 3 Cr L. J 153	556 960
555 = 10 C W N 82	clx
565 = 10 C W N 79	653 cxxii cxxiii cxxxiii
612 = 3 Cr I J 81	462 470 1002
614 = 3 Cr L. J 83	252 285 445 1116 1133 1141
616	cxvii cxxii
618 = 10 C W N 520	564 567
619 = 10 C W N 222	460 461 998
622 = 3 Cr L. J 115	614 862 864
624 = 3 Cr L. J 116	clxxii clxxx
625	109
xxxiii	536

3 Calcutta Law Journal, 1906

38 = 3 Cr L. J 187	492 493
87 = 3 Cr L. J 209	433
90 = 33 C 287	
133	457
137 = 3 Cr L. J 214	262
195 = 3 Cr L J 246	160 179
302 = 3 Cr L. J 303	474 1006
303 = 3 Cr L. J 304	901 920
357 = 3 Cr L. J 329	
360 = 3 Cr L. J 331	222 226 231
475 = 10 C W N 727	cxvi cxvii
478 = 3 Cr L. J 423	276
492 (F B = 10 C W N 642	38 39 48
573 = 3 Cr L. J 466	274 283 1097 1103
575 = 3 Cr L. J 468	196
637 = 33 C 1183	

4 Calcutta Law Journal, 1906

88 = 4 Cr L J 68	468 477
90	66
92 = 4 Cr L. J 71	clxxix clxxxvi
181 (P C)	24
232 = 4 Cr L. J 162	819 961
408 = 33 C 1036	
411 = 4 Cr L. J 394	819 916
415 = 10 C W N 1062 = 4 Cr L J 210	826 1022
418 = 4 Cr L. J 397	261 284 286
558 = 10 C W N 1099	553 563
562 = 4 Cr L. J 503	259

5 Calcutta Law Journal, 1907.

44 = 34 C. 347	
66 = 11 C W N 247	
176 = 5 Cr L. J 186	464
219 = 11 C. W N 195	467
222 = 5 Cr L. J 188	
224 = 5 Cr L. J 142	749 750, 751 1059
229 = 5 Cr L. J 147	1093
231 = 11 C W N 472	182
233	1015
447 = 5 Cr L. J 344	154
452 = 5 Cr L. J 349	823
508 (F B) = 34 C 551	

PAGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(*contd.*)

6 Calcutta Law Journal, 1907.

7 Calcutta Law Journal, 1908.

8 Calcutta Law Journal, 1908.

9 Calcutta Law Journal, 1909.

PAGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(*contd.*)

9 Calcutta Law Journal, 1909—(*contd.*)

10 Calcutta Law Journal, 1909.

11 Calcutta Law Journal, 1910.

12 Calcutta Law Journal, 1910.

13 Calcutta Law Journal, 1911.

PAGE OF REPORT — PAGE OF THIS BOOK

CALCUTTA CASES—(*contd*)

14 Calcutta Law Journal, 1911

120 = 12 Cr L. J 450 = 11 In. Ca 794 — 1001
123 = 15 C. W N 691 — 997 1004 1008 1013
375 = 39 C 164
416 = 15 C W N 921 — 889
429 = 39 C. 150
437 = 39 C 157
652 = 13 Cr L. J 1 — 566

15 Calcutta Law Journal, 1912

82 = 12 Cr L. J 391
267 = 12 Cr L. J 319 = 10 In. Ca 615 — 295 296 298 299 300 301 1211
323 = 13 Cr L. J 283 = 14 In Ca. 667
337 = 13 Cr L. J 291 = 14 In Ca. 755 — 467
396 — 16 C. W N 499 = 39 C. 456
403 = 16 C W N *426* — *1163 1210 1211 1212*
509 = 39 C. 463
517 — 16 C. W N 1105 — 18 480 481 482 484 555 579 600 750
692 = 13 Cr L. J 25ɔ = 14 In. Ca. 607 — 598

16 Calcutta Law Journal, 1912

45 = 13 Cr L. J 688 = 16 In. Ca. 336 — 787 1154
231 = 39 C 953 (P C.)
453 = 17 C W N 379
467 = 17 C. W N 238 — 174 203 957
569 = 14 Cr L. J 32 = 18 In. Ca 176

17 Calcutta Law Journal, 1913.

105 = 17 C W N 554 = 18 In Ca 737 — 206
245 (F B) = 40 C. 477
387
392 = 13 Cr L. J 787 = 17 In. Ca. 531
037 = 17 C. W N 20ɔ — 13 Cr L. J 789 — 238 265
698 = 17 C. W N 451 — 925 1133
610 = *17* C W N *144* = *14* Cr L. J *40* — *275 277*

18 Calcutta Law Journal, 1913

119 = 14 Cr L J 598 = 21 In Ca 470 — 203 v ii
121 — 14 Cr L. J 672 — ix
150 = 14 Cr L. J 602 = 21 In Ca. 474 — 1120 1126
365 (P C) = 36 M 501
452 = 41 C 173
522 = 15 Cr L. J 31 — 722 731
574 = 15 Cr L J 41 = 22 In. Ca. 185 — 587
582 = 41 C. 406

19 Calcutta Law Journal, 1914.

53 = 41 C 694 — 608
92 = 18 C. W N 384 — 38 39 48
107 = 41 C 568 (P C)
356 = 18 C W N 700 — 268 1165
631 = 18 C W N 1148 — 218 221 226 231
633 — 15 Cr L J 472 = 24 In Ca 352 — 603

20 Calcutta Law Journal, 1914

161 = 41 C 10"3 (P C)
518 — 206

CALCUTTA CASES—(*contd*)

21 Calcutta Law Journal, 1915

53 = 42 C 612
68 — xv xx xxi
112 = 19 C W N 221
116 = 16 Cr L J 160 = 27 In Ca. 224 — 217
195 = 14 C W N 672 — 579 582 596
198 = 19 C W N 447 — 927
201 = 42 C. 1153 — 582 600
331 = 19 C W N 676
377 = 19 C W N 653
396 = 19 C W N 923 — 768
492 = 19 C W N 584
495 = 19 C. W N 556 — 832

23 Calcutta Law Journal, 1916

105 = 20 C W N 199 — 1ɔ7
108 = 43 C. 671
333 = 20 C W N 166
477 = 20 C. W N *512* — *331* 708
555 = 20 C W N 796
59ɔ — 874
596 — 66

24 Calcutta Law Journal, 1917

51 — 194
54 — 69
134 — 476
272 — 247
444 — 613

25 Calcutta Law Journal, 1918

59 — 455 476
349 — 228

27 Calcutta Law Journal.

91 — 770

29 Calcutta Law Journal

382 — 238
387 — 613

30 Calcutta Law Journal.

123 — 288

A I R. Calcutta Series 1927

876 — 1059

A I R Calcutta Series, 1928

269 — 695 704
862 — 1007

A I R Calcutta Series, 1929

269 — 692
479 — 630
508 — 939
7ɔ6 — 22 538 543 664 1145
807 — 591
813 — 216

MADRAS CASES

1 Madras High Court Reports, 1862-63

30 — 468 1005
66 — 54 512 774
83 — 862
138 — 1191
193 — 422
199 — 526 768 810 811

MADRAS CASES—(*contd.*)

2 Madras High Court Reports, 1864-65.

Page of Report	Page of this Book
43	... 23
240	... 176
396	99, 1062
427	...
444	... v

3 Madras High Court Reports, 1866-68.

Page of Report	Page of this Book
5 (Appx.)	...1170
20 („)	... cliii
23 („)	... 245
25 („)	lxxiii
32 („)	568, 601

4 Madras High Court Reports, 1868-69.

Page of Report	Page of this Book
81	... 543
146	875, 1023
162	499, 510, 517
185	...cviii
229	...1022
3 (Appx.)	...1039
5 („)	... 248
7 („)	... 705
8 („)	... 868
11 („)	... 737
13 („)	... 67
20 („)	... 278
22 („)	... 178
27 („)	65, 66
28 („)	1185, 1188
29 („)	... 610
39 („)	... 664
40 („)	...1116
44 („)	...1085
45 („)	...1086
46 („)	175, 205
49 („)	283, 278
55 („)	... 495
66 („)	611, 643
54	clxiii

5 Madras High Court Reports, 1869-70.

Page of Report	Page of this Book
101	...1031
212	1027, 1125
277	55, 533
326	...cviii
466	clx ii
1 (Appx.)	... 918
2 („)	... 825
4 („)	...
5 („)	495, 838
9 („)	... 803
10 („)	... 961
11 („)	726, 772
12 („)	... 823
15 („)	774, 1086
18 („)	... 64, xxxi, xxxii
19 („)	... 245
27	... 774
28	908, 1186
29 = Weir I, 497	... lxi
33	... cliv
34	...1045
43	... 791

6 Madras High Court Reports, 1869-70.

Page of Report	Page of this Book
31	... clix
16 (Appx.)	...1023
21 („)	... 485
22 („)	...1046
24 („)	... 111
27 („)	66, 565
38 („)	842, 843, 1068, 1087

6 Madras High Court Reports, 1870-71.

Page of Report	Page of this Book
7	21, 1138
92	... 463
120	162, 181
2 (Appx.)	... 792
3 („)	... 398
4 („)	... 276
7 („)	... 762
9 („)	... 543
10 („)	... 103
13 („)	... 270

7 Madras High Court Reports, 1871-74.

Page of Report	Page of this Book
29	... 954
58	488, 490
182	... 490
339	... 897
375	67, 585, 643
1 (Appx.)	lxxvi
4 („)	... clxi
5 („)	877, 969
10 („)	clxxviii
7 („)	clix, clxi
12 („)	464, lxxii
13 („)	...1188
17 („)	...1027
25 („)	709, 1156
27 („)	44, 925, 931
28 („)	...1027
29 („)	828, 843, 888, 921
30 („)	...
31 („)	54, 498
33 („)	... 445
37 („)	27, 760, 1046
40 („)	537, 541, 761
42 („)	... 893
43 („)	102, 1045

8 Madras High Court Reports, 1874-75.

Page of Report	Page of this Book
5 (Appx.)	... 612
7 („) Pro., 4th Mar., 1875	622, 909

I. L. R. 1 Madras Series, 1876-77.

Page of Report	Page of this Book
56	... 845
163	... 709
171	407, 416, 418
173	... 420
227	... 62
266	77, 79
280	...
289 (F.B.)	783, 787, 789
304	27, 766, 884
305	...1025
309	... 287
394	706, 707, 751

MADRAS CASES—(*contd*)

MADRAS CASES—(*contd.*)

I. L. R. 11 Madras Series, 1888.

PAGE OF REPORT	PAGE OF THIS BOOK
3	460
26 (P.C.)	457, 930
98	98, 354, 776
142	619, 650
199	19, 503, 1030, 1031, 1044
323	295
332	lxxvi
339	689, 690
359	870, lxvii
375	15, 459, 465
441	98, 567, 570, 600
443	18, 453, 494, 500
477	493
98	450
451	770
480	97, 98
500	457

I. L. R. 12 Madras Series, 1889.

PAGE OF REPORT	PAGE OF THIS BOOK
35	858, 859, 1057
36	64, 66, 67, 584
39	14, xxv
47	480
54	54, 1217
88	262
92	77
94 (F.B.)	16, 850, xxxix, xlviii
123	348
153	329, 770
196	705
201	460
273	567, 572
297	1217
352	1188
451	22, 441, 772, 871, 883, 892, 919, 933, 1171
459	983
475	216, 221, 225, 227, 234, 248

I. L. R. 13 Madras Series, 1890.

PAGE OF REPORT	PAGE OF THIS BOOK
17	1035
18	133
24	1027
142	651, clxxviii
144	18, 1013
269	869
343	727, 730
353	14
423	428, 1146
426	658

I. L. R. 14 Madras Series, 1891.

PAGE OF REPORT	PAGE OF THIS BOOK
36	730
121	14, 15
223	clxxv
631	234
334 (F.B.) (338) = 1 M. L. J.	537, 644, 941, 944, 946, 947
363	972, 974, 977
364	220
379	493, 780, 783
398	1043, 1050
399	44, 1132

MADRAS CASES—(*contd.*)

I. L. R. 15 Madras Series, 1892.

PAGE OF REPORT	PAGE OF THIS BOOK
36	927, 949
39	528, 540, 944, 946
63	752
83	608, 650, 654, 1205
88	1205
94	1135
131	15, 459, 1010, 1021
132	72
137	884
138 (F.B.) = 2 M. L. J. 64	480
224 = 2 M. L. J. 148	470, 478, 971, 994, 1001
312	678
352	447, 448, 540, 678, 752, 756, 781
414 = 2 M. L. J. 142	771

I. L. R. 16 Madras Series, 1893.

PAGE OF REPORT	PAGE OF THIS BOOK
105	cx, cxi
234	25, 518, 971, 1030, 1045
235	321, 493
410	40
421	24, 339, cvii, cviii
423	877
461	1011
463	103
468 = 3 M. L. J. 227	489, 1166

I. L. R. 17 Madras Series, 1894.

PAGE OF REPORT	PAGE OF THIS BOOK
13	1030
37	clx
103	98
105	iv, v
260	29, 1038, 1039
268	29, clviii
402	410, 541, 1144, 1146

I. L. R. 18 Madras Series, 1895.

PAGE OF REPORT	PAGE OF THIS BOOK
41	270
46 = Weir I, 919	clxxx
48 = 4 M. L. J. 242	1088
51	282
250	493
394	89, 795
402	244
487 = 5 M. L. J. 215	461, 1002
490 = Weir I, 909	clxxviii

I. L. R. 19 Madras Series, 1896.

PAGE OF REPORT	PAGE OF THIS BOOK
3	120, 121, 124
14	857
18	24, 238, 240
209	983, clxxi
238	887, 870, lxvi, lxvii
263	445, 1126, 1208, 1210, 1211, 1212
269 = 6 M. L. J. 134	801
349	136, 142, 148, 349
354	884
375 = 6 M. L. J. 195	113, 534, 544, 671, 672, 674, 774, 919, 967, 1115, 1122, 1129, 1130, 1131, cxi
461	1030, 1031, 1042
464	286
482	343, 344

14. Disqualification for hearing appeals.—No Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself *See* s. 556 and Notes thereunder, where a District Magistrate as executive head of the District is actively concerned in the institution of proceedings against a person under Chap. VIII, he is debarred from hearing an appeal under s. 406 without the permission of the Sessions Judge under s. 556, **1 S. L. R. 93 = 8 Cr. L. J. 356; 23 C. 328** *referred to.* A Magistrate who takes cognisance of a case under s. 190 (1) (*c*) cannot hear an appeal in the case, **12 C. W. N. 433 = 7 Cr. L. J. 224.** He must follow the procedure laid down in s. 192. But mere directing the issue of a summons does not make the Magistrate incompetent to hear the appeal, **36 C. 869.** *See* Note 8 at p. 427.

15. Proceedings of Magistrates not empowered to hear appeals, void.—If any Magistrate, not being empowered by law decides an appeal, his proceedings shall be void, s. 530 (*r*).

16. Proceedings of Judges not empowered to hear appeals, void.—*In Criminal Reference No.* 130 *of* 1906 (Allahabad High Court), a Sessions Judge erroneously entertained an appeal from the conviction of a second-class Magistrate and acquitted the appellant. *Held*, the order of the Sessions Judge disposing of the appeal was *ultra vires* *See* also **Ratanlal 17**, where it was *held* that an accused person acquitted and discharged by a Sessions Judge on hearing an appeal which he was not entitled by law to hear, may be re-arrested even after the expiration of the period to which he was originally sentenced and made to undergo the remaining portion of the sentence. But in **4 L. B. R. 49 = 6 Cr. L. J. 237,** it was *held* that an appellate judgment of a Sessions Judge not competent to hear the appeal, is not to be treated as a nullity till it is set aside.

17. Appeal is a continuation of the case and accused cannot be put on oath.—A criminal appeal is a continuation of the criminal case, and except so far as there is a provision to the contrary, the appellant has the privilege of the accused, and cannot be punished for making a false verification or statement, **12 M. 451.** *See* Note 3 to s. 423

Appeal from order rejecting application for restoration of attached property

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court, may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Note.—Appeals 'ordinarily lie,' *i.e.*, in the majority of cases, **11 B. 438.** *See* **28 M. 856 (F.B.)** and *see* Notes under Heading XXII at pp 470—473.

Appeal from order requiring security for keeping the peace or for good behaviour.

***406.** "Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

(*a*) if made by a Presidency Magistrate, to the High Court,

(*b*) if made by any other Magistrate, to the Court of Session:

Provided that the Local Government may, by notification in the Local Official Gazette direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session.

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-sec. (2) or sub-sec. (3-A) of s. 123"

Notes.—1. *See* ss. 124 and 125 for powers of District Magistrates in security matters, distinct from powers on appeal. And *see* Note 14 to ss. 404 and 556 as to disqualification of District Magistrates to hear appeals.

2. Change.—Considerable change has been effected by the new amendment of this section. Under the old law, an appeal was allowed to the District Magistrate against the orders under s. 118 in cases of security for good behaviour passed by Magistrates other than the District or Presidency Magistrates. Under the new

* This section was substituted by Act XVIII of 1923.

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(contd)

I L R 31 Madras Series, 1908—(contd)

I L R 32 Madras Series, 1909

I L R 33 Madras Series, 1910

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(contd)

I L R 33 Madras Series, 1910—(contd.)

I L R 34 Madras Series, 1911

I L R 35 Madras Series, 1912

PAGE OF REPORT		PAGE OF THIS BOOK

MADRAS CASES—(contd.)

I. L. R. 26 Madras Series, 1903—(contd.)

465 ... 843, 844
467 711
469 ... 146, 147
471 ... 153, 171, 177, 180, 234, 249, 253
477 ... ... 920, 948, 950
478 13 M. L. J. 263 ... 902, 903, 904
551 (F. B.) 242
592 461, 470, 522, 537, 538, 548, 584, 598, 601
596 — 13 M. L. J. 272 ... 44
598 ... 658, 734, 734
607 ... ... 25, 32, xiv, xxv
610 18, 20, 110, 477, 479, 521, 541, 1011, 1114, 1115
656 (F. B.) 470, 471, 871

I. L. R. 27 Madras Series, 1904.

13 ... 1040
51 1 Cr. L. J. 275 24, 166, 181, 488, 493, 537, 550, 558, 947, 948, 983, 1127
59 ... ... 626, 1010
61 1 Cr. L. J. 281 ... 434, 523, 524
124 1 Cr. L. J. 422 ... 476
127 1 Cr. L. J. 425 ... 18, 20, 390, 401
223 — 14 M. L. J. 71 — 1 Cr. L. J. 321 454, 463, 946, ii
237 — Weir II, 440 (1903) 1 Cr. L. J. 566 ... 818
238 — 1 Cr. L. J. 566 232, 634, 686, 737, 767, 771
271 — 14 M. L. J. 223 — 1 Cr. L. J. 641 565, 707, 719, 750, 751, 876
288 680
310 614
340 478
424 1069
510 — 1 Cr. L. J. 1087 ... 22, 203, 204, 816, 933, v
525 — 1 Cr. L. J. 1030 ... 192, 205, 848

I. L. R. 28 Madras Series, 1905.

17 ... ...clxxviii, clxxix
28 ... 956, ii
37 (F. B.) — Weir I, 671 A — 2 Cr. L. J. 149 ...
255 — 2 Cr. L. J. 752 ... 517, 923, 947
308 804
310 — 2 Cr. L. J. 758 514, 527-b, 642, 859, 934

I. L. R. 29 Madras Series, 1906.

89 — 3 Cr. L. J. 370 ... 21, 339, 368, cvii, cviii
91 (F. B.) — 3 Cr. L. J. 371 719, 722, 728, 730
97 — 15 M. L. J. 394 — 3 Cr. L. J. 31 294, 295, 296, 299
100 — 3 Cr. L. J. 376 21, 919, 990, 1013, 1019, 1062
126 (F. B.) — 16 M. L. J. 79 — 1 M. L. T. 31
= 3 Cr. L. J. 284 ... 513, 514, 550, 629, 614, 817, 824, 833, 837, 840, 905, 927, 928, 947, 996
149 = 3 Cr. L. J. 419 ... ... 213, 1153
187 = 3 Cr. L. J. 459 ... ... 625, 891
188 = 3 Cr. L. J. 460 ... ... 908, 911
190 = 3 Cr. L. J. 461 ... ... 145, 146, 148, 906
192 = 3 Cr. L. J. 463 ... ... clxi, cxxiii
236 = 4 Cr. L. J. 57 ... ... 886, 887
237 = 4 Cr. L. J. 58 ... ... 288, 295
331 = 4 Cr. L. J. 175 ... 986, 998, 999
372 = 4 Cr. L. J. 231 ... 608, 625, 634, 686
373 = 4 Cr. L. J. 232 ... ... 301, 302
375 = 4 Cr. L. J. 233 ... 1080, 1099, 1109
517 = 5 Cr. L. J. 86 ... 25, 620, 870, lxvi, lxvii
558 = 5 Cr. L. J. 133 ... 550, 566, 583, 929

MADRAS CASES—(contd.)

I. L. R. 29 Madras Series, 1906—(contd.)

561 — 16 M. L. J. 419 = 1 M. L. T. 405
5 Cr. L. J. 91 ... ... 257, 276, 259
567 5 Cr. L. J. 138 ... ... 911, 1218, 1220
569 — 1 M. L. T. 403 — 5 Cr. L. J. 94 ... 560, 561, 571

I. L. R. 30 Madras Series, 1907.

15 242
41 1 M. L. T. 309 — 5 Cr. L. J. 74 ... 701, 705, 707, 709, 711, 713, 857, 903
48 — 1 M. L. T. 160 5 Cr. L. J. 88 ... 760, 853
50 1153
94 1 M. L. T. 345 4 Cr. L. J. 540... 110, 1130
103 (F. B.) — 16 M. L. J. 580 — 1 M. L. T. 375
5 Cr. L. J. 301 ... ... 897, 899
126 iii
134 — 5 Cr. L. J. 422 ... 729, 733
136 16 M. L. J. 444 1 M. L. T. 402
— 4 Cr. L. J. 443 ... 31, 864, 919
224 16 M. L. J. 520 5 Cr. L. J. 100 ... 52a-b, 537, 937, 957
226 ... 45, 453, 482, 968, 970, 1015, iii
228 16 M. L. J. 540 2 M. L. T. 43
— 5 Cr. L. J. 104 ... 150, 135
233 1124
282 1104
284 2 M. L. T. 59 — 5 Cr. L. J. 200 1111
292 2 M. L. T. 184 5 Cr. L. J. 347 ...1150
311 — 17 M. L. J. 123 — 2 M. L. T. 84
— 5 Cr. L. J. 255 ... ... 1002, 1011, v
320 543
326 ... 457, 459, 917, 920
328 — 17 M. L. J. 141 — 2 M. L. T. 177
5 Cr. L. J. 341 ... 551, 552, 567, 569, 572, 573, 574, 582, 583, 1153
330 — 17 M. L. J. 407 2 M. L. T. 329
— 6 Cr. L. J. 278 183
341 1066
342 — 17 M. L. J. 279 — 2 M. L. T. 166
— 5 Cr. L. J. 359 1033
372 627
382 (F. B.) — 17 M. L. J. 260 — 2 M. L. T. 233
— 6 Cr. L. J. 102 ... ... 1020, 1021
400 ... ... 1032, 1035
466 — 17 M. L. J. 471 ... ... 328, 316, 1174
469 — 17 M. L. J. 471 ... ... 722, 723, 728
548 3 M. L. T. 18 — 7 Cr. L. J. 28 ... 240, 272, 273, 274, 1149, 1165
561 ... ... 276, 280

I. L. R. 31 Madras Series, 1908.

10 = 3 M. L. T. 25 = 7 Cr. L. J. 29 677, 679, 789, 945
43 = 17 M. L. J. 559 = 3 M. L. T. 113
= 7 Cr. L. J. 6 ... 457, 465, 574, 576, 584
80 = 17 M. L. J. 533 = 2 M. L. T. 193
= 6 Cr. L. J. 382 ... 213, 480, 488, 493, 1139, 1165
82 = 17 M. L. J. 535 = 3 M. L. T. 108 277, 278, 300
84 = 17 M. L. J. 555 = 3 M. L. T. 31
= 7 Cr. L. J. 5 836
114 = 3 M. L. T. 308 909
127 = 18 M. L. J. 66 = 3 M. L. T. 270
= 7 Cr. L. J. 325 329, 677, 698, 699, 701, 703, 905
131 = 7 Cr. L. J. 425 ... 640
133 = 18 M. L. J. 57 = 3 M. L. T. 230
= 7 Cr. L. J. 267 ... 931, 932, 946, 958

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(*contd.*)

I. L. R. 35 Madras Series, 1912—(*contd.*)

739 = 22 M. L. J. 114 = (1911) 2 M. W. N. 50 = 10 M. L. T. 518 = 12 Cr. L. J. 451 = 11 In. Ca. 795 ... ... iv, viii

I. L. R. 36 Madras Series, 1913.

72 = 23 M. L. J. 393 = 13 M. L. T. 367 = (1912) M. W. N. 1012 = 13 Cr. L. J. 723 = 16 In. Ca. 755 457, 458, 927, 929, 988, 995, 1014

94 169

138 = 10 M. L. T. 278 = (1911) 2 M. W. N. 259 = 12 Cr. L. J. 545 = 12 In. Ca. 521 ... 474, 475

159 = 22 M. L. J. 270 = 11 M. L. T. 93 = (1912) M. W. N. 125 = 13 Cr. L. J. 226 = 14 In. Ca. 418 680

216 F.B.) = 23 M. L. J. 39 = (1912) M. W. N. 476 = 13 Cr. L. J. 275 = 14 In. Ca. 659 501, 771, 772, 1127

275 = 23 M. L. J. 499 = 12 M. L. T. 439 = (1912) M. W. N. 1154 = 13 Cr. L. J. 753 = 17 In. Ca. 65 ... 273, 949, 953, 1138, 1150

282 ... ... 177, 1152

303 = 24 M. L. J. 463 = 13 M. L. T. 360 = 14 Cr. L. J. 214 = 19 In. Ca. 310 ... 576, 854, 859, 861, 863, 866

315 = 14 Cr. L. J. 559 = 21 In. Ca. 159 ... 153, 167, 180, 203, 205, 254, 613, 614, 853, 856, 858, 860, 938, 1057

321 = 23 M. L. J. 368 = (1912) 1 M. W. N. 1243 = 13 Cr. L. J. 778 = 13 M. L. T. 116 = 15 In. Ca. 410 ... 520, 524, 525, 533, 536, 539, 787

357 = 10 M. L. T. 563 = (1912) M. W. N. 3 = 13 Cr. L. J. 35 = 13 In. Ca. 275 ... 410, 479, 521, 536, 540, 1115

457 = 10 M. L. T. 508 = (1911) 2 M. W. N. 576 = 12 Cr. L. J. 585 = 12 In. Ca. 951 ... 686, 769, 899, 919

470 = (1912) M. W. N. 16 = 13 Cr. L. J. 16 = 13 In. Ca. 110 792

471 = 15 Cr. L. J. 43 = 22 In. Ca. 187 458

474 = 22 M. L. J. 357 = 11 M. L. T. 253 = (1912) M. W. N. 169 = 13 Cr. L. J. 447 = 15 In. Ca. 79 ... ... 156, 193, 1062

501 (P.C.) Vaithinatha x

585 = 15 Cr. L. J. 197 = 22 In. Ca. 981 ... 656, 695, 718, 721, 722, 723, 724

815 860

I. L. R. 37 Madras Series, 1914.

107 = 11 M. L. T. 391 = (1912) M. W. N. 536 = 13 Cr. L. J. 241 = 14 In. Ca. 593 ... 450

110 = 11 M. L. T. 431 = 13 Cr. L. J. 493 = 14 In. Ca. 757 1114

112 = 13 Cr. L. J. 493 = 15 In. Ca. 493 ... 129, 130

119 = 15 Cr. L. J. 180 = 22 In. Ca. 756 ... 973, 975

125 (F.B.) = 25 M. L. J. 459 = 14 M. L. T. 328 = (1913) M. W. N. 715 = 14 Cr. L. J. 546 = 21 In. Ca. 146 207

153 (F.B.) = 25 M. L. J. 403 = 14 M. L. T. 235 = (1913) M. W. N. 769 = 14 Cr. L. J. 574 = 21 In. Ca. 174 ... ... 148, 910

156 = 26 M. L. J. 63 = (1913) M. W. N. 77 = 13 Cr. L. J. 685 = 16 In. Ca. 332 ...1087

I. L. R. 37 Madras Series, 1914—(*contd.*)

238 = 23 M. L. J. 447 = 12 M. L. T. 615 = (1912) M. W. N. 1029 = 13 Cr. L. J. 800 = 17 In. Ca. 544 23

317 = 16 Cr. L. J. 39 = 26 In. Ca. 631 ... 1010, 1165

564 = 16 Cr. L. J. 167 = 27 In. Ca. 551 ... 463

565 = 25 M. L. J. 349 = 14 M. L. T. 24 = 14 Cr. L. J. 525 = (1913) M. W. N. 695 = 20 In. Ca. 1665 ... ... 1035, 1040

I. L. R. 38 Madras Series, 1915.

304 = 15 Cr. L. J. 469 = 29 In. Ca. 329 ... 36

432 = 14 M. L. T. 392 = (1913) M. W. N. 871 = 21 In. Ca. 564 257

489 = 25 M. L. J. 370 = 14 Cr. L. J. 559 = 21 In. Ca. 38 = 30 In. Ca. 453 = 16 Cr. L. J. 629 ... ... 239, 242, 247

495 = 25 M. L. J. 445 = 14 M. L. T. 317 = (1913) M. W. N. 862 = 14 Cr. L. J. 595 = 21 In. Ca. 467 ... 818, 830, 855, 893

512 = 25 M. L. J. 510 = 14 Cr. L. J. 633 = 21 In. Ca. 681 ... ... 515, 522

550 = 15 Cr. L. J. 161 = 22 In. Ca. 787 ... 976

552 = 15 Cr. L. J. 188 = 22 In. Ca. 764 768, 789

555 = 16 Cr. L. J. 631 = 30 In. Ca. 455 ... 192

556 (Footnote) 16 Cr. L. J. 626 = 30 In. Ca. 450 ... 192

581 = 27 M. L. J. 227 = 18 M. L. T. 128 = 15 Cr. L. J. 593 = 25 In. Ca. 345 457, 459, 930

585 = 27 M. L. J. 589 = 16 M. L. T. 303 = (1914) M. W. N. 646 = 15 Cr. L. J. 673 = 25 In. Ca. 1001 89, 633, 643, 796, 789 (Ad.), 936

639 = 29 M. L. J. 175 = 16 M. L. T. 505 = 26 In. Ca. 136 ... ... 410, 412, 418

650 = 25 M. L. J. 557 = 21 In. Ca. 629 ... 288

779 = 26 M. L. J. 235 = (1914) M. W. N. 324 = 15 Cr. L. J. 207 = 22 In. Ca. 991 408, 412, 419, 420, 425

797 reported under (1914) M. W. N. 867 = 15 Cr. L. J. 549 = 24 In. Ca. 957 ... 36

807 (P.C.) = 4 In. Ap. 314 = 18 C. W. N. 1089 = 27 M. L. T. 30 = (1914) M. W. N. 585 = 16 M. L. T. 165 = 20 C. L. J. 253 = 16 Bom. L. R. 625 = 12 A. L. J. 1155 = 24 In. Ca. 290 (Annie Besant) ...1054

1028 = 26 M. L. J. 160 = (1914) M. W. N. 273 = 15 Cr. L. J. 236 = 23 In. Ca. 188 860, 880, 881, 895, 896, 897, 949, 958, 972, 973

1044 reported under 26 M. L. J. 486 (which *see*) = 15 Cr. L. J. 271 = 23 In. Ca. 479 ...

1088 = 17 Cr. L. J. 132 = 33 In. Ca. 308 127, 972, 1064, 1156

I. L. R. 39 Madras Series, 1916.

224 527

449 reported under 28 M. L. J. 329 = 16 Cr. L. J. 294 ... ...

472 reported under 28 M. L. J. 483 = 16 Cr. L. J. 326 = 17 M. L. T. ... ...

503 reported under 18 M. L. T. 92 = 16 Cr. L. J. 540 ... ...

505 reported under (1915) M. W. N. 540 = 16 Cr. L. J. 600 ... ...

527 reported under 29 M. L. J. 101 = 16 Cr. L. J. 593 ... ...

MADRAS CASES—(*contd.*)

Weir's Criminal Rulings, II—(*contd.*)

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(contd)

21 Madras Law Journal Reports, 1911—(contd)

22 Madras Law Journal Reports, 1912

23 Madras Law Journal Reports, 1912

24 Madras Law Journal Reports, 1913

25 Madras Law Journal Reports, 1913

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(contd)

25 Madras Law Journal Reports, 1913—(contd)

26 Madras Law Journal Reports, 1914.

27 Madras Law Journal Reports, 1914.

28 Madras Law Journal Reports, 1915

PAGE OF REPORT	PAGE OF THIS BOOK

MADRAS CASES—(contd.)

11 Madras Law Journal Reports, 1901.

122 = Weir II. 93	238
233 — 25 M. 61 (P.C.)	...
241 = 24 M. 523	...

12 Madras Law Journal Reports, 1902.

354	27, 1028, 1059
391 = 26 M. 188	...
392	461
408	281, 461, 482, v
413 = 26 M. 43	...
447 = 26 M. 49	...

13 Madras Law Journal Reports, 1903.

65 (Notes)	888
69	1117, v
670	205

14 Madras Law Journal Reports, 1904.

74 = 27 M. 223	...
207 = Weir II, 62	220
223 = 27 M. 271	1031
394	288
491 = 1 Cr. L. J. 1076	153

15 Madras Law Journal Reports, 1905.

224 = 2 Cr. L. J. 381	503
225 = Weir II, 572 = 2 Cr. L. J. 382	972
373 = 2 Cr. L J. 774	538, 945, 947
394 = 29 M. 97	...
489 = Weir II, 601-A = 3 Cr. L. J. 118	24, 924, 931, 998, 1001

16 Madras Law Journal Reports, 1906.

79 (F.B.) = 29 M. 126	...
97	19
148 = 3 Cr. L. J. 487	240, 265, 266, 1165
419 = 29 M. 561	...
444 = 30 M 136	...
525 = 5 Cr. L. J. 99	538, 540
529 = 30 M. 224	...
546 = 30 M. 228	...
560 (F.B.) = 30 M. 103	...
4 (Sh. N.) (Cr. R. C. 477 of 1905)	1089, 1097
24 („) (Cr. R. C. 175 of 1906)	1095
37 („) (Cr. M. P. 309 of 1906)	473
40 („) (Cr. R. C. 264 of 1906)	1006
41 („) (Cr. R. C. 248 of 1906)	485
42 („) (C. M. P. 148 of 1906)	479
45 („) (L. P. A. 37 of 1906)	487

17 Madras Law Journal Reports, 1907.

123 = 30 M. 311	iv
141 = 30 M. 328	...
153 = 2 M. L. T. 24 = 5 Cr. L. J. 132	926, 949
158 (F.B.) = 5 Cr. L. J. 343	252, 286, v
219 (F.B.) = 5 Cr. L. J. 479	590, 591, 604
248 = 5 Cr. L. J. 496	874, 878
266 (F.B.) = 30 M. 382	...
279 = 30 M. 332	...
323 = 6 Cr. L. J. 105	...
407 = 30 M. 330	341
420 = 2 M. L. T. 496 = 6 Cr. L. J. 331	451, 455, 459
438 = 6 Cr. L. J. 352	120, 165, 609
449 = 4 M. L. T. 213 = 6 Cr. L. J. 345 = 8 Cr. L. J. 399	273

17 Madras Law Journal Reports, 1907—(contd.)

471 = 30 M. 466	...
476 = 30 M. 469	...
533 = 31 M. 80	...
584 = (F.B.) 31 M. 140	...
46 = (Sh. N.) (Cr. M. P. 146 of 1907)	541

18 Madras Law Journal Reports, 1908.

89	...
150 = 31 M. 185	...
197 = 7 Cr. L. J. 459	813
250 = 3 M. L. T. 263 = 7 Cr. L. J. 358	700, 702, 708, 709
329 = 3 M. L. T. 400 = 8 Cr. L. J. 149	clxxviii
330 = 3 M. L. T. 407 = 8 Cr. L. J. 152	570, 851
466 = 31 M. 510	...
561 = 4 M. L T. 140 = 8 Cr. L. J. 208	644
584 = 4 M. L. T. 214 = 8 Cr. L. J. 400	453, 458, 477
57	880

19 Madras Law Journal Reports, 1909.

18 = 5 M. L. T. 103 = 9 Cr. L. J. 565 = 2 In. Ca. 310	266
66 = 4 M. L. T. 468 = 9 Cr. L. J. 88 = 4 In. Ca 616	...
81 = 5 M. L. T. 24 = 9 Cr. L. J. 140 = 1 In. Ca. 42	554
254 = 5 M. L. T. 256 = 9 Cr. L. J. 149 = 1 In. Ca. 79	1095
271 = 4 M. L. T. 324 = 8 Cr. L. J. 421	634
274 = 31 M. 548	...
324 = (P.C.) = 13 C. W. N. 685	1023, 1027
478 = 11 Cr. L. J. 279 = 4 In. Ca. 871	1067, v
516 = 11 Cr. L. J. 68 = 4 In. Ca. 875	1097
566 = 11 Cr. L. J. 69 = 4 In. Ca. 876	926
617 = 1 In. Ca. 716	247
766 (F.B.) = 33 M. 48	...
9 (Sh. N.) (Ref. T. 1 of 1909)	813
25 („)	235
55 („) (Cr. R. C. 638 of 1909	455

20 Madras Law Journal Reports, 1910.

1 = 33 M. 22	561
12 = 7 M. L. T. 33 = 10 Cr. L. J. 502 = 4 In. Ca. 140	1060, 1042
84 = 33 M. 264	...
102 = 33 M. 90	...
119 = 8 M. L. T. 114 = 5 In. Ca. 902	249
132 = 8 M. L. T. 87 = 11 Cr. L. J. 286 = 5 In. Ca. 908	306, 319
13 (Sh. N.) = 7 M. L. T. 182 = 11 Cr. L J. 331 = 5 In. Ca. 903	...
982 = 34 M. 186	...

21 Madras Law Journal Reports, 1911.

195 = (1911) 1 M. W. N. 36 = 8 M. L. T. 300 = 11 Cr. L. J. 641 = 8 In. Ca. 393	1053
283 = (1911) 1 M. W. N. 327 = 12 Cr. L. J. 150 = 10 M. L. T. 84 = 9 In. Ca. 897	638, 639, 707
411 = 9 M. L. T. 325 = 12 Cr. L. J. 44 = 9 In. Ca. 262	807
441 = (1910) M. W. N. 143 = 8 M. L. T. 54 = 11 Cr. L. J. 306 = 6 In. Ca. 308	405, 410, 423
484 = 9 M. L. T. 273 = (1911) 2 M. W. N. 369 = 9 In. Ca. 672	947, ii
487 = (1911) 1 M. W. N. 44 = 9 M. L. T. 209 = 11 Cr. L. J. 721 = 8 In. Ca. 848	294

PAGE OF REPORT		PAGE OF THIS BOOK

MADRAS CASES—(contd.)

28 Madras Law Journal Reports, 1915—(contd.)

134 = 16 Cr. L. J. 156 = 27 In. Ca. 220 ... 275, 302, 643
204 = (1915) M. W. N. 131 = 17 M. L. T. 164
 = 2 L. W. 200 = 16 Cr. L. J. 128
 = 2 In. Ca. 192 ... ... 625, 626
307 = 39 M. 535 = (1915) M. W. N. 224
 = 16 Cr. L. J. 303 = 28 In. Ca. 527 ... 22, 203, 205, iv, v
329 = 39 M. 449 = (1915) M. W. N. 223
 = 17 M. L. T. 214 = 16 Cr. L. J. 294
 = 28 In. Ca. 518 ... ... 679, 655
379 331
381 = 2 L. W. 265 = 16 Cr. L. J. 298
 = 28 In. Ca. 522 ... 550, 556, 598, 599
397 = (1915) M. W. N. 241 = 17 M. L. T. 242
 = 16 Cr. L. J. 323 = 28 In. Ca. 659 570, 1160
483 = 39 M. 472 = 17 M. L. T. 330
 = 16 Cr. L. J. 326 = 28 In. Ca. 662 1027, 1047
486 = 17 M. L. T. 446 = 16 Cr. L. J. 439
 = 29 In. Ca. 71 ... ... 477, 478, 479
504 106
505 = (1915) M. W. N. 355 = 17 M. L. T. 398
 = 2 L. W. 463 = 16 Cr. L. J. 477
 = 29 In. Ca. 109 ... ... 105, 518, 566, ii

29 Madras Law Journal Reports, 1915.

16 (F.B.) = 29 In. Ca. 879 viii
101 (F.B.) = 39 M. 527 = (1915) M. W. N. 504
 = 18 M. L. T. 95 = 16 Cr. L. J. 593
 = 30 In. Ca. 145 564, 571, 599, 883, 888, 1153, 1159
175 = 38 M. 639 ... ...
178 = 39 M. 576 = (1915) M. W. N. 418
 = 18 M. L. T. 25 = 16 Cr. L. J. 491
 = 29 In. Ca. 331 ... ... 412, 418, 419
521 = 39 M. 604 = 18 M. L. T. 351
 = 16 Cr. L. J. 750 = 31 In. Ca. 350 780, 910, 958
758 = (1915) M. W. N. 1023 = 2 L. W. 1078
 = 16 Cr. L. J. 773 = 31 In. Ca. 373 ... 1143

31 Madras Law Journal Reports, 1916.

120	124, 125
440	1014

32 Madras Law Journal Reports.

54	463
78	621

33 Madras Law Journal Reports.

78	1164
449	1033, 1034
545	465
555	357

34 Madras Law Journal Reports.

404	478
552	751

35 Madras Law Journal Reports.

127	344, 359
259	501, 569
454	44, 248, 477
555	355
667	940

36 Madras Law Journal Reports.

448	937
452	723

37 Madras Law Journal Reports.

313	214
538	107
539	276, 277, 301

38 Madras Law Journal Reports.

73	272
370	22, 23

39 Madras Law Journal Reports.

484	613
714	1135

41 Madras Law Journal Reports.

172	625
398	620

42 Madras Law Journal Reports.

72	931
108	459
139	497
352	248
401	1097, 1101
557	491
566	1033

43 Madras Law Journal Reports.

72	972
87	1103
369	821
396	1051
375	477
402	766, 1163
535	937
534	502
710	509, 1163
716	269

44 Madras Law Journal Reports.

27	959
56	1101, 1103
74	1009
167	433
320	477
328	471
366	959
485	146
567	776
648	409

45 Madras Law Journal Reports.

230	769
255	621
279	768
305	641
602	888
808	793
824	769

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(*contd*)

9 Madras Law Times, 1911—(*contd*)

10 Madras Law Times, 1911

11 Madras Law Times, 1912

12 Madras Law Times, 1912

13 Madras Law Times, 1913.

14 Madras Law Times, 1913.

15 Madras Law Times, 1914

16 Madras Law Times, 1914

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(*contd.*)

5 Madras Law Times, 1909—(*contd.*)

162 = 11 Cr. L. J. 190 = 4 In. Ca. 1107 ... 1146, 1150, 1166
184 = 31 M. 543 ... 75, 737 933, 934, 946, 978, 1069
204 = 11 Cr. L. J. 191 = 4 In. Ca. 1115 ... 625, 1161, 1163
216 = 11 Cr. L. J. 193 = 4 In. Ca. 1126 ... 667, 769, 972, 1057
256 = (Ponnusami) = 19 M. L. J. 254 ...
256 = (Payani Chellaya) = 7 Cr. L. J. 276 = 1 In. Ca. 218 ... 772
257 = 9 Cr. L. J. 224 = 1 In. Ca. 245 ... 76, 530
258 = 11 Cr. L. J. 195 = 4 In. Ca. 1133 ... 971, 972
262 = 33 M. 89 ... ...
269 (F.B.) = 31 M. 258 ... ...
286 = 9 Cr. L. J. 309 = 1 In. Ca. 560 ... 1023, 1025
290 = 9 Cr. L. J. 305 = 1 In. Ca. 546 ... 763, 764
355 = 9 Cr. L. J. 304 = 1 In. Ca. 547 ... 464
355 = 9 Cr. L. J. 308 = 1 In. Ca. 547 ... 706, 709
356 { Kadir Meera ... 405, 593
356 { = 32 M. 214 ... ..
393 = 32 M. 384 ... ...

6 Madras Law Times, 1909.

14 = 9 Cr. L. J. 407 = 1 In. Ca. 889 1133
16 = 33 M. 83 ... ...
17 = 11 Cr. L. J. 30 = 4 In. Ca. 700 ... 486, 557, 579, 597, 603
90 = 9 Cr. L. J. 495 = 2 In. Ca. 125 ... 606, 757
91 = 10 Cr. L. J. 7 = 2 In. Ca. 431 ... 276, 461, 462
91 (Pasupathi) = 10 Cr. L. J. 6 = 2 In. Ca. 428 ... 257, 272
92 = 10 Cr. L. J. 8 = 2 In. Ca. 425 ... 998, 999
128 = 11 Cr. L. J. 162 = 4 In. Ca. 1056 ... 486
133 = 33 M. 85... ... 314
158 = 10 Cr. L. J. 243 = 3 In. Ca. 77 192
238 = 10 Cr. L. J. 289 = 3 In. Ca. 434... ...
241 = 10 Cr. L. J. 290 = 3 In. Ca. 437... ...1187
259 = 11 Cr. L. J. 156 = 4 In. Ca. 1043 ... 311, 642
261 = 11 Cr. L. J. 156 = 4 In. Ca. 1045 ... 19, 620, 1032
266 550
295 = 33 M. 22 1204
308 = 10 Cr. L. J. 481 = 4 In. Ca. 36 190
309 = 10 Cr. L. J. 491 = 4 In. Ca. 37 ... ...
327 (F.B.) = 33 M. 48 ... ...
546 = 10 Cr. L. J. 364 = 3 In. Ca. 723... ... 474

7 Madras Law Times, 1910.

34 = 20 M. L. J. 12 ... ...
77 = 11 Cr. L. J. 217 = 5 In. Ca. 743... 553, 554
79 = 33 M. 264... ...
81 = 11 Cr. L. J. 243 = 5 In. Ca. 754... ... 905
90 = 11 Cr. L. J. 244 = 5 In. Ca. 761... ... 201
104 (105) = 11 Cr. L. J. 251 = 5 In. Ca. 809 ... 202
121 = 33 M. 514... ...
127 = 11 Cr. L. J. 135 = 5 In. Ca. 436... ... 601
128 = 33 M. 90 ... ...
175 = 11 Cr. L. J. 331 = 3 In. Ca. 926... ... 511
179 = 34 M. 94 ... ...
182 = 20 M. L. J. (S.N.) 13 = 141 Cr. L. J. 331 = 5 In. Ca. 928 ... 821, 959
186 = 11 Cr. L. J. 333 = 5 In. Ca. 932... ... 540
187 = 11 Cr. L. J. 333 = 5 In. Ca. 933... 535, 543
191 = 11 Cr. L. J. 334 = 5 In. Ca. 935... ... 698

MADRAS CASES—(*contd.*)

7 Madras Law Times, 1910—(*contd.*)

202 = 11 Cr. L. J. 340 = 5 In. Ca. 974... ... 901
299 = 33 M. 502 602
304 = 34 M. 139 ... ...
305 = (1910) M. W. N. 52 = 11 Cr. L. J. 249 = 5 In. Ca. 797 ... ...
314 = (1910) M. W. N. 77 = 11 Cr. L. J. 222 = 6 In. Ca. 51 ... ...
340 = (1910) M. W. N. 52 = 11 Cr. L. J. 249 = 5 In. Ca. 797 903
362 = 11 Cr. L. J. 136 = 5 In. Ca. 438... ... 143
367 = 1910 M. W. N. 541 = 11 Cr. L. J. 293 = 6 In. Ca. 242 ... 581, 608

8 Madras Law Times, 1910.

47 = 33 M. 288 ... ...
54 = 21 M. L. J. 441 ... 403, 411, 412, 425
78 = 11 Cr. L. J. 350 = 6 In. Ca. 385 ... 613, 936
81 (Muthu) = 11 Cr. L. J. 221 = 6 In. Ca. 12 ... 895, 961
81 (Kurumba) = 11 Cr. L. J. 481 = 7 In. Ca. 397 ... 820
81 (Ramakrishnama) = 11 Cr. L. J. 479 = 7 In. Ca. 398 988
82 = 11 Cr. L. J. 482 = 7 In. Ca. 401 ... 705, 711
86 = (1910) M. W. N. 397 = 11 Cr. L. J. 353 = 6 In. Ca. 406 467
87 = 20 M. L. J. 132 321
88 = 11 Cr. L. J. 327 = 6 In. Ca. 358 927
104 = 34 M. 138 ... ...
117 = 11 Cr. J. 482 = 7 In. Ca. 414 808
180 = (1910) M. W. N. 354 = 11 Cr. L. J. 449 = 7 In. Ca. 343 239
198 = 1910 M. W. N. 366 = 11 Cr. L. J. 500 = 7 In. Ca. 557 359
203 = 11 Cr. L. J. 531 = 7 In. Ca. 802... ... 428
222 = (Masba Sabjee) 11 Cr. L. J. 533 = 8 In. Ca. 856 ... 1125, 1136
246 = 11 Cr. L. J. 638 = 8 In. Ca. 320 ... 162, 187
291 = 11 Cr. L. J. 646 = 8 In. Ca. 392 ... ...
297 = 34 M. 186 ... ...
300 = 21 M. L. J. 195 1052
313 = 34 M. 545 ... ...
314 (1910) M. W. N. 821 = 11 Cr. L. J. 536 = 7 In. Ca. 895 279
347 = 64 M. 255 ... ...
352 = 11 Cr. L. J. 636 = 8 In. Ca. 300... ...1218
367 = 11 Cr. L. J. 520 = 7 In. Ca. 712 634
372 = 11 Cr. L. J. 683 = 8 In. Ca. 573 ... 699, 708
380 = (1910) M. W. N. 517 = 11 Cr. L. J. 622 = 8 In. Ca. 293 ... 949, 971
416 = (1910) M. W. N. 618 = 11 Cr. L. J. 535 = 7 In. Ca. 895 134
418 = 11 Cr. L. J. 571 = 8 In. Ca. 145... 918, 919
428 = (1910) M. W. N. 829 = 11 Cr. L. J. 734 = 8 In. Ca. 943 ... 918, 919
447 = 11 Cr. L. J. 560 = 8 In. Ca. 63 285

9 Madras Law Times, 1911.

71 = (1910) M. W. N. 852 = 12 Cr. L. J. 20 = 8 In. Ca. 1103 532
91 = 12 Cr. L. J. 47 = 9 In. Ca. 285 276
97 = (1911) 1 M. W. N. 100 = 11 Cr. L. J. 699 = 8 In. Ca. 679 484
162 = (1910) M. W. N. 735 = 11 Cr. L. J. 702 = 8 In. Ca. 721 ... ...
203 = (1911) M. W. N. 106 = 11 Cr. L. J. 722 = 8 In. Ca. 867 1059

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(*contd*)

9 Madras Law Times, 1911—(*contd*)

10 Madras Law Times, 1911

11 Madras Law Times, 1912

12 Madras Law Times, 1912

13 Madras Law Times, 1913

14 Madras Law Times, 1913

15 Madras Law Times, 1914

16 Madras Law Times, 1914

MADRAS CASES—(contd.)

5 Madras Law Times, 1909—(contd.)

Page of Report	Page of this Book
162 = 11 Cr. L. J. 190 = 4 In. Ca. 1107	1146, 1150, 1166
184 = 31 M. 543 ...	75, 737 933, 934, 946, 978, 1069
204 = 11 Cr. L. J. 191 = 4 In. Ca. 1115	625, 1161, 1163
216 = 11 Cr. L. J. 193 = 4 In. Ca. 1126	667, 769, 972, 1057
256 = (Ponnusami) = 19 M. L. J. 254	...
256 = (Payani Chellaya) = 7 Cr L. J. 276 = 1 In. Ca. 218	... 772
257 = 9 Cr. L. J. 224 = 1 In. Ca. 245 ...	76, 530
258 = 11 Cr. L. J. 195 = 4 In. Ca. 1133	971, 972
262 = 33 M. 89	...
269 (F.B.) = 31 M. 258	...
286 = 9 Cr. L J. 309 = 1 In. Ca. 560 ...	1023, 1025
290 = 9 Cr. L. J. 305 = 1 In. Ca. 546 ...	763, 764
355 = 9 Cr. L. J. 304 = 1 In. Ca. 547 ...	... 464
355 = 9 Cr. L. J. 308 = 1 In. Ca. 547 ...	706, 709
356 { Kadir Meera	405, 593
356 { = 32 M. 214	..
393 = 32 M. 384	...

6 Madras Law Times, 1909.

Page of Report	Page of this Book
14 = 9 Cr. L. J. 407 = 1 In. Ca. 889 ...	...1133
16 = 33 M. 83	...
17 = 11 Cr. L. J. 30 = 4 In. Ca. 700 ...	486, 557, 579, 597, 603
90 = 9 Cr. L. J. 495 = 2 In. Ca. 128 ...	606, 757
91 = 10 Cr. L. J. 7 = 2 In Ca. 431 ...	276, 461, 462
91 (Pasupathi) = 10 Cr. L. J. 6 = 2 In Ca. 428	257, 272
92 = 10 Cr. L. J. 8 = 2 In. Ca. 425 ...	998, 999
128 = 11 Cr. L. J. 162 = 4 In. Ca. 1056	... 486
133 = 33 M. 85...	... 314
158 = 10 Cr. L. J. 243 = 3 In. Ca. 77 ...	... 192
238 = 10 Cr. L. J. 289 = 3 In. Ca. 434...	...
241 = 10 Cr. L. J. 290 = 3 In. Ca. 437...	...1187
259 = 11 Cr. L. J. 156 = 4 In. Ca. 1043	311, 642
261 = 11 Cr. L. J 156 = 4 In. Ca 1045	19, 620, 1032
266	... 550
295 = 33 M. 22	...1204
308 = 10 Cr. L. J. 481 = 4 In. Ca. 36 ...	... 190
309 = 10 Cr. L. J. 491 = 4 In. Ca. 37 ...	...
327 (F.B.) = 33 M 48	...
546 = 10 Cr. L. J. 364 = 3 In Ca. 723...	... 474

7 Madras Law Times, 1910.

Page of Report	Page of this Book
34 = 20 M. L. J. 12	...
77 = 11 Cr. L. J. 217 = 5 In. Ca. 743...	553, 554
79 = 33 M. 264...	...
81 = 11 Cr. L. J. 243 = 5 In. Ca. 754...	... 905
90 = 11 Cr. L J. 244 = 5 In. Ca. 761...	... 201
104 (105) = 11 Cr. L. J. 251 = 5 In. Ca. 809	... 202
121 = 33 M. 514...	...
127 = 11 Cr. L. J. 135 = 5 In Ca. 436...	... 601
128 = 33 M. 90	...
175 = 11 Cr. L. J. 331 = 3 In. Ca. 926...	... 511
179 = 34 M. 94	...
182 = 20 M. L. J. (S.N.) 13 = 141 Cr. L. J. 331 = 5 In. Ca. 928	821, 959
186 = 11 Cr. L. J. 333 = 5 In. Ca. 932...	... 540
187 = 11 Cr. L. J. 333 = 5 In. Ca. 933...	535, 543
191 = 11 Cr. L. J. 334 = 5 In. Ca. 935...	... 698

MADRAS CASES—(contd.)

7 Madras Law Times, 1910—(contd.)

Page of Report	Page of this Book
202 = 11 Cr. L. J. 340 = 5 In. Ca. 974...	... 901
299 = 33 M. 502	... 602
304 = 34 M. 139	...
305 = (1910) M. W. N. 52 = 11 Cr. L. J. 249 = 5 In. Ca. 797	...
314 = (1910) M. W. N. 77 = 11 Cr. L. J. 222 = 6 In. Ca. 51	...
340 = (1910) M. W. N. 52 = 11 Cr. L. J. 249 = 5 In. Ca. 797	... 903
362 = 11 Cr. L. J. 136 = 5 In. Ca. 438...	... 143
367 = 1910 M. W. N. 541 = 11 Cr. L. J. 293 = 6 In. Ca. 242	581, 608

8 Madras Law Times, 1910.

Page of Report	Page of this Book
47 = 33 M. 288	...
54 = 21 M. L. J. 441 ...	403, 411, 412, 425
78 = 11 Cr. L. J. 350 = 6 In. Ca. 385 ...	613, 936
81 (Muthu) = 11 Cr. L. J. 221 = 6 In. Ca. 12	895, 961
81 (Kurumba) = 11 Cr. L. J. 481 = 7 In. Ca. 397	820
81 (Ramakrishnama) = 11 Cr. L. J. 479 = 7 In. Ca. 398	... 988
82 = 11 Cr. L. J. 482 = 7 In. Ca. 401 ...	705, 711
86 = (1910) M. W. N. 397 = 11 Cr. L. J. 353 = 6 In. Ca. 406	... 467
87 = 20 M. L. J. 132	... 321
88 = 11 Cr. L. J. 327 = 6 In. Ca. 358 ...	... 927
104 = 34 M. 138	...
117 = 11 Cr. J. 482 = 7 In. Ca. 414 ...	... 808
180 = (1910) M W. N. 354 = 11 Cr. L. J. 449 = 7 In. Ca. 343	... 239
198 = 1910 M. W. N. 366 = 11 Cr. L. J. 500 = 7 In. Ca. 557	... 359
203 = 11 Cr. L. J. 531 = 7 In. Ca. 802...	... 428
222 = (Masba Sabjee) 11 Cr. L. J. 533 = 8 In. Ca. 856	1125, 1136
246 = 11 Cr. L J. 638 = 8 In. Ca. 320 ...	162, 187
291 = 11 Cr. L. J. 646 = 8 In. Ca. 392 ...	...
297 = 34 M. 186	...
300 = 21 M. L. J. 195	...1052
313 = 34 M. 545	...
314 (1910) M. W. N. 821 = 11 Cr. L. J. 536 = 7 In. Ca. 895	... 279
347 = 64 M. 255	...
352 = 11 Cr. L J. 636 = 8 In. Ca. 300...	...1218
367 = 11 Cr. L. J. 520 = 7 In. Ca. 712 ...	... 634
372 = 11 Cr. L J. 683 = 8 In. Ca. 573 ...	699, 708
380 = (1910) M. W. N. 517 = 11 Cr. L. J. 622 = 8 In. Ca. 293	949, 971
416 = (1910) M. W. N. 618 = 11 Cr. L. J. 535 = 7 In. Ca. 895	... 134
418 = 11 Cr. L. J. 571 = 8 In. Ca. 145...	918, 919
428 = (1910) M. W. N. 829 = 11 Cr. L. J. 734 = 8 In. Ca. 943	918, 919
447 = 11 Cr. L. J. 560 = 8 In. Ca. 63 ...	... 285

9 Madras Law Times, 1911.

Page of Report	Page of this Book
71 = (1910) M. W. N. 852 = 12 Cr. L. J. 20 = 8 In. Ca. 1103	... 532
91 = 12 Cr. L. J. 47 = 9 In. Ca. 285 ...	... 276
97 = (1911) 1 M. W. N. 100 = 11 Cr. L. J. 699 = 8 In. Ca. 679	... 484
162 = (1910) M. W. N. 735 = 11 Cr. L. J. 702 = 8 In. Ca. 721	...
203 = (1911) M. W. N. 106 = 11 Cr. L. J. 722 = 8 In Ca. 867	...1059

MADRAS CASES—(contd)

1911 (2) Madras Weekly Notes—(contd)

PAGE OF REPORT	PAGE OF THIS BOOK
373 = 12 Cr L. J 551 = 12 In Ca 527	301
375 = 12 Cr L. J 562 = 12 In Ca 650	339
431 = 12 Cr L. J 556 = 10 M L. T 389	826, 1009 1013
452 = 12 Cr L. J 430 = 11 In Ca 614	113
467 = 12 Cr L. J 567 = 12 In. Ca. 655	556 574
472 = 12 Cr L. J 566 = 12 In. Ca 654	644
526 = 13 Cr L J 19 = 13 In. Ca. 211	465, 466, 473, 481
536 = 13 Cr L. J 21 = 13 In. Ca 213	552, 572 578 587
558 = 10 M L. T 550 = 13 Cr L J 29 = 13 In. Ca. 221	301
576 = 36 M 457	509 636 638 647

1912 Madras Weekly Notes.

PAGE OF REPORT	PAGE OF THIS BOOK
35 = 22 M L. J 186 = 11 M L. T 20	711
47 = 22 M L J 251 = 13 Cr L. J 143	148 150
49 = 13 Cr L. J 125 = 13 In. Ca 781	571, 1157
50 = 13 Cr L. J 121 = 13 In. Ca 777	976
69 = 13 Cr L J 124 = 13 In Ca. 780	569
100 = 13 Cr L. J 271 = 14 In Ca 655	605
125 = 36 M 159	
169 = 36 M 474	
207 = 35 M 247	
378 = 13 Cr L. J 473 = 15 In Ca 313	675 1153, 1199
396 = 11 M L T 213	847
400 = 11 M L. T 191	1004
476 = 36 M 216	
[illegible]	.79 481, 482, vii
	450
	— 291
	578
549 = 35 M 397	vi
881 = 12 M L. T 385	823
1012 = 36 M 72	
1110 = 14 Cr L. J 239 = 19 In Ca 335	901
1111 = 23 M L. J 445	341
1121 = 13 Cr L J 828 = 17 In Ca 572	643 644, 1130
1154 = 36 M 275	iii
1206 = 13 Cr L. J 825 = 17 In Ca 569	997

1913 Madras Weekly Notes.

PAGE OF REPORT	PAGE OF THIS BOOK
77 = 37 M 156	
638 = 14 Cr L. J 572 = 21 In Ca 172	942
695 = 37 M. 565	
715 = 37 M 125	
769 = 37 M 153	
771 = 14 M L T 195	— 298
806 (P C) = 36 M 501	
851 = 24 M L. J 1	1108
871 = 38 M 432	
1002 = 25 M L. J 593	
1003 = 55 M L J 628	235 244

1914 Madras Weekly Notes

PAGE OF REPORT	PAGE OF THIS BOOK
11 Clifford (P C)	
124 = 15 Cr L. J 225 = 23 In Ca 177	972
169 = 28 M L. J 132	240, 242 243
273 = 38 M 1028	
324 = 38 M 779	
351 = 15 Cr L J 357 = 23 In. Ca 725	499

MADRAS CASES—(contd)

1914 Madras Weekly Notes—(contd)

PAGE OF REPORT	PAGE OF THIS BOOK
352 = 15 Cr L. J 256 = 23 In Ca 208	602
363 = 15 Cr L. J 417 = 24 In Ca 153	754
382 = 15 Cr L. J 622 = 25 In Ca 630	304 306, 311 314 565
394 = 26 M L. J 233	294
484 = 26 M L. J 152	
498 = 15 Cr L. J 439 and 576 = 24 In Ca 175	110 116 192, 848
646 = 38 M 585	23
651 = 27 M L. J 392	
776 = 15 Cr L. J 641 = 25 In Ca 841	1058 1059
778 = 16 Cr L J 79 = 26 In Ca. 671	919
793 = 27 M L. J 586	455
795 = 15 Cr L. J 669 = 25 In Ca 997	258 271
798 = 16 M L. T 52	266
804 = 27 M L. J 37	60
867 = 38 M 797	36

1915 Madras Weekly Notes

PAGE OF REPORT	PAGE OF THIS BOOK
34 = 16 Cr L J 14 = 26 In Ca 318	467, 819
140 = 17 M L T 15	461 467
177 = 28 M L. J 123	453
181 = 28 M L J 204	
224 = 28 M L. J 307	22 203 204 iv v
229 = 28 M L. J 329	
233 = 16 Cr L J 307 = 28 In Ca 643	536
240 = 39 M 537 = 16 Cr L J 349 = 28 In Ca 733	244
253 = 16 Cr L. J 252 = 28 In Ca 108	1001
267 = 17 M L. T 225	258
269 = 17 M L T 191	70
276 = 17 M L. T 263	
365 = 28 M L J 505	
411 reported under 17 M L T 457	
413 = 2 L W 939 = 16 Cr L. J 623 = 30 In Ca. 447	769 770
418 = 18 M L. T 25	
504 = 29 M L. J 101 (F B)	
540 = 39 M 506 = 16 Cr L J 600 = 30 In Ca. 152	887 973
544 = 16 Cr L. J 615 = 30 In Ca 439	684
546 = 18 M L T 92	611 630
786 = 16 Cr L. J 697 = 30 In Ca 745	964
1023 = 29 M L. J 758	

1916 Madras Weekly Notes

PAGE OF REPORT	PAGE OF THIS BOOK
8	478
111 reported under 19 M L. T 23	
327 = 3 L W 403 = 17 Cr L. J 288 = 34 In Ca. 1008	553
372 = 17 Cr L. J 166 = 3 L W 496 = 33 In Ca 646	797 814 1159
384	493, 494, 497
804	626

1916 (2) Madras Weekly Notes.

PAGE OF REPORT	PAGE OF THIS BOOK
159	630
179	544

PAGE OF REPORT — PAGE OF THIS BOOK

MADRAS CASES—(*contd.*)

17 Madras Law Times, 1915.

15 = (1915) M. W. N. 140 = 16 Cr. L. J. 115
= 27 In. Ca. 179 ... ... 462, 467
164 = 28 M. L. J. 204 .. ..
191 = (1915) M. W. 269 = 2 L. W. 233
= 16 Cr. L. J. 268 = 28 In. Ca. 156 ... 72
214 = 28 M. L. J. 329 ... ... 685, 770
225 = (1915) M. W. N. 267 = 16 Cr. L. J. 284
= 28 In. Ca. 332 ... ... 258, 266, 273
241 = 28 M. L. J. 397 575
263 = (1915) M. W. N. 276 = 16 Cr. L. J. 219
= 27 In. Ca. 843 79
268 = 16 Cr. L. J. 232 = 27 In. Ca. 904 ...1015
330 = 28 M. L. J. 483 ... ... 1030, 1049
391 = 2 L. W. 410 = 16 Cr. L. J. 591
= 30 In. Ca. 144 ... ...
392 = 16 Cr. L. J. 481 = 29 In. Ca. 322 287, 288
398 = 28 M. L. J. 505 ... ... 915, 916
441 = Balmokund (P.C.) ... ...
446 = 28 M. L. J. 486 477
457 = 16 Cr. L. J. 558 = 29 In. Ca. 830 ... 911

18 Madras Law Times, 1915.

25 = 29 M. L. J. 178 ... ...
92 = 39 M. 503 = (1915) M. W. N. 546
= 2 L. W. 574 = 16 Cr. L. J. 540
= 29 In. Ca. 668 ... ... 612, 631
95 = 29 M. L. J. 101 (F.B.) ... 569, 575, 602, 881, 886, 1153, 1158
121 = 2 L. W. 631 = 16 Cr. L. J. 611
= 30 In. Ca. 435 147
322 = 16 Cr. L. J. 721 = 31 In. Ca. 161 ... 454
381 = 29 M. L. J. 521 782
488 = 2 L. W. 1135 = 16 Cr. L. J. 797
= 31 In. Ca. 653 ... ... 993, 1001
591 = 17 Cr. L. J. 42 = 32 In. Ca. 330 ...1005, 1015, 1017
602 = 2 L. W. 1200 = 16 Cr. L. J. 803
= 31 In. Ca. 819 ... ... 783, 784, 785

19 Madras Law Times, 1916.

23 = (1916) M. W. N. 111 = 17 Cr. L. J. 16
= 32 In. Ca. 144 ... 1031, 1036, 1041

20 Madras Law Times, 1917.

234 576
252 ... ... 916, 1006
557 462

22 Madras Law Times, 1919.

42 778

23 Madras Law Times.

240 783

25 Madras Law Times.

18 997

1910 Madras Weekly Notes.

52 = 7 M. L. T. 310 881
52 = 7 M. L. T. 305 ... ...
63 = 33 M. 502 602

1910 Madras Weekly Notes—(*contd.*)

77 = 7 M. L. T. 314 1078
143 = 21 M. L. J. 441 ... 405, 412, 413, 424
354 = 8 M. L. T. 180 = 11 Cr. L. J. 449 ... 239
366 = 8 M. L. T. 198 = 11 Cr. L. J. 500 ... 359
397 = 3 M. L. T. 86 = 11 Cr. L. J. 353 ... 468
517 = 8 M. L. T. 380 = 11 Cr. L. J. 622 949, 971
541 = 7 M. L. T. 367 584
735 = 9 M. L. T. 162 1124
818 134
821 = 8 M. L. T. 314 275
829 = 8 M. L. T. 428 ... ... 918, 919
852 = 8 M. L. T. 71 ... ... 54, 526, 537

1911 (1) Madras Weekly Notes.

34 = 34 M. 255 ... ...
36 = 8 M. L. T. 300 = 21 M. L. J. 195 ...1052
44 = 21 M. L. J. 487 ... ... 289, 291
100 = 9 M. L. T. 97 = 11 Cr. L. J. 699 482, 484
106 = 9 M. L. T. 203 = 11 Cr. L. J. 722 ...1060
125 = 12 Cr. L. J. 123 = 9 In. Ca. 726... ... 520
136 = 9 M. L. T. 323 = 12 Cr. L. J. 40 ... 919
138 = 9 M. L. T. 321 = 12 Cr. L. J. 124 360, 401
149 = 9 M. L. T. 302 = 12 Cr. L. J. 105 ... 634
190 = 9 M. L. T. 345 = 12 Cr. L. J. 140 700, 705, 725, 727
199 = 12 Cr. L. J. 142 = 9 M. L. T. 316 ... 682
231 = 9 M. L. T. 414 = 12 Cr. L. J. 190 ... 26
327 = 12 Cr. L. J. 150 = 21 M. L. J. 283 638, 639, 707
452 = 12 Cr. L. J. 430 = 11 In. Ca. 614 ... 525

1911 (2) Madras Weekly Notes.

8 = 10 M. L. T. 96 = 12 Cr. L. J. 497 ... 521
9 = 10 M. L. T. 47 = 12 Cr. L. J. 323
= 21 M. L. J. 795 24, 459, 516, 519, 1003, 1005, 1014
14 = 12 Cr. L. J. 497 = 12 In. Ca. 217 ... 300
50 = 35 M. 739 ... ... 46, 1129, v, vii
74 = 10 M. L. T. 120 = 12 Cr. L. J. 463 309, 316
74 = 12 Cr. L. J. 440 = 11 In. Ca. 624 506, 509, 521, 1058
96 (Journal) 251
97 = 12 Cr. L. J. 454 = 10 M. L. T. 115 902, 1070
97 = 9 M. L. T. 334 = 12 Cr. L. J. 64 ...
98 997
105 = 12 Cr. L. J. 269 = 35 M. 243 ... 597, 901, 902
107 (Journal) 1003
109 = 13 Cr. L. J. 23 = 13 In. Ca. 215 ... 282
110 (Journal) 1122
138 = 12 Cr. L. J. 503 = 12 In. Ca. 223 ...1064
159 = 15 C. W. N. LXI Birch (P.C.) ... ...ix, x
170 = 12 Cr. L. J. 495 = 12 In. Ca. 215 ... 968
172 = 10 M. L. T. 117 = 12 Cr. L. J. 446 463, 464, 498
189 = 10 M. L. T. 23 = 12 Cr. L. J. 263 ... 602
192 = 12 Cr. L. J. 548 = 12 In. Ca. 524 639, 643
196 = 34 M. 343 ... ...
197 = 12 Cr. L. J. 488 = 12 In. Ca. 96... ... 660
199 = 34 M. 346 ... ...
135 = 12 Cr. L. J. 104 = 9 M. L. T. 271 150, 152
259 = 35 M. 138 475
311 = 35 M. 701 ... ...
355 = 12 Cr. L. J. 359 = 10 In. Ca. 959 171, 188
356 = 36 M. 606 174
369 = 21 M. L. J. 484 957
370 = 12 Cr. L. J. 400 = 11 In. Ca. 584 ...1098

PAGE OF REPORT	PAGE OF THIS BOOK

MADRAS CASES—(*contd.*)

1917 Madras Weekly Notes.

1	... 669
141	... 460
156	... 626
494	... 134
875	... 324

1918 Madras Weekly Notes.

37	... 156
751	... 160
926	... 491

1919 Madras Weekly Notes.

199	... 309

A. I. R. Madras Series, 1928.

1171	...1045
1267	... 968

A. I. R. Madras Series, 1929.

260	... 644
844	...1128
839	... 605
847	274, 924

NUMBER OF REPORT	

PUNJAB CASES.

1867 Punjab Record.

39	... 353
44	...1020
47	460, cxvi

1868 Punjab Record.

9	460, cxvi

1869 Punjab Record.

24	... 622
34	.. 1021

1870 Punjab Record.

2	.. 1187
21	.. 1037
35	857, 860

1871 Punjab Record.

7	... 869
10	...1029

1872 Punjab Record.

7	.. 1099
8	.. 1099
17	... 353

1873 Punjab Record.

8	... 216
21	...1037

1874 Punjab Record.

1	... 496
2	... 654

NUMBER OF REPORT	PAGE OF THIS BOOK

PUNJAB CASES—(*contd.*)

1876 Punjab Record.

1	...1043
2	...1047
5	896, 915
6	... 820

1877 Punjab Record.

2	... 495
7	...1187
9	... 760
12	...1046
15	... 619

1878 Punjab Record

2	...1037
10 and 14	...1188
17	...1139
20	407, 416, 417, 1069
25	... lxvi
33	... 248

1879 Punjab Record.

8	... 487
9	... 479
17	... 622
20	... 795
22	...1026
24	... 59
26	... lxv
27	... 496
29	... 464

1880 Punjab Record.

2	... 248
3	... 339
5	... lxvi
16	407, 416
17	... 62
23	.. cxxi
26	... 248
31	...1046
35	... 416
36	... 57
38	... 197
15	...1038

1881 Punjab Record.

4	... 61
11	...1035
21	... 335
22	... 601
23	... 57
26	... 601
30	...1037
40	...1021

1882 Punjab Record.

1	...1037
6	xlviii
9	... 59
14	.. 477
15	601, 1159

PUNJAB CASES—(*contd.*)

1888 Punjab Record—(*contd.*)

NUMBER OF REPORT	PAGE OF THIS BOOK
41	930, 1117
42	1043, 1046, 1047
43	1199
46	1091, 1092
47	220

1889 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1	676, 774
2	1189
3	1047
5	75, 652
6	756
7	653, 975, 976
8	989
9	649
10	845
11	201, 428, 1088
13	152
14	413
17	59
18	491
23	204
24	606
25	464
26	580, 587, 632
30	407, 428
37	762, 763, 990
39	220
132 (page)	467

1890 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1	795
2	608
3	147
5	219
6	1188
12	1047
13	883
14	486
16	18, 19, 434, 480, 481, 1145
27	589
28	109, 121
29	869
30	175, 199, 1068
31	962
33	475, 1166
36	473

1891 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
3	56, 529
4	lxvii
5	329
7	887, 889
8	435, 491
13	928
14	939, 941
17	780

PUNJAB CASES—(*contd.*)

1892 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1	434, 480
2	434, 480
3	434, 480
4	545, 1170
5	162, 172
12	187
22 (page)	70

1893 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 (F.B.)	56, 529
2	334, 337, 334
3	409, 1029, 1030, 1031, 1048
4	438
6	921, 964
9	426
15	120, 127, 631, 936, 939
16	25, 190, 620

1894 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
7	407, 417, 426
8	420
9	332
11	984
12	848
14	681, 684, 752
15	335, 502, 507
18	1041, 1042, 1043
19	506
21	1040, 1049, 1051
22	14, 1089
23	14
25	77, 200
26	1089
28	329
29	80, 443
30	77, 426
31	585
33	515, 933
42	480

1895 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1	182, 183
3	1200, 1204
5	1107
11	1156
14	205, 848
15	756
16	900, 902
17	939
21	889, 890
23	494

1896 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
4	190, 205, 620
5	1204
6	181
7	321
9	781
10	498, 799, 1071

PUNJAB CASES—(*contd.*)

1903 Punjab Record—(*contd.*)

NUMBER OF REPORT	PAGE OF THIS BOOK
14 = 175 P. L. R. 1903	643, 796
16 = 153 P. L. R. 1903	... 343
17	... 566
18	... 625
19	...1044
20 = 23 P. L. R. 1904	xxxviii, xliii
24 = 20 P. L. R. 1904 = 1 Cr. L. J. 96	202, 941
27 = 21 P. L. R. 1904 = 1 Cr. L. J. 99	205, 206, 1200
29 = 5 P. L. R. 1904 = 1 Cr. L. J. 32 ...	626, 972, 1189, 1190
32 = 15 P. L. R. 1904 = 1 Cr. L. J. 90	201, 1085, 1088

1904 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 95 P. L. R. 1904	... 591
3 = 79 P. L. R. 1903 = 1 Cr. L. J. 499	680, 681, 684, 752
6 = 1 Cr. L. J. 597	... 626
7 = 97 P. L. R. 1904 = 1 Cr. L. J. 781	896, 897
8 = 70 P. L. R. 1904 = 1 Cr. L. J. 514	204, 224, 957, 966, 967
9 = 69 P. L. R. 1904 = 1 Cr. L. J. 513	... 220
10	... 758
12 = 599 P. L. R. 1904 = 1 Cr. L. J. 942	717, 903, 915, 974, 975
15 = 131 P. L. R. 1904 = 1 Cr. L. J. 1063	57, 926 935
16 = 1 Cr. L. J. 1091	... 136
20 = 1 Cr. L. J. 1095	775, 776
21 = 135 P. L. R. 1904 = 1 Cr. L. J. 1066	750, 772
22	... 930
24 = 1 Cr. L. J. 1098	874, 1219
26 = 1 Cr. L. J. 1100	200, 1088
29 = 9 P. L. R. 1905 = 2 Cr. L. J. 119	.. 487
31 = 176 P. L. R. 1905 = 1 Cr. L. J. 1082	757, 758
32 = 68 P. L. R. 1904 = 1 Cr. L. J. 511	... 431

1905 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
2 = 44 P. L. R. 1905 = 2 Cr. L. J. 34	568, 573, 574, 961
3 = 21 P. L. R. 1905 = 2 Cr. L. J. 37	567, 568, 599
5 = 85 P. L. R. 1905 = 2 Cr. L. J. 40	1029, 1040, 1133
6 = 70 P. L. R. 1905	...1060
8 = 170 P. L. R. 1905 = 2 Cr. L. J. 45	443, 1204
11 = 117 P. L. R. 1905 = 2 Cr. L. J. 66	889, 890
12 = 74 P. L. R. 1905 = 2 Cr. L. J. 66	476, 477, 960, 994, 1026, 1202
13	... 949
14 = 64 P. L. R. 1905 = 2 Cr. L. J. 130	551, 972, 973
15 = 99 P. L. R. 1905 = 2 Cr. L. J. 131	970, 972, 1089, 1090
16 = 120 P. L. R. 1905 = 2 Cr. L. J. 278	208, 1068
19 = 46 P. L. R. 1905	... 976
21 = 34 P. L. R. 1905 = 2 Cr. L. J. 190	148, 791, 909
23 = 168 P. L. R. 1905 = 3 Cr. L. J. 301	... 928
25 = 91 P. L. R. 1905 = 2 Cr. L. J. 369	... 786
29 = 90 P. L. R. 1905 = 2 Cr. L. J. 421	19, 503, 1030, 1032
30 = 105 P. L. R. 1905 = 2 Cr. L. J. 687	19, 453, 1010
33 = 149 P. L. R. 1905 = 2 Cr. L. J. 716	180, 202
36 = 87 P. L. R. 1905 = 2 Cr. L. J. 719	240, 248
37 = 141 P. L. R. 1905 = 2 Cr. L. J. 711	... 59
38 = 115 P. L. R. 1905 = 2 Cr. L. J. 694	605, 904
39 = 108 P. L. R. 1905 = 2 Cr. L. J. 690	1043, 1047
41 = 153 P. L. R. 1905 = 2 Cr. L. J. 55	748, 752

PUNJAB CASES—(*contd.*)

1905 Punjab Record—(*contd.*)

NUMBER OF REPORT	PAGE OF THIS BOOK
42 = 131 P. L. R. 1905 = 2 Cr. L J. 697	19, 257 202, 937, 938
43 = 42 P. L. R. 1905 = 3 Cr. L. J. 341	... 976
44 = 187 P. L. R. 1905 = 3 Cr. L. J. 128	24, 458, 927, 996
48 = 192 P. L. R. 1905 = 3 Cr. L. J. 132	735, 748
51 = 165 P. L. R. 1905 = 3 Cr. L J. 76	... 605
54 = 169 P. L. R. 1905 = 3 Cr. L. J. 80	662, 985
56 = 180 P. L. R. 1905 = 3 Cr. L. J. 121	463, 478
57 = 181 P. L. R. 1905 = 3 Cr. L. J. 123	... 624
58 = 144 P. L. R. 1905	... 66
59 = 40 P. L. R. 1906 = 3 Cr. L. J. 342	... 758

1906 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 48 P. L. R. 1906 = 3 Cr. L. J. 346	... 928
2 = 37 P. L. R. 1906 = 3 Cr. L. J. 345	630, 633
3 = 84 P. L. R. 1906 = 4 Cr. L. J. 36	514, 618
4 = 115 P. L. R. 1907 = 4 Cr. L. J. 73	...1033.
5 = 116 P. L. R. 1907 = 4 Cr. L. J. 75	570, 571, 599, 601, 956, 1153, 1159
6 = 114 P. L. R. 1907 = 4 Cr. L. J. 78	... 776
7 = 139 P. L. R. 1906 = 4 Cr. L. J. 278	199, 1087
9 = 113 P. L. R. 1907 = 4 Cr. L. J. 282	748, 750, 752, 772
10 = 117 P. L. R. 1907 = 4 Cr. L. J. 285	568, 579, 603
12 (F.B.) = 54 P. L. R. 1906 = 4 Cr. L. J. 293	949, 972, 973
17 = 60 P. L. R. 1907 = 4 Cr. L. J. 89	406, 630
18 = 5 P. W. R. 1907 = 14 P. L. R. 1907 = 5 Cr. L. J. 148	193, 194, 198

1907 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
2 = 18 P. W. R. 1907 = 49 P. L. R. 1907 = 6 Cr. L. J. 258 = 5 Cr. L. J. 491...	475, 514
5 = 26 P. W. R. 1907 = 41 P. L. R. 1907 = 6 Cr. L J. 108	33, 542
6 = 23 P. W. R. 1907 = 6 Cr. L. J. 111	... 791
7 = 71 P. L. R. 1908 = 6 Cr. L J. 113	255, 273, 274
8 = 33 P. W. R. 1907 = 46 P. L. R. 1908 = 6 Cr. L J. 337	236, 810
11 = 34 P. W. R. 1907 = 47 P. L. R. 1908 = 6 Cr. L. J 336	... 782
12 = 32 P. W. R. 1907 = 45 P. L. R. 1908 = 6 Cr. L. J. 339	... 636
17 = 35 P. W. R. 1907 = 6 Cr. L. J. 378	...1221
18 = 43 P. W. R. 1907 = 55 P. L. R. 1908	xlvii
20 = 20 P. W. R. 1907 = 6 Cr. L. J. 263	... 960

1908 Punjab Record.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 4 P. W. R. 1908 = 136 P. L. R. 1908 = 7 Cr. L. J. 274	...1139
2 = 6 P. W. R. 1908 = 140 P. L. R. 1908 = 7 Cr. L. J. 279 ...	917, 1099, xlviii
4 = 1 P. W. R. 1908 = 86 P. L. R. 1908 = 7 Cr. L. J. 202	505, 929, 957
5 (F.B.) = 7 P. W. R. 1908 = 103 P. L. R. 1908 = 7 Cr. L. J. 281 ...	... 927, 1013, 1014
8 = 15 P. W. R. 1908 = 149 P. L. R. 1908 = 7 Cr. L. J. 353	19, 480, 1166
9 = 29 P. W. R. 1908 = 3 Cr. L. J. 260	125, 840, 971
10 = 8 P. W. R. 1908 = 112 P. W. R. 1908 = 7 Cr. L. J. 290	... 493

PUNJAB CASES—(contd)

1900 Punjab Law Reporter.

1901 Punjab Law Reporter

1902 Punjab Law Reporter.

1903 Punjab Law Reporter.

1904 Punjab Law Reporter.

1905 Punjab Law Reporter.

1905 Punjab Law Reporter—(contd)

1906 Punjab Law Reporter.

1907 Punjab Law Reporter.

1908 Punjab Law Reporter.

NUMBER OF REPORT	PAGE OF THIS BOOK
PUNJAB CASES—(*contd.*)	
1908 Punjab Law Reporter—(*contd.*)	
55 = 18 P. R. 1907 = 43 P. W. R. 1907	...
71 = 7 P. R. 1907 = 24 P. W. R. 1907	...
72 = 13 P. W. R. 1907 = 5 Cr. L. J. 438	... 972
86 = 1 P. R 1908 = 1 P. W. R. 1908	... 929
101 = 3 P. W. R. 1908 = 7 Cr. L. J. 272	...
103 (F.B.) = 5 P. R. 1908	...1013
112 = 10 P. R. 1908	... 493
136 = 1 P. R. 1908 = 4 P. W. R. 1908...	...1139
140 = 2 P. R. 1908	...
149 = 8 P. R. 1908	...
157 = 22 P. W. R. 1908 = 8 Cr. L. J. 162	... 824
1909 Punjab Law Reporter.	
11 = 11 P. R. 1909	...
14	... 897
36 = 1 P. W. R. 1909 = 9 Cr. L. J. 151 = 1 In. Ca. 93	... 966
37 = 2 P. W. R. 1909 = 9 Cr. L. J. 152	474, 477
41 = 4 P. R. 1909 = 10 P. W. R. 1909	954, 977
94 = 16 P. W. R. 1909 = 11 Cr. L. J. 105 = 4 In. Ca. 985	... 989
105 = 12 P. R. 1909 = 11 P. W. R. 1909	295, 297, 299
106 = 13 P. W. R. 1909 = 11 Cr. L. J. 97	...
137 = 11 Cr. L. J. 87 = 4 In. Ca. 945 ...	... 477
149 = 25 P. W. R. 1909 = 10 Cr. L. J. 591	...
153 = 24 P. W. 1909 = 10 Cr. L. J. 584	... 336
155 = 10 P. R. 1909 = 32 P. W. R. 1909	...
156 = 32 P. W. R. 1909	..
1910 Punjab Law Reporter.	
22 = 11 Cr. L. J. 366 = 6 In. Ca. 497 ...	... 783
25 = 14 P. R. 1909	...
36 = 11 Cr L. J. 597 = 8 In. Ca. 229...	...
37 = 9 P. R. 1909	... 566
85 = 23 P. R. 1910	...
87 = 11 Cr. L. J. 602 = 8 In. Ca. 247 ...	... 440
101 = 1 P. R. 1910	...
103 = 19 P. R. 1910	...
126 = 11 Cr. L. J. 680 = 8 In. Ca. 551...	... 147
140 = 20 P. R. 1910	...
164 = 3 P. R. 1910	...
166 = 9 P. R. 1910	...
169 = 5 P. R. 1910	...
170 = 6 P. R. 1910	...
172 = 7 P. R. 1910	...
184 = 11 P. R. 1910	...
185 = 12 P. R. 1910	...
193 = 24 P. R. 1910	...
195 = 25 P. R. 1910	...
196 = 29 P. R. 1910	162, 169
197 = 30 P. R. 1910	...
199 = 28 P. R. 1910	... 200
215 = 11 Cr. L. J. 751 = 8 In. Ca. 751 ...	... 531
1911 Punjab Law Reporter.	
10 = 4 P. W. R. 1911 = 12 Cr. L. J. 68 = 9 In. Ca. 389	
19	... 998
39 = 32 P. R. 1910	751, 752
56 = 12 Cr. L. J. 94 = 9 In. Ca. 511 ...	...
57 = 33 P. R. 1910	... 854
63 = 12 Cr. L. J. 73 = 9 In. Ca. 436 ...	... 774
	691, 894

NUMBER OF REPORT	PAGE OF THIS BOOK
PUNJAB CASES—(*contd.*)	
1911 Punjab Law Reporter—(*contd.*)	
68 = 12 Cr. L. J. 260 = 10 In. Ca. 833	... 600
72 = 14 P. W. R. 1911 = 12 Cr. L. J. 265 = 10 In. Ca. 840	... 472
81 = 1 P. R. 1911	...
91 = 5 P. R. 1911	... 752
96 = 12 Cr. L. J. 460 = 11 In Ca. 581	1099, 1101
101 = 8 P. R. 1911 = 9 In. Ca. 826 ...	127, 971
117 = 20 P. W. R. 1911	215, 219, 220
122 = 23 P. W. R 1911 = 12 Cr. L. J. 205 = 10 In. Ca. 63	597, 603
123 = 18 P. W. R. 1911 = 12 Cr. L. J. 403 = 11 In. Ca. 537	289, 291, 292
126 = 43 P. W. R 1911 = 12 Cr. L. J. 156 = 9 In. Ca. 1026	... 151
146 = 11 P. R. 1911	64, 435, 489, 498, 500, 567
153 = 6 P. R 1911 (F.B.)	202, 937
155 = 16 P. R. 1911	1217, 1220
157 = 12 Cr. L. J 214 = 10 In. Ca. 119	...1050
158 = 38 P. W. R. 1911 = 12 Cr. L. J. 216 = 10 In. Ca. 121	...1013
161 = 12 Cr. L. J. 236 = 10 In. Ca. 278	57, 874
168 = 37 P. W. R. 1911 = 12 Cr. L. J. 266 = 10 In. Ca. 331	597, 602
184 = 15 P. W. R. 1911 = 12 Cr. L. J. 143 = 9 In. Ca. 831	649, cxxxii
205 (F.B.) = 10 P R. 1911 ...	514, 937, 939, 940
226 = 12 Cr. L. J 401 = 11 In Ca. 588	1085, 1089
1912 Punjab Law Reporter.	
11 = 2 P. R. 1912	475, 499, 500, 501, 506, 509
20 = 13 P. W R 1912 = 13 Cr L. J. 3 = 13 In. Ca 109	68, 848
43 = 17 P W. R 1912 = 13 Cr. L J. 252 = 11 In. Ca. 604	... 591
60 = 3 P. W. R. 1912	... 518
64 = 5 P. W. R. 1912 = 13 Cr. L. J. 294 = 14 In. Ca. 758	...1203
66 = 4 P. W. R. 1912 = 13 Cr. L. J. 474 = 15 In. Ca 311	...1058
67 = 7 P. W. R. 1912 = 13 Cr. L. J. 476 = 15 In. Ca. 316	... 963
83 = 1 P. W. R. 1912 = 13 Cr. L. J. 136 = 13 In. Ca. 824	... 622
113 = 8 P. W. R. 1912 = 13 Cr. L. J. 463 = 15 In. Ca 95	... 960
125 = 4 P. R. 1912	155, 172
175 = 30 P. W. R. 1912 = 13 Cr. L. J. 451 = 15 In. Ca. 83	... 758
195 = 34 P. W. R. 1912	... 204
224 = 38 P. W. R. 1912 = 13 Cr. L. J. 774 = 17 In. Ca. 406	... 960
239 = 14 Cr. L. J 131 = 18 In. Ca. 883	...1050
243 = 39 P. W. R. 1912 = 7 P. R. 1912	... 866
254 = 1 P. R. 1913	202, 1130
1913 Punjab Law Reporter.	
6 = 2 P. W. R. 1913 = 14 Cr. L. J. 138 = 18 In. Ca. 890	277, 283
7 = 2 P. R. 1913	901, 917

PUNJAB CASES—(*contd*)

1911 Punjab Weekly Reporter—(*contd*)

NUMBER OF REPORT	PAGE OF THIS BOOK
32 = 11 P R 1911	435
37 = 168 P L R 1911 = 12 Cr L J 266 = 10 In Ca 331	597
38 = 158 P L R 1911 = 12 Cr L J 216 = 10 In Ca 121	1013
39 = 13 P R 1911	
43 = 126 P L R 1911	151
44 = 12 Cr L J 615 = 12 In Ca 991	938

1912 Punjab Weekly Reporter

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 83 P L R 1912 = 13 Cr L J 136 = 13 In Ca 824	622
2	962
3 = 60 P L R 1912 = 13 Cr L J 176 = 13 In Ca 928	518
4 = 66 P L R 1912	1068 1119 1123
5 = 64 P L R 1912	1203
7 = 67 P L R 1912	963
8 = 113 P L R 1912 — 13 Cr L J 463 = 15 In Ca 95	960
11 = 4 P R 1912	172
13 = 20 P L R 1912 = 13 Cr L J 3 = 13 In Ca 109	848
17 — 43 P L R 1912	591
19 = 13 Cr L J 182 = 13 In Ca 998	751
20 = 13 Cr L J 550 = 14 In Ca 966	188
21 = 13 Cr L J 175 = 13 In Ca 127	1015
22 = 13 Cr L J 533 = 15 In Ca 971	960
23 = 13 Cr L J 567 = 15 In Ca 983	971 1024
24 = 6 P R 1912 = 13 Cr L J 197	1136
25 = 13 Cr L J 594 = 16 In Ca 162	218
26 = 13 Cr L J 601 = 16 In Ca 169	1209
28 = 13 Cr L J 712 = 16 In Ca 520	960
30 = 175 P L R 1912 = 13 Cr L J 451 = 15 In Ca 83	758
33 = 193 P L R 1912 = 13 Cr L J 719 = 16 In Ca 527	
34 = 195 P L R 1912 = 13 Cr L J 720 — 16 In Ca 528	204
38 = 224 P L R 1912 = 13 Cr L J 774 = 17 In Ca 406	960
39 = 7 P R 1912	866
42 = 1 P R 1913	1130
43 = 2 P R 1913 (7 P L R 1913) = 13 Cr L J 737 = 17 In Ca 49	901 917

1913 Punjab Weekly Reporter

NUMBER OF REPORT	PAGE OF THIS BOOK
2 = 6 P L R 1913 = 14 Cr L J 138 = 18 In Ca 890	277 283
4 = 14 Cr L J 286 = 19 In Ca 718	1118
5 = 152 P L R 1913 = 14 Cr L J 320 = 19 In Ca 1008	960
7 (F B) — 13 P R 1913	200 1088
8 = 9 P R 1913 = 13 Cr L J 860	616 868 940
9 = 6 P R 1913 (F B) = 13 Cr L J 815	719 725
10 = 33 P L R 1913 = 14 Cr L J 128 = 18 In Ca 688	18 512 966
11 = 43 P L R 1913 = 14 Cr L J 3 = 18 In Ca 147	966 1071
12 = 66 P L R 1913 = 14 Cr L J 148 = 19 In Ca 148	960

PUNJAB CASES—(*contd*)

1913 Punjab Weekly Reporter—(*contd*)

NUMBER OF REPORT	PAGE OF THIS BOOK
13 = 68 P L R 1913 = 14 Cr L J 107 = 18 In Ca 667	461 463 1003 1009
15 = 171 P L R 1913 = 14 Cr L J 190 = 19 In Ca 190	325 329
16 = 92 P L R 1913 = 14 Cr L J 63 = 18 In Ca 351	282 624
17 = 14 Cr L J 64 = 18 In Ca 352	748
22 = 8 P R 1913 = 223 P L R 1913 = 14 Cr L J 278	833
26 = 14 Cr L J 525 = 20 In Ca 1005	880 897
27 = 13 P L R 1913	1217
28 = 14 Cr L J 605 = 21 In Ca 477	538 947
29 = 313 P L R 1913 = 14 Cr L J 599 = 21 In Ca 471	956 975 976
33 = 14 Cr L J 603 = 21 In Ca 475	188
37 = 14 Cr L J 596 = 21 In Ca 468	944 1097
39 = 15 P R 1913	
40 = 14 Cr L J 659 = 21 In Ca 659	1186
43	960

1914 Punjab Weekly Reporter

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 245 P L R 1915 (N W F P)	325 360 361
3 = 4 P L R 1914	1221
6 = 22 P R 1913	1065 1068
7 = 62 P L R 1914	199 950 1087
8 = 38 P L R 1914	34 329 332 336
9 = 63 P L R 1914	329
10 = 15 Cr L J 261 = 23 In Ca 469	439
12 = 21 P L R 1914	960
14 = 15 P R 1914	1106
15 = 68 P L R 1914	271 274 962 1165
16 = 19 P R 1914	976
18 = 113 P L R 1914	960
20 = 123 P L R 1914	959
21 = 115 P L R 1914	1035 1036 1041
23 = 172 P L R 1914	304
26 = 170 P L R 1914	1039
27 = 125 P L R 1914	809 897
28 = 168 P L R 1914	960
35 = 227 P L R 1914	321
46 = 213 P L R 1918	1036
47 = 22 P R 1914	1087
48 = 22 P R 1914	187
50 = 30 P R 1914	343 344 752
483	187

1915 Punjab Weekly Reporter

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 127 P L R 1915	1126
4 = 130 P L R 1915	939 940
6 = 95 P L R 1915	200 1088
7 = 16 Cr L J 202 = 27 In Ca 762	960
9 = 92 P L R 1915	255 272 280
11 = 17 P R 1915	343 555 557 600 747 1147
12 = 18 P R 1915	1156
15 = 16 Cr L J 612 = 30 In Ca 436	343
18	974
19 = 16 Cr L J 662 = 30 In Ca 646	940 943
20 = 13 P R 1915	1056
22 = 163 P L R 1915	344
26 = 16 Cr L J 634 = 30 In Ca 458	304
28 = 16 Cr L J 737 = 31 In Ca 337	960
32 = 169 P L R 1915	
42 = 22 P R 1915	

PUNJAB CASES—(*contd.*)

1907 Punjab Weekly Reporter—(*contd.*)

NUMBER OF REPORT	PAGE OF THIS BOOK
7 = 57 P. L. R. 1907 = 5 Cr. L. J. 181	194
9 = 5 Cr. L. J. 217	60, 835, 1216
11 = 5 Cr. L. J. 219	189
13 = 72 P. L. R. 1908 = 5 Cr. L. J. 438	949, 972, 973
16 = 6 Cr. L. J. 137	551, 961
18 = 2 P. R. 1907	...
20 = 20 P. R. 1907	960
22 = 6 Cr. L. J. 275	629, 1085
24 = 7 P. R. 1907	255, 273
26 = 5 P. R. 1907	33
30	626
31 = 7 Cr. L. J. 232	150, 152
32 = 12 P. R. 1907	636
33 = 8 P. R. 1907	...
34 = 11 P. R. 1907	782
35 = 17 P. R. 1907	1221
37 = 6 Cr. L J. 411	1093, 1095
38	552
43 = 18 P. R. 1907	xlviii

1908 Punjab Weekly Reporter.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 4 P. R. 1908	929
3 = 101 P. L. R. 1908	630
4 = 1 P. R. 1908	1139
6 = 2 P. R. 1908	1099
7 = 5 P. R. 1908	927, 1014
8 = 10 P. R. 1908	...
9 = 26 P. R. 1908	928
11 = 7 Cr. L. J. 347	938, 939
12 = 7 Cr. L. J. 348	207
15 = 8 P. R. 1908	480
17 = 7 Cr. L. J. 461	57
18 = 8 Cr. L. J. 75	412, 414, 577, 583, 1144
19 (F.B.) = 15 P. R. 1908	125, 1066
20 = 8 Cr. L. J. 454	110, 112, 519, 799
22 = 157 P. L. R. 1908 = 8 Cr. L. J. 462	824
23 = 8 Cr. L. J. 455	1217
25 = 12 P. R. 1908	125, 939
26 = 8 Cr. L. J. 249	515, 644, 933
27 = 11 P. R. 1908	955
29 = 9 P. R. 1908	840, 971
30 = 14 P. R. 1908	959
36 = 3 P. R. 1909	965, xx
40 = 27 P. R. 1908	...
42 = 24 P. R. 1908	...
45 = 21 P. R. 1908 = 9 Cr. L. J.	84

1909 Punjab Weekly Reporter.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 36 P. L. R. 1900 = 9 Cr. L. J. 151 = 1 In. Ca. 93	966
2 = 37 P. L. 1909 = 9 Cr. L. J. 152 = 1 In. Ca. 93	474, 477
3 = 9 Cr. L. J. 154 = 1 In. Ca. 99	491, 966, 967
5 = 9 Cr. L. J. 158 = 1 In. Ca. 101	519, 800
6 = 1 P. R. 1909	954
8	676
10 = 4 P. R. 1909	954, 978
12 = 6 P. R. 1909	998
13 = 106 P. L. R. 1909	960
14 = 11 Cr. L. J. 99 = 4 In. Ca. 980	304, 909, 968, 976, 1195

1909 Punjab Weekly Reporter—(*contd.*)

NUMBER OF REPORT	PAGE OF THIS BOOK
16 = 94 P. L. R. 1909 11 Cr. L. J. 105 = 4 In. Ca. 985	852, 989
17 = 8 P. 1909	941, 959
18 = 11 Cr. L. J. 110 = 4 In. Ca. 990	630, 632, 941, 959, 961, 1212
20 = 11 Cr. L. J. 131 = 4 In. Ca. 993	558, 559, 899
24 = 153 P. L. R. 1909 = 10 Cr. L. J. 584 = 4 In. Ca. 429	335, 336, 343
25 = 149 P. L. R. 1909 = 10 Cr. L. J. 591 = 4 In. Ca. 432	183
28 = 11 P. R. 1909	...
30 = 9 P. R. 1909	928, 969
35 = 3 P. R. 1910	437, 439, 446, 1135

1910 Punjab Weekly Reporter.

NUMBER OF REPORT	PAGE OF THIS BOOK
1 = 11 Cr. L. J. 171 = 5 In. Ca. 602	767, 1210, 1212
2 = 11 Cr. L. J. 178 = 5 In. Ca. 611	24, 824, 827
3 = 1 P. R. 1910	...
4 = 11 Cr. L. J. 205 = 5 In. Ca. 714	512, cxxi
5 = 11 Cr. L. J. 211 = 5 In. Ca. 720	568, 599, 977
7 = 7 P. R. 1910	412, 420, 859, 950
8 = 5 P. R. 1910	199
10 = 6 P. R. 1910	460
11 = 11 Cr. L. J. 347 = 5 In. Ca. 991	515, 868, 933
12 = 9 P. R. 1910 = 11 Cr. L. J. 329 = 5 In. Ca. 914	...
16 = 11 P. R. 1910 = 11 Cr. L. J. 330 = 5 In. Ca. 915	313
17 = 11 Cr. L. J. 387 = 6 In. Ca. 624	204, 966
18 = 11 Cr. L. J. 388 = 6 In. Ca. 626	203, 966
19 = 11 Cr L. J. 389 = 6 In. Ca. 639	956, 976
20 = 14 P. R. 1910 = 11 Cr. L. J. 390 = 6 In. Ca. 640	869
24 = 11 Cr. L. J. 422 = 6 In. Ca. 955	...
25 = 11 Cr. L. J. 425 = 6 In. Ca. 957	960
28 = 11 Cr. L. J. 427 = 6 In. Ca. 960	1040
29 = 11 Cr. L. J. 450 = 7 In. Ca. 354	139
30 = 20 P. R. 1910 = 11 Cr. L. J. 420	588
37 = 24 P. R. 1910	187
38 = 24 P. R. 1910	343
39 = 28 P. R. 1908	...
44 = 30 P. R. 1910	619
45 = 28 P. R. 1910	200, 967

1911 Punjab Weekly Reporter.

NUMBER OF REPORT	PAGE OF THIS BOOK
3 = 12 Cr. L. J. 35 = 9 In. Ca. 232	960
4 = 10 P. L. R. 1911	406, 418, 428, 998
8 = 12 Cr. L. J. 274 = 10 In. Ca. 851	776, 971, 1129
14 = 72 P. L. R. 1911	472
15 = 184 P. L. R. 1911 = 12 Cr. L J. 143 = 9 In. Ca. 831	649, cxxii
16 = 12 Cr. L. J. 412	832, 895
17	79
18 = 123 P. L. R. 1911	289, 291, 292
20 = 17 P. L. R. 1911 = 12 Cr. L. J. 146 = 9 In. Ca. 891	215, 219, 220
22 = 12 Cr. L. J. 483 = 12 In. Ca. 91	550
24 (F.B.) = 10 P. R. 1911	514, 933, 939, 940
27 = 5 P. R. 1911	...
28 = 122 P. L. R. 1911	597, 603
30 = 153 P. L. R. 1911 = 12 Cr. L. J. 232 = 10 In. Ca. 178 = 6 P. R. 1911 (F.B.)	202, 937

CENTRAL PROVINCES CASES—(*concld*)

5 Nagpur Law Reports, 1909—(*contd*

PAGE OF REPORT	PAGE OF THIS BOOK
76 = 9 Cr L J 553 = 2 In Ca 247	816 81 827 828 886 888 889 893 921
94 = 10 Cr L J 221 = 3 In Ca 64	153 254
113 = 10 Cr L J 303 = 3 In Ca 568	430 443 798
125 = 10 Cr L J 306 = 3 In Ca 575	*120 127 128*
134 = 10 Cr L J 418 = 3 In Ca 922	757

6 Nagpur Law Reports, 1910

PAGE OF REPORT	PAGE OF THIS BOOK
168 = 12 Cr L J 28 = 8 In Ca 1127	1156
180 = 12 Cr L J 60 = 8 In Ca 1181	*324 329*

7 Nagpur Law Reports, 1911

PAGE OF REPORT	PAGE OF THIS BOOK
65 = 12 Cr L J 326 = 10 In Ca 622	441 758
93 = 12 Cr L J 436 = 11 In Ca 620	22 785 788 1139
97 = 12 Cr L J 437 = 11 In Ca 621	445 1133 1135
101 = 12 Cr L J 441 = 11 In Ca 785	77 78
109 = 12 Cr L J 444 = 11 In Ca 788	892 907 908

8 Nagpur Law Reports, 1912

PAGE OF REPORT	PAGE OF THIS BOOK
1 = 13 Cr L J 326 = 14 In Ca 428	*1206*
20 = 13 Cr L J 189 = 13 In Ca 1005	192 205 848
65 = 13 Cr L J 554 = 15 In Ca 970	610 629 637 640
84 = 13 Cr L J 559 = 15 In Ca 975	822 916

9 Nagpur Law Reports, 1913

PAGE OF REPORT	PAGE OF THIS BOOK
68 = 14 Cr L J 293 = 19 In Ca 949	599
81 = 14 Cr L J 385 = 20 In Ca 209	894 956 957 958 1200 1201 1202 1204 1207
88 = 14 Cr L J 390 = 20 In Ca 214	548 1157 1222
184 = 15 Cr L J 33 = 22 In 177	467 994 1004 1013 1014

10 Nagpur Law Reports, 1914

PAGE OF REPORT	PAGE OF THIS BOOK
8 = 15 Cr L J 290 = 23 In Ca 498	624
15 = 15 Cr L J 196 = 22 In Ca 980	1120
19 = 15 Cr L J 243 = 23 In Ca 195	330
177 = 16 Cr L J 161 = 27 In Ca 545	24 467 956 1005 1014

11 Nagpur Law Reports, 1915

PAGE OF REPORT	PAGE OF THIS BOOK
36 = 16 Cr L J 289 = 28 In Ca 513	463 470 472 924 931 1002
59 = 16 Cr L J 417 = 28 In Ca 293	748 749 752 755 756 757 758
98 = 16 Cr L J 555 = 29 In Ca 827	*207*
162 = 16 Cr L J 507 = 30 In Ca 993	776 777 1064

12 Nagpur Law Reports, 1917

PAGE OF REPORT	PAGE OF THIS BOOK
94	935 936 940 944 945

13 Nagpur Law Reports, 1918

PAGE OF REPORT	PAGE OF THIS BOOK
169	822

14 Nagpur Law Reports, 1919

PAGE OF REPORT	PAGE OF THIS BOOK
190	649

OUDH CASES

Oudh Sessions Cases.

PAGE OF REPORT	PAGE OF THIS BOOK
31	1057
64	296 951
65	240
70	177
73	158
125	68
227	286
230	516
277	302

3 Oudh Cases, 1900

PAGE OF REPORT	PAGE OF THIS BOOK
314	910

4 Oudh Cases, 1901

PAGE OF REPORT	PAGE OF THIS BOOK
127	474
376	412 419 420

5 Oudh Cases, 1902

PAGE OF REPORT	PAGE OF THIS BOOK
316	951

6 Oudh Cases, 1903.

PAGE OF REPORT	PAGE OF THIS BOOK
199	197
216	927

7 Oudh Cases, 1904

PAGE OF REPORT	PAGE OF THIS BOOK
28 = 1 Cr L J 697	910
113 = 1 Cr L J 459	208

8 Oudh Cases, 1905

PAGE OF REPORT	PAGE OF THIS BOOK
91 = 2 Cr L J 224	*192*
245 = 2 Cr L J 507	208
313 = 2 Cr L J 653	455
395 = 3 Cr L J 811	342 343

9 Oudh Cases, 1906

PAGE OF REPORT	PAGE OF THIS BOOK
49 = 3 Cr L J 229	1032, [illegible]
69 = 3 Cr L J 290	*182, 183, [illegible]*
357	[illegible]

10 Oudh Cases, 1907

PAGE OF REPORT	PAGE OF THIS BOOK
89 = 5 Cr L J 394	[illegible]
112 = 6 Cr L J 94	341 [illegible]
132	[illegible]
165 = 6 Cr L J 254	[illegible]
168 = 6 Cr L J 256	[illegible]
287 = 6 Cr L J 302	[illegible]
337 = 7 Cr L J 89	[illegible]
365 = 7 Cr L J 94	[illegible]
367 = 7 Cr L J 89	[illegible]

11 Oudh Cases, 190[illegible]

PAGE OF REPORT	PAGE OF THIS BOOK
5 (misprint for 267)	[illegible]
61 = 7 Cr L J 423	[illegible]
148 = 7 Cr L J 457	[illegible]
261 = 8 Cr L J 342	[illegible]
267 = 8 Cr L J 344	[illegible]
328 = 8 Cr L J 393	[illegible]
358 = 9 Cr L J 54	[illegible]
360 = 9 Cr L J 55	[illegible]

PUNJAB CASES—(*concld.*)

1916 Punjab Weekly Reporter.

Number of Report	Page of this Book
2	751
4 = 17 Cr. L. J. 7 = 32 In. Ca. 135	775
5	908
6 = 16 Cr. L. J. 815 = 31 In. Ca. 831	343
7 = 32 In. Ca. 833	751, 897, 968, 1167
8	1015
9	951, 970, 1015
12 = 17 Cr. L. J. 60 = 32 In. Ca. 652	951, 1156
14	774
19	751
20	940
23 = 4 P. R. 1916	
28	877

1917 Punjab Weekly Reporter.

Number of Report	Page of this Book
8	187
20	876
34	215

1919 Punjab Weekly Reporter.

Number of Report	Page of this Book
16	796

CENTRAL PROVINCES CASES.

1 Central Provinces Reports, 1887.

Page of Report	Page of this Book
115	339

2 Central Provinces Reports, 1888.

Page of Report	Page of this Book
82	940

5 Central Provinces Reports, 1891.

Page of Report	Page of this Book
13	1338
17	59
18	547
24	817, 916
45	1188
50	59
92	cxxiv

6 Central Provinces Reports, 1892.

Page of Report	Page of this Book
3	1079
15	972
21	257, 272
24	886, 887
27	169
31	1062
38	123
45	74

7 Central Provinces Reports, 1893.

Page of Report	Page of this Book
1	795
2	619
9	152, 185
14	342
24	61, 737, 1221
36	796

8 Central Provinces Reports, 1894.

Page of Report	Page of this Book
6	814
9	674
13	618
21	1147
23	907

CENTRAL PROVINCES CASES—(*contd.*)

9 Central Provinces Reports, 1895.

Page of Report	Page of this Book
26	1204

10 Central Provinces Reports, 1896.

Page of Report	Page of this Book
16	339

11 Central Provinces Reports, 1897.

Page of Report	Page of this Book
10	lxv
47	1102

14 Central Provinces Reports, 1900.

Page of Report	Page of this Book
60	1096
159	67
190	1135

15 Central Provinces Reports, 1901.

Page of Report	Page of this Book
53	578
57	606
192	1206

17 Central Provinces Reports, 1903-04.

Page of Report	Page of this Book
17	1102
97 = 1 Cr. L. J. 751	900
105 = 1 Cr. L. J. 763	494
107 = 1 Cr. L. J. 764	962, 1102, 1103
113 = 1 Cr. L. J. 854	1067, 1086
127 = 1 Cr. L. J. 864	938, 1030

1 Nagpur Law Reports, 1905.

Page of Report	Page of this Book
18 = 2 Cr. L. J 651	514, 817, 933
133 = 2 Cr. L J. 745	1222
137 = 2 Cr. L. J. 749	61, 1221
139 = 2 Cr. L. J. 751	1217
187 = 2 Cr. L. J. 820	789

2 Nagpur Law Reports, 1906.

Page of Report	Page of this Book
147 = 4 Cr. L. J. 420	578
149 = 4 Cr. L. J. 422	926, 949

3 Nagpur Law Reports, 1907.

Page of Report	Page of this Book
1 = 5 Cr. L. J. 220	1079
51 = 5 Cr. L. J. 434	25, 158, 184, 329
67 = 6 Cr. L. J. 43	37, 907, 908, 1199
90 = 6 Cr. L. J. 100	907

4 Nagpur Law Reports, 1908.

Page of Report	Page of this Book
18 = 7 Cr. L. J. 319	54, 1217, 1220
71 = 8 Cr. L. J. 11	598, 606
81 = 8 Cr. L. J. 20	508, 761
140 = 8 Cr. L J. 351	927, 1013
163 = 9 Cr. L. J. 56	549, 768, 769, 876, 1079
177 = 9 Cr. L. J. 97	1221
180 = 9 Cr. L. J. 99	xl

5 Nagpur Law Reports, 1909.

Page of Report	Page of this Book
4 = 9 Cr. L. J. 211 = 1 In. Ca. 238	949, 955, 972, 973
19 = 9 Cr. L. J. 390 = 1 In. Ca. 801	1037, 1039, 1048
59 = 9 Cr. L. J. 539 = 2 In. Ca. 233	1093, 1095
65 = 9 Cr. L. J. 560 = 2 In. Ca. 240	182

OUDH CASES—(*contd*)

12 Oudh Cases, 1909.

PAGE OF REPORT	PAGE OF THIS BOOK
308 = 10 Cr. L. J. 509 = 4 In. Ca. 160	772
400 = 11 Cr. L. J. 69 = 4 In. Ca. 876	253, 267, 273, 1165
118 = 11 Cr. L. J. 71 = 1 In. Ca. 881	344, 706, 751, 752

13 Oudh Cases, 1910.

PAGE OF REPORT	PAGE OF THIS BOOK
7 = 11 Cr. L. J. 7 = 5 In. Ca. 357	321, 325, 326, 328
66 = 11 Cr. L. J. 335 = 5 In. Cr. 913	301
161 = 7 In. Ca 539 = 11 Cr. L. J. 196	910, 969
198 = 7 In. Ca. 612 = 11 Cr. L. J. 511	927, 996
289 = 8 In. Ca. 171 = 11 Cr. L. J. 629	515, 938
295 = 8 In. Ca. 373 = 11 Cr. L. J. 630	720
309 = 8 In. Ca. 379 = 11 Cr. L. J. 631	889
355 = 8 In. Ca. 873 = 11 Cr. L. J. 723	875
337 = 8 In. Ca. 874 = 11 Cr. L. J. 721	673, 743
351 = 8 In. Ca. 879 = 11 Cr. L. J. 725	...

15 Oudh Cases, 1911-12.

PAGE OF REPORT	PAGE OF THIS BOOK
177 = 15 In. Ca. 967 = 13 Cr. L. J. 551	162
263 = 17 In. Ca. 71 = 13 Cr. L. J. 760	162, 181, 183, 194
311 = 18 In. Ca. 641 = 14 Cr. L. J. 81	989
386 = 19 In. Ca. 170 = 14 Cr. L. J. 170	874, 877

16 Oudh Cases, 1912-13.

PAGE OF REPORT	PAGE OF THIS BOOK
192 = 11 In. Ca. 477 = 14 Cr. L. J. 605	281, 294, 826
211 = 11 In. Ca. 426	249
281 = 11 In. Ca. 384 = 14 Cr. L. J. 592	910
357 = 14 Cr. L. J. 594 = 21 In. Ca. 466	653
370	68
371 = 22 In. Ca. 753 = 15 Cr. L. J. 177	1195

17 Oudh Cases, 1913-14.

PAGE OF REPORT	PAGE OF THIS BOOK
18 = 23 In. Ca. 182 = 15 Cr. L. J. 230	644, 860
25 = 22 In. Ca. 1001 = 15 Cr. L. J. 217	924, 927, 1004, 1007, 1014
92 = 15 Cr. L. J. 567 = 24 In. Ca. 975	780, 969
184 = 15 Cr. L. J. 625 = 25 In. Ca. 633	68
260 = 15 Cr. L. J. 646 = 25 In. Ca. 846	1040, 1051
260 = 15 Cr. L. J. 668 = 25 In. Ca. 996	957
273 = 15 Cr. L. J. 638 = 25 In. Ca. 838	515, 868
276	579
309 = 16 Cr. L. J. 91 = 26 In. Ca. 1003	...
331 = 26 In. Ca. 526	1032
363	335

18 Oudh Cases, 1914-15.

PAGE OF REPORT	PAGE OF THIS BOOK
69 = 16 Cr. L. J. 541 = 29 In. Ca. 669	...
92 = 16 Cr. L. J. 270 = 28 In. Ca. 150	1160

KATHIAWAR CASES.

14 Kathiawar Law Reports, 1904.

PAGE OF REPORT	PAGE OF THIS BOOK
21 = 1 Cr. L. J. 489	1160

15 Kathiawar Law Reports, 1905.

PAGE OF REPORT	PAGE OF THIS BOOK
148 = 2 Cr. L. J. 590	405, 588

SINDH CASES.

1 Sindh Law Reports, 1908.

PAGE OF REPORT	PAGE OF THIS BOOK
2 = 9 Cr. L. J. 216	201, 445, 1133
3 = 9 Cr. L. J. 217	197
4 = 9 Cr. L. J. 218	922
5 = 6 Cr. L. J. 219	1071, 1074
8 = 9 Cr. L. J. 251	1117, 1119, 1122
12 = 9 Cr. L. J. 255	626
11 = 9 Cr. L. J. 253	197
25 = 9 Cr. L. J. [illegible]	279
28 = 9 Cr. L. J. [illegible]	626
30 = 9 Cr. L. J. 270	967
33 = 9 Cr. L. J. 272	290
35 = 9 Cr. L. J. 274	1130
37 = 9 Cr. L. J. 275 = 8 Cr. L. J. 159	1122, 1125
38 = 8 Cr. L. J. 160	550
40 = 8 Cr. L. J. 161	926, 963, 974
46 = 8 Cr. L. J. 166	197
50 = 8 Cr. L. J. 170	254, 255
61 = 8 Cr. L. J. 182	clxxi
69 = 8 Cr. L. J. 187	112, 517
72 = 8 Cr. L. J. 190	495
73 = 8 Cr. L. J. 191	569, 577, 579, 587, 597, 600
84 = 8 Cr. L. J. 209	1011
91 = 8 Cr. L. J. 215	689, 690, 691
98 = 8 Cr. L. J. 356	871, 957, 1116, 1200, 1201, 1205
103 = 8 Cr. L. J. 360	531, 532
101 = 8 Cr. L. J. 351	420
119 = 8 Cr. L. J. 371	430
124 = 8 Cr. L. J. 378	772

2 Sindh Law Reports, 1908-09.

PAGE OF REPORT	PAGE OF THIS BOOK
3 = 10 Cr. L. J. 216	653
4 = 10 Cr. L. J. 220	623
5 = 10 Cr. L. J. 207	640
8 = 10 Cr. L. J. 211	1070
11 = 10 Cr. L. J. 225	23, 194
14 = 10 Cr. L. J. 229	623
15 = 10 Cr. L. J. 230	194
16 = 10 Cr. L. J. 228	781
18 = 10 Cr. L. J. 231	254
20 = 10 Cr. L. J. 233	957
23 = 10 Cr. L. J. 236	68, 69, 848
25 = 10 Cr. L. J. 237	931, 942, 955, 963, 966, 967
32 = 10 Cr. L. J. 198	1195
34 = 10 Cr. L. J. 200	...
39 = 10 Cr. L. J. 204	886

3 Sindh Law Reports, 1909-10.

PAGE OF REPORT	PAGE OF THIS BOOK
7 = 9 Cr. L. J. 146 = 1 In. Ca. 938	939, 943
13 = 9 Cr. L. J. 449 = 1 In. Ca. 141	1167
15 = 9 Cr. L. J. 450 = 1 In. Ca. 941	496
16 = 6 Cr. L. J. 411	604
56 = 10 Cr. L. J. 3 = 2 In. Ca. 371	115, 138
58 = 10 Cr. L. J. 5 = 2 In. Ca. 372	661
66 = 10 Cr. L. J. 395 = 3 In. Ca. 886	927, 997, 1014
80 = 10 Cr. L. J. 407 = 3 In. Ca. 894	clxxi, cxcviii
102 = 11 Cr. L. J. 13 = 4 In. Ca. 597	695, 698, 699, 882, 912, 1167
114 = 11 Cr. L. J. 15 = 4 In. Ca. 603	848
125 = 11 Cr. L. J. 15 = 4 In. Ca. 608	699, 712
132 = 11 Cr. L. J. 3 = 4 In. Ca. 477	475
155 = 10 Cr. L. J. 570 = 4 In. Ca. 379	1130
167 = 11 Cr. L. J. 197 = 4 In. Ca. 1152	519

BURMA CASES—(*contd.*)

Upper Burma Rulings, 1904.

PAGE OF REPORT	PAGE OF THIS BOOK
7 = 1 Cr. L. J. 537	66, 1216, 1219
10 = 1 Cr. L. J. 545	1031, 1037, 1051
13 = 1 Cr. L. J. 547	200, 1088
25 = 1 Cr. L. J. 1047	437

Upper Burma Rulings, 1905.

1	438
29 = 2 Cr. L. J. 462	177
31 = 2 Cr. L. J. 463	200, 1068, 1089
33 = 2 Cr. L. J. 464	633, 785, 792
35 = 2 Cr. L. J. 465	829, 954
37 = 2 Cr. L. J. 468	1201
39 = 2 Cr. L. J. 830	1041
45 = 3 Cr. L. J. 428	1039

Upper Burma Rulings, 1906.

Ev. 3 = 5 Cr. L. J. 300	750, 770, 771
47 = 4 Cr. L. J. 281	844
49 = 4 Cr. L. J. 284	887
51 = 5 Cr. L. J. 298	623, 635
C. P. 4	1013

Upper Burma Rulings, 1907.

1 = 6 Cr. L. J. 25	435, 461, 1013
5 = 6 Cr. L J. 28 = 14 Bur. L. R. 38	599
7 = 7 Cr. L. J. 245 = 14 Bur. L. R. 306	748, 749, 757

Upper Burma Rulings, 1908.

2nd Qr. 1 = 8 Cr. L. J. 413	141
Cr. P. C. 15 = 10 Cr. L. J. 14	1060

Upper Burma Rulings, 1909.

Ev. 3 = 11 Cr. L. J. 41 = 4 In. Ca. 759	342
17 = 11 Cr. L. J. 40 = 4 In. Ca. 758	1030, 1043
19 = 11 Cr. L. J. 79 = 4 In. Ca. 899	1045, 1047
21 = 11 Cr. L. J. 70 = 4 In. Ca. 900	1045, 1047

Upper Burma Rulings, 1910.

1 = 11 Cr. L. J. 488 = 7 In Ca. 460	1034, 4041
2 = 11 Cr. L. J. 489 = 7 In. Ca. 461	431
4 = 11 Cr. L. J. 490 = 7 In. Ca. 462	161
34 = 11 Cr. L. J. 662 = 8 In. Ca. 479	1034, 1037, 1041
57 = 12 Cr. L. J. 386 = 11 In. Ca. 250	762, 763
66 = 12 Cr. L. J. 392 = 11 In. Ca. 256	...
70 = 12 Cr. L. J. 383 = 11 In. Ca. 247	1141
73 = 12 Cr. L. J. 385 = 11 In. Ca. 249	499, 503, 507, 509

Upper Burma Rulings, 1911.

90 = 13 Cr. L. J. 162 = 13 In. Ca. 914	1034
96 = 13 Cr. L. J. 404	751
98 = 13 Cr. L. J. 429 = 14 In. Ca. 973	593, 594
100 = 13 Cr. L. J. 457 = 15 In. Ca. 89	903

BURMA CASES—(*contd.*)

Upper Burma Rulings, 1912.

PAGE OF REPORT	PAGE OF THIS BOOK
123 = 13 Cr. L. J. 569 = 15 In. Ca. 985	806
134 = 13 Cr. L. J. 576 = 15 In. Ca. 992	476, 477
151 = 14 Cr. L. J. 175 = 19 In. Ca. 175	797
152 = 14 Cr. L. J. 287 = 19 In. Ca. 719	799, 1163
155 = 14 Cr. L. J. 284 = 19 In. Ca. 716	494, 495

Upper Burma Rulings, 1913.

159 = 14 Cr. L. J. 430 = 20 In. Ca. 414	201
166 = 14 Cr. L. J. 422 = 20 In. Ca. 406	462, 468, 469, 471, 474, 479
169 = 14 Cr. L. J. 570 = 21 In. Ca. 170	822, 916
170 = 14 Cr. L. J. 566 = 21 In. Ca. 166	663
180 = 15 Cr. L. J. 253 = 23 In. Ca. 205	220

Upper Burma Rulings, 1914.

1st Qr. 3 = 15 Cr. L. J. 531 = 24 In. Ca. 843	203, 937, 939
II 19 = 16 Cr. L. J. 97 = 27 In. Ca. 145	20, 311, 437
III 28 = 16 Cr. L J. 95 = 26 In. Ca. 1007	989
III 31 = 16 Cr. L. J. 92 = 26 In. Ca. 1004	...
144	197

Upper Burma Rulings, 1915.

1st Qr. 52 = 16 Cr. L. J. 538 = 29 In. Ca 666	886
1st Qr. 53 = 16 Cr. L. J. 531 = 29 In Ca. 659	1040, 1051
1st Qr. 55 = 16 Cr. L. J. 535 = 29 In. Ca. 663	834, 1218
III 83 = 17 Cr. L. J. 82 = 32 In. Ca. 674	927, 1004, 1014
III 91 = 17 Cr. L. J. 59 = 32 In. Ca. 651	1010
IV 95	476

Upper Burma Rulings, 1917.

29 U. B. R. 3rd Qr.	534, 537
U. B. R. (1917) 2nd Qr. 18	765
U. B R. (1917) 2nd Qr. 19	974
U. B. R. (1917) 3rd Qr. 32	xxxiii

1 Burma Law Reports, 1895.

87	984
145	1042
320	810
530	218

7 Burma Law Reports, 1901.

66	87, 628
80	xl, xlviii
83	117, 405
86	1066
198	579

BURMA CASES—(*contd*)

8 Burma Law Reports, 1902

PAGE OF REPORT	PAGE OF THIS BOOK
96	1035 1036 1042

10 Burma Law Reports, 1904

PAGE OF REPORT	PAGE OF THIS BOOK
1 = 2 L. B R 27	868
36 = 2 L. B R 146	
77 = 1 Cr L. J 370	479
130 = 1 Cr L. J 669	219
150 = 1 Cr I J 671	1202
166 = 1 Cr L J 883	1035
253 = 1 Cr L. J 993	142
306 = 2 L B R 285	791
321 = 1 Cr L. J 543	874 1219

11 Burma Law Reports, 1905

PAGE OF REPORT	PAGE OF THIS BOOK
8 = 2 Cr L. J 133	804 806
33 = 2 Cr L. J 227	737
293 = 3 L. B R 109 = 3 Cr L. J 23	
298 = 3 L. B R 75 = 3 Cr L. J 1	
317 = 3 L. B R 97	

12 Burma Law Reports, 1906

PAGE OF REPORT	PAGE OF THIS BOOK
33 = 2 Cr L J 830	1641
246 = 4 Cr L. J 389	
248 = 4 Cr L J 390	
318 = 3 L B R 234	

14 Burma Law Reports, 1908

PAGE OF REPORT	PAGE OF THIS BOOK
38 = 1907 U B R Cr P 5 = 6 Cr L J 28	599 604
67 = 4 L. B R 121 = 7 Cr L. J 87	565 568
81 = 7 Cr L J 479	141
207 = 7 Cr L. J 495	467 470
233 = 4 L. B R 244 = 8 Cr L. J 62	769
240 = 8 Cr L. J 422	1038
242 = (F B) = 4 L. B R. 294 = 8 Cr L J 497	572
250 = 4 L. B R 300 = 8 C L J 505	435 439
259 = 4 L. B R 337	
306 = 7 Cr L. J 245 = 4 U B. R Cr P 7	752
327 = 9 Cr L. J 64	431 440
335 = 9 Cr L. J 66	1205

3 Burma Law Times, 1910.

PAGE OF REPORT	PAGE OF THIS BOOK
9 = 11 Cr L. J 684 = 8 In Ca. 594	899
74 = 11 Cr L. J 655 = 8 In. Ca 453	260 270
101 = 12 Cr L. J 85 = 8 In Ca 1197	1004 1013
108 = 12 Cr L. J 87 = 8 In Ca 1202	479
111 = 12 Cr L J 88 = 8 In Ca 1204	1099
119 = 11 Cr L. J 734 = 8 In Ca 947	1013
151 = 11 Cr L J 749 = 8 In Ca. 996	462 467
164 = 11 Cr L J 750 = 8 In Ca. 997	1038

4 Burma Law Times, 1911

PAGE OF REPORT	PAGE OF THIS BOOK
13 = 12 Cr L. J 82 = 9 In Ca 457	1040
24 = 12 Cr L J 89 = 9 In Ca 468	180 183 636
58 (F B) = 5 L. B R 221 = 12 Cr L. J 198 = 10 In Ca. 705	408 427
69 = 12 Cr L. J 244 — 10 In Ca 773	xl
70 = 12 Cr L. J 244 = 10 In Ca 774	1064
84 = 12 Cr L J 248 = 10 In Ca 789	157
87 = 12 Cr L. J 250 = 10 In Ca 792	909

BURMA CASES—(*contd*)

4 Burma Law Times, 1911—(*contd*)

PAGE OF REPORT	PAGE OF THIS BOOK
[illegible] In Ca 796	141
	1123
	1043
	1099
	819 824
	1093
	774
	142
	626 998 1013
	443
262 = 13 Cr L J 56 = 13 In Ca 392	473
263 = 13 Cr L. J 59 = 13 In Ca 395	599 604
269 = 13 Cr L. J 55 = 13 In Ca 391	1037 1042
270 = 13 Cr L J 62 = 13 In. Ca 398	198
271 = 13 Cr L J 58 = 13 In Ca 394	649 1143

5 Burma Law Times, 1912

PAGE OF REPORT	PAGE OF THIS BOOK
20 = 13 Cr L. J 259 = 14 In Ca 643	819 824
37 = 13 Cr L. J 301 = 14 In Ca 765	826 939 943
38 = 13 Cr L. J 299 = 14 In Ca 763	684
101 = 13 Cr L J 485 = 15 In Ca 485	198 568 578 579
107 = 6 L. B R 49	
111 = 6 L. B R 50	476
[illegible]	[illegible] cxxxi
	476
	39, 787

6 Burma Law Times, 1913

PAGE OF REPORT	PAGE OF THIS BOOK
[illegible] In Ca 179	344
	68 636
	330
	67
	331
	647
	927 1014
	330
	597

7 Burma Law Times, 1914

PAGE OF REPORT	PAGE OF THIS BOOK
20 = 15 Cr L. J 257 = 23 In Ca 465	704 710
23 = 15 Cr L. J 259 = 23 In Ca 467	225 226 231
26 = 15 Cr L. J 270 = 23 In. Ca 478	521 539 541 1144 1146 1154
34 = 15 Cr L. J 278 = 23 In Ca 486	1035 1041 1042
71 = 15 Cr L J 484 = 24 In Ca 572	1031 1035
73 = 15 Cr L. J 488 = 24 In Ca. 576	774 970
99 = 7 L. B R 63	
143 = 8 L. B R 38 = 15 Cr L J 441 = 24 In Ca 321	141
163 = 15 Cr L J 523 = 24 In Ca 835	143
167 Channing Arnold (P C.) = 41 C. 1023	
225 = 7 L B R 351	1046
293 = 15 Cr L. J 500 = 24 In Ca 588	292

PATNA CASES—(contd)

5 Patna Law Journal.

PAGE OF REPORT	PAGE OF THIS BOOK
11	597
61	1154
94	639 641
104	258
129	98
135	456 1002
246	262 276
321	1110
402	766
430	765

6 Patna Law Journal

PAGE OF REPORT	PAGE OF THIS BOOK
146	1008
147	765 766 cxi
174	765 766
241	326
284	729
644	766

I L R 1 Patna Series

PAGE OF REPORT	PAGE OF THIS BOOK
57	xxii

I L R 2 Patna Series.

PAGE OF REPORT	PAGE OF THIS BOOK
67	222
257	966
333	1135
459	431 996
517	305 684
768	1058
793	519

I L R 3 Patna Series

PAGE OF REPORT	PAGE OF THIS BOOK
417	1144
503	862
591	640 641
781	684
809	267
870	144
872	1148
1015	766 791

I L R 4 Patna Series.

PAGE OF REPORT	PAGE OF THIS BOOK
24	995
231	765 805
254	889
323	19 455 476
327	344
438	1107
484	1007
488	766 770 805
626	824
783	217 233

I L R 5 Patna Series

PAGE OF REPORT	PAGE OF THIS BOOK
25	973
33	476
63	327 805
110	639 1168
171	333
243	616
262	1017 1018
274	1017
450	1011 1027
45[illegible]	859
795	cxxiv

I L R 6 Patna Series

PAGE OF REPORT	PAGE OF THIS BOOK
1	161
16	886
16	893
329	525
553	1130
583	599
802	1066
817	732
817	727

I L R 7 Patna Series

PAGE OF REPORT	PAGE OF THIS BOOK
50	670
153	331
269	240
561	19
561	363
579	956

I. L. R. 8 Patna Series

PAGE OF REPORT	PAGE OF THIS BOOK
205	328
279	279
289	562
344	727
428	1017
428	1018
468	963
496	881
537	514
731	587
904	826

A I R Patna Series, 1929.

PAGE OF REPORT	PAGE OF THIS BOOK
11	591
93	301
121	539
473	431
512	969
640	412
644	944
644	23

LAHORE CASES

I L R 1 Lahore Series

PAGE OF REPORT	PAGE OF THIS BOOK
406	86
455	976

I L R 2 Lahore Series

PAGE OF REPORT	PAGE OF THIS BOOK
68	1009
204	1089
237	795
279	146
305	485
325	341 1148
364	284
372	270

I L R 3 Lahore Series

PAGE OF REPORT	PAGE OF THIS BOOK
23	926
115	796
144	685
359	141
401	284
431	747

LAHORE CASES—(*contd.*)

Criminal Law Journal, 1928—(*contd*)

Criminal Law Journal, 1929

LAHORE CASES—(*contd*)

Criminal Law Journal, 1929—(*contd*)

Criminal Law Journal, 1930

I C. 91

I C 99

I C 100

I C. 101

I C 102

I C 103

I C. 104

I C 105

I C 106

I C. 107

ENGLISH AND AMERICAN CASES.

A

		PAGE
Abbot *v* Booth	51 Barb 546	114
Abraham Mallory Dilet	(1887) 12 App Cas 459	ix
Aldred *Ex parte*	(1892) A C 81	ix
Aldred *v* Hicks	5 Taunt 186	105
Alexander *v* Jones	L R 1 Ex 133	1031
Allinson *v* General Council of Medical Education and Registration	(1894) 1 Q B 750	1119 1199
Armstrong *v* R.	30 T L R 215 P C	x
Arnold *v* R	(1914) A C 644	x
Aspinall *v* The Queen	2 Q B D 48	555
Atchinson *v* Spencer	9 Wend 62	110

B

Badger *v* Att Gen of New Zealand	97 I T 621	ix
Badische Anilin and Soda Fabrik *v* Basel Chemical Works	(1898) A C 200	415
Baronett *In re*	(1853) 1 El and Bl 1	407 1061
Beckwith *v* Philby	(1827) 6 B and C 635	85 89
Bell *v* Clap	10 Johns 263	136
Bergess *v* Beatefeur	8 Scott N R 194	853
Birmingham and Gloucester R Co	3 Q B Rep 223	486
Blatch *v* Arthur	1 Cowp 63	115
Boardman *v* Boardman	L R 1 Prob and Mat 233	1025
Bradlaugh *Ex parte*	(1878) L R 3 Q B D 509	xlvii
Bradlaugh s Case	(1877) L R 3 Q B D 607	554
Bryant *In re*	(1863) 27 J P 277 289	784
Bullock *v* Dunlop	(1876) L R 2 Exch D 43	1110
Burdett *v* Abbott	(1811) 14 East 157	82
Burgess *v* Langla	(1843) 5 M and G 722	720

C

Caledonian Ry Co		xlvii
Campbell *In re*		784
Carew *Ex parte*		
Caudle *v* Seymour		110
Champion The	J Atk 409	1025
Charles Rose *In re*	14 Times L R 213	*1061*
Clifford *v* E	40 I A 241	ix x
C dd C h	(1876) L R 1 Exch D 352	81 116
	L R 2 Q B D 611	1036
	(1874) L R 5 P C 417	xlvi
	11 N Y 203	1074
	24 L R Jr 458	89
	4 Abb Pr 413	1074

D

Davies *In re*	L R 21 Q B D 236	1025
Davis *v* Russell	5 Bing 354	85
Deeming *Ex parte*	(1892) A C 422 (P C)	x
Demar *v* Van Zant	2 Johns 69	*1073*
	Peak N P 307	112
	3 H L Ca 793	1199 1207
	(1889) 61 L T 740	*x*
	30 Barb 300	114
	L R 1 Exch D 172	1110
	(1849) 3 C and K 193	860
Dwinelly *v* Howland	1 Abb Pr 87	*1073*

Q—(*contd.*)

R

R—(*contd.*)

R—(*contd*)

R—(concld)

S

T

478. **S. 195,** *Note* 105—

When offence is not committed by parties to any proceeding while it is pending, in respect of a document produced, s. 195 does not operate as a bar to cognisance of offence. **51 C. L. J. 51.**

514. **S. 203,** *Note* 26 –

A second complaint for an alleged offence is entertainable by a Magistrate and it is not necessary to get a previous order of dismissal set aside by a Superior Court before lodging a second complaint. It is entertainable even when the previous order of dismissal is confirmed by a superior Court in revision. **52 C. L. J. 171 = A. I. R. 1930 Lahore 879.**

623. **S. 250,** *Note* 26—

This section is not applicable to offences triable by a Court of Sessions according to Column 8 of Schedule II of this Code. An order of compensation in respect of such an offence is without jurisdiction. **A. I. R. 1930 Lahore 482.**

641. **S. 257,** *Note* 5—

A Magistrate has a large discretion under s. 257. When, however the accused clearly explained that he wanted an adjournment because his Vakil was ill, and if the witnesses are subsequently present there is no reason for not letting them be cross-examined. **124 Ind. Cases 606.**

717. **S. 300,** *Note* 3—

If the jurymen were not able to come to a decision or agree upon a verdict before retiring, the law requires that they should retire to consider their verdict and it follows that they should all be in their retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken. The jury are not to be allowed to separate until they have considered and returned their verdict. **126 Ind. Cases 753.**

722. **S. 303,** *Note* 1—

The object of s. 303 is merely to enable the Court to ascertain whether the jury intended to bring in a verdict of guilty or not guilty and for no other reason is a Judge entitled to interrogate the jury after they have given their verdict. **34 C. W. N. 283.**

767. **S. 342,** *Note* 10—

Provided the accused is given opportunity to explain the evidence against him, it is immaterial, whether he is examined before or after framing the charge. **32 Bom. L. R. 596.**

768. **S. 342,** *Note* 12—

It is the duty of the Magistrate when dealing with ignorant individuals accused of technical offences, to go very thoroughly into the evidence and where they are not defended by advocates to give them some assistance in putting up defence pleas. **A. I. R. 1930, Rangoon 349.**

836. **S. 421,** *Note* 7—

Once a pleader is heard and the record called for, then though in many cases it may be useful to hear the pleader again yet there is no illegality in summarily dismissing the appeal without hearing the pleader again. **9 Patna 504.**

962. **S. 439 (5),** *Note* 22—

S. 439 (5) cannot constitute a bar to District Magistrate's action under s. 438 in case of acquittal by a Subordinate Magistrate. The Local Government and the District Magistrate are distinct and non-interchangeable terms. The mere fact that he may be able in his executive capacity to move the Local Government to appeal under s. 439 (5) cannot bar his taking action under s. 438. **A. I. R. 1930, Allahabad 741.**

ADDENDA.

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PAGE

142 **S. 103,** *Note* 8—

Both the letter and spirit of s 103 require that the Panchas should actually accompany the persons making the search and should be actual witnesses to the fact of finding of the property It is not sufficient that the Panchas should be merely summoned and kept present outside a building while the search is being carried on within it and then called in to see what has been found **32 Bom L R 344.**

164 **S. 112,** *Preliminary Note*—

A Magistrate acting under s 112 is a Court A person called upon to show cause under s 107 is not entitled to a copy of the written information by the Police on which the order is based as it does not form part of the record **A. I. R. 1930 Madras 975.**

240 **S. 144,** *Note* 16—

Where a Magistrate is formulating an order under s 144 it is incumbent upon him to show two things plainly, first of all the thing which is prohibited and secondly the persons who are prohibited It is not fair to leave people in doubt as to whether they are prohibited from doing a thing or not The public generally can only be prohibited under s 144 (3) **33 Bom. L. R. 59.**

325 **S. 162,** *Note* 6—

An oral statement made by any person to a Police Officer during investigation cannot be used for contra dicting a defence witness **4 Lucknow 726 = A. I R. 1930, Oudh. 60.**

326 **S. 162,** *Note* 10—

It is contrary to law to make use of Police Diary for the purpose of corroborating the evidence of prosecution witnesses as given in Court **1931 Criminal Cases 192.**

328 **S. 162,** *Note* 14—

When examining witnesses for the prosecution the Counsel for the accused asked for copies of the state ments made by those witnesses to the Police On refering to the Police diaries the Court found that the statements, of these witnesses were taken jointly with other witnesses who were tendered for cross-examination but were not cross-examined *Held,* that the Court in these circumstances could refuse to supply copies of the statements made to the Police **31 Cr. L. J. 444 = 122 I. C. 491.**

353 **S. 167,** *Note* 9—

(*a*) A remand to Police custody ought not to be granted by a Magistrate without satisfying himself as to its necessity and the period of remand ought also to be restricted to the necessities of the case (*b*) The mere fact that his relations have been granted an interview is no excuse for refusing an interview of the accused with his Counsel (*c*) An accused person is entitled to be represented by Counsel in proceedings before a Magistrate under s 167 **A. I. R. 1931 Lahore 99**

418 **S. 181** (2) *Note* 7 (*i*) *and s* 179—

The jurisdiction to try an offence of Criminal misappropriation or Criminal Breach of trust is governed by s 181 (2) and not by s 179 Further, if there is a duty enjoined upon the agent or the factor to render accounts at another place, the failure to render such accounts or rendering of false accounts at such a place does not confer jurisdiction under s 179 upon the Magistrate at the latter place, **32 Bom L. R. 1193 (F.B.) (46 Bom. 641 overruled).**

Magistrates exerc sing powers of the first or second class is hereby empowered to try summarily all or any of the offences specified in clauses (1) and (2) of Rule 1 *supra* Government Order No 16"8 Notification Judicial 8th October 1912 *See* also *Fort St George Gazette* 1891, Pt I pp 879 923 and 1095

8 The Governor in Council is pleased to direct that the term of office of Honorary Magistrates shall be five years

III —BOMBAY RULES

Rules made by Government of Bombay for the guidence of Benches of Magistrates " A and B established by Government Notification No 5848 for the area within the limits of the Poona City and Suburban Municipalities —

1 *Class of cases to be tried* —Except in respect of offences under the Indian Penal Code Chapters VI VII VIII IX XV XXI XXII and offences designated in Col 8 Sch II of the Criminal Procedure Code 1882 as triable exclusively by the Court of Session any such *quorum* of either of the said Benches as shall be constituted as hereinafter provided may exercise the ordinary powers of a Magistrate of the first class in all cases transferred to the said Bench by or under the order of the Magistrate of the district or by the Sub-divisional Magistrate to whom the said Benches are immediately subordinate

2 *Each Bench to be divided into two sections* —Each of the said Benches shall be divided into two sections containing four Honorary Magistrates in each

3 *District Magistrate to determine composition of each sectio* —The Magistrate of the district shall from time to time determine which of the Honorary Magistrates in each Bench shall belong to each section of such Bench The constitution of each section should be frequently changed

4 *Each section to sit separately* —Each such section shall sit separately but any stipendiary Magistrate who is a member of Bench may sit at any time on either section

5 *Ti nes of sitting* —Except on Sundays and close holidays at least one section of each Bench shall hold a sitting every day between the hours of 10 a m and 5 p m

6 *Order and days of sitting* —Not less than ten days before the end of each month each Bench shall meet and arrange the order in which and the days on which each of its sections shall sit during the following month The arrangement so made shall be forthwith submitted to the Magistrate of the district for his approval

Unless the Magistrate of the district communicates his disapproval before the beginning of the month for which it is made the said arrangement shall hold good for that month If either Bench fails to make such

the district may

h and shall hold

7 *Places of sitting* —*Each section of each Bench shall hold its sitting at such places as may be from* time to time appointed for this purpose by the Magistrates of the district

8. *Quorum* —In order to form a *quorum* at least three members shall be present from the beginning to the end of a trial or inquiry as members of the Bench

Provided that if a stipendiary first-class Magistrate be present throughout a trial or inquiry as President the case may be proceeded with to its conclusion notwithstanding that a *quor m* may not have been present throughout the proceedings

9 *Stipendiary Magistrate may take part in any proceedings at any time* —Any stipendiary Magistrate who is a member of the Bench and is present during any part of any proceedings may take part therein as a member

but not given final vote unless present througho t.—Provided that no member of a Bench shall preside or give such vote as is referred to in Rule 15 in any case who has been absent during any part of the proceedings therein

10 *What members entitled to preside* —Except as provided in Rule 9 the stipendiary Magistrate of highest official rank present if he be a first-class Magistrate and if his official rank is not inferior to that Deputy Collector shall preside If there be no such stipendiary Magistrate present the H

3. **Shall be subordinate to the District Magistrate,**—*i.e.*, (*a*) shall be *inferior in rank*. *See* the observations of WEST, J., in **9 B. 100**; also **12 C. 473; 7 A. 853; 8 M. 18 (F.B.); 14 M. 399; 38 P. R. 1885;** (*b*) *Subordinate in respect of judicial as well as executive powers*; **2 A. 205 (F.B.).** It has been *held* that under s. 435, *infra*, a District Magistrate has power to call for and examine the record of a proceeding before a Sub-divisional Magistrate of the first class, **7 A. 853 (F.B.).**

4. **Subordination to District Magistrate ceases on transfer to a different post.**—When a Magistrate is gazetted to the office of the Chairman of a Municipal Board and takes charge of that office, he is thereby divested of his jurisdiction as Magistrate. He ceases to be subordinate to the District Magistrate and the latter cannot transfer any case to him for trial, **36 A. 513.**

5. **Cantonment Magistrate subordinate to District Magistrate.**—The Cantonment Magistrate as such shall be subordinate to the District Magistrate or to the District Magistrate and the Sub-divisional Magistrate as the case may be, s. 7, Act XIII of 1889 (*The Cantonment Act*).

6. **Subordination of Magistrates to Sub-divisional Magistrates, etc.**—According to cl. (2) a first-class Magistrate in a division is subordinate to the Divisional Magistrate, even though the latter has only second-class powers. As regards original jurisdiction, whatever the District Magistrate might do with regard to offences committed outside the division, the Sub-divisional Magistrate is competent to do within his local jurisdiction, **4 A. 366.**

7. **Within sub-divison, jurisdiction of District Magistrate and Sub-divisional Magistrate co-ordinate.**—Within a sub-division the jurisdiction of the District Magistrate and the Sub-divisional Magistrate are co-ordinate, **4 A. 366.** A Magistrate who is subordinate to Sub-divisional Magistrate is also subordinate to District Magistrate, **14 M. 399.**

8. **Subordination of Magistrates to Sessions Judge is restricted to cases mentioned in the Code.**—*See* ss. 123, 193, 195 (7), 408, 431, 436 and 437. "District Magistrates should comply with all requisitions for records, returns and informations made by *Sessions Judges* with regard to any case appealable to them or referrable by them to the High Court whether decided by the District Magistrate or other magisterial officers of the district or made by Sessions Judges under orders of the High Court in the exercise of their duty of superintendence over the Subordinate Courts. They should also render any explanation which *Session Judges* may require *from them* and obtain and submit any which they may require from Subordinate Magistrates in order to assist the Appellate Courts in respect of the classes of cases above referred to." *G. I.*, No. 1753, dated 3rd November, 1876. *See* also **7 M. H. C. R. Appx. XXVII.** A District Magistrate has no authority to disregard the order of a Sessions Judge setting aside a conviction and directing a new trial because he is of opinion that no trial is necessary, **5 L. B. R. 49 = 10 Cr. L. J. 77.** A Magistrate passing an order under section 144 of the Code does so only, as a public servant and not as a Court; and sub-section (7) of section 195 is inapplicable to such a case. Therefore the sanction for prosecution could not be revoked by the Sessions Judge acting under sub-section (6) of section 195. The proper authority to revoke. The sanction in such a case, is the District Magistrate. **44 M. L. J. 323; 35 M. L. J. 455.** (*Dissented from.*)

9. **Subordination is confined to judicial work.**—A Sub-divisional Magistrate acting as an *executive* officer but not *as a Court*, is not subordinate to the Sessions Judge, **Weir II, 19** and **155**; and under clauses (1) and (5) of this section, neither the District Magistrate nor the other Magistrates are subordinate to the Sessions Judge, except in so far as is specially provided for in the Code. Hence an order made by a District and Sessions Judge under s. 36 of the *Legal Practitioners' Act* declaring certain persons to be *touts* and prohibiting their appearance within the precincts of his own Court and the Courts subordinate to it, was *held* not to extend to the Courts of the District and other Magistrates, **26 M. 596.**

10. **Additional and Assistant Sessions Judges.**—As to their original, appellate and revisional powers, *see* ss. 193 (2), 409 and 438 (2), *infra*; and only to the extent necessary for the exercise of any of these powers, are District Magistrate and other Magistrates subordinate to Additional or Assistant Sessions Judges.

11. **Subordination of all Presidency Magistrates to Chief Presidency Magistrate.**—*See* Note 1 under s. 21.

12. **High Court's power of Superintendent over the Criminal Courts in the Presidency.**—The High Court has power, under section 107 of the Government of India Act to stay the trial of a criminal case by a

5 The Chairman shall conduct the Proceedings of the Court and shall exercise all the functions in that behalf usually exercised by a Magistrate when sitting alone He shall decide upon the admissibility of evidence and maintain order in the Court, but it shall be open to any member of the Bench to put any question to the parties or witnesses, either direct or through the Chairman as the latter may deem advisable and to suggest any matter for the Chairman's consideration

6 Any recording of evidence, issuing of process or other function exercisable by the Chairman may consent with his be exercised by anyone of his colleagues

7 Each member of the Bench shall have a voice in the finding and sentence, which shall be signed by the Chairman and by the members present In regard to the finding when the number of members is uneven, the opinion of the majority shall prevail, when the number is even and the members are equally divided the accused shall get the benefit of the doubt

In regard to the sentence, the opinion of the majority shall prevail, when the members are equally divided, the Chairman shall have casting vote, when the opinions of members are all different (as in a Full Bench of three members) the opinion of the Chairman shall prevail

8 No Bench shall take cognisance of any offence committed by any European British subject or Government official. Any such case shall be forwarded to the Magistrate for disposal Rule 8 above forbids Benches of Honorary Magistrates to take cognisance of any offence committed by any European British subject or Government official, but there is no order which debars the Magistrate from transferring such cases to Benches of Honorary Magistrates for trial The Government assumes however that the Magistrates of districts will before exercising this power, carefully consider the circumstances of any such case, especially where Police-officers and Policemen are concerned *See* C P Circular (1908), p 4 and All Man, p 47

For *Lower Burma see* G O, Judicial No 266, dated 12th August, 1905, p 40, Lower Burma Manual, 1905

17. (1) All Magistrates appointed under ss 12, 13 and 14, and all Benches constituted under s 15 shall be subordinate to the District Magistrate and he may, from time to time, make rules or *give special orders* consistent with this Code as to the distribution of business among such Magistrates and Benches, and

Subordination of *Magistrates and* Benches to District Magistrate

(2) Every Magistrate (other than a Sub-divisional Magistrate) and every Bench exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate

To Sub-divisional Magistrate

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges

Subordination of Assistant Sessions Judges to Sessions Judge

(4) *The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Judge by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application*

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under ss 12, 13, 14 and 15 shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided

Notes.—1. Scope of Sub-section (1) District Magistrate cannot delegate his power to distribute work.— Power to distribute work is confined to District Magistrates alone and cannot be delegated to or be exercised by a Sub-divisional Magistrate An order of a District Magistrate directing that the senior Honorary Magistrate should distribute work among the other Honorary Magistrates is *ultra vires*, **36 A. 468.**

2. District Magistrate cannot make rules or issue orders inconsistent with the Code.—The Code does not empower the District Magistrate to pass on his powers of calling up cases from subordinate Courts and re-distributing them, *vide* s 526, such an order would be *ultra vires*, **36 A. 468.**

Note.—Power hereinafter conferred.—*See* s. 21, *infra*. This section corresponds with the latter part of s. 18 of the Code of 1882.

Local limits of jurisdiction.

20. Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency town for which he is appointed, and within the limits of the Port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port dues.

Notes.—1. Conflict between the Jurisdiction of a Presidency Magistrate in Calcutta and of the Coroner under Act IV of 1871.—The conflict of jurisdiction noted in **1867 Ind. Jurist N. S. 101; 16 B. 151** and **31 C. 1** has now been removed by the Amending Act IV of 1908. *See* App. VIII.

2. **Ports.**—See *Indian Ports Act* X of 1889, now XV of 1908, ss. 4 and 5, and notification thereunder, prescribing the limits of Ports; also *the Calcutta Ports Act* III of 1890. *See* also **Ratanlal 193, 47 Cal. 147** (jurisdiction outside the limits of Calcutta, but within the limits of the Port of Calcutta).

3. **Jurisdiction in admiralty cases.**—The Presidency Magistrate has authority to convict a person of an offence under the I.P.C., it having been committed in a British ship during her voyage on the High Seas, **25 B. 636.**

Chief Presidency Magistrate.

21. (1) Every Chief *Presidency* Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

(*a*) the conduct and distribution of business and the practice in the Court of the Magistrates of the town;

(*b*) the times and places at which Benches of Magistrates shall sit;

(*c*) the constitution of such Benches;

(*d*) the mode of settling differences of opinion, which may arise between Magistrates in Session, and

(*e*) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

(2) The Local Government may, for the purposes of this Code, declare what Presidency Magistrates* including Additional Chief Presidency Magistrate* are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination.

Notes.—1. Subordination of Presidency Magistrates to Chief Presidency Magistrates—Madras.—*See* G.O. No. 168, Judicial, dated 2nd February, 1900. In Madras the subordination is limited to the purposes of ss. 124 (1), 144 (4), 192 and 528, *infra*. Notwithstanding this subordination, the Courts of the Chief Presidency Magistrate and of the other Presidency Magistrates are Courts of equal jurisdiction, as they are empowered by law to entertain the same classes of cases to dispose of them in the same way to inflict the same punishment and all the Courts have territorial jurisdiction over the whole town, **10 M. L. T. 518 = (1911) 2 M. W. N. 50 = 12 Cr. L. J. 451.** The High Court has power to transfer a case from the file of the Chief Presidency Magistrate to that of a Presidency Magistrate, *ibid.*

1-A. The relation between the Chief Presidency Magistrate and Additional Chief Presidency Magistrate.—The Chief Presidency Magistrate has power, under s. 528 of the Code to withdraw a case made over by the additional Chief Presidency Magistrate to another Presidency Magistrate for disposal, **51 C. 820 = 28 C. W. N. 903.** (**40 M. 791** relied on, **26 M. 130** *not followed*.)

* These words are added by Act XVIII of 1923.

Magistrate pending the decision of a civil suit between the parties "*Quære*" whether a District Magistrate has no power to stay the trial of a criminal case pending in the Court of a Magistrate subordinate to him in the district? **44 M. L J. 642.** (**30 M. 226**, *referred to*)

D.—COURTS OF PRESIDENCY MAGISTRATES.

Appointment of Presidency Magistrates.

18. (1) That Local Government shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates, to be Magistrates for each of the Presidency towns, and shall appoint one of such persons to be Chief *Presidency* Magistrate for each such town,

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly, or by any Bench of Presidency Magistrates

*(3) A Presidency Magistrate may be appointed under this section for such terms as the Local Government may, by general or special order, direct

(4) The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct

Notes.—1. "**Presidency town** shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William Madras or Bombay, as the case may be,' s 3 (4) *General Clauses Act* X of 1897

2. Chief Presidency Magistrate.—Only an officer who is already a Presidency Magistrate can be appointed a Chief Presidency Magistrate Under s 557, *infra* no pleader, who practises in the Courts of Presidency Magistrates, is competent to be a Presidency Magistrate

3. Jurisdiction of Presidency Magistrate—High Seas—A Presidency Magistrate has jurisdiction to charge, convict and punish under the Indian Penal Code a person who has committed an offence on the High Seas on board a British ship **25 B. 639.** *See* also **Ratanlal 193.**

4. Jurisdiction under the Workmen's Breach of Contract Act.—A Presidency Magistrate of Calcutta may lawfully take cognisance of a complaint in respect of a breach of contract by an artificer the contract having been entered into in Calcutta though the breach took place beyond the limits of the local jurisdiction of the Magistrate The expression *Magistrate of the Police* in s 1 of Act XIII of 1859 means a *Presidency Magistrate See* Note 1 at p lxx Appendix VII But now the whole of Act XIII of 1859 stands repealed *by Act III of 1925 from 1st of April, 1926*

5. Jurisdiction under Prisons Act X of 1894—A Presidency Magistrate has no jurisdiction to try offences under s 52 as he is not a District Magistrate or first-class Magistrate, **32 M. 303.**

6. Jurisdiction under the Emigration Act 1883.—For the purposes of the *Emigration Act* (XXI of 1883) it has been *held* in **31 B 611** and **32 B. 10** that the Magistrate, of the first class in s. 111 of that Act includes a Presidency Magistrate *See* Note 6 to s 6

7 Bench of Presidency Magistrates can act under s. 106.—Since the section confers on a Bench of Honorary Magistrates the full powers of a Presidency Magistrate the Bench is competent to take action under s 106 *infra*, **7 Bom L. R. 833.**

8. The powers of Presidency Magistrates are restricted by s. 437 and therefore a Chief Presidency Magistrate has no jurisdiction to try a person for an offence under s 188 I P C, for disobedience of his own order, **12 C. W. N. 246 = 7 C. L. J. 70 = 7 Cr L. J. 103.**

Benches

19. Any two or more of such persons may (subject to the rules made by the Chief *Presidency* Magistrate under the power hereinafter conferred) sit together as a Bench

* Sub sections (3) and (4) have been added by the Criminal Procedure (Amendment) Act, 1923

Note.—[This Rule has been declared to be inconsistent with the provisions of the Code in so far as it directs that in a Bench composed of two members, the decision of the Chairman shall prevail. It was also said to be arbitrary and not consonant with natural justice, **8 C. W. N. 862.** This ruling was, however, not followed in **9 C. W. N. CCLXIX** and by the majority of the Full Bench in **10 C. W. N. 642 = 3 C. L. J. 492 (F.B.).** *See* also **19 C. L. J. 92 = 14 Cr. L. J. 684.** The Full Court, however, expressed so strong a disapproval of the analogous rule, Rule 6 under s. 16, *supra*, that the Bengal Government modified the same.—See *Calcutta Gazette, 2nd May*, 1906, *Pt. I, p.* 980.]

9. The Chairman shall ordinarily record the evidence and judgment in cases where a record of evidence and judgment is necessary; but such duty may, with his consent, be performed by any of his colleagues, or the evidence and judgment may be taken down by the Registrar, or the Clerk of the Court, at the dictation of the Chairman.

10. A Bench or a Presidency Magistrate sitting singly may hold one or more adjourned sittings, should it be necessary to do so for the disposal of business or part-heard cases, but such adjournment shall be, so far as possible, *de die in diem.*

11. Any part-heard case may be sent back to the Chief Presidency Magistrate for disposal, should it, in the opinion of the Court, be thought to be a case which should be committed to the Sessions Court for trial.

12. Any case transferred to a Bench or to a Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate sitting singly remaining unheard at the close of the day may be either adjourned or, on necessity arising, may be sent back, for disposal to the Chief Presidency Magistrate.

13 No private business shall be carried on in the Chambers set apart for the Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate, and no outsiders shall be admitted therein. It will be the duty of the Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate to report to the Chief Presidency Magistrate any fraction of this rule which may come to their knowledge.

14. It shall be the duty of the Registrar to inform the Chief Presidency Magistrate of any stress of business in the Courts.

15. The Chief Presidency Magistrate may at any time delegate any or all powers conferred on him under these rules to the salaried Presidency Magistrate—*Notification* No. 1256 J., dated 5th March, 1900, *Calcutta Gazette,* 1900, Pt. I, p. 714.

Madras.—(i) The Chief Presidency Magistrate may of his own motion or on the application of any Presidency Magistrate refer any case, or class of cases, triable by a Presidency Magistrate, for trial by a Bench of two or more Magistrates and may, by his order, appoint the time and place at which such Bench shall sit.

(ii) The Chief Magistrate shall, if present, officiate as Chairman. In his absence the senior Magistrate present shall officiate as Chairman.

(iii) The Chairman shall conduct the proceedings of the Court and exercise all the functions in that behalf usually exercised by a Presidency Magistrate when sitting alone; but it shall be competent to any member of the Bench to put any question to a witness either direct or through the Chairman as the latter may deem advisable, and to suggest any matter for the Chairman's consideration.

(iv) Each member of the Bench shall have a voice in the finding and sentence. In a Bench of three or other uneven number, the opinion of the majority shall prevail. When the numbers are even, the Chairman shall have a casting vote.

(v) In regard to the recording of evidence and the judgment, the proceeding shall be conducted in a manner similar to proceedings before a single Magistrate and subject to the provisions of the Criminal Procedure Code.

(vi) The Bench may hold one or more sittings for the disposal of such cases as may be referred to it, or of part-heard cases. Any part-heard case postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearings in the case (but *see* **20 C. 870**), but subject to the provisions of s. 350 of the Criminal Procedure Code.— *Fort St. George Gazette,* 1901 Pt. I, p. 1414.

Calcutta.—Presidency Magistrates in Calcutta, whether stipendiary or non-stipendiary, sitting singly or only as members of Benches are subordinate to the Chief Presidency Magistrate See *Calcutta Gazette*, dated 7th October, 1903, Notification No 3510, J D, and **2 C. W. N. CCLXI.**

Bombay.—All Presidency Magistrates and Benches are subordinate to the Chief Presidency Magistrate See *Bombay Gazette*, 1897, Pt. I, p 330

2. Result of declaration of Presidency Magistrates subordination to Chief Presidency Magistrate on footing of Sub-Magistrates to District Magistrate.—Where the Local Government has declared that all the Presidency Magistrates other than the Chief Presidency Magistrate shall be subordinate to the latter, and that the subordination shall be deemed to be of the same kind and extent as the subordination of Magistrates and Benches to the District Magistrate under s 17 (1) the Chief Presidency Magistrate has power to transfer a case from one Presidency Magistrate to another Presidency Magistrate, but he cannot do so without notice to the parties concerned, **1 Bom. L. R. 347.**

3 Powers of a Bench of Honorary Presidency Magistrates cannot be restricted by the Chief Presidency Magistrate—S 18 *supra* has conferred on Benches of Presidency Magistrates all the power of a Presidency Magistrate The Chief Presidency Magistrate has therefore no power either to confer, restrict or enlarge these powers **7 Bom L. R. 833.** Where a Chief Presidency Magistrate revived a case and transferred it for trial to a Bench of Magistrates, *held* that the Bench has jurisdiction to entertain a Preliminary objection as to the jurisdiction of the Chief Presidency Magistrate so to revise and transfer, **7 C. W. N. 517.**

4. Duty of Presidency Magistrates to record evidence.—In (*a*) petty cases, s. 362 does not enable a Presidency Magistrate to act arbitrarily and record nothing by way of evidence *See* **10 Bom. L. R. 201 = 7 Cr. L. J. 194** under s. 362, *infra*, (*b*) proceedings under s 110 *See* **13 C. W. N. 318 = 9 C. L. J. 439 = 10 Cr. L. J. 122,** under s 110 *infra.*

5 Rules for the guidance of Benches—Calcutta.—The following revised rules have been sanctioned by the Lieutenant-Governor for the guidance of Benches of Magistrates in the town of Calcutta —

1 The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall sit in the rotation arranged by the Chief Presidency Magistrate.

2. The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall take only such business as is made over to them by the general or special order of the Chief Presidency Magistrate

3 The Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate shall ordinarily sit from noon to 5 p m on the days on which they have been invited to attend by the Chief Presidency Magistrate

4 A Bench of Presidency Magistrates shall ordinarily be composed of three Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate sitting together, or of two so sitting when in the opinion of the Chief Presidency Magistrate this is necessary

5 A Bench of Presidency Magistrates may, however, be composed of the Chief Presidency Magistrate or the salaried Presidency Magistrate and two Presidency Magistrates other than the Chief Presidency Magistrate or salaried Presidency Magistrate, or of the Chief Presidency Magistrate or the salaried Presidency Magistrate and one Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate

6 Should any Presidency Magistrate other than the Chief Presidency Magistrate or salaried Presidency Magistrate appointed to sit in Bench be unable or fail to be present on the appointed day, the Chief Presidency Magistrate may in his discretion, at any time before the actual sitting of the Court reform or reconstitute such Bench in such manner as to him seems most convenient for the disposal of business

7 The Chief Presidency Magistrate and the salaried Presidency Magistrate shall be *ex officio* members of Benches, the Chief Presidency Magistrate shall, if present, officiate as Chairman of the Bench, the salaried Presidency Magistrate, if sitting shall in the absence of the Chief Presidency Magistrate, officiate as Chairman, and in the absence of the Chief Presidency Magistrate or the salaried Presidency Magistrate the Chief Presidency Magistrate shall nominate the Chairman

8 Every member of a Bench shall have a voice in the determination of all points arising in cases before them and in the finding and sentence In a Bench composed of three members, the decision of the majority shall prevail, and in a Bench composed of two members the decision of the Chairman shall p

(12) *Signing Calendars.*—Every Honorary Presidency Magistrate will sign the daily calendar of the day's proceedings at which he is present.

(13) *Transfer of cases.*—The Chief Presidency Magistrate may at any time transfer for disposal any case whether part-heard or not from the file of any Bench to his own file or to the file of any salaried Magistrate or Bench of Honorary Magistrates.

(14) *Delegation of powers.*—The Chief Presidency Magistrate may at any time delegate any of his powers under these rules to any salaried Magistrate subordinate to him.

(15) *Additional Benches.*—These rules shall also apply to any additional Benches of Honorary Presidency Magistrates which the Governor in Council may be pleased to appoint. *See* Notification No. 18 published in Part I of *Fort St. George Gazette*, dated 3rd January, 1911, pp. 7 and 8.

Bombay.—The following revised rules to regulate the conduct and distribution of business and the practice in the Courts of the Magistrates of the Town and Island of Bombay, which have been made by the Chief Presidency Magistrate with the previous sanction of His Excellency the Governor of Bombay under section 21 of the Code of Criminal Procedure, are hereby published in supersession of the rules published in Government Notification No. 287, dated the 16th January, 1894:—

1. The Magistrates will ordinarily sit in Court for the disposal of business at 11-30 a.m. (S.T.) Complaints and cases arising in the "A" Division and cases pertaining to the Princess Street and Pydhoni Police-stations of the "B" Division and those arising in the "G," "H" and "I" Divisions shall ordinarily be heard at the Esplanade Police Court. Complaints and cases pertaining to the Dongri Police-station of the "B" Division and the "D" Division including Agripada section shall ordinarily be heard at the Mazagon Police Court. Complaints and cases pertaining to the "C" Division shall be ordinarily heard at the Girgaum Police Court. Complaints and cases pertaining to the "E" and "F" Divisions shall ordinarily be heard at the Dadar Police-station.

2. Chief Presidency and Third Presidency Magistrate will ordinarily sit at the Esplanade Police Court. Second Presidency Magistrate will ordinarily sit at the Mazagon Police Court, the Fourth Presidency Magistrate will ordinarily preside at the Girgaum Police Court and the Temporary Additional Presidency Magistrate will sit at the Dadar Police Court. In case of emergency, any Presidency Magistrate may hold his Court at such place and hour as he may consider best suited to meet the requirements of the public service.

3. In the event of any pressure of work occurring in any Court, or during the casual or other absence of any Magistrate, the Chief Presidency Magistrate shall arrange for the distribution of business among the Magistrates.

4. All applications for process, copies, certificates or otherwise shall ordinarily be made to the Magistrates on their first taking their seats on the Bench in the morning. Applications which are shown to involve urgency may be made at any time during the sitting of the Court. The Magistrates will not undertake to entertain any application of any sort at their private residences.

5. Complaints and applications should, as a general rule, be made in writing, with proper stamp affixed. In each complaint the name of the complainant and of the accused parties and also of the witnesses, and the section of the law alleged to have been infringed should be legibly written, with such particulars of the facts as may be necessary to support the complaint.

6. All applications must be presented in person or by pleader. The Magistrates will not undertake to reply to written communications.

7. The following fees shall be levied:—

(*a*) Copying fees at 5 annas per folio of 90 words or fraction thereof. Prisoners will be charged 2 annas per folio for copies or proceedings, but will be furnished with a copy of the judgment in cases other than summons-cases free of charge.

(*b*) Inspection fee Re. 1 on each application per day.

(*c*) Translation fee Re. 1 per folio of 90 words or fraction thereof. Parties not supplying their own paper for copies will be charged ¼ anna per sheet of foolscap supplied.

Rules for the guidance of Honorary Presidency Magistrate in Madras —

(1) *Power of trial* —The Honorary Presidency Magistrates shall sit as Benches to try such cases or classes of cases and to undertake such business as may be made over to them by the general or special order of the Chief Presidency Magistrate

(2) *Number and Sitting hours* —Each Bench will ordinarily consist of three Magistrates selected by the Chief Presidency Magistrate from the list of those appointed by Government A Bench will sit in the Magistrate's Court at Egmore, another in the Court at Georgetown from 7-30 to 9-30 a m or till the work of the day is over, if earlier, on all days except Sundays and close holidays

(3) *Sitting to be arranged by Chief Presidency Magistrate Inability to attend to be notified* —Not less than ten days before the end of each month the Chief Presidency Magistrate will arrange the order in which and the days on which the Honorary Presidency Magistrates shall sit during the following month and communicate the same to the Honorary Presidency Magistrates concerned. If any Honorary Presidency Magistrate is unable to attend on a day for which he has been named, he shall give timely notice to the Chief Presidency Magistrate, mentioning, where possible, a substitute who is willing to take his place The Chief Presidency Magistrate may depute such substitute in his place or make such other arrangements as he thinks fit If occasion arises, the Chief Presidency Magistrate may alter any arrangement he has made under this rule

(4) *Salaried Magistrates may sit* —The Chief Presidency Magistrate or any salaried Presidency Magistrate may, with the permission of the Chief Presidency Magistrate, sit as a member of a Bench of Honorary Presidency Magistrates

(5) *Quorum* —In order to form a quorum, at least two Magistrates shall be present from the beginning to the end of a trial or inquiry as members of the Bench, provided that if a salaried Magistrate be present throughout the inquiry or trial a case may be proceeded with to a decision notwithstanding that a quorum was not present throughout the proceedings If Bench is unable to sit for any particular day, the cases set down for hearing before it on that day may be put up before a Stipendiary Magistrate or adjourned to the Bench s next working day, as the Chief Presidency Magistrate may direct.

(6) *Adjournment* —Any case before a Bench remaining unheard at the close of a sitting may be either adjourned to the next working day or sent back to be disposed of as the Chief Presidency Magistrate directs

(7) *Chairman* —The Chief Presidency Magistrate shall, if present, officiate as Chairman of the Bench In his absence the Stipendiary Presidency Magistrate (if any) present shall officiate as Chairman of the Bench In the absence of any Stipendiary Presidency Magistrate, the Bench shall, so often as may be necessary, elect a Chairman from among the Magistrates present. If the votes should be equal, the Chief Presidency Magistrate shall decide which Honorary Magistrate shall preside

(8) *Powers of Chairman* —The Chairman shall conduct the proceedings of the Court and exercise all the functions in that behalf, usually exercised by a Stipendiary Magistrate when sitting alone He shall decide upon the admissibility of evidence and maintain order in the Court, but it shall be open to any member of the Bench to put any question to the witnesses, either direct or through the Chairman as the latter may deem advisable and to suggest any matter for the Chairman's consideration

(9) *Taking down evidence* —The Chairman shall generally record the evidence and judgment in cases in which a record of evidence and judgment are necessary, but such duty may, with his consent, be performed by anyone of his colleagues

(10) *Opinion of majority of members to prevail* —Each member of the Bench who has been present throughout the proceedings shall have a voice in the finding and sentence In a Bench of three or other uneven number, the opinion of the majority shall prevail, when the numbers are even, the Chairman shall have a casting vote

(11) *Same Bench to hear a case till conclusion* —Notwithstanding any arrangement made as provided in Rule 3, any quorum that may have heard part of a case which stands adjourned at the rising of the Court shall proceed with such case till the conclusion of the trial or inquiry, as the case may be, at sittings held either from day to day, or, if the case stands adjourned for more than one day, then on the days to which it stands adjourned In such case the Chief Presidency Magistrate may, for as long as shall be necessary, set aside or vary any arrangement made under Rule 3

(6) The Chief Presidency Magistrate, or any salaried Presidency Magistrate, may, if he so desires, sit in any Honorary Presidency Magistrate's Court as a member of the Bench.

(7) In order to form a *quorum* at least two Magistrates shall be present from the beginning to the end of trial and enquiry as members of the Bench:

Provided that if a salaried Presidency Magistrate be present throughout the trial or enquiry as President, the case may be proceeded with to its conclusion notwithstanding that a *quorum* may not have been present throughout the proceedings.

(8) The Chief Presidency Magistrate shall, if present, officiate as Chairman of the Bench. In his absence, the senior salaried Presidency Magistrate (if any) present shall officiate as Chairman of the Bench. In the absence of any salaried Presidency Magistrate the Bench shall, as often as may be necessary, elect a Chairman from among the Magistrates present.

(9) The Chairman shall conduct the proceedings of the Court, but every member of a Bench shall have a voice in the determination of all points arising in any case before the Bench and in the finding and sentence. When opinions are divided, the decision of the majority shall prevail; and, when the Bench is equally divided, the Chairman shall have a second or casting vote.

Note.—Under Rules 9 and 10, the opinion of the senior Magistrate should prevail where there is a difference of opinion between two Magistrates constituting a Bench. The judgment of the dissenting Magistrate should however, form part of the record. **29 Bom. L. R. 1270 = A. I. R. 1927 Bom. 630.**

(10) The Chairman of a Bench shall ordinarily record the evidence (when necessary) and the judgment and/or sentence of the Court: but such duty, may, with the Chairman's consent, be performed by anyone of his colleagues, or at his dictation, by the Judicial Clerk of the Court. If the last course be adopted, each record of judgment or sentence shall be signed by the Chairman of the Bench.

(11) Notwithstanding any arrangement made as provided in Rule 4, any *quorum* that may have heard part of a case which stands adjourned at the rising of the Court shall proceed with such case till the conclusion of the trial or inquiry, as the case may be, at sittings held either from day to day or if the case stand adjourned for more than one day, then on the days to which it stands adjourned.

In such case the Chief Presidency Magistrate or the senior salaried Presidency Magistrate may, as for as long as may be necessary, set aside or vary any arrangement made under Rule 4.

(12) Where the hearing of any case has been commenced by a Bench of Honorary Presidency Magistrates, no Magistrate who has not been present on the Bench throughout the proceedings shall take any part in them.

E.—Justices of the Peace.

Justices of the Peace or the mofussil.

22. The Governor-General in Council, so far as regards the whole or any part of British India outside the Presidency towns, and every Local Government, so far as regards the territories subject to its administration* may, by notification in the *Official Gazette* appoint such † persons resident within British India and not being the subjects of any foreign state as he or it thinks fit to be Justices of the Peace within and for the territories mentioned in such notification.

Note.—1. Powers of Justices of the Peace appointed for places beyond British India.—A Justice of the Peace appointed under *the Extradition Act* (now XV of 1903) has jurisdiction to commit a person charged with an offence against the *Mysore Mines Regulation*, 1897, for trial to the Madras High Court, **26 M. 607.** *See* **25 B. 636,** for the jurisdiction of a Justice of the Peace to try a person for an offence committed on the High Seas. "In exercise of the powers conferred by the Indian (Foreign Jurisdiction) order in Council, 1902, the Governor-General in Council is pleased to direct that any European British subject appointed either by name or by virtue of his office to be a Justice of the Peace in or for any country or place beyond the limits of British India shall have in proceedings against European British subjects or persons accused of having committed offences jointly

* The words "other than the Presidency towns" have been omitted by Act XII of 1923.

† Substituted for the words "European British subjects" by Act XII of 1923.

8 The Magistrates at each Court will divide the work between themselves, and any difference of opinion will be decided by the Chief Presidency Magistrate. As a general rule, petty Police cases will be disposed of before others

9 The Magistrate shall submit such forms, records, reports and returns as may be called for by the Chief Presidency Magistrate

Note—[When a Presidency Magistrate examined the complainant on oath and then thinking that the case could be more conveniently tried by the Chief Presidency Magistrate returned the complaint for presentation to the latter Magistrate, *held* that the rule did not justify the action of the Magistrate the rule referring only to a division of work *i e*, an allotment of particular cases or particular days and hours of work **Ratanlal 968**]

10 The office hours shall be from 10 a m to 5 p m The Courts and offices shall be closed on the gazetted Government holidays, but the Chief Presidency Magistrate will arrange for the despatch of urgent business.

11 If in any case, there exist special circumstances which in the opinion of any party concerned or interested in such case, require a departure from the ordinary procedure prescribed by these rules such party may bring such special circumstances to the notice of the Chief Presidency Magistrate who shall thereupon make such order in the matter as he shall think fit.

Note—An authorised petition writer is attached to each Court for the purpose of writing at a moderate charge applications and petitions for persons requiring his services—*See* Bombay Notification No 2536 dated 19th May, 1904

Rules for the guidance of the Benches of Honorary Presidency Magistrates for the area comprised within the limits of the Town and Island of Bombay

Notification No 2536 J D, 19th May 1904, B G 1904 Pt I, p 649, as amended by Notification No 1653 J O, 28th March 1903

In exercise of the power conferred by section 21 of the Code of Criminal Procedure 1898 the Chief Presidency Magistrate, Bombay, with the previous sanction of the Governor in Council makes the following Rules for the guidance of the Benches of Honorary Presidency Magistrates appointed by Government Notification No 2535 dated the 19th May, 1904 to the area comprised within the limits of the Town and Island of Bombay —

(1) The Honorary Presidency Magistrates shall undertake only such business as is made over to them by the general or special order of the Chief Presidency Magistrate

(2) Courts of Honorary Presidency Magistrates shall be constituted in such place or places within the Town and Island of Bombay as may, from time to time be appointed for this purpose by the Chief Presidency Magistrate with the sanction of Government, and the services of individual Honorary Presidency Magistrates shall be assigned from time to time by the Chief Presidency Magistrate to the Bench of one or more of such Courts

(3) Each of the said Benches shall be divided into sections containing not less than four Honorary Presidency Magistrates.

(4) Not less than ten days before the end of each month the Honorary Presidency Magistrates whose services have been assigned to each Court shall arrange the order in which and the days on which the sections of each Bench shall sit during the following months. The arrangement so made shall be forthwith submitted to the Chief Presidency Magistrate for his approval Unless the Chief Presidency Magistrate communicates his disapproval before the beginning of a month on which it is made, the arrangement so made shall hold good for that month.

If the Honorary Presidency Magistrates whose services have been assigned to any Court fail to make such arrangement, or [illegible]
Magistrate may himself m[illegible]
Presidency Magistrates c[illegible]

(5) Except on Sundays and close holidays one section of each Bench shall hold a sitting every day from the hour of 8 a.m until such time as an adjournment may be voted.

(*c*) by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable.

Illustration.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

Notes.—For other provisions, see *e.g.*, ss. 191 to 193, 443, 444, 449, 452, 467, 477, 480, 485 and 556.

1. **Jurisdiction of High Court or Court of Session not restricted by provisions as to other Courts.**—The provision as to the other Courts indicated in this section does not cut down or limit the jurisdiction of the High Courts or Courts of Session, **8 A. 665.** The *illustration* is new and is intended to show that although an offence may appear in Sch. II as one triable only by a Magistrate, if the case is before the Court of Session on commitment made for a more heinous offence, the Sessions Court is competent to hold the trial for the minor offence *alone*. But if the offence is punishable under some other law in which a Court is specially mentioned, *e.g.*, a Magistrate, it cannot be tried by any other Court, *e.g.*, by a Court of Session, **19 A. 465.** *See* **1888 A. W. N. 235; 24 C. 429.**

2. **When cases triable by Magistrates should be committed.**—*See* Notes 7—11 under s. 209.

3. **Jurisdiction of inferior tribunal over offences cognisable by it when aggravating circumstances also present.**—*See* Note 15 to s. 260, Note 4 to s. 346 and Note 10 to s. 537. When an offence falls under two sections of the I.P.C., the one general and cognisable by an inferior tribunal, the other specifying aggravated circumstances and cognisable by a superior tribunal only, the jurisdiction of the inferior tribunal is not *necessarily* ousted, **Weir II, 20.** If the facts of a case are sufficient to bring it within s. 397, I.P.C., the Magistrate ought to commit the case to a Court of Session and not himself try it under s. 392, I.P.C.; while it is a matter for the discretion of the Magistrate whether he will himself try a case under s. 394 or commit it to the Court of Sessions, **Weir I, 448.** But no Court can clutch jurisdiction by intentionally ignoring facts of aggravation which makes the offence really cognisable only by a higher tribunal, **Weir II, 21; 24 M. 675; 12 M. 54; 4 N. L. R. 18; 1910 M. W. N. 852 = 12 Cr. L. J. 20.**

4. **Jurisdiction of inferior tribunal over persons jointly charged when one is triable by superior tribunal.**—If two or more persons are jointly charged with an offence and the jurisdiction of the Magistrate is ousted in the case of one, the Magistrate should commit both or all for trial before the Sessions Court, **Weir II, 20 and I, 448.** *See* Note 7 to s. 209.

5. **Refusal by Magistrate to proceed with a charge.**—Where a Magistrate has in the exercise of his discretion refused to proceed with a criminal charge pending a civil action in respect of the matter out of which the charge arose, a *mandamus* will not be granted to compel the hearing of the charge. **1 M. H. C. R. 66.**

6. **Magistrate cannot decline jurisdiction.**—It is not competent to a subordinate Magistrate to direct a complainant who brings a charge of petty theft or assault, ordinarily within the cognisance of heads of villages to seek redress from the head of the village (**VII M. H. C. R. Appx. XXXI**); where the exercise of *Ecclesiastical* jurisdiction is plainly *ultra vires* or otherwise unsanctioned by the ordinances of a religious society or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction. **8 M. 140.**

Note.—*See* Note on s. 436, *infra.*

Offences under other laws.

29. (1) *Subject to the other provisions of this Code,** any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid † by any Court constituted under this Code *by which such offence is shown in the eighth column of the Second Schedule to be triable.*

* The words "other provisions of this Code" have been substituted for provisions of s. 447, Act XII of 1923.
† The words "subject as aforesaid" have been inserted by Act XII of 1923.

with such subjects all the powers conferred by the Code of Criminal Procedure 1898, on Magistrates of the first class who are Justices of the Peace and European British subjects Notification No 2770 (F B) of the 14th July, 1904' The powers conferred by the above Notification are the powers referred to in s 36 of this Code and specified in the third schedule and styled ordinary powers, and the language of the notification cannot be read as including powers which by virtue of s 37 a Magistrate of the first class may be invested with by one or other of the authorities and the power to entertain complaints is not one of the ordinary powers of a first-class Magistrate, **34 M. 353**

23 and 24 are omitted by Act XII of 1923

Ex officio Justices of the Peace

25. In virtue of their respective offices the Governor General, *Governors Lieutenant-Governors and Chief Commissioners* the Ordinary Members of the Council of the Governor General and the Judges of the High Courts* are Justices of the Peace within and for the whole of British India, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates

Note —Compare the *East Indian Company Act* 1772 (13 Geo III Cap 63) s 38

F.—Suspension and Removals.

Suspension and removal of Judges and Magistrates

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates, may be suspended or removed from office by the Local Government

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor General in Council only shall not be suspended or removed from office by any other authority

Notes —1. *See* s 16 of the *General Clauses Act* X of 1897 and *the Public Servants (Inquiries) Act* XXXVII of 1850 and I of 1897

2 Removed.—The word '*Removed*" is a technical term implying dismissal from the Bench, and does not include such administrative measures as removals or transfers of officers from one place to another —*Madras Notification, 10th August* 1874

3. *Mahalkari* appointed as Second-class Magistrate—suspension by departmental order whether operates as suspension of the person as Magistrate need for order of Local Government, **30 Bom L. R. 1050.**

Suspension and removal of Justices of the Peace

27. The Governor-General in Council may suspend or remove from office any Justice of the Peace appointed by him, and the Local Government may suspend or remove from office any Justice of the Peace appointed by it

Note —Compare s 16 of the *General Clauses Act* X of 1897

CHAPTER III

POWERS OF COURTS

A —Description of Offences cognisable by each Court

Offences under Penal Code

28. Subject to the other provisions of this Code, any offence under the Indian Penal Code may be tried—

(*a*) by the High Court, or

(*b*) by the Court of Session, or

* The words "*and the Recorder of Rangoon*" are omitted by Act VI of 1900 s 47 and Sch I

of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of powers conferred thereby."

Offences not punishable with death.

30. In the territories respectively administered by the Lieutenant-Governors of the Punjab* *and Burma* and the Chief Commissioners of Oudh,† the Central Provinces, Coorg and Assam, *in Sindh*, and in those parts of the other Provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may ‡ notwithstanding anything contained in section 29, invest the District Magistrate *or any Magistrate of the first-class* with power to try as a Magistrate all offences not punishable with death.

Notes.—1. Investment on Magistrates of powers under this section by the Local Governments.—This section should be read with s. 34. "This section is so amended as to make it applicable to all non-regulation Provinces. Further, the Local Governments are now authorised to invest first-class Magistrates with powers under the section."—*Sel. Com. Rep.*

In *Bengal*, the powers under this section are vested in the Deputy Commissioners of the following Districts, *viz.*, Darjeeling, Julpigori, Cachar, Sonthal Purgannas, Hazaribagh, Lohardugga, Sinbhoom, Manbhoom, Goalpara, Kamroop, Durrung, Nowgong, Seebsaugar and Luckimpore.—*Calcutta Gazette*, 1873, p. 67.

In *the United Provinces*, all Deputy Commissioners in Districts of the *Jhansi Division* have been empowered under this section. See *N.-W. P. Gazette*, 1873, p. 3. As to OUDH, see *Oudh Gazette*, 1873, p. 1.

In *Punjab, see* ss. 5, 6 and 7 of Regulation IV of 1877 (*Frontier Crimes*).

In *Bombay*, the Deputy Commissioners of Thar, Parkar and the Upper Sindh Frontier Districts have been given this power.—*Bombay Gazette*, 1881, Pt. I, p. 600.

In *Burma* all District Magistrates have this power.—*Burma Gazette*, 1892, Pt. I, p. 49.

In *Central Provinces* (excluding Berar) all District Magistrates are invested with special powers under this section—C. P. Cr. Cir., 1908, Edn., No. 4.

2. Magistrates specially empowered cannot try offences punishable with death.—A District Magistrate empowered under s. 30 to try all offences not punishable with death is not legally competent to try the offence of culpable homicide not amounting to murder punishable under the first part of s. 304, I.P.C., an offence not punishable with death. What the law contemplates and intends is that when there is credible evidence both of murder and of qualified murder, the accused should be committed for trial before a Court which is competent to do what a District Magistrate is not, *viz.*, try both offences once for all and pronounce a judgment which shall be an effectual bar to a second trial on the same facts, **1 P. R. 1893 (F.B.)**. A Magistrate exercising the powers under this section cannot try an offence punishable with death and find the accused guilty of culpable homicide not amounting to murder, on the ground that the case falls within one or other of the exceptions to s. 300, I.P.C., **3 P. R. 1891.** Where it appears from some of the evidence that the accused might have been charged with the offence of murder, the Magistrate should not take upon himself to reduce the charge to such minor offence that he might try it. By adopting such a course he incurs a grave responsibility. In such a case, therefore, he should commit the accused to the Court of Sessions. Where, however, a Deputy Commissioner, specially empowered under this section, tried a case under s. 304, I.P.C., there being some evidence which might have supported a charge under s. 302: *held*, that having regard to s. 209, *infra* it was not possible to say that Court had acted without jurisdiction, **10 C. 85 = 13 C. L. R. 375.**

3. What cases District Magistrates should not try.—As a general rule, cases on the border line of jurisdiction and cases of great difficulty ought to be committed to the Sessions. The offence of attempting to wage war against the Queen should not be tried as a dacoity case by a District Magistrate, **1 Bur. S. R. 158.**

* These territories included at the time the Code was passed, the territories which now form the *N.-W. Frontier Province.*

† This title now merges in that of the Lieutenant-Governor of the United Provinces of Agra and Oudh.—See *Gazette of India*, 1902, Pt. I, p. 228.

‡ See *Gazette of India*, 1899, Pt. II, p. 420, for notification investing the Assistant Commissioner of Ajmere with powers under this section.

Notes.—1. "We have omitted the proviso to this clause which existed in the old Act and specified in the Second Schedule the respective Courts by which offences under other laws are triable"—*Sel Com Rep*

2. When any Court is mentioned, shall be tried by such Court and not by any other.—It is a general rule that where a statute makes unlawful that which was lawful before, and inseparably connects with the prohibition or offence a special remedy, that remedy must be pursued and no other Thus, where a prisoner was convicted at the Criminal Sessions of the Madras High Court for supplying liquor without a license (an act punishable by Mad Act I of 1866), it was *held* the High Court had no jurisdiction to try, inasmuch as the Act which created the offence declares it to be punishable, by a Magistrate, **5 M. H. C. R. 277.** Again the jurisdiction to punish an offender for nuisance, etc., under s 16 Bombay Act VIII of 1867, is confined to the Police *patels* duly empowered and does not extend to their official superiors (*Taluka* Magistrates) **Ratanlal 196.** (*a*) *District Magistrate* So also a Presidency Magistrate has no jurisdiction to try prisoners for offences under s 52 of the *Prisons Act* IX of 1894 as he is not a District Magistrate or Magistrate of the first class mentioned therein, **32 M. 303.** (*b*) *Magistrate specially empowered* An offence under a special law, cognisable by a *Magistrate invested with special powers,* cannot be transferred to an ordinary Magistrate, **1886 A. W. N. 289.** Thus a Magistrate taking cognisance of an offence under s 9 of the Opium Act I of 1878, has no powers to commit the accused to the Court of Session, **19 A. 465.** So, too under s 29 of the *Police Act* V of 1861, **1 W. R. 5**; (*c*) *by Presidency Magistrates, see* s 184 *infra*, and also s 133 of Act I of 1890 (*Railways*) under which all Railway offences have to be tried either by a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, (*d*) *by District or Sub-divisional Magistrates, e g, see* s 5 (2) of the *Metal Tokens Act* I of 1889, under which certain offences are to be taken cognisance of by District or Sub-divisional Magistrate and by no other Magistrates, except with the previous sanction of the District or Sub-divisional Magistrate, (*e*) *by first class Magistrate, e g, see* s 52 of the *Prisons Act* IX of 1894, **32 M. 303**; (*f*) *by second class Magistrates, e g, see* s. 83 of the *Indian Registration Act* III of 1877, **7 M. 347** *followed* in **Weir II, 25**; also offences under the *Indian Stamp Act* II or 1899, the *Indian Salt Act* XII of 1882 the *European Vagrancy Act* IX of 1874

3. It was *held* (**Weir II, 23**) that a third-class Magistrate has no power to try an offence under s 20 of the *Indian Treasure Trove Act* VI of 1878 This is no longer law, having regard to the addition now made to Sch II, under the heading '*offences against other laws*' A third-class Magistrate has jurisdiction to try an offence under s 68 of Bom Act VI of 1873, **Ratanlal 763.**

4. Jurisdiction where no Court is mentioned—A Magistrate has jurisdiction to try a landlord for an act specified in s 58 (3) of the *Bengal Tenancy Act, viz*, failure to prepare and retain counterfoils of rent receipts in the same way as he would try a summons-case, the Act not having specified any particular Magistrate to try such an offence **9 C. W. N. 816 = 2 Cr. L. J. 532.** Reading the first paragraph of this section with s 21 of Act XVI of 1861 (*Stage Carriages*) all Magistrates have jurisdiction to try offences against ss 7 and 9 of the said Act, **Ratanlal 364.**

5. As to the effect of s 8 of Act X of 1872 with which cl (2) of this section corresponds to a certain extent, on the question of jurisdiction, *see* **2 M. 161.**

Trial of European British subject by second and third-class Magistrates

*"**29-A.** No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees which where the accused is an European British subject who claims to be tried as such."

Note.—In a case where the accused did not make a claim to be tried as a European British subject when he was first brought before the Magistrate for purposes of inquiry or trial, it is not open to him to revive or make it at any subsequent stage **54 Cal. 1041.**

Jurisdictions in the case of juveniles

†"**29-B.** Any offence, other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by section 8, sub-section (1)

* This section was inserted by the Criminal Law Amendment Act XII of 1923 s 6

† This section was inserted by the Criminal Procedure Code, Amendment Act XVIII of 1923, s 6

3. "We have dispensed with the necessity for confirmation of sentences passed by Assistant Sessions Judges where such sentences exceed four years. For the most part such confirmation is simply a preliminary to an appeal, and interposes a useless formality which delays the hearing of the appeal on the merits"—*Sel. Com. Rep.*

4. **Confirmation.**—*See* Chapter XXVII, ss. 374—380.

5. **Powers of an Assistant Sessions Judge.**—These are the same as those of a Magistrate invested with special powers under s. 30, there being, however, some difference in *the mode of trial.* The Magistrate tries cases under Chapter XXI as in warrant-cases, while the Assistant Sessions Judge tries them with the aid of assessors or by jury.

6. **Appeals from Assistant and Additional Sessions Judges and from Courts of Session.**—*See* ss. 408 and 410 and also **9 C. 513 = 12 C. L. R. 500.** As to powers of Reference and Revisions by Additional Sessions Judges, *see* s. 438 (2), superseding **9 B. 164.**

Sentences which Magistrates may pass.

32. (1) The Courts of Magistrates may pass the following sentences, namely:—

(*a*) Courts of Presidency Magistrates and of Magistrates of the first class.	Imprisonment for a term not exceeding two years, including such solitary confinement as is authorised by law; Fine not exceeding one thousand rupees; Whipping.
(*b*) Courts of Magistrates of the second class.	Imprisonment for a term not exceeding six months, including such solitary confinement as is authorised by law; Fine not exceeding two hundred rupees. * * * * *
(*c*) Courts of Magistrates of the third class.	Imprisonment for a term not exceeding one month; Fine not exceeding fifty rupees.

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorised by law to pass.

* * * * *

Amendment of Section.—The words "Whipping (*if specially empowered*)" in sub-sec. (1) (*b*) and sub-sec. (3) "No Court of any Magistrate of the second class shall pass a sentence of whipping, unless it is specially empowered in this behalf by the Local Government," have been repealed by the *Whipping Act* IV of 1909.

Notes.—1. Imprisonment.—*I.e.*, either simple or rigorous. *General Clauses Act* X of 1897, s. 3 (26)

Solitary confinement.—*See* ss. 73 and 74, I.P.C. This punishment is done away with in England.

Whipping.—See *the Whipping Act* IV of 1909 printed in the Appendix; and ss. 390—396 as to the mode of execution of the punishment of whipping. As to powers of Magistrates in Upper Burma to pass sentences of whipping, *see* Reg. V of 1892, Schedule IV, under which a Magistrate of any class may pass a sentence of whipping.

Fine.—*See* ss. 386—388 and Note 7, *infra.*

2. **Solitary confinement in cases tried summarily.**—It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily under Chapter XXII, **6 A. 83;** s. 262 limits the term of imprisonment only, but does not interfere with the Court's powers under this section or s. 73, I.P.C.

3. **Separate sentences of solitary confinement for each offence.**—Separate sentences of solitary confinement in respect of each of several offences, which exceed three months in all, but do not exceed for each offence the maximum provided in s. 73, I.P.C., for one offence, are not illegal, but, as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more

4. Procedure to be adopted by District Magistrate.—A District Magistrate empowered under this section, in trying a case which but for his special powers, he would be bound to commit to the Court of Sessions, should adopt the procedure laid down in Chapter XXI (*Warrant Cases*) *infra*

5. What sentence may be awarded by District Magistrate—*See* s 34, *infra* Such a Magistrate is competent to pass a sentence of transportation for seven years instead of awarding a sentence of imprisonment, **9 W. R. 6 (F.B)** In passing a sentence under s 471, I P C, he can pass a sentence of one year and nine months in default of payment of fine only **35 P. R. 1885.**

6. Magistrate must purport to act under the section.—A first class Magistrate who was simply described in the heading of his judgment as invested with the special powers under this section but not purporting to act under it cannot exercise these powers in passing sentence, **17 P. W. R. 1908.**

7. Subordinate Magistrates not allowed to make over Sessions cases to be tried by Deputy Commissioners specially empowered—A Magistrate of the first class who is holding an inquiry in a case of dacoity has jurisdiction either to commit the accused to the Court of Sessions or to discharge him He has no authority to make over the case to a District Magistrate who is a Deputy Commissioner specially empowered under this section to try such cases But when it was found that the accused had not been prejudiced at the trial, the High Court maintained the conviction **7 C. W. N. 457.**

8. Magistrate trying under this section not competent to try an approver.—When a Deputy Commissioner tries a case, exclusively triable by the Court of Sessions under powers conferred upon him by this section, he does so as a Magistrate and if he tenders conditional pardon to one of the accused he is precluded from trying the case himself, **10 C W. N. 847 = 4 Cr. L. J. 44.**

9. Appeals.—*See* s 408 (*b*) It has been ***held*** that "*District Magistrate* in s. 408 *infra* include a District Magistrate empowered under this section, **9 C. 513—516.** *In a case transferred to a District Magistrate under* s 349, *infra* the District Magistrate must be regarded as a Magistrate not empowered with the powers under this section and if he sentences the accused as if he were empowered under this section such sentence is *ultra vires* and appeals would lie even if the sentence exceeds four years rigorous imprisonment not to the High Court, but to the Court of Session, **4 L. B. R 53 = 6 Cr. L. J. 289.** Where a Magistrate duly empowered under this section convicted two persons and submitted the case to the Sessions Judge for the confirmation of the sentence against one only and the other appealed to the Sessions Court ***held*** that both the appeal and the submission lay to the High Court under s 408 *infra* **12 P. R. 1900** *See* also **36 P. R. 1880; 23 P. R. 1881, 161 P. L. R. 1911 = 12 Cr. L. J. 236.**

10. Revision—Magistrate Inferior to Sessions Court.—A Sessions Judge is competent to make an order for further inquiry under s 437 *infra*, when an accused has been discharged by a District Magistrate, notwithstanding that such Magistrate was exercising his enhanced powers under this section **15 P. R. 1904**

B—Sentences which may be passed by Courts of various classes.

Sentences which High Courts and Sessions Judges may pass.

31. (1) A High Court may pass any sentence authorised by law

(2) A Sessions Judge *or* Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court

(3) An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years, or of imprisonment for a term exceeding seven years

Notes.—1. Any sentence authorised by law.—*See* s 53, I P C A Magistrate has no jurisdiction to pass a sentence otherwise unlawful and unauthorised, merely because the accused asks for it **3 B. L. R. Ap. Cr. 50.** *See* s 59, I P C, as to power of commutation of *imprisonment into transportation* But transportation can be awarded only in lieu of *substantive* terms of imprisonment, **5 M. 28.**

2. European British subject.—Upon an European British subject a Court of Session can pass a sentence of one year s imprisonment only S 449

'*Distinct offences.*'—The Code of 1861 contained the words 'offences punishable under the same or different sections of the Indian Penal Code' and the Code of 1872 the words 'punishable under the same or different sections of any law for the time being.'

'*May sentence.*'—The words in the 1861 Code were 'It shall be lawful for the Court to sentence.'

'*In such order as the Court may direct.*'—These words were first used in the Code of 1882.

1-A. Effect of the amendments by Act XXVIII of 1923.—By Act XXVIII of 1923, the following amendments were made:—

(1) the word "distinct" has been omitted;

(2) "subject to the provisions of s. 71 of the Indian Penal Code" are substituted;

(3) the explanation and illustration to the old section are repealed;

the effect of these amendments is to restore the previous view of the law laid down in the case of Queen-Empress *v.* Bhana Punja, **17 Bom. 260**, that separate sentences are quite legal. *Cf.* **49 B. 916.**

2. Conviction may be either under the Penal Code or under any special or local law.—The Code of 1861 restricted the operation of the corresponding section to "offences punishable under the same or different sections of the *Indian Penal Code*," while the language of the 1872 Code was "punishable under the same or different sections of *any law* for the time being." *See*, however, s. 26 of the *General Clauses Act* X of 1897.

3. Whipping in case of sentences passed at one trial.—When a person is convicted at one time of two or more offences it is illegal to sentence him to whipping for one of those offences *in addition to* imprisonment or fine for the other or others. But it is not illegal to sentence him to one whipping in lieu of all other punishments, **9 W. R. 41 (F.B.); 4 Bom. L. R. 929; Ratanal 561** and **955; 1 W. R. 24** and **14 W. R. 7.** In **5 M. H. C. R. Appendix XVIII,** it has, however, been *held* that a Court is empowered to sentence a prisoner in the one case to imprisonment and in the other to whipping. *See* Note 5 to s. 3 of the *Whipping Act* 1909, Appendix III.

I.—SCOPE OF THE SECTION.

Notes.—4. Section lays down rule for punishment.—Ss. 233—239 contain only rules of criminal pleading in regard to joinder of charges and they do not deal with the sentences to be passed on conviction. The rules for assessing punishment are laid down in this section and in ss. 71 and 72 of the Indian Penal Code, **12 M. 36; 10 B. 493; 7 A. 29—33; 9 N. L. R. 26 = 14 Cr. L. J. 135.** These sections provide as follows:—

Limit of punishment of offence made up of several offences.

S. 71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts of which one or more than one would by itself or themselves constitute an offence when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for anyone of such offences.

Punishment of person guilty of one of several offences the judgment stating that it is doubtful of which.

S. 72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

5. Section applies only to convictions of offences.—It has no application to imprisonments imposed under s. 123 of the Code, **4 Bom. L. R. 876; 5 Bom. L. R. 26.**

6. Section applies only to convictions at one trial.—This section does not embrace the case of separate trials held on the same or subsequent days for separate offences committed by the same accused person, but covers only conviction of the same *accused*, for two or more offences at *one trial*, **Weir II, 30** and **31; 4 Bom. L. R. 876; 146 P. L. R. 1911 = 12 Cr. L. J. 217.** This section does not control sentences passed at different trials, **7 W. R. 1** and **14 P. R. 1866; 1 Bur. S. R. 217; 8 A. 305; 1881 A. W. N. 23; 11 A. L. J. 263 = 14 Cr. L. J. 240.** *See* Note 32 under Heading VI at page 64; **19 A. L. J. 810; 47 A. 59.**

7. Previous conviction not a distinct offence.—A person convicted under s. 411, I.P.C., read with s. 75, I.P.C., is not convicted of *distinct offences* within the meaning of this section, **11 A. 393;** *see* also **Ratanlal 49.**

than one offence, **7 P. R. 1897**; but in a later case it was *held* that such a sentence should not be passed, **37 P. R. 1905.** *See* also **1897 P. J. L. B. 596** and **1 U. B. R. 247.**

4. Solitary confinement only awardable for offence under I.P.C.—A person convicted under s 35 of *the Excise Act* XXII of 1881, **17 P. R. 1889**; or s 19 of Act XXVII of 1871 (*Criminal Tribes Act*), or s 48 of Post Offices Act (1866), **24 P. R. 1879** is not liable to solitary confinement, as the offence is not under the Penal Code, **17 P. R. 1889**; **ibid.** *footnote* Solitary confinement cannot be awarded when imprisonment is not part of the substantive sentences, **9 P. R. 1882**; nor as a part of the imprisonment in lieu of fine, **53 P. R. 1887**; but *see* **14 P. R. 1899.** Solitary confinement cannot be awarded as part of an order of imprisonment awarded under ss 118 and 123 in default of furnishing security **36 A. 493**

5. Solitary confinement not regulated by Magistrate's choice.—A Magistrate has no power to direct that the sentence of solitary confinement should be executed in the first week of every month Such confinement is regulated by the Penal Code, **8 C. P. Cr. 17.** *See* s 74, I P C

6. Solitary confinement suitable for old offenders.—For old offenders convicted of offences against property the sentence of solitary confinement is a salutary punishment, but it is not suitable for persons convicted of culpable homicide not amounting to murder, **5 C. P. Cr. 50.**

7. Fine-Limit to Magisterial power to.—*See* ss 63—70, I P C, and s 25 of *the General Clauses Act* which makes the provisions of this Code in relation to the issue and execution of warrants for the levy of fines applicable to all fines under any Act, etc, unless there is an express provision to the contrary therein The power of a Magistrate to fine is in all cases limited to Rs 1 000 It is only the Court of Session and the High Court that can inflict fines to an unlimited extent **7 W. R 37,** but *see* Note 10 *infra*

8. Fine, relative to means of accused.—No sentence of fine should be passed by a Criminal Court on an accused person without regard to the means of the accused to pay the fine, **1 Bur. S. R. 483.**

9. Infliction of excessive fine for increasing the term of imprisonment—Where a fine is not suited to the nature of the offence and is quite beyond the means of the offender to pay it, it should never be inflicted merely in order that a further term of imprisonment in default should be suffered If the substantive sentence awardable by a Magistrate is insufficient for the offence, the case should be sent for trial to a Court which can inflict an adequate sentence, **20 R 1895.**

10. Provisions of s. 35 of Companies Act, not affected by s. 32.—The omission to duly stamp a share certificate is an offence under s 35 *Indian Companies Act* VI of 1882 now (Act VII of 1913) and a Magistrate has power to impose fine according to special law in respect of each share certificate, as the omission in each case is a separate offence The provisions of that section are not affected by this section, though the amount of fine in the aggregate exceeds Rs 1,000, **20 C. 676; 35 A. 173**

11. Payment of daily fine.—An order for the payment of a *daily fine* is illegal inasmuch as it is an adjudication so far as the future is concerned in respect of an offence which has not been committed when the order is passed, **27 C. 565.** *See* also **24 A. 309, 1 B. L. R. O. Cr. 41; 18 W. R. 44; 25 W. R. 6; 22 B. 766 and 15 C. W. N. CXI.** But, where the statute (s 580 of *the Calcutta Municipal Act* III of 1899 B C) makes default on every subsequent day an offence for which a fine can be imposed, no fresh order is necessary to authorise the imposition of a daily fine, **7 C. W. N. 853.** For a similar provision, *see* s 50 of the *Indian Companies Act* VI of 1882, now (Act VII of 1913)

12. Use of discretion in awarding sentence of fine.—"The attention of the Courts is directed to the very great importance of exercising great discretion in regulating the sentences of fine passed by them so as to accord with the circumstances of the persons on whom the sentences are passed Fines are sometimes imposed which are manifestly impossible of realisation, while there is reason to fear that many fines imposed in petty cases though realised, are paid only with difficulty It would appear that in dealing with numerous petty cases some Magistrates fall into a way of fixing the fines at particular amounts as a matter of course, without much thought as to how they will be felt by the particular individual on whom they are imposed"

"It is a first principle in inflicting this mode of punishment that it is necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence Fines should never, in any case, be imposed which are not likely to be realised at all, and they should never be imposed in petty cases so severe as not to be easily realisable"—*C P Cr, Part I, No* 1

But see Note 1-A above. It has been *held* by the Bombay High Court in **49 B. 916** that the effect of the amendment in 1923 of s. 35 of the Code is to restore the previous view of the law as *held* in **17 B. 260** that separate sentences for offences punishable under ss. 148 and 326, I.P.C., are legal subject to the provisions of s. 71, I.P.C. In this case **23 B. 706 (F.B.)** was considered. *See* also **4 C. L. J. 90; 3 S. L. R. 224 = 11 Cr. L. J. 414.** The Allahabad High Court, however, has *held* that the law does not prohibit the Court from passing a sentence in respect of each offence established, but it declares that the offender must not receive for such offence collectively a punishment more severe that might have been awarded for any of them or for the offence formed by their combination, **2 A. 101; 10 A. 58; 10 A. 146.** *See* also **12 M. 36; 9 N. L. R. 26 = 14 Cr. L. J. 135** and **1 L. B. R. 33** *followed* in **6 L. B. R. 160 = 14 Cr. L. J. 167.** Omission to determine whether the sentences of imprisonment and transportation are to run concurrently or consecutively makes the sentence defective in form. **23 C. L. J. 596.**

III.—DISTINCT OFFENCES AND OFFENCES NOT DISTINCT.

Notes.—15. District offences.—When a single transaction or connected series of events gives rise to several offences of a different character or to several offences of the same character affecting different persons, each such offence is separately indictable and punishable. *See* s. 71, I.P.C., and s. 235, *infra*, illustrations (*a*), (*f*) and (*g*).

(*a*) *Kidnapping and selling for purposes of prostitution*, ss. 363 and 372, I.P.C., **7 W. R. 68; 4 M. H. C. R. Appx. XXVII.** (*b*) *Resistance to a public servant taking property and assaulting a public servant*, ss. 353 and 183, I.P.C., **14 W. R. 19.** (*c*) Where several seals of different descriptions are found with the accused who possessed them with intent to commit forgery there is a complete and distinct offence under s. 473, I.P.C., for each seal, **13 W. R. 16.** (*d*) *Criminal intimidation to three persons at one time*, **9 W. R. 30.** (*e*) *False charge and giving false evidence*, ss. 211 and 193, I.P.C., **10 B. 254.** (*f*) *Theft and receiving gift to recover stolen property*, **(1902) 1 L. B. R. 203 (F.B.).** (*g*) *Rescuing from custody of one officer and using criminal force to another officer*, **13 W. R. 75.** (*h*) *Riot and grievous hurt by accused*, ss. 48, 323 and 326, I.P.C., when accused is guilty of writing *by his own hands* and has also caused grievous hurt, **12 C. 495; 16 C. 725; 19 C. 105; 40 C. 511; 17 B. 260 (F.B.) 7 A. 414 (F.B.); 7 A. 29** and *see* **7 A. 757; 12 C. W. N. CXLVII.** (*i*) *Personating a public servant and extortion*, ss. 170 and 384, I.P.C., **10 A. 58.** (*j*) *Concealing stolen property in the field of an enemy to implicate him*, ss. 193 and 414, I.P.C., **1 A. 379.** (*k*) *Theft in house and breaking a closed receptacle*, ss. 380 and 461, I.P.C., **1896 A. W. N. 194.** (*l*) *Issue of share warrants not duly stamped.* The issue of each of nine share warrants in favour of bearer not duly stamped is a separate offence under the *Companies Act*, **20 C. 676.**

(*b*) It is not necessary that the offences should be distinct to enable the Magistrate to pass consecutive sentences where the Magistrate convicted the accused of offences under, ss. 411 and 414, I.P.C., and passed separate sentences to run consecutively, the conviction and sentences were held to be sustainable under this section—**30 Bom. L. R. 383.**

16. Repetition of several offences constitutes one offence only of exactly the same character.—In the following cases, though the offences are of the same character, they are not *distinct* offences:—

(*a*) *Theft of property belonging to several persons.*—Where accused stole property at night belonging to two different persons from the same room, he cannot be sentenced separately as for two offences of theft, **11 W. R. 38; Ratanlal 927;** nor where a person steals at one time from different parts of a house, **U. B. R. 1904 = 1 Cr. L. J. 537; 1 Bur. S. R. 168** and **475.** Nor when a guard in charge of a train stole one time articles from separate bags of two different persons in a truck, **58 P. R. 1905.**

(*b*) *Possession of stolen property belonging to several persons.*—Where stolen property belonging to two different persons is found in the possession of the accused at the same time, he cannot be sentenced separately for receiving each property there being nothing to show that two distinct offences had been committed, **14 P. R. 1885.**

(*c*) *Dacoity in respect of property of several persons.*—Where a gang of dacoits in pursuance of a common object attacked at the same time two different houses in the same village, **1889 S. J. L. B. 444.**

(*d*) *False statements in one deposition.*—The making of any number of false statements in the course of the same deposition is only one offence, **6 M. H. C. Appx. XXVII** *followed* in **36 C. 808.**

17. Same facts constituting offences falling within two or more separate definitions.—Where the same facts constitute different offences, each such offence should be separately charged, though only one offence has been committed, *see* s. 71 (2), I.P.C.

8. Section does not authorise splitting offences for taking cognisance of cases.—A Magistrate is not entitled to split up an offence for the purpose of giving himself jurisdiction over the part which he would not have had over the whole, and thus deprive the prisoner of an appeal, **4 C. 18.** In **27 C. 983** it was *held* to be highly improper on the part of the Magistrate that instead of trying accused persons for offences which the acts attributed to them constitute, he should have tried them for a lesser offence, so that the trial might be conducted under the *summary procedure* laid down in Chapter XXII

9. Section merely permissive—The use of the words "may sentence" make it clear that this section is merely *permissive* and a Criminal Court is not bound to pass separate sentences in respect of each of the offences of which an accused person may be found guilty at one trial, **1 Bur. S. R. 271.** As to the principles which should guide a Court in passing single or separate sentences, *see* Heading III

II.—IMPOSING OF SEPARATE OR AGGREGATE SENTENCES ON CONVICTION.

Notes.—10 Generally separate sentence should be imposed on conviction of each offence.—It is generally the proper course, where an accused person is convicted at one trial of two or more distinct offences not being parts of the same transaction, a separate sentence should always be passed for each offence regard being had to provisions of this section, **Ratanlal 597 (F.B.) 2 B. H. C. R. Cr. 391, 5 B. H. C. R. Cr. 3.**

11. Punishment not to be aggregate.—This section does not empower a District Magistrate or any other Magistrate to pass an aggregate sentence instead of separate sentences upon an accused person convicted at one trial of two or more distinct offences The first clause of the section clearly contemplates separate sentences of imprisonment or transportation The amount of the aggregate punishment awardable under this section is limited by the proviso, but this does not import that an aggregate sentence within these limits may be imposed by a single sentence insead of by several sentences When sentence is passed in the aggregate, it is impossible to apportion it to the different offences of which the accused stands convicted, **14 P. R. 1886.** Such a course would in the event of the conviction being quashed in appeal enable the Appellate Court to ascertain readily the amount of punishment to be remitted, **4 M. H. C. R. Appx. XXVII.** *See*, however, **1 Bur. S. R 271** (Note 12), where it was *held* that a Criminal Court is not bound to pass separate sentences at such trial and there is nothing illegal if separate sentences are not passed

12. Separate sentence unnecessary when it is nugatory.—This direction namely, to pass separate sentence for each offence, does not apply of course to cases in which such a sentence is passed in respect of one of the offences as would render another sentence nugatory, as a sentence of death or of transportation for life *Cen Prov Cir No* 1

13. Sentences for offences forming part of one continuous transaction.—Where there is a simultaneous conviction of two or more offences being part of the same transaction the question whether a separate sentence should be passed for each offence will depend on circumstances, *Cen Prov Cir No* 1 If a prisoner be convicted of two or more offences forming part of one continuous transaction he can only be sentenced for the principal offence—*M H C Pro, dated 17th October*, 1862, *and 30th March*, 1863, and it is not necessary to record a finding on the minor counts *M H C Pro, dated 28th June*, 1868 Where a person though charged under different sections of the Penal Code was convicted of what was substantially but a single offence, it was not lawful to pass a sentence of imprisonment as for separate offences, exceeding in the aggregate the punishment which it was competent for the Court to inflict on conviction of a single offence **2 B. H. C. R. 126.** If a prisoner be convicted of two or more offences forming parts of one continuous transaction he can only be sentenced for the principal offence, and it is not necessary to record a finding on the minor counts *e g*, a man cannot be convicted both for *culpable homicide not amounting to murder* and for *being member of an unlawful assembly* because the offence is single and entire and the fact that he was present as a member of an unlawful assembly is really only part of the evidence of the major offence **7 W. R. 13; 3 Bom. L. R. 539.** *See* also cases under Heading III

14. In cases falling under s. 71, I P.C., practice differs.—The Calcutta High Court holds that in awarding punishment under s 71, I P C, in case of convictions of several separable offences falling within the purview of the section it is illegal to impose a sentence for each offence, **16 C. 442; 51 C. 79.** The Punjab Chief Court *held* in **4 P. R. 1901 (F.B)** that separate sentences cannot be awarded where the first clause of s 71, I P C, applies The Bombay High Court in **23 B. 706 (F.B)** *held* that a Court in awarding punishment under s. 71, I P C, should pass one sentence for either of the offences and not a separate sentence for each offence, but if two sentences are nevertheless passed and the aggregate of these does not exceed the punishment provided by law for anyone of the offences, or the jurisdiction of the Court, that would be an irregularity and not an illegality

(*c*) *Rioting and being member of unlawful assembly.*—Ss. 149 and 143, I.P.C. There cannot be a conviction both of rioting and being a member of an unlawful assembly, **1 W. R. 7.**

(*d*) *Rioting and hurt caused by other members.*—Where the accused is convicted of rioting and of hurt and the conviction for hurt depends upon the application of s. 149, I.P.C., there is a difference of opinion among the various High Courts. A Full Bench of the Calcutta High Court has ruled that separate sentences are not legal where it is found that such persons did not individually commit any act which amounted to voluntarily causing hurt but were guilty of that offence by s. 149, I.P.C., **16 C. 442 (F.B.)** *overruling* **11 C. 349** and *approving* **6 A. 121.** This Full Bench decision was followed in **3 C. W. N. 761; 4 C. W. N. 245; 14 C. W. N. LXIII; 40 C. 511.** It was discussed and distinguished in **8 C. W. N. 519;** *see* also **27 C. 566; 9 W. R. 33; 10 W. R. 63; 13 W. R 42; 6 C. 718; 14 C. 395; 16 C. 726.**

The Bombay High Court decided in **17 B. 260** that it was not illegal to pass two sentences, one for riot and one for hurt depending upon the application of s. 149. But this case is practically rendered obsolete by the present explanation. *See* **23 B. 706** and **3 S. L. R. 224 = 11 Cr. L. J. 414.**

The Allahabad High Court has *held* in **6 A. 121** that separate sentences for the offence of rioting as well as for the offence of causing grievous hurt by virtue of s. 149 was illegal. In **7 A. 757 (F.B.)** and **10 A. 58,** it was *held* in that such sentences were legal. These decisions were passed before the present Code.

A Full Bench of the Punjab Chief Court *held* in **4 P. R. 1901** that separate sentences for the offences of rioting and grievous hurt cannot by legally imposed upon a member of an unlawful assembly where the offence or rioting was not complete until the grievous hurt was actually inflicted.

The Oudh Judicial Commissioner's Court *following* the cases in **Oudh S. C. 125; 7 A. 757; 17 B. 260,** *held* that separate sentences may be passed under s 147, I.P.C., and any other section which becomes applicable to the accused with reference to terms of s. 149, I.P.C. The case in **16 C. 442** was distinguished on the ground that in that case none of the members of the unlawful assembly was proved to have committed any act, which amounted to an offence under s 324, I.P.C., **17 O. C. 184 = 15 Cr. L. J. 625.** Separate sentences under s. 147 and ss. 325, 129, I P.C, are illegal under s. 71, even when they are made to run concurrently, **51 C. 79.**

(*e*) *Rioting and criminal trespass.*—Ss. 147 and 447, I.P.C.—Where the accused was found with several others to have criminally trespassed on another's land and caused hurt in prosecution of the common object, *held* he could not be convicted and sentenced under s. 447, I P.C., in addition to a conviction and sentence under s. 147, I.P.C., the common object of the riot, and the intention in criminal trespass being substantially the same, but he might have been separately charged and convicted of *mischief*, **8 C. W. N. 305.**

(*f*) *Rioting and using criminal force.*—Ss. 147 and 353, I.P.C.—Where the force which was used and formed one of the component elements of the offence of rioting was the criminal force used to the public servants in the execution of their duty, to pass separate sentences under s. 147 and under s. 353, I.P.C., is in fact to punish an offender twice for the same offence. Similarly, to punish an offender for actually committing an assault and again for committing the same offence constructively, is illegal, **3 C. W. N. 174.**

(*g*) *Possession of utensils and manufacture of liquor.*—S. 43 of the *Bom. Abkari Act* of 1878.—Where accused was convicted of the offence of (1) manufacturing liquor and (2) being in possession of utensils for manufacture of liquor under cl. (*f*), and sentenced for both offences separately, *held* that under the explanation to this section the offences were not distinct ones and that the second offence was necessarily included in the first, **1 Bom. L. R. 344; 4 Bom. L. R. 720.**

IV.—CONCURRENT SENTENCES.

Notes.—19. Power to pass concurrent sentences is new.—This power has been for the first time conferred by the Code of 1898 and it overrules **25 C. 557; 10 A. 58; 20 A. 1; 10 B. 254; Ratanlal 383** and **878.**

20. Only sentences passed at one and same trial can be made to run concurrently.—The section does not authorise any Court to direct that two or more sentences shall run concurrently except sentences passed at one and the same trial. If trials are different, s. 397, *infra* is explicit and a sentence of imprisonment must commence at the expiry of the previous sentence. The Court has no option, **4 L. B. R. 147=7 Cr. L. J. 445; 6 Bur. L. T. 67 = 14 Cr. L. J. 388; 2 S. L. R. 23; 20 P. L. R. 1912 = 13 Cr. L. J. 3** and **11 A. L. J. 263 = 14 Cr. L. J. 240; 16 O. C. 370 = 15 Cr. L. J. 300.** But when a prisoner was tried on the same day separately for two offences for which he could have been tried at one trial, the trial being for all practical purposes one, an order passing concurrent sentences under this section is not illegal, **13 Bom. L. R. 200 = 12 Cr. L. J. 241, 19 A. L. J. 310.**

(*a*) *Adultery and enticing for illicit intercourse* —Ss 497 and 498, I P C., **2 W. R. 35.**

(*b*) *Stealing a buffalo and killing it* —Ss. 379 and 429, I P C, **14 C P. L. R. 159.**

(*c*) *Abetment of abduction and wrongful confinement*—Ss 109, 498 and 343 I P C, **1864 W. R. Sup. No. 21.**

(*d*) *Abandonment of child and culpable homicide* —Ss 317 and 304, I P.C, **2 A. 349.**

(*e*) *False information and public servant framing incorrect record*—Ss 177 and 218, I P C, **Weir II, 35.**

(*f*) *Receiving stolen property and assisting in concealment thereof*—Ss 411 and 414, I P C, **4 M. H. C. R. Appx. XIII; Weir I, 469.**

(*g*) *Abetment of theft and receiving stolen property* —Ss 109 380 and 411 I P C, **3 A. 181—185.**

(*h*) *Attempt and abetment*—A person cannot be separately punished for attempting and for abetting the same offences, **8 Bom. L. R. 855 = 4 Cr. L. J. 450.**

(*i*) *Forgery and fraudulent destruction of document*—Ss 411 and 477, I P C Where the act of the accused which constituted forgery and was the basis of his conviction under s 467, I P C., was the same as the act which amounted to fraudulent destruction or defacement and was the basis of his conviction under s 477 he cannot be separately sentenced under ss 471 and 477, I P C, **4 P. R. 1913 = 14 Cr. L. J. 183.**

(*j*) *Abduction with intent to ransom and putting a person in fear of death in order to commit extortion* —Ss 365 and 383, I P C, **6 L B. R. 160 = 6 Bur. L. T. 77 = 14 Cr. L. J. 167** *following* **1 L. B. R. 33.**

(*k*) *Assaulting public servants* —Ss 152 and 332 I P C, **19 C. 105.**

(*l*) *Offence under Penal Code and special law* —Where an act is an offence under the Penal Code and also under a special law the accused cannot be punished twice **5 N. W. P. H. C. R. 49.** In **1903 A. W. N. 26,** where the accused was charged under ss 420 and 511, I P C and s 29 of the *Telegraph Act* XIII of 1885 for sending a false telegram in furtherance of an attempt to cheat the High Court on appeal passed sentences of three years under each to run concurrently *See* also s 26 of the *General Clauses Act* 1897

18. Facts constituting several distinct offences constituting when combined a different offence.—Sometimes an act which is in itself an offence becomes either a different offence or an aggravated form of the same offence when combined with other facts either in themselves innocent or criminal *See* s 71 cl (3) I P C and s 235 (3) *infra* and ill, (*m*) thereto In such cases it is proper to frame charges and convict the accused for the several distinct offences and as well for the combined offence, but as to whether a sentence should follow each of such convictions, there is a difference of opinion between the Allahabad High Court on the one hand and the Bombay and Calcutta High Courts on the other (*See* Note 17, *supra*) So far as this section is concerned, the explanation and illustration make it clear that such offences are not distinct offences for the purposes of this section

(*a*) *House breaking with intent to commit theft and theft*—Ss 457 and 380, I P C A Full Bench of the Bombay High Court *held* in **23 B. 706** that though it is proper to charge a person and convict him for each of such offences, the Court in awarding punishment should, having regard to s 71, I P C, and illustration to this section, pass one sentence for either of the offences in question and not a separate one for each offence But if two sentences were passed and the aggregate of them did not exceed the punishment provided by law for any one of such offences or the jurisdiction of the Court, that would be a mere irregularity **9 B. H. C. R. 172** and **1 B. 214** were not followed SUBRAMANIA IYER, J, of the Madras High Court is also of opinion that two separate setences in a case like this are illegal under this Code **Weir II, 34.** The decisions in **10 B. 493** and **Ratanlal 228** and **12 M. 36** must be taken to have been overruled *See* also **1 Bom. L. R. 69; 12 C. W. N. CLXXXVII.** The Calcutta High Court has always *held* the view that separate punishment is illegal, **2. W. R. 63; 5 W. R. 49; 6 W. R. 49** and **92; 8 W. R. 31** (*see* Note 17 above)

(*b*) *Abducting a child with intent to taking property and theft*—Ss 369 and 380, I P C A prisoner tried convicted and punished under s 369 I P C, for abducting a child with the dishonest intent of taking movable property cannot also be punished for the theft of a part of the movable property which he intended dishonestly to take through means of the abduction, **7 M. H. C. R. 375.** This case though overruled in **12 M. 36** may now, in view of the illustration, be treated as good law

Accused was tried by a District Magistrate in the exercise of his special powers under s. 30 on three distinct charges: (1) of dacoity, s. 395 I.P.C., in respect of *S*; (2) of dacoity in respect of *A*; (3) kidnapping under s. 369, I.P.C., in regard to one *J*. The first two charges were tried together at a single trial and the third in a distinct trial. Judgment in each trial was passed and recorded on the same day. The judgment in the dacoity case concluded thus: "under s. 35, Cr. P. C., I sentence the accused to 14 years' imprisonment in the aggregate, accused has been found guilty of kidnapping under s. 369, I.P.C., but I can pass no further sentence of imprisonment upon him." The judgment in the trial for kidnapping after setting out the conviction under s. 369 concluded thus:—"As I have already sentenced the accused to 14 years' imprisonment under s. 35, Cr. P. C., I can pass no further sentence." *Held*, that the District Magistrate erred in supposing that because he had passed a sentence of 14 years' imprisonment in the dacoity trial, he had exhausted his power of sentencing and could pass no sentence on the conviction for kidnapping. It is true that his punishing powers were exhausted when he sentenced the accused to 14 years' imprisonment for the two offences of dacoity, but this section has no operation or effect on his powers to sentence the accused for the distinct offence of kidnapping, of which he had been convicted at a separate trial. The circumstance that the separate trials were contemporaneous and terminated on the same day, was wholly immaterial as regards the Magistrate's powers of sentencing, **14 P. R. 1886.**

30. Sentence of imprisonment cannot be aggregated for purpose of substituting transportation.—It is only for purposes of appeal that consecutive sentences are allowed to be treated as one sentence. Transportation can only be substituted for imprisonment under s. 59, I.P.C., when the offender is sentenced to at least seven years' imprisonment *in one case*, **3 W. R. 44.** It cannot be made up by adding two or more sentences together and then commuting *aggregate* period to transportation under s. 59, I.P.C., **2 W. R. 1**; nor can *a general sentence* of transportation be given for two or more offences when only one of the punishments awarded is seven years' imprisonment, **5 W. R. 44.**

31. Meaning of "for the purpose of appeal."—These words in cl. (3) mean only "for the purpose of being appealed from, **45 P. R. 1887.**

32. Only substantive sentences can be aggregated.—A sentence of imprisonment in default of payment of fine must not be included for purposes of calculation, **22 P. R. 1892**; nor one in default of finding security for keeping the peace. *See* s. 415.

33. Concurrent sentences cannot be aggregated for purposes of appeal.—By the amendment of clause 3 in the present section by the introduction of the words "of consecutive" the conflict of decisions on the point whether the aggregate of two or more concurrent sentences is to be deemed or one sentence for purposes of appeal is set at rest. Therefore when an accused has been sentenced to concurrent terms of imprisonment, not one of which is individually appealable, he has no right of appeal against them collectively, **40 C. 631**; *see* also **25 P. R. 1901; U. B. R. (1897 to 1901) 13; 33 A. 164; 11 Bom. L. R. 544 = 10 Cr. L. J. 250; 12 B. H. C. R. 147; 25 C. W. N. 613.**

VII.—EFFECT OF AMENDMENT OF SENTENCE BY SUPERIOR COURT.

Notes.—34. When terms of imprisonment concurrent.—When sentences are concurrent the annulment of one of them does not affect the others in any way. They all start from the same date.

35. When terms of imprisonment consecutive.—When sentences are to take effect consecutively and one of them is annulled, the sentence which is next to come into force immediately takes effect, as the sentence cannot have retrospective effect and as the sentence which precedes it holds good until annulled, it follows that when a prior sentence is annulled, the next in order of sequence immediately takes effect. *See*, however, next note.

36. When the sentence set aside on appeal, has been partly executed.—Where there are two sentences of imprisonment to be carried out on the same prisoner, one of which is to be carried out on the expiration of the other, and the first sentence for execution comes to an end upon an order reversing the finding and sentence being passed by the Appellate Court, the second sentence would, as the law stands, take effect from the date of the order of the Appellate Court. It is, however, only just that the period of imprisonment undergone under the first sentence should, under such circumstances, be deducted from the second-sentence, and it is open to the Appellate Court, on reversing the first finding and sentence, to direct that the sentence which remains undisturbed, shall be computed from the date of conviction. Such a direction should ordinarly be given and

21. Sentences of imprisonment in default of payment of fine cannot be made to run concurrently.—An order directing that terms of imprisonment awarded in default of payment of fines imposed for separate offences, to run concurrently is not justified by this section **5 S. L. R. 263 = 13 Cr. L. J 536; 27 Bom. C. R. 1351.**

22. Sentence of imprisonment may run concurrently with sentence of transporation for life.—21 P. R. 1913 = 50 P. L. R. 2914 = 15 Cr. L. J. 68.

23. Concurrent sentences cannot be aggregated for purposes of appeal.—*See* Note 36

V.—CONSECUTIVE SENTENCES AND HOW THEY SHOULD BE EXECUTED.

Notes.—24. Direction as to mode of execution must appear in the body of sentence.—The direction that a sentence of imprisonment in one case is to run from the date of the expiration of the sentence in a previous case, should appear in the body of the sentence and should also be inserted in the warrant (*Mad H. C Pro, 23rd December*, 1873)

25. Must be executed one after the other.—Where a convict is imprisoned under two warrants, which order consecutive imprisonment, the first warrant should be completely executed both in regard to the substantive sentence of imprisonment and imprisonment in default of payment of fine before any effect is given to the second warrant, **Ratanlal 19.**

26. Mode of execution when alternative sentences passed—Imprisonment in default of payment of fine.—Such sentences may be passed where the fine is the only sentence or where the fine is imposed in addition to a substantive sentence of imprisonment. The first case presents no difficulty *See* s 388, *infra* In the second case the substantive sentence of imprisonment begins to run at once the imprisonment in default of payment of fine is contingent upon the fine not being paid or recovered and is postponed until the expiration of the substantive sentence of imprisonment by the sentence If a person, who is undergoing the substantive sentence of imprisonment and is liable to further imprisonment for not paying a fine imposed, be senteneed again to substantive imprisonment, the second sentence begins when first expires and imprisonment to be undergone in default of the payment of the fine is not excused but is postponed by operation of law. *See* s 398 (2).

27. Sentences passed at different trials—S 397 is explicit and gives the Court no option a sentence of imprisonment must commence at the expiry of the previous sentence, **4 L B. R. 147 = 7 Cr. L. J. 445; 2 S. L. R. 23.** It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore, **20 M. 444.** An order directing that the sentences in two different cases do run concurrently is illegal **24 C. L. J. 54.** Where there are two or more separate convictions for two or more distinct offences in the same case this section contemplates that a separate sentence should be passed for each offence, **46 P. R. 1917 (Cr.)**

VI.—AGGREGATION OF SENTENCES.

Notes.—28. Sentences must be imposed separately.—The amount of the aggregate punishments awardable under the section is limited by proviso (*a*) but this does not import that any aggregate sentence within these limits may be imposed *by a single sentence*, instead of by a separate sentence, **14 P. R. 1886.**

29. Limit of maximum term of punishment applies only to sentences passed at one trial—(*a*) *Limit of* 14 *years*—Sentences of imprisonment may be accumulated beyond the term of 14 years The limit of 14 years has reference only to sentences passed simultaneously at one trial or passed on charges tried simultaneously, **7 W. R. 1.** (*b*) *Limit of twice the amount of punishment proviso*—Where a person accused of several offences of the same kind [*see* s 234 (2) *infra*] is tried for each of such offences *separately* by a Magistrate the aggregate punishment which such Magistrate can inflict on him in respect of such offences is not limited to twice the amount which he is by his ordinary jurisdiction competent to inflict, but such Magistrate can inflict on him for each offence the punishment which he is by his ordinary jurisdiction competent to inflict **1 Bur. S. R. 271.** A person accused of theft on the 1st August and of house-breaking by night in order to steal on the 2nd August, both offences involving a stealing from the same person *was charged and tried* by a Magistrate of the first-class *at the same time* for such offences and sentenced to rigorous imprisonment for two years *for each* of such offences *Held*, that the joinder of charges was regular under s 234, and the punishment was within the limits prescribed by this section as each trial was separate from charge to sentence, though judgments were given and punishments inflicted on one and the same day, **3 A. 305 (F.B)** (*c*) *The fact that the separate trials are contemporaneous and terminate on same day is immaterial as regards the ordinary powers of the Ma*

Notes.—1. Effect of conferring higher power during trial.—Clause (2) was introduced for the first time into the 1882 Code to meet **6 C. 476.** A Magistrate of the second class began the trial of a case in that capacity, but before passing sentence he was invested with first-class powers. *Held*, that he could pass sentence in the latter capacity, **7 A. 414 (F.B.).** (PETHERAM, C.J. and BROADHURST, J., *dissenting*.)

2. Tahsildar Magistrates in Madras.—In Taluks where there are no Stationary Sub-Magistrates, all second-class powers are conferred on Tahsildars, but in Taluks where there are Stationary Sub-Magistrates all second-class powers except those under ss. 190 and 206, *infra*, are conferred on them—*Fort St. George Gazette*, 1893, Part I, p. 579.

3. 'Generally' and 'specially' distinguished.—S. 39 declares that the Local Government may empower classes of officials *generally* by the official titles, or persons *specially* by name or in virtue of their office. When, therefore, a class of officials is invested with powers to try certain offences, it would, appear that they are '*generally*' empowered. The word '*generally*' is in contrast to the word '*specially*' which is used in speaking of individuals. The word '*specially*' does not refer to the extra or special powers conferred by the Government whether to an individual or to a class.

Under s. 3 of the *Opium Act* I of 1878, a Magistrate is defined as a Presidency Magistrate...............or (when specially empowered by the Madras Government to try cases under this Act) a second-class Magistrate. By a notification of the Local Government, all Magistrates of the second class were empowered to try cases under the *Opium Act*. It was *held* that the notification was *ultra vires* of the powers given by the Act, as its effect is to enlarge the definition of Magistrate as given therein and that the word 'specially' in s. 3 of that Act must be construed to refer to individuals, **17 M. L. T. 191 = (1915) M. W. N. 269 = 16 Cr. L. J. 268.**

Continuance of powers of officers transferred.

40. Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is* appointed to an equal or higher office of the same nature, within a like local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed,† exercise the same powers in the local area in which he is so appointed.†

Notes.—1. Officer retains powers on transfer or reversion.—This section relates only to transfers from one district or area to another, and a *Mamlatdar* invested by name with any higher magisterial powers in a district retains them, though on reversion to his appointment as *Awalkarkun* he ceases to be a *Mamlatdar*, his revenue title being matter of description only, **Ratanlal 322.** When an officer was last invested with the powers of a Magistrate of a certain class, those powers must be taken to continue so long as he is a Magistrate, though he reverts to a less responsible post, unless they are withdrawn by a fresh notification, **Weir II, 36.** A Sub-Registrar, invested with magisterial powers under Act XXIV of 1859 (*Town Nuisances Act*), is competent to exercise such power on his transfer to another place, unless the Local Government direct him not to exercise them, **15 M. 132.**

2. Transfer to an equal or higher office of the same nature.—Where a Head Assistant Magistrate during the pendency of a criminal case of which the trial was almost finished, was appointed to the office of Deputy Magistrate in another part of the same district and the case was transferred by an order of the District Magistrate to the file of the Deputy Magistrate, it was *held* the Deputy Magistrate could proceed with the trial from the point at which he had arrived as Head Assistant Magistrate, **22 M. 47.** But if a Magistrate temporarily holding the office of a *District Magistrate* is transferred to another district, but not as *District Magistrate*, he will not carry with him the powers of a District Magistrate, since he has not been transferred to an *equal or higher office of the same nature*, **3 A. 563 (F.B.).**

3. On transfer to different district, Magistrate loses local jurisdiction and cannot continue trial.—A Magistrate of the first class was appointed to officiate as District Magistrate in a certain district. While so acting he was appointed to officiate as District Magistrate in another district "on being relieved." When "relieved" he completed the criminal case which he had heard while officiating as District Magistrate and passed judgment and sentence upon the prisoners. *Held*, that the jurisdiction of the Magistrate ceased as soon as he was "relieved," and from that moment he no longer stood appointed to the first district and could exercise

* Substituted for "transferred" by Act XVIII of 1923.
† Omitted by Act XVIII of 1923.

communicated by the Appellate Court to the Court which passed the sentence with a view to a fresh warrant being issued to the jail authorities in supersession of the original warrant (*Punj Cir No* 4 *of* 1891) But in Bombay, where a Sessions Judge directed that the term of imprisonment to which he sentenced an accused person should commence on the expiration of a period of sentence passed by a Magistrate which was subsequently reversed on appeal it was *held* that the sentence by the Sessions Judge must be deemed to have commenced from the time it was ordered to commence, *viz* from the expiration of the sentence by the Magistrate, whether by reversal or by completion of the punishment **Ratanlal 139.** Where a person is convicted in two cases by different tribunals, and on appeal conviction in the first case is set aside, the imprisonment undergone should be reckoned as imprisonment under the sentence passed on the second conviction (*Mad H C Pro*, 15*th February*, 1879) See *contra* **Ratanlal 523.**

C.—Ordinary and Additional Powers

Ordinary powers of Magistrates

36. All District Magistrates, Sub-divisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule Such powers are called their "ordinary powers"

Notes.—1. *See* s 12 and Ch XV as to the local jurisdiction of Magistrates s 32 for their ordinary power to pass sentence and Column 8 of Schedule II for their jurisdiction to try offences

2 **Magistrates in Burma and Punjab** —As to powers of Magistrates *in Upper Burma* see Reg V of 1892, Schs IV and V, as amended by Act XIII of 1898 (*Burma Laws Act*) and as to European British subjects, *ibid*, Sch XVII Criminal cases in the Punjab against European or native soldiers, can only be taken up by Magistrates of the first class—*Punj Gazette*, 1880, *Pt III p* 77

3 **Whether this section can be construed as giving powers not specifically referred to in Sch. III.**—Where an accused person is not sent before a District Magistrate by any other Magistrate under sub-sec (3) of s 107, *infra*, so as to bring the case within sub-sec. (4) such District Magistrate s order detaining him in custody is one made without jurisdiction Even if s 36 can be construed as giving powers which are not specially referred to in Sch III having regard to the terms of sub-sec (3) of s 107, the power is not one which can vest in the Magistrate to whom the accused person is sent **31 M 315 (F.B.).**

4. Power to entertain complaints is not one of the "ordinary powers"—Power to entertain complaints is not one of the ordinary powers of a first-class Magistrate **34 M 343**

Additional powers conferrable on Magistrates

37. In addition to his ordinary powers any Sub-divisional Magistrate or any Magistrate of the first, second or third class may be invested by the Local Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate

Notes.—1. In the Punjab —District Magistrates conferring powers under this section on their subordinates, should report the same to the Local Government—*Punj Gazette*, 1880 *Pt I p* 77 As to additional powers conferred on the various grades of Magistrates see *Punj Notification No* 507, *dated* 3*rd April*, 1904, set out in 39 *Punj Rec Cir Orders, p* 4

2. Upper Burma —*See* Note 1 to s 36 *supra* As to the conferment of these additional Magisterial powers on Police-officers in the SALWEEN and ARAKHAN HILL DISTRICTS, see *Act XI of* 1889 s 101

3. Withdrawal of Powers —*See* s 41, *infra*

Control of District Magistrate s investing power

38. The power conferred on the District Magistrate by s 37 shall be exercised subject to the control of the Local Government

D —Conferment, Continuance and Cancellation of Powers.

Mode of conferring powers

39. (1) In conferring powers under this Code, the Local Government may by order empower persons specially by name, or in virtue of their office, or classes of officials generally by their official titles

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered *

* See *e g Fort St George Gazette* 1900 Pt I, p 1103

3. **"Assist."**—The assistance that can be demanded under this section is *personal assistance* of the individual of whom it is demanded and not the supply of a contingent of men to assist, **Weir II, 37.** In construing the word "assistance" in s. 187, I.P.C., it was *held* that the word must have some direct personal relation to the execution of the duty by the public officer. The word implies that the party who assists is doing something which in the ordinary circumstances, the party assisted can do it for himself, **56 M. 419 (F.B.).** The word *reasonably* was first introduced by the 1882 Code.

4. **Not bound to assist if not legally bound.**—Where a Magistrate directed a landholder to find a clue in a case of theft within 15 days and to assist the Police, it was *held* that the order was unauthorised and unreasonable and the conviction under ss. 187 and 188, I.P.C., for neglecting such direction, could not be upheld as the landholder is not required to perform the duties for which the Police are appointed and paid, **3 A. 201.** Refusal to assist a Police constable to bury a person is not an offence, **6 C. P. L. R. 45 ; 42 A. 314=18 A. L. J. 169.**

5. **Illegal to escape from custody of private person lawfully arresting.**—A Police-officer who is charged with the duty of arresting a person is authorised to employ a Chowkidar in assisting him in arresting the person or in preventing his escape, and if the person escapes from the Chowkidar's custody, he would be guilty of an offence under s. 225, I.P.C., **6 C. W. N. 337.**

6. **Protection to persons acting in aid of officers of justice.**—The protection which the law affords to Ministers of justice extends also to every person coming to their aid and lending his assistance or attending for that purpose. See *Russell on Crimes, p.* 726. The *Sissing hurst* Case, **1 Hale 461** and *R.* v. *Porter,* **12 Cox 444.** *See* also s. 99, I.P.C.

7. **Duty of private person under English Law.**—In case of a riot, if a constable sees a breach of the peace committed, he may call for anyone present for his assistance if there is a reasonable necessity therefor. If the person called upon without any physical impossibility or lawful excuse refuse to do so, he is liable to be indicted, and it is no defence to plead that in consequence of the number of rioters, the single aid of the person called upon would have been of no use.—*R.* v. *Brown,* Case No. 314, *Russell,* pp. 431 and 727. It is not necessary that the arrest, to effect which a Police-officer demands assistance under this section, should in itself be Lawful, *Reg.* v. *Sherlock,* **L. R. I. C. C. R. 20.**

Aid to person, other than Police-officer executing warrant.

43. When a warrant is directed to a person other than a Police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Notes.—1. To a person other than a Police-officer.—*See* ss. 77 and 78. Having regard to explanation 2 to s. 99, I.P.C., persons acting under this section must, if required, state the authority under which they act or produce the same, if in writing.

2. **May aid.**—The assistance to be rendered under this section is not obligatory as under s. 42, *supra,* but is merely optional, and the section indemnifies any person who so aids.

Public to give information of certain offences.

44. (1) Every person, whether within or without the Presidency towns aware of the commission of, or of the intention of any other person to commit, any offence punishable under *any* of the following sections of the Indian Penal Code, *viz.,* 121, 121-A, 122, 123, 124, 124-A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or Police-officer of such commission or intention.

(2) *For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.*

Notes.—1. Scope of this Section.—The scope of the corresponding section of the 1872 Code was narrow, inasmuch as it was confined to persons aware of *the commission* of any of the offences specified, while the present section goes further and imposes the obligation as well on persons aware of *the intention to commit* any of such offences.

no jurisdiction therein as a Magistrate of the first class and therefore the conviction of such accused persons had been properly quashed on the ground that the Magistrate had no jurisdiction, **3 A. 563 (F.B.)**. *B*, a Magistrate, exercising jurisdiction in *M* district was transferred from that district ' on the arrival of *K*' *Held* BANERJI, J that the effect of such order so expressed was that *B* ceased to have jurisdiction as a Magistrate within the district of *M* from the time when *K* commenced work as a Magistrate in that district *Held* by AIKMAN, J, that the effect of said order was that *B* ceased to have jurisdiction on the arrival of *K*, but whether such arrival was his arrival within the limits of the district or at headquarters not clear from the order, **19 A. 114** *See* also **15 P. R. 1884, 3 A. L. J. 825 = 4 Cr. L J. 140**; and **4 Cr. L. J. 239 (A.)** and Note 3 to s 12 But where an application for sanction is properly before a Magistrate of the first class in charge of a sub-division of a district his jurisdiction to pass orders on such application is not taken away by the fact of his being transferred to another sub-division of the same district **42 A. 649.**

4. Magistrate going on leave does not lose powers.—This section can keep alive the magsiterial powers once conferred on an officer in a different district even when he is interrupted by repeated absence on furlough and privilege leave But the case is different if he absents without leave or overstays leave, and thereby vacates his appointment according to rules of service, **2 Bom. L R. 536.**

5. Under the same Local Government.—These words were first added to the 1882 Code in order to meet **2 C. 117,** so that it might be clear that powers conferred by one Local Government do not accompany an officer when he is transferred to a province under another Local Government *See* also **15 P. R. 1884, p. 20.**

Powers may be cancelled

41. (1) The Local Government may withdraw* *all or any of the* powers conferred under this Code on any person by it or by any officer subordinate to it.

(2) *Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate*

Note.—Powers conferred by District Magistrates —*See* ss 13 and 37 and Schedule IV

PART III.

GENERAL PROVISIONS

CHAPTER IV.

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS

Public when to assist Magistrates and Police

42. Every person is bound to assist a Magistrate or Police-officer reasonably demanding his aid, whether within or without the Presidency towns —

(*a*) in the taking *or preventing the escape* of any other person whom such Magistrate or Police-officer is authorised to arrest

(*b*) in the prevention or *suppression* of a breach of the peace, or *in the prevention* of any injury attempted to be committed to any railway, canal, telegraph or public property

Notes —1. *See* also ss 77 and 128 as to the assistance which a private person is bound to render to a public servant *See* ss 54—57 and 151 as to circumstances under which a Police-officer may lawfully arrest.

2. Punishment for omission to assist —Intentional omission to assist a public servant is punishable under s 187, I P C Under N Y Cr Pro a person refusing to aid public officer is guilty of *misdemeanour*, s. 104

* See *e g* *Assam Gazette* 1903, Pt II, p 170

(*b*) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender :

(*c*) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under ss. 143, 144, 145, 147 or 148 of the Indian Penal Code:

(*d*) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances ;* " or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person:"

(*e*) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, † 231, 232-A, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460 [489-A, 489-B, 489-C and 489-D]:

(*f*) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information.

(2) In this section—

(i) " village " includes village-lands, and

(ii) the expression " proclaimed offender " includes any person proclaimed as an offender by any Court or authority established or continued by the Governor-General in Council in any part of India in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435 436, 449, 450, 457, 458, 459 and 460.

Appointment of village-headmen by District Magistrate in certain cases for purpose of this section.

(3) Subject to rules in this behalf to be made by the Local Government, the District Magistrate or Sub-divisional Magistrate † may from time to time, appoint one or more persons to be village-headmen for the purposes of this section in any village for which there is no such headman appointed under any other law, with his or their consent to perform. The duties of a village-headman under this section whether a village-headman has or has not been appointed for that village under any other law.†

Note. 1.—Analagous provisions.—See *Criminal Tribes Act* XXVII of 1871, ss. 1 and 2 ; *Forest Act* VII of 1878, s. 78. *Upper Burma.* In Upper Burma the following has been substituted for s. 45 by *Upper Burma Village Regulation* XIV of 1887, s. 4 :—

Village-headman bound to report certain matters

45-A. A headman appointed under the *Upper Burma Village Regulation* XIV of 1887 shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest Police-station or military post, whichever is the nearer, any information which he may obtain respecting—(*a*) the permanent or temporary residence of any notorious receiver or vendor of stolen property in his village ; (*b*) the resort to any place within, or the passage through his village of any person whom he knows, or reasonably subjects, to be a dacoit, robber, escaped convict or proclaimed offender ; (*c*) the commission of, or attempt or intention to commit, within his village any of the

* These words were added by the Cr. P. C., Amendment Act (XVIII of 1923), s. 9.
† Added by Act XVIII of 1923.

The word *forthwith* was introduced by the 1882 Code *See* s 154 I P C for special obligation of a similar nature imposed on owners and occupiers of land

2 **Nature of the offences mentioned** —The following are the several offences mentioned above in respect to which information has to be given —

S 121 —Waging or attempting to wage war against the Queen or abetting the same 121 A —Conspiring to commit certain offences against the State 122 —Collecting arms etc with the intention of waging war against the Queen 123 —Concealing with intent to facilitate a design to wage war 124 —Assaulting Governor General etc with intent to compel or restrain the exercise of any lawful power 124 A —Sedition 125 —Waging war against any Asiatic Power in alliance or at peace with the Queen or abetting the waging of such war 126 —Committing depredation on the territories of any power in alliance or at peace with the Queen, 130 —Aiding escape of or harbouring State or war prisoners or offering any resistance to the recapture of such prisoner 143 —Being member of an unlawful assembly 144 —Joining an unlawful assembly armed with any deadly weapon 145 —Joining or continuing in an unlawful assembly knowing that it had been commanded to disperse 147 —Rioting 148 —Rioting armed with a deadly weapon 302 —Murder 303 —Murder by a life convict 304 —Culpable homicide not amounting to murder 382 —Theft after preparation made for causing death or hurt in order to the committing of theft 392 —Robbery 393 —Attempt to commit robbery 394 —Voluntarily causing hurt in committing robbery 395—Dacoity 396 —Murder in dacoity 397 —Robbery or dacoity with attempt to cause death or grievous hurt 398 —Attempt to commit robbery or dacoity when armed with deadly weapons 399 —Making preparation to commit dacoity 402 —Assembling for the purpose of committing dacoity 435 —Mischief by fire or explosive substance with intent to cause damage to the amount of Rs 100 or upwards 436 —Mischief by fire or explosive substance with intent to destroy a house 449 —House trespass in order to the commission of an offence punishable with death 450 —House trespass for the commission of an offence punishable with transportation for life 456 —Lurking house trespass or house breaking by night 457 —Lurking house trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment 458 —Lurking house-trespass or house breaking by night after preparation made for causing hurt etc 459 —Grievous hurt caused while committing lurking house-trespass or house-breaking 460 —Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night etc.

3 **Punishment** —As to punishments for breach of obligation imposed by this section *see* ss 118 176 and 202 of the I P C and for furnishing false information s 177 I P C. For the necessity of obtaining sanction *see* s 195 (*a*) *infra*

4. **Omission to give information must be intentional** —When there are several Lambarders and one of them to the knowledge of others directs the village Chowkidar to make a report of burglary at the *thana* it cannot be said that any of them had intentionally failed to give information prescribed by law or that there was no reasonable excuse for not giving it if the Chowkidar had disobeyed the order **5 P. R 1869**

5 **No further duty after giving information** —When once information of the fact of a crime has reached the Police the object of this section has been fulfilled and no further duty imposed by it remains **Ratanlal 674**

Village headman accountants land holders and others bound to report certain matters

45. (1) Every village headman village-accountant village watchman village Police officer, owner or occupier of land and the agent of any such owner or occupier* in charge of the management of that land and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest Police station whichever is the nearer, any information which he may possess† respecting—

(*a*) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman accountant watchman or Police-officer, or in which he owns or occupies land or is agent or collects revenue or rent

* Added by Act XVIII of 19 3
† Substituted by Act XVIII of 19 3

25. False complaint to Village Magistrate is an offence.—In **32 M. 258** *dissenting* from **31 M. 506**, it was *held* (SANKARAN NAIR, J., *dissenting*) that a false complaint to a Village Magistrate or other person mentioned in this section is an offence, when the information is one which under this section the Village Magistrate or such person is bound to report to the higher constituted authorities, will amount to an offence under s. 211, I.P.C. It would be otherwise, if the offence complained of is one in regard to which the information need not be passed to the higher authorities. *See* also **27 M. L. J. 37 = 1914 M. W. N. 804 = 15 Cr. L. J. 431; 16 Cr. L. J. 248 (M).**

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

Note.—Powers of Police in Calcutta, Bombay and Madras.—In the absence of any specific provison to the contrary, nothing in this Code applies to the Police in the towns of Calcutta and Bombay, s. 1, *supra.* Having regad to the fact that ss. 54—56 in this chapter and col. 3 of Sch. II are made especially applicable to the Police in the towns of Calcutta and Bombay, it may well be doubted whether the other sections of the chapter which are for the most part directory apply to the Police there. The powers of the Police as regards Arrest and Procedure are regulated in the town of Calcutta by this chapter, the 3rd col. of Sch. II and *the Calcutta Police Act* IV of 1866 (B. C.) as amended; in Madras by Act III of 1888 and by the provisions of this Code and in Bombay by Act XIII of 1856, Bombay Acts I of 1872, III of 1879, IV of 1882, XVI of 1895 and IV of 1902 and the provisions of this Code especially extended to it. Practically, therefore, the powers of the Police in the Presideny towns are throughout the same. *See* **31 C. 557.**

A.—Arrest generally.

Arrest now made.

46. (1) In making an arrest, the Police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Resisting endeavour to arrest.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such Police-officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death, or with transportation for life.

Notes.—1. Amendment of section in Punjab.—In the places where the *Punjab Frontier Crimes Regulation* III of 1901 is in force s. 46 is to be read as if the following were added to it, namely:—" But this section, gives a right to cause the death of a person against whom those portions of the Punjab Frontier Crimes Regulation, 1887, which are not of general application, may be enforced—(*a*) if he is committing or attempting to commit an offence, or resisting or evading arrest, in such circumstances as to afford reasonable ground for believing that he intends to use arms to effect his purpose; or (*b*) if a hue and cry has been raised against him of his having been concerned in any such offence as is specified in the last foregoing paragraph of this section or of his committing or attempting to commit an offence or resisting or evading, arrests in such circumstances as are referred to in clause (*a*) of this paragraph." *See* s. 38 (*ii*), Reg. III of 1901.

Under the corresponding section (s. 37) of the *Punjab Frontier Crimes Regulation* IV of 1887, it was *held* that the limits of s. 46 of this Code, as to the classes of persons to whom death may be caused in effecting an arrest, do not prevail, but that the regulation makes no alteration in the general principle of the law, that in making such an arrest, no more force is to be used than is necessary, and that death may not be caused, unless she arrest cannot be effected without causing it, **29 P. R. 1894, p. 104.**

2. Who may arrest.—(1) *A Police-officer* may arrest without a warrant under ss. 54 and 151; under a warrant under ss. 77 and 79; under the written order of an officer in charge of a Police-station, ss. 56 and 157; under the orders of a Magistrate, ss. 64 and 65 and in non-cognisable offences under s. 57. (2) A superior Police-officer, *see* s. 550. (3) An officer in charge of a Police-station—ss. 55 and 157. (4) A Magistrate under ss. 64,

following offences, namely —(i) murder, (ii) culpable homicide not amounting to murder, (iii) dacoity, (iv) robbery, (v) offence against the *Indian Arms Act* XI of 1878 and (vi) any other offence respecting which the Deputy Commissioner, by general or special order, made with the previous sanction of the Commissioner directs him to communicate information, in (*d*) the occurrence in his village of any sudden or unnatural death or of any death under suspicious circumstances *Explanation* —In this section, village has the meaning assigned to the word in the *Upper Burma Village Regulation*, 1887

Lower Burma —As to the section in force in those parts of Lower Burma to which the *Lower Burma Village Act* III of 1889, is extended, *see* ss. 5 and 6 of that Act and Burma Cesses and Rural Police Act II of 1880 s 14

Madras —*See* Madras Reg of 1816, ss 8 and 9, Madras Reg I of 1830, s 3

Central Provinces —*See* s 141 *of the Central Provinces Land Revenue Act* XVIII of 1881 and **7 N. L. R. 101 = 12 Cr. L. J. 441.**

I.—PERSONS ON WHOM THE DUTY UNDER THIS SECTION IS IMPOSED.

Notes.—2. Village-headman in Madras means Village Munsiff or Village Magistrate, **32 M. 258 (F.B.)**

3. Zaildar not a Village-headman.—A Zaildar not being a village headman is not one of the persons to whom the provisions of cl. (*c*) of this section are applicable, **25 P. R. 1894** and **30 P. R 1894, p. 34.** *See* Rules 24 and 28 under ss. 5 and 39-A of the *Punjab Laws Act*, 1872 But rule 170 of the Rules made by the Financial Commissioner under s 28 of the *Punjab Land Revenue Act*, 1887, imposes on a Zaildar, the duty of reporting heinous crimes to the Police and Magistrate It is proposed to confer power on Sub-divisional Magistrates to appoint for the purpose of this section village headmen in villages where there are no headmen under any other law

4. Village-Accountant.—It was *held* in **1 M. 266** that a Village Accountant and a Village Munsiff's peon did not come under the class of persons bound under the corersponding section of the 1872 Code, but the *Village Accountant* is now *expressly* included in the section *See* also *Forest Act* VII of 1878, s 78, which requires him to give information of Forest offences

5. Village-watchman.—*See* for other enactments imposing duties upon him, *Forest Act* VII of 1878 s 78, the *Criminal Tribes Act* XXVII of 1871, ss. 21 and 22, *N W Provinces, Act* XVI of 1873, s 8 and in *Oudh*, Act XVIII of 1876, s 34

6. Village Police-officer.—For his other obligations of a similar nature, *see* in *Madras*, Act XII of 1882, s 25, in *Bengal*, Act V of 1861, ss 31 and 47, and Act (B C.) VI of 1870 in *Bombay*, Bombay Acts VII and VIII of 1867 and *Bombay*, Reg XII of 1827, in *N-W Provinces*, Act XVI of 1872 and in *Oudh*, Act XVIII of 1876

7. A Mukkaddam.—In the Central Provinces though no person has been appointed as the village headman under cl (3) of this section, the *Mukkaddam* appointed under Central Provinces Land Revenue Act XVIII of 1881 is defined in s 4 (13) as the executive headman of the village under s 141 of that Act and rules framed thereunder has to perform duties identical with those laid down by this section, **7 N. L. R. 101=12 Cr. L. J. 441.**

8. Owner or occupier of land.—No doubt the wods '*at or near such village*' are not added after land but they must evidently be intended because the duty imposed of giving information, etc, is intended to apply only when such occurrence takes place at or near the village of which the person bound to give information is the headman, etc Residence in a dwelling house belonging to another is not *occupation of land* within the meaning of this section, **23 W. R. 60.** It is absurd to hold that a person by the mere circumstance of being the owner or occupier of land anywhere, would be bound to give information in respect of an occurrence in a remote part of the country from where the land is owned and held. The liability is on the owner when he occupies the land, and on the occupier, where somebody other than the owner occupies it *physically*

9. Obligation on owner of house.—The provisions of this section do not apply to the owner of a house, **12 M. 92; 30 Bom. L. R. 1570** Owners or occupiers of *houses* in a village are not owners or occupiers of land within the meaning of this section and omission by them to report the sudden death of children in their houses by snake-bites or stings of scorpions, is not punishable, **Weir I, 101; II, 38.** So also, a father was *held* not bound to report the death by drowning of his child in an irrigation tank, not being an owner or occupier of land, *M H C Cr Rev*, *Case No* 67 *of* 1905

Central Provinces.—Handcuffs shall always be used in the following cases:—(1) In the case of any person accused of (*a*) offences relating to coin, ss 231—254; (*b*) murder and culpable homicide, ss 302—304; (*c*) attempt to commit murder and culpable homicide, ss. 307 and 308; (*d*) of being a thug, s 311; (*e*) robbery, s 392, (*f*) dacoity, s 395, I.P.C; (*g*) of any minor offence against property, *if he has been previously convicted of any offence against property or has been ordered to find security for good behaviour.* (2) In the case of any person who has been arrested under s. 55, cl (*c*), Cr. P. C., as being an habitual robber, house breaker, etc., *if such person has been previously convicted of any offence against property.* (3) No person shall be handcuffed who by reason of age, sex or infirmity, can easily and securely be kept in custody without handcuffs—*C. P. Pol Man*, *p* 190

14. **Arrest in foreign territory.**—No arrest can take place in foreign territory without a warrant, and the warrant must go through the regular channel The proper course to pursue when such person has taken refuge in foreign territory is to report it to the Magistrate of the district in order that the necessary warrant may issue and the usual step may be to procure *extradition*—*Mad. Pol Man p.* 93

15. **Arrest of fugitive criminals from Feudatory States.**—The Police shall not arrest any fugitive from a Feudatory State without an order from the District Magistrate, provided that in case of extraditable offences, if the accused is pursued by the Police of such State and his arrest claimed he shall be arrested if, the suspicion attaching to him be reasonable, but the person so arrested, together with any property recovered from him shall not be removed to the Feudatory State until receipt of District Magistrate's orders—*C. P Pol Man*, *p* 166 The officers or agents of Feudatory Chiefs have no authority to make arrest of criminals or to search for or seize property in British territory, but they may pursue such criminals accused of extraditable offences, and seek the aid of the British Police in securing their arrest or recovering property in their possession or disposed of by them

16. **Intimation of arrest of soldiers to their commandants.**—In the event of arrests of soldiers, British or Native, charged with the commission of offences, as early intimation as possible of the fact must be given to the officer commanding the regiment to which the men arrested may belong, so as to enable him to adopt in time any measures he may think necessary for their defence—*Bom Pol Man*, *p* 95

17. **Arrest of persons in Portuguese territory.**—*See* Act IV of 1880 (*Portuguese Treaty Act*), cl. (*l*) of the Schedule

18. **Arrest in British territory by foreign Police is illegal.**—*See* 29 A. 377.

Search of Place entered by person sought to be arrested

47. If any person acting under a warrant of arrest, or any Police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such Police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Notes.—1. Scope of Section.—This section is not intended to restrict the powers of the Police to enter the place to be searched, on the contrary, it is a provision compelling house-holders to afford the Police facilities in carrying out their duties and s 48 provides that if difficulties are placed in the way of a Police-officer, he may use force to obtain ingress, **41 C. 350.**

2. **Persons acting under a warrant.**—Need not necessarily be Police officers, *see* ss. 77 and 78, *infra.*

3. **Police-officers having authority to arrest.**—As to when a Police-officer may arrest without a warrant, *see* ss 54 and 58, *infra*

4 **Section applies to arrest under s. 66.**—The provisions of this section and of ss 48 and 49, *infra* apply also to arrests under s 66, *infra* *See* s 67, *infra*

5. **Notice of authority and purpose necessary.**—Where the right to obtain ingress, etc, exists, it may not be exercised unless there has been a notice of the business on which the officers are come, a demand to enter and a refusal to admit, *Launock* v. *Brown*, **2 B.** and **Ad. 592;** *Burdett* v *Abbot*, **14 East 157.** No precise words are needed and it is enough to give notice that entry is sought under proper authority See *Russell on Crimes*, p 145

65, 66 and 67 (5) A military officer under ss 130 and 131 (6) A private person without warrant, s 59, under warrant, ss 77 and 78, under orders of a Police-officer, s 42, under orders of a Magistrate, ss 42, 64, 65, *see* s. 43 for aiding persons other than Police-officers and ss 66 and 67 for re-arrest

3. Who may authorise arrest.—(1) A Police-officer, ss 42 and 79 (2) Officer in charge of a Police-station, ss 55 and 56 (3) Magistrate (*a*) verbally ss 42, 64 and 65, (*b*) by warrant ss 90, 92, 107, 114, 186, 204, 208, 497 (4) High Court, s 427

4. Procedure subsequent to arrest—For *bail*, *see* ss 57, 60, 63, 76, 169, 170, 496 and 497, for *search of person see* ss 51, 52, 53, for *delivery to proper authority*, ss 59, 60, 61, 63, 167, 186, 187, 445, where arrest without warrant and ss 76, 78, 81, 85, 86, 167, 186, 187, 445, where arrest is under warrant, for *reporting arrest*, s 42 and for *subsequent investigation*, *see* Chap XIV

5. Arrest how made.—An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the officers. S 171, N Y Cr P C

6. Law allows no informal detention.—Arrest is the taking of a person into custody that he may be held to answer for a crime, s 167, N Y Cr P C Arrest is the restraint of a man's person, obliging him to be obedient to law But it should be observed that the law authorises *no* informal detention or restraint of any description by the Police All detention or restraint by a Police officer in the course of an investigation is either legal arrest or wrongful restraint and confinement,—*Reg and Ord*, *N W P*, p 358 Keeping a person in a condition of restraint without previously arresting him is not only illegal, but it is a gross and unwarrantable breach of the powers entrusted to Police officers, **1885 A. W. N. 59.** *See* Note 10 to s 54

7. Person arresting on a warrant must have it in his possession.—When warrant of arrest has been issued to apprehend a person for an offence less than felony, the Police-officer who executes it must have the warrant in his possession at the time of the arrest, otherwise the person arrested could not be convicted upon an information charging him with assaulting the Police-officer in execution of his duties—*Codd v Cobe*, **L. R. 1 Ex. D. 352—34 L T. 453.** It is necessary that the person executing a warrant of arrest should have the warrant in his possession at the time of arrest, **5 A. 318.** *See* s 80

8. Person arresting on warrant must notify substance.—*See* s 80 and Notes thereunder

9. Punishment for resistance to arrest.—Resistance or obstruction to the lawful arrest of a person is punishable under ss 224 225 and 225 B of the Indian Penal Code *See* also ss 186 187 212 216 I P C

10 Officer acting illegally not protected—The protection afforded to Police-officers and to those acting under their authority by s 99 I P C, does not extend to an officer whose acts are wholly illegal **13 B 168.** Where a constable executing a bailable warrant did not give the slightest intimation to the person arrested of the fact that bail had been allowed, the arrest is illegal and the accused persons are justified by the provisions of s 99, I P C, in committing a common assault upon the constable, **16 C. W. N. 549 = 13 Cr. L J. 590.** *See* **24 W. R. 51** which rules that arrest without malice is not criminal

11. What violence justifiable.—A Chowkidar may wound a fugitive house breaker if that amount of violence be necessary to secure his person The question is "whether the means employed to stop the fugitive were such as an ordinary prudent man who had no intention of doing any serious injury would make use of," **2 W. R. 9.**

12. Punishment for undue violence.—For penalty for unwarrantable violence by a Police-officer to a person in his custody see *Police Act*, 1861, s 29 *Appendix XIV* As to village Police-officers in Bengal, see *Chowkidari Act* I of 1892

13. Use of handcuffs.—*United Provinces of Allahabad and Agra.*—As a rule, all persons accused of non bailable offences may be handcuffed when arrested and when in transit from one place to another, handcuffs should, however, only be imposed when from the heinous nature of the crime or the character or behaviour of the accused, a fair presumption arises that such restraint is necessary to prevent escape or violence Dangerous and desperate prisoners should be properly ironed while in transit and should be carefully watched Irons should not be removed unless prisoners are confined in a secure place from which escape would be impossible—*Reg & Ord*, *N W P*, p 215

Madras—The use of handcuffs ordinarily and unnecessarily by inferior officers of Police should be discouraged Under trial prisoners are in no case to be handcuffed without the express order of the Magistrate in charge of the jail in which the prisoner may be confined.—*Mad Pol Man*, *p* 96

Search of arrested persons.

51. Whenever a person is arrested by a Police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail, the officer making the arrest or, when the arrest is made by private person, the Police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him.

Notes.—1. Private person cannot search.—A private person may arrest under s. 57, but he cannot make any search under this section.

2. Arrested persons must be searched.—All persons arrested by the Police and not admitted to bail shall, as soon after arrest as possible, be thoroughly searched; in the case of females such search shall, if possible, be conducted by a woman, and shall in all cases be conducted with due regard to decency. *Reg. & Ord. Punj., p.* 303.

Directly a prisoner is arrested on charge of any offence included in Sch. II of Act X of 1882 (now Act V of 1898), or of vagrancy, he must be thoroughly searched, and whenever possible, in the presence of two witnesses not connected with the Police. Whenever such witnesses cannot be procured, the fact must be explicitly stated. Female searchers only may be employed in searching women. All property found, not actual clothing must be carefully marked and labelled, so that its identity is a matter of certainty. The greatest care must be taken when a prisoner is arrested to guard against his getting rid of any weapon or article or property, which may furnish evidence of his guilt. Constables receiving prisoners will be careful to ascertain that they have been thoroughly searched according to the above rules by the Police party from whom they receive the prisoners.—*Reg. & Ord. N.-W.P., p.* 274.

3. Seizure when not justifiable.—Generally speaking, it is not right that a man's money should be taken away from him, unless it is connected in some way with the property stolen. If it is connected with the robbery, it is quite proper it should be taken. But unless it is, it is not a fair thing to take his money which he might use for his defence; *R.* v. *O'Donnell*, **7 C.** and **P. 138.** *See* also *R.* v. *Burgess*, **7 C.** and **P. 488.** With regard to seizure of property suspected to be stolen, it is to be observed that no such seizure must ever be made, except when there are strong and definite grounds for believing that the property must have been dishonestly come by, *e.g.*, when jewels of large value are found with a person of mean condition and having no ostensible means of livelihood. It is not justifiable to seize valuables which are not identified as stolen property, merely because the Police-officer who comes upon them in the course of his searches has an unfavourable opinion of the character of the possessor. To raise a presumption of guilt, the possession of property believed to be stolen, should be exclusive as well as recent.—*C. P. Pol. Man., p.* 115.

4. Safe custody of property seized.—As to custody of offensive weapons, *see* s. 53. Also **19 W. R. 7.** Police officers should bear in mind the propriety of returning to prisoners the property taken from them which appears to have nothing to do with the charge against them. *Reg.* v. *Griffiths*, **8 J. P. 66.**

5. Procedure of Police on seizure of property.—*See* s. 523.

6. Appeals against orders directing restoration of property.—An order under this section directing the restoration of the property to the person on whom it was found does not come within s. 517, *infra* and is therefore not appealable, **30 C. 690.** *See* also **14 C. 834; 1 B. 630** and **22 B. 844.** *See* Chap. XVIII, *infra.*

Mode of searching women.

52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

Note.—With strict regard to decency.—The language of the corresponding section of the 1872 Code was with regard to the '*habits and customs of the country.*'

Power to seize offensive weapons.

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

48. If ingress to such place cannot be obtained under s 47 it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape for a Police-officer to enter such place and search therein and, in order to effect an entrance into such place to break open any outer or inner door or window of any house or place whether that of the person to be arrested or of any other person if after notification of his authority and purpose and demand of admittance duly made he cannot otherwise obtain admittance

Procedure where ingress not obtainable

Provided that if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who according to custom does not appear in public such person or Police-officer shall before entering such apartment give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter it

Breaking open Zenana

Notes—1 The procedure here laid down applies also to Search Warrants *See* s 102 *infra* A Salt Revenue Officer making search under *Salt Act* XII of 1882 and wishing to search a *zenana* will be guided by this proviso—*vide* s 18 Act XII of 1882

2 **Police officer acting bona fide not liable for trespass**—If a Police-officer in order to arrest suspected persons enters into a building his action would be *prima facie* justifiable **36 C. 433**

3 **The Proviso**—The powers as to breaking open *zenana* are now more extensive than those contained in s 181 of the Code of 1872. A Police-officer who knowingly disobeys the proviso to this section may be liable under s 166 I P C

49. Any Police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who having lawfully entered for the purpose of making an arrest is detained therein

Power to break open doors and windows for purposes of liberation

Notes—1 *Cf* s 176 of N Y Cr P Code which is similar to this section.

2 **English Law**—If the officer having lawfully entered the house through an open outer door is locked inside by the inmates he may break out or be rescued by his associates breaking in—1 *Bishop* Cri Pro s 202 2 *Hawk* P C. Chap 14 s 1 1 *Hale* P C 459

No unnecessary restraint.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape

Notes—1 The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention—S 172 N Y Cr P C

2 **Punishment for unnecessary restraint**—Abuse of the power given by this section is punishable under s 220 of the I P C A Police-officer offering unwarrantable personal violence to any person in his custody is liable to punishment under s 29 of Act V of 1861 *See* **19 W R 36** and ss 62 and 63 *infra*

3. **Ill treating prisoners highly objectionable**—Apart from this criminal liability the maltreatment of defenceless prisoners is a dishonourable act which cannot in any way be extenuated and will ordinarily be punished with dismissal whatever the rank or antecedents of the culprit Police-officers of all ranks must exert themselves to prevent the good name of the Force being sullied by the faintest show of harshness or violence in the treatment of persons in custody—*C P Pol Man p* 190 Police-officers will be severely punished if prisoners in their custody are subjected to needless indignity or harsh treatment. As a rule persons of good social position who are accustomed to use carts and carriages may be allowed that accommodation provided that it does not endanger safe custody—*Mad P Man p* 96

4 **Detaining without reasons**—*See* s 61 and Notes thereunder

2. **Under the New York Cr. P. C.**—"A peace-officer may arrest, without a warrant, a person—(1) for a crime committed or attempt in his presence; (2) when the person arrested has committed felony, although not in his presence; (3) when a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." S. 177, N. Y. Cr. P. C.

GENERAL.

3. **Any Police-officer.**—*See* s. 551 as to powers of superior Police-officers and s. 58 for pursuit of offenders to other jurisdiction. Village Chowkidars are not Police-officers within the meaning of this section, **3 A. 60; 27 C. 366; 35 C. 361; 41 C. 17**; nor within the meaning of ss. 25 and 26 of *the Evidence Act*, **2 C. W. N. 71**; but under Reg. XX of 1817 and Act I of 1892, he is a Police-officer, **2 C. W. N. 637.** As a public servant he is not bound to arrest outside the limits of his circle, *any person who is not a proclaimed offender.* When, a warrant has been issued for the arrest of certain persons on a charge of a cognisable offence, any Police-officer will be justified in making the arrest and any person obstructing such officer will be guilty of offences under ss. 225 and 332, I.P.C. **40 M. 1028.**

4. **Police in Presidency towns.** *See* Introductory Note to Ch. V.

5. **Power not limited to his Circle.**—The power to arrest conferred by this section on a Police-officer may be exercised at a place beyond the limits of his station, **8 S. L. R. 1 = 16 Cr. L. J. 15.**

6. **Arrest in British territory by Police of Native State and subsequent custody by British Village Chowkidar illegal.**—The Police of an adjoining Native State arrested in British territory one *P. S.* suspected of having committed an offence in the Native State and made him over to a British Village Chowkidar from whose custody he escaped. *Held*, that neither the original arrest nor the subsequent custody by the Chowkidar was lawful and, therefore, that the Chowkidar could not properly be convicted under s. 223, I.P.C., **29 A. 377** where **3 A. 60; 27 C. 366** and **23 A. 626** are *referred to.*

7. **Arrest outside British India by British Police illegal.**—*See* **24 I. A. 137** and ss. 58, 82 and 188, *infra*, **1 Lahore 406.**

8. **May arrest.**—The powers under this section being discretionary, should not be exercised in petty cases, especially after a complaint has been made. In such a case, it can be exercised only when there is sufficient reason for the arrest, *e.g.*, likelihood of the accused person absconding or the risk of committing some further offence if at large, **1 B. H. C. Bk. Cir. 1; Ratanlal 795.** *See* Notes under cl. 1 at p. 85.

9. **Without an order from a Magistrate.**—*See* s. 65 and Notes 2 and 3 to s. 46. Ordinarily, the mere order of a Magistrate, whether verbal or in writing, will not in the slightest decree authorise a Police-officer in arresting in any case in which under Sch. II, *infra*, he is not allowed to arrest without a warrant. All Police-officers may, in cognisable offences, arrest on a telegram under cl. (1) of this section. *Reg. & Ord., N. W. P.* s. 10, p. 273.

10. **Restraint cannot be exercised lawfully so long as person is not arrested.**—In cases where a suspected person is not arrested forthwith either because the Police-officer is not as yet satisfied that the provisons of s. 54, Cr. P. C. apply to the individual in question or because, being satisfied that they do apply to him, the Police-officer for sufficient reason postpones immediate arrest, care must be taken that the suspected person *remains at liberty and is a free agent.* If the circumstances of the case so require, it is the duty of the Police to watch his movements openly or secretly, and to keep themselves acquainted with his actions so as to be able to arrest him at any given movement; but no restraint of any kind may lawfully be exercised over him so long as he is not placed under arrest. *C. P. Pol. Man., p.* 169. *See* Note 6 to s. 56.

11. **Police-officers cannot send private persons to make arrest.**—A Police-officer may without a warrant arrest a person who is suspected to have committed an offence under sub-sec. (1), but the Code does not empower him to send persons, not Police-officers (*see* s. 56, *infra*) to make an arrest which he himself can lawfully make. So, where private persons sent by a Police-officer to make an arrest were resisted by the accused, it was *held* that they had no authority to arrest the accused and any resistance offered to them constituted no offence, **5 L. B. R. 21.** But where a Police-officer without arresting a person himself, directs some of the neighbours to take charge of him, the person arrested is in law in his custody and he is responsible in the same way as if he had himself made the arrest. **7 W. R. 3.**

12. **Power to arrest implies power to detain.**—"Authority given to arrest by this section" implies authority to detain, **Ratanlal 220**; but it is illegal to keep a man in condition of restraint without arresting him **1885 A. W. N. 59.**

B.—Arrest without Warrant.*

When Police may arrest without warrant

54. (1) Any Police officer may, without an order from a Magistrate and without a warrant arrest —

first—any person who has been concerned in any cognisable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned,

secondly—any person having in his possession, without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking,

thirdly—any person who has been proclaimed as an offender either under this Code or by order of the Local Government,

fourthly—any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing,

fifthly—any person who obstructs a Police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody,

sixthly—any person reasonably suspected of being a deserter from His Majesty's Army or Navy, or of belonging to His Majesty's Indian Marine Service and being illegally absent from that service,

seventhly—any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881 [44 *and* 45 *Vict*, *c* 69], or otherwise, liable to be apprehended or detained in custody in British India,

eighthly—any released convict committing a breach of any rule made under section 565, *sub section* (3), *and*

† *ninthly*—any person for whose arrest a requisition has been received from another Police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) This section applies also to the Police in the town of Calcutta ‡

Notes.—1. When a constable may arrest without warrant under English Common Law.—At Common Law a constable may arrest a person whom he finds committing *felony*, or upon reasonable suspicion that a felony has been committed by the person arrested, although no felony has in fact, been committed, and whether the reasonable ground of suspicion are matters within the constable's knowledge, or are derived from facts stated to him by others, *Beckwith* v *Philby*, **6 B.** and **C. 635**, *Davis* v *Russell*, **5 Bing. 354**; *Hogg* v *Ward* **27 L. J. Ex. 443**; *Marsh* v *Loader*, **14 C. B. (N.S.) 535.** A constable is not, as a general rule, entitled to arrest for *misdemeanour* after it has been committed, whether the offence be fraud, breach of the peace etc., nor to arrest on suspicion of misdemeanour He may arrest any person who in his presence commits a misdemeanour or a breach of the peace, *Timothy* v *Simpson*, **1 Cr. M.** and **R. 757**, if the arrest is effected at the time when or immediately after the offence is committed *Fox* v *Gaunt* **3 B.** and **Ald. 798**; or while there is danger of its renewal but not after the breach or danger of its renewal has ceased, *R* v *Walker*, **23 L. J. M. C. 123.** He may arrest or start in immediate pursuit if the misdemeanour is a breach of the public peace And he may take into his custody persons given in charge to him by persons who have witnessed a breach of the peace if there is a danger of its immediate renewal but not if the affray is over and peace restored, **1 East P. C 305.** See *Russell on Crimes*, p 724

* S 106 of the 1872 Code authorised masters and mates to arrest deserters from ships This is now provided by the Merchant Shipping Acts
† This 9th clause was added by the Cr P C Amendment Act (XVIII of 1923) s 10
‡ The letter (S) and the words 'and Bombay were repealed by s 2 (1) *The City of Bombay Police Act* Bom Act IV of 1902

(*g*) *Emigration Act.*—If any person other than a recruiter licensed under *the Indian Emigration Act* commits any offence mentioned in s. 82 of the said Act, any Police-officer may arrest him without a warrant.—*S.* 82, *cl.* (2), *Act XXI of* 1883.

(*h*) *Rangoon Tramways Act.*—Any person avoiding payment of fare under *Rangoon Tramways Act.*—*S.* 19, *Act XXII of* 1883.

(*i*) *Indian Explosives Act.*—Whoever is found to be committing any act for which he is punishable under *the Indian Explosive Act* No. IV of 1884, or the rules made under that Act, and which tends to cause explosion or fire in or about any place where an explosive is manufactured or stored or any railway or port or any carriage, ship or boat, may be apprehended without a warrant by a Police-officer, or by the occupier of or the agent or servant of, other person authorised by the occupier of, that place, or by any agent or servant of or other person authorised by the Railway Administration, or Conservator of the Port, and be removed from the place where he is arrested, and conveyed as soon as conveniently may be before a Magistrate.—*S.* 13, *Act IV of* 1884.

(*j*) *Burma Gaming Act.*—A Police-officer may arrest without warrant any person soliciting or collecting stakes for the game of *ti* or any other game and in any street or thoroughfare or place to which the public have access in British Burma.—*S.* 7, *Act XVI of* 1884.

(*k*) *Cantonment Act.*—Any Police-officer may, without an order from a Magistrate, and without a warrant, arrest any person whom he finds committing an offence against ss. 13 and 14 of *the Cantonment Act.*—*S.* 15, *Act XIII of* 1889.

(*l*) *Indian Railways Act.*—Any person committing an offence under *the Indian Railways Act*, and who is likely to abscond, or whose name and address are unknown, may be arrested by any Railway servant or Police-officer without warrant and detained until he can be taken before a Magistrate.—*S.* 132, *Act IX of* 1890. Committing an offence mentioned in ss. 100, 101, 119, 120, 121, 126, 127, 128, 129 or 130, sub-sec. (1) of the Indian Railways Act, 1890, may be arrested without a warrant by any Railway servant or Police-officer.—*Ibid.*

(*m*) *Punjab Municipal Act.*—Any person committing any offence against *the Punjab Municipal Act* or the rules or bye-laws may be arrested.—*S.* 83, *Act XX* of 1891. *See* also s. 18, *ibid.*

(*n*) *Indian Fisheries Act*—Any Police-officer or other person specially empowered by the Local Government in this behalf may, without an order from a Magistrate and without warrant, arrest any person committing in his view any offence punishable under s. 4 or or s. 5 or under any rule under s. 6—(*a*) if the name and address of the person are unknown to him, and (*b*) if the person declines to give his name and address, or if there is reason to doubt the accuracy of the name and address if given.—*S.* 7, *Act IV of* 1897 (*Indian Fisheries*).

(*o*) *Reformatory Act VIII of* 1897.—*See* s. 29, *Act VIII of* 1897 (*Reformatory Act*), Appendix IV.

(*p*) *See* also the *Burma Municipal Act*, Burma Act III of 1898, s. 194.
The *Upper Burma Forest Regulation* V of 1898, s. 63.
The *Burma Forest Act*, Burma Act IV of 1902, s. 47 (1).
Cruelty to Animals Act, Bengal Act III of 1869, s. 1.
The *Excise Act* XXII of 1881, s. 27, and the *Bengal Excise Act* VII of 1878, ss. 40 and 41.
The *N.-W. Provinces and Oudh Municipalities Act* XV of 1873, s. 35.
Bengal Salt Act VII of 1864, s. 24.
Madras Salt Act IV of 1889, s. 49.
Madras Abkari Act I of 1886, s. 34.
Bombay Salt Act II of 1890, s. 39.
Bombay Gambling Act IV of 1867, s. 12-A.
Bengal Regulation XX of 1817, s. 29 (*Poppy*).
Assam Labour and Emigration Act VI of 1901, s. 195.
For arrest of lunatics, *see* Act XXXVI of 1858, ss. 4 and 6-A.

CLAUSE 1.

17. **What is reasonable complaint or suspicion.**—A general definition of what constitutes reasonableness in a complaint or suspicion and credibility of information cannot be given. But both must depend upon the existence of *tangible legal* evidence within the cognisance of the Police-officer and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge, information or

13. When question of guilty knowledge on the part of the officer arresting arises.—It seems where the arrest is legal there can be no guilty knowledge, 'superadded to an illegal act' such as it is necessary to establish against the accused to justify a conviction under s 220 of the *Indian Penal Code* It is only where there has been an excess by a Police-officer of his legal powers of arrest that it becomes necessary for a Court to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting 'contrary to law,' **10 B. 506** In **24 W. R. 51,** where there was no malice, no intention of doing any act of the nature spoken of in s. 339 or s 340, I P C., and no voluntary obstruction or restraint, though there was probably excessive and mistaken exercise of powers not civilly excusable in a Police-officer, the arrest was held not to amount to the criminal offence of wrongful restraint *See* also **12 B. 377.** Proof of an unlawful confinement will not of itself warrant the legal inference of malice—knowledge that such confinement is contrary to law is a question of *fact* and not of *law* and must be proved to satisfy the requirements of s 220, I P C , **9. B H C. R. 346.**

14. When arresting, it is advisable that notice of the authority and business of the officer be given.—It is always desirable that the prisoner must have notice of the authority and business of the officer making an arrest unless the circumstances of the case render notice unnecessary, *e g* , where an attempt is made to arrest a man while committing an offence or on fresh pursuit, *R* v. *Howarth,* **1 Mood. 207.** It is only when the person whose liberty is interfered with has actual knowledge or express or implied notice of the officer s status and business that he was no right of private defence See *Russell on Crimes p* **734.** *See* also s 79, I P C , and Note 6 to s 56

When arresting a person without warrant the officer must inform him of the authority of the officer, and the cause of the arrest, except when the person arrested is in the actual commission of the crime, or is pur sued immediately after escape S 18, N Y Cr P C.

15. Illegality of arrest does not take away the jurisdiction of the Magistrate trying.—If the Magis trate before whom an accused has been charged has jurisdiction to try the offence, his jurisdiction to enquire or try cannot be affected by any illegality in connection with his arrest It will not avail the accused to say that he was brought there illegally, **35 B. 225,** where *Q* v *Nelson*, **Cockburn's Rep., 2nd Edn , p. 118,** *in* re *Parisot,* **5 T. L. R. 344,** *in* re *Susannah Scot* **9 Ban. C. 446** · *Q* v *Lopez,* **7 Cox C. C. 431** and **6 B. 222** are cited and *followed*, and *Muhammad Yusuffuddin*, **24 I. A. 137** is *distinguished* *See* also **26 M. 124** and **31 C. 557.**

15-A. Authorises arrest without an order from a Magistrate and without a warrant only in certain circumstances. *In* re Charn Chandra Mazumdar, **44 C. 76.** *See* **21 A. L. J. 791.**

A Magistrate s order under s 202 of the Code directing the Police to inquire into a cognisable case does not debar the Police from exercising their powers of arrest and investigation in regard to the same matter as formed the subject of the complaint **2 Pat. 379.**

16. Arrest without warrant under other Acts.—(*a*) *Police Act—See* section 34, Act V of 1861 at p cxxxix, Appendix XIV

(*b*) *Public Gambling Act*—Any Police-officer can apprehend without warrant any person found gaming or setting birds and animals to fight in the public street, place or thoroughfare, or any person there present aiding and abetting such public fighting of birds and animals—S 13, *Act III of* 1867 (*Public Gambling Act*) *See* **7 Bur. L. R. 66** at **p. 68**; *also Bengal Act II of* 1867, s. 11, *etc*

(*c*) *Criminal Tribes Act*—Any person registered under *the Criminal Tribes Act* who is found in any part of British India, beyond the limits prescribed for his residence, without such pass as may be required by the rules made under that Act, or in a place or at a time not permitted by the conditions of his pass or who escapes from a reformatory settlement may be arrested by any Police officer without warrant.—S 20 *Act XXVII of* 1871 Any registered eunuch under *the Criminal Tribes Act* who appears in female clothes in a public street or place with the intention of being seen from a public street or place, etc , may be arrested without a warrant.—*S* 26, *Act XXVII of* 1871

(*d*) *European Vagrancy Act*—Any person refusing or failing to accompany a Police-officer to, or to appear before, a Magistrate of Police or Justice of the Peace for the purpose of preliminary inquiry when required so to do under s 4 may be arrested without warrant—*S* 19, *Act IX of* 1874 *See* Appendix V

(*e*) *Forest Act*—Any Forest officer or Police-officer may without orders from a Magistrate, and without a warrant, arrest any person against whom reasonable suspicion exists of his having been concerned in any forest offence punishable with imprisonment for one month or upward—*S* 63, *Act VII of* 1878

(*f*) *Arms Act*—Any person found carrying arms, ammunition, etc , in such manner as to afford just ground of suspicion that the same will be used for any unlawful purpose, may be apprehended without a warrant by any person—*S* 12, *Act XI of* 1878

person of mean condition and having no ostensible means of livelihood. It is not justifiable to seize valuables which are not identified as stolen property merely because the Police-officer who comes upon them in the course of a search has an unfavourable opinion of the character of the possessor. To raise presumption of guilt, the possession of property believed to be stolen should be exclusive as well as recent, *C. P. Pol. Man., p.* 108 (*Mad. Pol. Man., p.* 115), Police-officers who act thus render themselves liable in a suit for damages.—*Mad. Pol. Man., p.* 115.

27. Arrest should precede search.—It appears to be thought that a Policeman can stop a traveller or any other person and search him, and seize any property the person may be in possession of, which the Police-officer does not think he ought to possess, or regarding which he cannot give an explanation which satisfies the Police-officer. In this way a traveller may be deprived of his property, and may not be able to make his journey in order to complain and to recover it. This procedure is clearly wrong. Before anyone is searched or deprived of his property on the ground that it is stolen property, he should be arrested under this section. If the arrest be *prima facie* justified, by the discovery on his person of what appears to be stolen property, the suspected person should be taken before a Magistrate. A Police-officer should in no case retain property, while allowing the man in whose possession he found it to go free.—*C. P. Pol. Man., p.* 108.

28. Police-officer acting in good faith is protected by s. 79, I.P.C.—Where a Police-officer on duty at his post sees an honest man not previously known to him, at an unusual time, *i.e.*, at about sunrise, carrying a bundle, which the Police-officer mistakenly suspects to be stolen property, he may put questions to him, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions. The circumstance that he does so is an indication of good faith, within the meaning of s. 52, I.P.C. If the answers to his questions do not remove the Police-officer's suspicions, though they might have satisfied an officer of higher position or greater intelligence, he is none the less acting in *good faith* if after such inquiry as was possible to an officer in his position, in the circumstances in which he was placed, he retains an honest belief that such a state of fact existed as would justify placing his hand on the bundle whether with the intention of further inspecting it or arresting the accused for being in possession of it. His act is not under the circumstances an offence. He is protected by s. 79 of the I.P.C., **12 B. 377; 18 A 246; 7 Bom. L. R. 463.**

CLAUSE 5.

29. Obstructs.—The word *obstruction* is not defined in the Penal Code. *See*, however, ss. 186, 224 and 225, I.P.C., where it is rendered penal. If a Police-officer is under a *bona fide* belief that he is justified in detaining property which he believes to be stolen property, he may arrest the person who obstructs him in the endeavour to detain that property, **12 B. 377.**

30. Escape from lawful custody.—This section authorises arrest upon a reasonable suspicion of committing an offence, and the custody under it is none the less legal because it is not followed by conviction or trial on the merits, **1896 A. W. N. 151.** *See* also **28 C. 253** and **21 C. 337; 3 L. B. R. 221 = 4 Cr. L. J. 389.**

CLAUSE 6.

31. Procedure to be followed on arresting deserters.—In dealing with European deserters, the Police shall act according to the following provision of s. 154 of *the Army Act*, 1881 [44 and 45 *Vict., c.* 58], and Europeans apprehended on suspicion of being deserters from the British Army shall not be made over to the military authorities without having first been duly committed as such by a Magistrate:—

S. 154. With respect to deserters, the following provisions shall have effect:—

(1) Upon reasonable suspicion that person is a deserter, it shall be lawful for any constable, or if no constable can be immediately met with, then for any officer or soldier or other person, to apprehend such suspected person and forthwith to bring him before a Court of summary jurisdiction.

(2) Where a person is brought before a Court of summary jurisdiction charged with being a deserter under this Act, such Court may deal with the case in like manner as if such person were brought before the Court charged with an indictable offence, or in Scotland an offence.

(3) The Court, if satisfied either by evidence on oath, or by the confession of such person that he is a deserter, shall forthwith, as it may seem to the Court most expedient with regard to his safe custody, cause him either to be delivered into military custody in such manner as the Court may deem most expedient, or until he can be so delivered, to be committed to some prison, Police-station or other place legally provided for the confinement of persons in custody, for such reasonable time as appears to the Court reasonably necessary for the purpose of delivering him into military custody.

suspicion Again, the moment when an arrest should be made, is not and obviously cannot be prescribed. The arrest may be made as soon as the suspected person appears to the Police-officer to be such a person as is mentioned in s 54, clauses (1) and (4), or the arrest may for sufficient reason be postponed—*Reg & Ord*, *N-W. P*, *s* 10, *para* 366, *cl* (8), *p.* 359 "What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere surmise or information Still less have the Police any power to arrest the persons, as they appear sometimes to do, merely on the chance of something being hereafter proved against them"—*Per* MARKBY, J in **7 W. R. 3.** Where the accused who were armed with guns and were called on by a Police Sergeant (who believed from the report of a *biswadar* that they were dacoits) to surrender, resisted and fired several shots wounding and killing several persons who were assisting in their arrest, it was *held* the Sergeant was justified in arresting the accused under s 45 (*b*) and *the present clause*, and that the accused had no right of private defence under s 99, I P C, against the Sergeant arresting them, **21 P R. 1900.** As to what is *reasonable suspicion, see* also **12 B. 377** and *Beckwith* v *Philby* **6 B.** and **C. 635.**

18. Arrest excusable when complaint is reasonable.—In ordinary cases, when the offence charged is not of a serious description and there is no likelihood of the accused trying to escape, arrest need not be made until the inquiry has at all events proceeded so far as to satisfy the Police-officer that the charge can be properly substantiated before a Magistrate But in grave cases such as dacoity, murder and the like, where there may be subsequently difficulty in discovering the whereabouts of the suspected person or danger of his absconding, the investigating officer should exercise his powers of arrest as soon as it appears that the complaint or suspicion is a reasonable one If it turns out that the person arrested is not the guilty party, he can at once be released on bail or upon his own bond, the circumstances being set forth in the Case Diary

19. Ground of arrest is a mixed question of law and fact.—What is a reasonable and probable ground for suspicion is a mixed proposition of law and fact Whether the circumstances alleged to show it probable or not probable, are true and existed is a matter of fact Whether, supposing them true, they amount to a probable cause is a question of law—*Johnson* v *Sutton*, **1 Term Rep. 545.**

20. When Police should refrain from arresting respectable persons.—A Police officer to whom a complaint of a cognisable offence is made ought, if there be circumstances in the case which lead him to suspect the information, to refrain from arresting persons of respectable position, and leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of issue of warrant of arrest, **Ratanlal 795.**

21. May arrest when once warrant has issued.—Where warrant for a cognisable offence has been issued, any Police officer who knows of its issue may arrest though he has not the warrant, *Creagh* v *Gamble*, **24 L. R. Jr. 458.** *Russell on Crimes*, p 737 In such a case he is really exercising his power to arrest on suspicion or upon credible information, **36 A. 6.**

22. May arrest on telegram.—All Police officers may in cognisable offences arrest on a telegram under the authority conferred by this clause, *Reg & Ord*, *N WP*, s 10, p 273

CLAUSE 3.

23. Proclaimed offender.—*See* s 87, *infra.*

24. By order of the Local Government.—These words were substituted in the 1882 Code for the expression "*in a District or Police Gazette or Notification*" used in the 1872 Code.

CLAUSE 4.

25. Stolen property.—For definition, *see* s. 410, I P C. The finding of any such thing must be reported forthwith to a Magistrate empowered to pass order regarding its disposal. *See* ss 523—525

26. When property suspected to be stolen may be seized.—It is not necessary that a formal complaint should have been made in order to authorise a Police officer to apprehend any person found with *stolen property* But the possession must be both *recent and exclusive*, **8 W. R. 28.** This clause refers only to property reasonably suspected to have been stolen and not anything which a Police-officer may choose to imagine has been stolen **10 W. R. 20.** With regard to the seizure of property suspected to be stolen, it is to be observed that no such seizure must ever be made, except when there are strong and definite grounds for believing that the property must have been dishonestly come by, *e g*, when jewels of large value are found with a

36. Arrest in British territory by foreign Police.—*See* **29 A. 377,** Note 6 under Heading "General," *supra.*

CLAUSE 8.

See Notes under s. 565 for rules of various Local Governments, regarding the notification of residence, etc., by released convicts.

37. No power to arrest or detain witnesses.—With regard to persons whose evidence is required by a Police-officer making an inquiry, no power exists to *arrest* or *detain them* for a single moment. An officer in charge of a Police-station may, under s. 160, *infra,* summon witnesses, and the person so summoned are bound to obey the order. But in no case can the Police-officer compel the witness by force to attend before him.

* **55.** (1) Any officer in charge of a Police-station may, in like manner arrest or cause to be arrested—

Arrest of vagabonds, habitual robbers, etc.

(*a*) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognisable offence; or

(*b*) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(*c*) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion, or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the Police in the town of Calcutta.†

GENERAL.

Notes.—1. Scope of the section—Persons arrested should be bailed.—The powers with which *officers in charge of Police-stations* have been armed under the Code for the purpose of restraining bad characters are exceptional powers. They provide strong remedies, and should never be put in force without the greatest deliberation. Section 55 was intended for suppression of habitual bad characters whom an officer in charge of Police-station suddenly finds within his circle, or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under s. 112. That at any rate would be a safe way of using the powers given by the section. When the Police Act under s. 55, they are bound to give the person arrested the option of bail, and the bail should not be excessive, **14 A. 45;** but this section does not empower the Police to arrest a person on suspicion of unlawful gaming. The proper course to be adopted would be to proceed under s. 112, *infra,* **3 L. B. R. 94 = 3 Cr. L. J. 20.** This section, however, is independent of Chapter VIII, although proceedings under Chapter VIII may follow such arrest as a natural sequence, **35 A. 407.** The section cannot legally be made use of for the purpose of retaining under arrest a person whom a Court, having acquitted him of the offence with which he was charged, has ordered to be set at liberty, **41 A. 483,** *followed* in **43 A. 186.**

2. 'Officer in charge of Police-station.'—This includes Police-officers of higher rank also. *See* s. 550, *infra.*

3. Escape from lawful custody.—If a person arrested by Police, on his supposed identity with the real offender, escapes from custody, such an escape, when the detention is not for an offence, is not punishable under s. 224, I.P.C., **21 C. 337.**

4. Punishment for escape from custody.—Resistance or obstruction to lawful apprehension, or escape or rescue of a person lawfully detained and not otherwise provided for is by the addition of s. 285-B to the Indian Penal Code, now made an offence punishable with imprisonment for six months or with fine or with

* In Upper Burma the powers conferred on an officer in charge of a Police-station by s 55 may be exercised by any Police-officer. *See* Reg. V of 1892, Sch. VI.

† *See* footnote to s. 54, *supra.*

(4) Where the person confessed himself to be a deserter, and the evidence of the truth or falsehood of such confession is not then forthcoming, the Court shall remand such person for the purpose of obtaining information as to the truth or falsehood of the said confession, and for that purpose the Court shall transmit, if sitting in the United Kingdom to a Secretary of State, and, if in India to the General or other officer commanding the forces in the military district or station where the Court sits, and if in a colony to the General or other officer commanding the forces in that colony, a return (in this Act referred to as a descriptive return) containing such particulars and being in such form as is specified in the fifth Schedule to this Act, or as may be from time to time directed by a Secretary of State

(5) The Court may, from time to time, remand the said person for a period not exceeding eight days in each instance and not exceeding in the whole such period as appears to the Court reasonably necessary for the purpose of obtaining the said information

(6) Where the Court causes person either to be delivered into a military custody or to be committed as a deserter, the Court shall send if in the United Kingdom, to a Secretary of State, and in India or a colony to the General or other officer commanding as aforesaid a descriptive return in relation to such deserter for which the clerk of the Court shall be entitled to a fee of two shillings

(7) A Secretary of State shall direct payment of the said fee —*Reg & Ord, N WP, s* 10, *para* 442, *p* 436 A reward of Rs 5 is paid for the apprehension of a deserter from the Native Army —*C P Pol Man, p* 54

See also s 549, *infra* As to Marine Service, *see* s 19 of Act XIV of 1887 (*the Indian Marine Act*) *The Indian Articles of War* (Act V of 1869) provide that a deserter when arrested should be brought before the nearest Magistrate, or the nearest Military Commanding Officer, when no Magistrate is accessible, to be dealt with according to law

32. Reward for arresting deserters—A reward of Rs 30 will be paid to any Police-officer who shall apprehend an European soldier deserter the sum authorised will be paid by the Pay Department without requiring anything further than bills submitted and vouched under the following rules —

If the Corps from which the man is supposed to have deserted be quartered at the place of capture, or in the immediate vicinity of it he is to be sent by the Civil authority concerned (*see* s 10, para 442) direct to the regiment

If found to be a deserter from such Corps, the Commanding Officer will forward the following certificate immediately to the superior officer or the captor, who will submit it with a bill to the Pay Department and be responsible for issue of the reward to the person entitled to receive it —

CERTIFICATE

Certified that Private , a deserter from the regiment under my command, was restored to his Corps by the Magistrate of district (or other functionary as the case may be) on this date (place and date) Commanding Regiment

In every case of a man being apprehended as a deserter from a regiment quartered at a distance from the place of apprehension, he is to be made over by the Civil authority concerned (*see* s 10, para. 442) to the Brigade station or Garrison Staff Officer on the spot.—*Reg & Ord, N-W. P p* 367, *Ben Pol Code*, p 509

CLAUSE 7.

33. Arrest without warrant for offence committed out of British India.—A British subject committing outside British India criminal breach of trust, or any one of the offences mentioned in the schedule to the Extradition Act, 1903 may now be arrested in British India by virtue of cl (7) of s 54, **19 B. 72** is now *superseded*, this clause having been first introduced by Act III of 1894, s. 3, to meet the above Bombay Case, **7 Bom. L. R. 463.**

In **52 Cal. 319** the above cases were referred to and discussed and it was held that the words "Credible information" and "Reasonable suspicion' in s 54 seventhly of the Code refer to the mind of the Police-officer and that mere telegrams from the Police of a Native State giving information about the embezzlement of money do not come within the purview of the above two phrases *Held* further that the words in s. 54 seventhly "for which he is under any law relating to extradition . liable to be apprehended" do not qualify the offence but indicate a present liability to apprehension, *i e*, there must be an extradition warrant under s 7 or requisition under s 9 otherwise the arrest cannot be made under s 54 seventhly **29 C. W. N. 98.**

34. Law relating to extradition, etc.—*See* Act XV of 1903 printed as Appendix II

35. Fugitive Offenders' Act, 1881.—This is not an Indian Act, but an enactment of the British Legislatures being 44 and 45 *Vict*, *c* 69, the object of which is to facilitate the apprehension and return of fugitive offenders, from any one part to any other part of the British Dominions

14. Surveillance of bad characters by Railway Police.—The Railway Police shall be always on the watch for bad characters known to them, and shall ascertain their destination if they are found travelling by rail. If necessary they shall get into the train for the better watching of suspected persons, or shall communicate their suspicions to the station-master and the guard of the train. The station-master, will, if it seems advisable, telegraph the presence of bad characters in the train to the station of destination—*C. P. Pol. Man., p.* 83.

15. Mode of becoming acquainted with criminal classes and habitual offenders.—To make Police-officers acquainted with the names and appearances of prisoners of the habitual or criminal classes and to give them an opportunity of identifying old offenders who have not been recognised as such, any member of the Police Force so authorised in writing by the District Superintendent, or in his absence by the Reserve Inspector, is at liberty to accompany the Superintendent of the Jail during the Sunday inspection of the prisoners, and also to visit the jail during the evening meals on Tuesday and Friday. Under-trial prisoners should also be inspected. The District Superintendent should send a few of his officers, especially the Court Inspector and his subordinates and the local station Police-officers to the jail weekly, and should also take advantage of the presence of any Police-officers or men of out-stations, who may have come into the *Sadar* station on public business, to send them for the above purposes to the jail. Officers or men should not, however, be brought in specially from out-stations to inspect prisoners.—*Reg. & Ord., N.-W. P., p.* 287; *C. P. Pol. Man., p.* 199.

16. Persons living by unlawful gaming cannot be arrested.—The Police, under the sanction of a Magistrate under this section, arrested a person who was suspected of earning his livelihood by unlawful gaming, *held* this section did not empower the Police to make this arrest and that the proper procedure would have been for the Magistrate to make an order under s. 112, *infra*, and to summon the accused to appear under s. 114, attaching to this summons a copy of the proceedings under s. 112, as required by s. 115, *infra*, **3 L. B. R. 9.** = **3 Cr. L. J. 20.** *See* also **2 L. B. R. 166.**

17. How to prepare and keep Budmash lists.—"For the protection of the public it has been found necessary in every civilised State, to constitute certain persons officers for the prevention and detection of crime and to render them efficient, it has also been found necessary to confer on them powers of interfering with the liberties of their fellow-citizens which, if exercised by private persons, would render them liable to civil proceedings. It is necessary for the efficiency of the Police that they should possess information of the names of persons who are likely to commit offences; and, inasmuch as changes must of necessity constantly take place in the members who constitute the Police Force, it is also necessary that the information above mentioned should be preserved. To effect this, registers are ordinarily kept, showing the names of persons who have committed or who on strong grounds are suspected of the commission of offences. Such a register, accurately compiled and strictly reserved for the purpose for which it was designed—the private use of the Police may be of great advantage to the public in enabling the Police to perform their duties effectually. But if this register be a public register, or if the persons having the custody of it allow its contents to be matter of public conversation, we can imagine no greater engine of injustice and oppression. The matter recorded is not confined to facts which have been ascertained by fair and open investigation in Courts of Justice. It does and necessarily must in a great measure consist of the results of *ex parte* investigations made in private by the Police. It is, and necessarily must be, in great part the fruit of rumour and suspicion, and sometimes, it may be, of malice. Were it permitted that such a register should be kept as a register to which the public might have access, or of which the entries, were bruited about, the characters of honest men might be blasted, without redress through the instrumentality of any who could gain the ear or excite the suspicions of the Police. Very shortly after the establishment of this Court, the abuse of the register was on more than one occasion prominently brought to its notice. It had at that time (and we fear the evil has not even yet been cured) come to be regarded as a public register, and Magistrates, not unfrequently passed orders directing the entry of a person's name as a kind of punishment. The Court on the 9th August, 1866, addressed the Government of these Provinces on the subject, and pointed out the probabilities and magnitude of the evils of which we have above made mention, and the Government promptly passed an order that entries should only be made by the District Superintendent, or the Magistrate, in his capacity of Superintendent of Police and directed that the register should be considered a private register and should only be open to inspection by officers of Police. In the present case, had the orders of Government been obeyed in spirit as well as in letter, although the plaintiffs might have been unjustly recorded, they would not have been greatly damnified, but no sooner was the entry made than it became known that it had been made.—*N.-W. P. High Court*, BABOO DUTTER LAL *v.* HORSFORD, quoted in *Princep's* Cr. P. Code.

both This addition has the effect of superseding the decisions in **8 C. 331** and **7 A. 67.** Therefore if a person arrested by a Police-officer under this section escapes from his custody, he is guilty of an offence punishable under s 225 B This addition was thus accounted for—

"It is proposed by the section to substitute for s 225 A of the I P.C, a section that will cover not only the case there provided for, but the case which s 651 of the Code of Civil Procedure was intended to meet, and others such as those referred to in **8 C. 331** and **7 A. 67** for which no provision has hitherto been made"—*Statement of Objects and Reasons of Act X of* 1886

5. **Effect of illegal arrest.**—The question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest, ought not in any way effect the question whether the accused was or was not guilty of the offence with which he was charged, **28 M. 124; 31 C. 557.** But it is open to the prisoner to take steps to obtain redress for the wrongful arrest, **31 C. 557.**

6. **Section applies to Calcutta Police**—Where a person was arrested under the provisions of cl (*b*) of this section by an Inspector in charge of *thana* in Calcutta, and placed under s 109 (*b*), *infra* before a Magistrate and was discharged on the ground that the arrest was illegal, as the Inspector was not *an officer in, charge of a Police station* and the *thana* not *a Police station* within the meaning of s 4, *cls* (*p*) and (*s*), *supra, held* that the arrest was legal, as this section is made specially applicable to the Calcutta Police, while s 4 is not so applicable having regard to s 1 (*a*) *supra* and that an Inspector in charge of a *thana* correspondent to an officer in charge of a Police-station, **31 C. 557.** *See* Introductory Note to Chapter V at p 76, *supra*

CLAUSE (*a*)

7. **To justify arrest there must be an intention to commit cognisable offence.**—Under the 1872 Code any person found '*lurking*' within the limits of the Police-station might be arrested It will now be necessary to justify the arrest to show that the person arrested intended to commit a cognisable offence For definition of cognisable offence, *see* s 4, cl (*f*), *supra*

8. **Presence must be voluntary**—The person must be within the limits of the Police-station *voluntarily* **1883 A. W. N. 223.** *Cf* **1884 A. W. N. 85.**

CLAUSE (*b*)

9. **Who has no ostensible means of subsistence.**—This would include a vagrant as defined in s. 3 of the *European Vagrancy Act* IX of 1874 For powers of arrest, *see* s 4, *ibid* For similar provisions for arrest of military offenders, see *the Indian Articles of War* (Act V of 1869)

10 **Security for good behaviour.**—As to requiring security for good behaviour from persons comprised within clauses (*a*) and (*b*) *see* s 109

11. **Re-arrest after proceedings under s. 110 have proved infructuous.**—A person against whom proceedings under Chapter VIII were held to be illegal, cannot be re arrested under the provisions of this section, except on fresh grounds of complaint, **1883 A. W. N. 223.**

CLAUSE (*c*).

12. **Expediency of arrest under s. 55.**—No arrests under cl (*c*) of this section shall be effected without the previous sanction of the District Magistrate, unless immediate arrest be necessary for the ends of justice Arrest under this section is a more effective procedure than simply laying an information under ss 109 and 110 as when the latter course is adopted, the Magistrate must issue a summons to the person against whom the information is laid and the result must usually be that the person in question will temporarily disappear, so that summons cannot be served—*C P Pol Man*, *p* 212

13. **Habitual Criminal.**—The Code is silent as to the meaning of this term Under the N Y Cr P Code, when a person is convicted of a felony, who has been, before that conviction, convicted in this state of any other crime, he may be adjudged by the Court in addition to other punishment inflicted upon him, to be an *habitual criminal* A person convicted of a misdemeanour who has been already five times convicted in this state of a misdemeanour may be adjudged by Court in addition to, or instead of, other punishment, to be an *habitual criminal*—*S* 510, *N Y Cr P C*

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained, within twenty-four hours from time of arrest, or should he fail to execute the bond or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Notes.—1. Scope of the Section.—This section has been so re-cast as to provide a procedure applicable to the case of residents of Native States who are accused of having committed a non-cognisable offence in British India. For powers of Police-officers when accused arrested by private person, *see* s. 59, *infra.*

2. **Analogous provisions.**—For provisions analogous to this section, *see* s. 132 of the *Indian Railways Act* IX of 1890; s. 54 of the *Madras Forest Act* V of 1882; s. 516 of *Bombay Act* III of 1888 and s. 43 of the *Prisons Act* IX of 1894.

3. **Powers of Police to arrest without warrant in non-cognisable cases.**—This is the only case in which the Police can make an arrest without a warrant in non-cognisable cases. *See* s. 155 as to the procedure to be adopted on receiving information in non-cognisable cases. The scope of such inquiry is limited as laid down in this section.

4. **Powers of the Police strictly limited by the express provisions of the section.**—A Police constable asked the complainant not to create any disturbances on a public road. Upon the complainant's declining to do so he demanded his name and address which were not given. The constable thereupon abused him by calling him a *soowar* and arrested and dragged him to the Police Chowky and detained him there till his name and address were ascertained. On these facts the constable was convicted under ss. 220, 323 and 504, I.P.C. *Held*, that the convictions under ss. 220 and 323 could not stand having regard to the powers conferred on the constable by this section, **5 Bom. L. R. 597.**

5. **Persons arrested under Railways Act should be treated as in cognisable case.**—When an arrest is made under s. 131 of Act IX of 1890, *the Indian Railways Act*, of a person who, there is reason to believe, will abscond, or whose name and address are unknown and he refuses to give them, or when given, are reasonably believed to be incorrect, the case should be sent to the Magistrate in accordance with the provisions of s. 170, Cr. P. C., as a cognisable case within the definition of s. 4 (*f*) of the Code, although the offence alleged against the accused be not itself cognisable.—*Bom. H. C. Cr. Cir.*, para. 10-A, p. 4.

6. **Power of arrest under the Prisons Act, 1894.**—Section 43 of Act IX of 1894 (*Prisons*), printed in the Appendix.

Pursuit of offenders into other jurisdictions.

58. A Police-officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest under this Chapter, pursue such person into any place in British India.

Notes.—1. Scope of the Section.—Under the 1872 Code, the power of pursuit and arrest was limited to *cognisable cases;* but now it can be exercised in any case in which a Police-officer is empowered to arrest without a warrant.

As to arrest without a warrant, *see* ss. 54 and 55, *supra*, and as to arrest in foreign country, *the Extradition Act* XV of 1903, printed in the Appendix. For definition of British India, see *General Clauses Act X of* 1899, s. 3 (7).

2. **Arrest in Foreign territory by British Police, illegal.**—*See* Note 36 under s. 54.

3. **Instruction as to pursuit of offenders.**—All Police-officers in pursuit of offenders shall follow up such pursuit beyond the bounds of their own circle until an equally responsible officer is at hand to take it up; inquiry and pursuit are not to stop at the boundary of a station.

*56. (1) When any officer in charge of a Police-station or any Police-officer making an investigation under Chapter XIV requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant he shall deliver to the officer required to make the arrest an order in writing specifying the person to be arrested and the offence *or other cause* for which the arrest is to be made The officer so required shall before making the arrest notify to the person to be arrested the substance of the order and if so required by such person shall show him the order

Procedure when Police-officer deputes subordinate to arrest without warrant

(2) This section applies *also* to the Police in the town of Calcutta †

Notes —1 Officers subordinate —It has been held having regard to s 39 of *Village Chowkidari Act* (B C) V' 1870 that a Chowkidar is an officer *subordinate to an officer in charge of a Police-station* within the meaning of this section and therefore an arrest of a person without warrant by a Chowkidar on the authority of an order in writing delivered to him in conformity with cl (1) of this section is *legal* and resistance to such an arrest is punishable under s 225 B I P C **10 C W N 287 — 3 Cr L J 201,** but *see* **27 C 566,** but the Code confers no power on a Police-officer to send *persons not Police-officers* to make an arrest which he himself can lawfully make and therefore any resistance to such persons is no offence **5 L B R 21**

2 **Contents of the order in writing** — Writing the names of subordinates on the back of the copy of a warrant and signing of that endorsement by an officer in charge of a Police-station does not constitute the copy an order in writing within the meaning of this section **18 A 246, p 248** but writing arrest the person within named and for the offence within named and putting the names of the constables on the copy of the warrant and signing the endorsement himself would have made it an order in writing **18 A 248** The order mentioned in this section is apparently personal and cannot like a warrant be endorsed over by one Police-officer to another for execution

3 **No order necessary where offence is cognisable** — *See* s 54 *supra* under which any Police-officer may arrest on his own responsibility when offence is cognisable Where a Head Constable *verbally* ordered a subordinate constable who was with him to arrest a person suspected of *dacoity* which the constable did in the presence of the superior it was *held* the arrest was legal as *dacoity* is an offence for which any Police officer may arrest without warrant and the arrest was virtually made by the Head Constable **11 W R 20**

4 **Assault on Police making arrest without sufficient authority** If a Police officer be not acting under an order in writing made under this section the person arrested will not be liable to punishment under s 332 I P C in respect of hurt inflicted by him on the arresting Police officer as the latter would not be acting in the discharge of his duty within the meaning of that section but he would be liable under s 323 if hurt is caused to the Police officer executing the warrant as under s 99 I P C there is no right of private defence when the *Police-officer* is acting *bona fide* under colour of his office **18 A 246, p 252,** *see* also **28 C 411**

5 **Jurisdiction of Police not excluded by Magistrate issuing warrant** —A Magistrate issuing a warrant for the arrest of a person does not exclude the jurisdiction of the officer in charge of a Police station and prevent him issuing his written order under this section It might be different if the Magistrate had decided that no warrant should issue against a certain person and that a summons should issue **18 A 246 p 248**

6 **Under the present amendment of this section** —A Police-officer making arrest under this section is bound to notify to the person to be arrested the substance of the order if so required by such person And therefore **27 C. 320,** *is no longer good law*

7 **Other cause for which the arrest is to be made** —As to the other causes *see* ss 55 92 etc also ss 107 (3) and 114 which relate to security proceedings

‡57. (1) When any person *who* in the presence of a Police officer has committed or *has been* accused of committing a non cognisable offence refuses on demand of such officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false he may be arrested by such officer in order that his name or residence may be ascertained

Refusal to give name and residence

* As to *Upper Burma see* Reg V of 189 (Sch VI)
† *See* footnote under s 54 *supra*
‡ As to power of detention by Police in Upper Burma *see* Reg V of 1892 Schedules VII and VIII

offender. He may cause such offender to be arrested by another person. On this point, 35 C. 361 is dissented from. It is further held that in India the distinction between felonies and misdemeanours has never been accepted. The common Law of England relating to the right of arrest by a private person does not obtain in India. The Indian Law on this subject is embodied in s. 59 of the Code.

2. **Private persons' powers of arrest under other enactments.**—See, *e.g.*, (1) s. 12 of *the Indian Arms Act* XI of 1878; (2) s. 195 of *the Assam Labour and Emigration Act* VI of 1901; (3) s. 87 of *the Indian Merchant Shipping Act* I of 1889 (under which a master or owner and certain others are empowered to arrest without warrant)

3. **Arrest by a Railway servant.**—If a Railway servant arrests a man under s. 132 of Act IX of 1890 and makes him over to the Police, the action of the Police will be governed by the provisions of this section—*Reg & Ord*, *N-W.P.*, s. 10, p 319.

4. **Rescue from the custody of a private person.**—Who had arrested the thief in the act of stealing is an offence within the meaning of s 225, I.P.C, **11 M. 441.** *See* also **17 M. 103** and **5 M. 22.**

5. **Arrested person may be forwarded in custody of a servant.**—The provisions of this section as to making over a person arrested to a Police officer without unreasonable delay are complied with if the arrested person is forwarded in the custody of a servant of a private person, **11 M. 450**; *approved* in **23 A. 266.** *See* **6 C. W. N. 337.** *See* the present amendment of sub-section (1) which is in consonance with the cases cited in this note

6. **Make over arrested person to a Police-officer.**—A Village Chowkidar in Bengal cannot properly be regarded as a Police-officer within the terms of this section; therefore an offender arrested by a private person (in whose view the alleged offence was not committed) and made over to such Chowkidar cannot be regarded as being in lawful custody for the purpose of conviction under s 224, I P.C, **27 C. 366**; **3 A. 60.** When a private person after arresting an offender, made him over to a Chowkidar to be taken to the *thana* the custody of the latter is not legal as he is not a Police-officer and no offence is committed if the offender escapes from such custody, **41 C. 17.** *See* Bengal Act I of 1892, s 13, cl (4) and Notes to s 163, *infra* But in **29 A. 575**, it was *held* that the requirements of this section are sufficiently complied with by the person arresting the thief in the act of committing theft, sending him to the Police-station in the custody of the Village Chowkidar, so that the rescue from the Chowkidar constituted an offence under s 225, I P C *See* also **11 M. 480**; **17 M. 103**; **17 C. W. N. 978.**

7. **How far private person making arrest protected.**—For protection of persons, acting in good faith under this section, *see* ss. 79 and 99, I P.C. The protection given to Ministers of Justice extends also to private persons arresting or endeavouring to arrest felons, etc, under certain limitations. As these persons are discharging duties or exercising powers imposed and given by law, they are in a sense engaged in the public service and for the advancement of justice, though not especially appointed If such a person is resisted and killed, the slayer is guilty of murder if he had express notice of the purpose for which the deceased came, *e g*, by commanding the peace or otherwise showing that his interposition was in the interests of peace and justice or with friendly intent, **1 East P. C. 304.** Where express notice is not given, the purpose of private intervention may be misunderstood and violence offered may be extenuated, *Russell on Crimes*, *p.* 727; **5 Pat. L. I. 129.**

8. **Powers of private persons to arrest under the English Common Law.**—At common law a private person may, on his own initiative, without warrant apprehend and detain, until they can be carried before a Magistrate, all persons *found committing or attempting to* commit a felony, *R.* v. *Hunt*, **1 Mood. 93**; *R.* v. *Howarth*, **1 Mood. 207.** He is also justified in using force to prevent the commission of felony, *Hancock* v. *Baker*, **2 B.** and **P. 260**, and in arresting persons committing a breach of the public peace, or in giving them into the custody of a peace-officer at the time of the breach or while there is danger of its renewal. In the case of private persons using their endeavours to bring felons to justice, these cautions ought to be observed; that a felony hath been *actually* committed; for if *no* felony hath been committed, no suspicion how wellsoever grounded, will bring the persons so interposing within the protection of the law. *Russell on Crimes*, *p* 727.

Person arrested to be taken before Magistrate or officer in charge of Police-station.

60. A Police-officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a Police-station.

Notes.—1. Discharge of arrested persons.—A person arrested can only be discharged on his own bond, or on bail or under the special order of a Magistrate. *See* s. 63, *infra*

It is necessary that the communication between the Police-officers of one and those of another province should be free and unfettered by official address, and hue and cry after a criminal shall not be broken by the *fugitive getting beyond* the boundary, nor the pursuit abandoned Pursuit of an offender, more particularly if such be a grave criminal, should not cease, because the territory of the North Western Provinces and Oudh has been crossed it may be continued into any place in British India, except when the criminal may have gone into foreign territory If the frontier [illegible]
until pursuit can be taken up by [illegible]
If this is not obtained before [illegible]
delivered to the custody of the officer in charge, with full information of the crime for which arrested and of the district within which perpetrated

All officers are responsible that requisition for aid to pursue, for search or apprehension of offenders are immediately complied with and every exertion made for the successful performance of the duty required

Except in the case of hot pursuit of fugitives who have committed serious offences in British territory (when under such circumstances, an *arrest is made, the Police should communicate at once with the nearest* authority in foreign territory), if a criminal escapes, the pursuit of the Police and crosses the frontier of an independent Native State, the Police may not follow him, but should at once return and report the circumstance through the District Superintendent of the Police to the Magistrate, who will proceed—*Reg & Ord*, *N W P*, *s* 10, p 272 *See* Notes to s 82

4. Pursuit of offenders in foreign territory.—The Police may, if necessary, pursue into, arrest in, and remove from any Feudatory State of the Central Provinces a person who has committed an offence in Khalsa territory In doing so, *they must ask the aid of the Feudatory official and must be careful not to give* any offence by the manner in which they perform the duty, in ordinary cases when the arrest is not emergent, it should be effected through Feudatory officials upon a requisition sent with that object by the officer in charge of the division in which investigation was held The Police may, *in hot pursuit*, follow an offender into an *independent Native State*, if they arrest him there, they must take him at once to the nearest Police authority of such State If not in hot pursuit, they should ordinarily apply to the nearest Police authorities of the State and request them to effect the arrest of the fugitive In no case ought the Police to *remove from* the territory of an independent Native State an offender arrested there without such offender having been made over to them for the purpose by the local authorities or by the Police of the State If rules of procedure regarding the surrender of fugitive offenders have been framed by the State, the Police must conform to them —*C P Pol Man p* 170

Arrest by private persons. Procedure on such arrest

59. (1) *Any private person may arrest any person who in his view commits a non bailable and cognisable offence, or any proclaimed offender, and without, unnecessary delay, shall make over any person so arrested to a Police officer, or, in the absence of a Police officer, take such person or cause him to be taken in custody to the nearest Police-station

(2) If there is reason to believe that such person comes under the provisions of s 54, a Police-officer shall re arrest him,

(3) If there is reason to believe that he has committed a non cognisable offence, and he refuses on the demand of a Police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of s 57 *If there is no sufficient reason to believe that* he has *committed* any offence, he shall be at once *released*

Notes —1 Scope of the Section —The section is purely enabling and not in any sense obligatory Further, it is the intention of the Legislature to prevent arrests by *private persons* on mere suspicion or information Hence the limitation as to persons who could be arrested by the words [illegible] *non bailable and cognisable offence or who has been proclaimed* (*under s* 87, *infra*), *see* 11 M. 482. A p[illegible] person has no power, on receiving information of theft to arrest the thief while [illegible] as the offence was *neither* a *continuing* offence *nor* one committed in his presence, [illegible] *See*, [illegible] proposed amendment.

See, however, **52 C. 615** in which it is now held that it is not [illegible] whose presence a non bailable and cognisable offence is committed, [illegible]

* This sub section was substituted for the original sub section (1) by the Cr P C. [illegible]

6. **After 24 hours' confinement may become wrongful.**—In no case is a Police-officer justified in detaining a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case. The time during which a party is kept in wrongful confinement is immaterial, except with reference to the extent of punishment; the longer the period, the more severe the punishment, **6 W. R. 88.** Even if a person be rightly arrested, it does not rest with the Police-officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate for more than 24 hours. Unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful; and though the Code is not so express upon this point as upon the time of confinement, still it is perfectly clear that it was intended that where a Police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select, but that he should, if possible, be sent immediately to the Police-station and be placed in the custody of the officer in charge at the station who is the person entrusted by the Act with the conduct of the inquiry, **7 W. R. 3.** It would be absolutely improper for a Police-officer to take the accused to a private house and there detain him in private custody. The provisions of this section are imperative and where a Police-officer is charged with having detained prisoners for more than 24 hours, without the special orders of a Magistrate, it is not necessary to prove that he detained them with a guilty knowledge, **19 W. R. 36.**

7. **Special order of a Magistrate,** *i.e.*, of the nearest Magistrate whether having jurisdiction to try the case or not. There is no warrant for sending the person arrested to the next superior officer of the Police, instead of to the Magistrate. The special order under s. 167, *infra* is altogether a different thing from an order of *adjournment and remand* under s. 344 or s. 247, *infra.*

8. **Order for indefinite detention illegal.**—The order of a Magistrate sanctioning the detention by the Police of an accused person for an indefinite period is illegal, **5 B. H. C. R. Cr. Ca. 31.** Only if there be reasonable ground, can the accused be detained up to the limit of 24 hours. At the expiration of 24 hours from the time of arrest, the accused must either be discharged or be brought before a Magistrate who can then remand under s 344, *infra* for a period not exceeding 15 days.

9. **Magistracy should vigilantly guard against illegal detentions by Police.**—It is the duty of Magistrates of all classes vigilantly to guard His Majesty's subjects against needless and illegal detentions. The placing of an accused person before a Magistrate within 24 hours is absolutely prescribed by law. The Police-officer who fails to comply with this rule is himself guilty of an offence, of which serious notice should be taken. Special orders for the detention of accused persons under s. 167, Cr. P. C., must not be granted to the Police without good and sufficient cause shown; as a general rule, accused persons should be brought before the Magistrate having jurisdiction, who, if further investigation seems necessary, can adjourn his inquiry from time to time under s. 344—*Bom. H. C. Cr. Cir., p.* 2. A remand to Police custody ought to be granted only in cases of real necessity, and when there is good reason to believe that the accused can point out the property or do something that will assist in elucidating the case.—*Punj. Bk. Cir., p.* 167. Magistrates should require applications by the Police to detain accused persons in their custody for more than 24 hours to be on specific grounds and to show good cause for the presence of the accused being necessary at the Police-station.

10. **Reasons for prolonged detention in Police custody to be recorded.**—A Magistrate authorising detention in the custody of the Police under s. 167 should record his reasons for so doing. He can make an order under that section only when the accused has been produced before him, **13 W. R. 27 = 5 B. L. R. 274.**

11. **Procedure when women arrested after childbirth.**—Women accused of any offences, if arrested so soon after childbirth that they cannot at once be taken before the Magistrate without personal suffering and risk to health, should not ordinarily be removed until they are in a proper condition to travel. They should be allowed to remain under proper charge in the care of their relations, or be sent to the nearest dispensary, and suffered to remain there until the officer in charge of the dispensary certifies that they are sufficiently recovered. In such cases, sanction must be obtained by the Police from the nearest Magistrate for their detention at their homes, or at the dispensary, beyond the period of 24 hours allowed by s. 61 of the *Cr. P. C.—Bom. H. C. Cr. Cir., p.* 3.

12. **Use of handcuffs.**—"In all heinous cases, where a single prisoner is sent in, he should be handcuffed. When two or more prisoners are sent, they should be handcuffed to each other, two and two. In cases not of a heinous nature, the prisoner should not be handcuffed unless violent, and then only by order of the officer in charge of the station not below the rank of Sub-Inspector." *Beng. Pol. Man.*, 1888, *p.* 398.

2 **Without unnecessary delay.**—He cannot be detained for more than 24 hours (s. 61), except under the special orders of a Magistrate (s 167) The belief that a Police-officer is *entitled* to detain every arrested person in custody *at all events* for 24 hours is quite unwarranted by the Code S 61 merely prescribes the *maximum* period of detention, where such detention is found to be absolutely necessary for purposes of investigation "In no case is a Police-officer justified by s 61 in detaining a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case" It is for the accused to show that he had reasonable grounds, **6 W. R. 88.**

3. **Take or send the arrested person.**—Where a Police officer, in whose sight a theft was committed, arrested the thief and being himself unable to take or send the accused to a Magistrate, sent a report on which the Magistrate issued a warrant, it was *held* that under these circumstances, the accused was legally brought before the Magistrate **5 B. H. C. R. Cr. Ca. 39.**

4. **Before the Magistrate,** *i e*, into the very presence of the Magistrate, the object being that the person arrested should have the opportunity of applying forthwith for his discharge or release or of complaining of ill treatment by the Police and the like

5. **Procedure where person is arrested in district where he cannot be tried.**—If the Police lawfully arrest a person without warrant in a district in which the investigation and trial cannot be made and heard and the offence is non bailable or such person cannot give bail, they shall be guided in the disposal of such person by the provisions of the s 60 of Cr P Code —*C P Pol Man*, *p* 187 *See* **28 C. W. N. 850.**

Person arrested not to be detained more than 24 hours

61. No Police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under s 167, exceed 24 hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate s Court

Notes.—1. Analogous provisions—As to power of detention by officers in charge of Police station in *Upper Burma see* Reg V of 1892, Sch VII, and in *British Baluchistan see* s 7 (1) of the *Criminal Justice Regulation* VIII of 1896 *See* s 12 of *the Bombay Village Police Act* VIII of 1867, for similar provision allowing the accused to be forwarded to the District Police station within 24 hours from his arrest This period is exclusive of the 24 hours allowed by this section, **Ratanlal 22**

2. **Section applies only to persons arrested without warrant**—This section applies only to persons *arrested without warrant*, while s 81, *infra* provides for the case of persons arrested under warrant The language of the corresponding s 124 of the 1872 Code was wider and provided that no *accused person in custody* should be detained longer than 24 hours *See* also **11 M. 93.**

3. **What amounts to Police "custody."**—Police "custody" includes custody on the authority of the Police, every person who is kept in attendance to answer a charge in such a way that he is practically deprived of his freedom is to be considered as in custody A Police-officer who, without himself arresting a person, directs some of the neighbours to take charge of him is responsible in the same way as if he had himself made the arrest Requiring a person's attendance by letter and deputing a constable to accompany him with orders to prevent him from speaking to anyone amounts to an arrest.—*Beng Pol Code*, *p* 380 *See* also **2 M. H. C. R. 396** and **7 W. R. 3.** Whenever an accused person is sent for and made to attend at a station house, or his attendance is enforced while a local inquiry is proceeding, he is to be considered as having been arrested—*Mad Pol Man*, *p* 92, **4 Bom L. R. 79.**

4. **"Nazar Kaid" amounts to Police "custody."**—Surveillance is one thing, and detention in any kind of custody another It is a mere evasion of the law to place a suspected person in what is ordinarily known as "*Nazar Kaid*" and to say that he is not under arrest The system is still more objectionable when applied to a witness When a person is placed under "*Nazar Kaid*" or Police supervision and restraint, he should be considered to be in the custody of the Police and the provisions of s 60, Cr P C, should be held applicable to him.—*Bom Pol Man*, *p* 96

5. **Custody for 24 hours must be continuous**—Section 61 does not apply to cases in which there has not been a continuous detention of 24 hours The number of hours an accused person is detained at a *thana* is not merely to be added up irrespective of circumstances If the accused is under the surveillance of the Police for two days and a half, he is not said to be in continuous legal custody at any one time for 34 hours **1 W. R 6**

Provisions of ss. 47, 48 and 49 to apply to arrests under s. 66

67. The provisions of ss. 47, 48 and 49 shall apply to arrests under s. 66, although the person making any such arrest is not acting under a warrant and is not a Police-officer having authority to arrest.

CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

A.—Summons.

Form of summons.

68. (1) Every summons issued by a Court under this Code shall be in writing, in duplicate signed and sealed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule, direct.

Summons by whom served.

(2) Such summons shall be served by a Police-officer, or, subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant.

(3) This section applies also to the Police in the towns of Calcutta and Bombay.

Notes.—1. Scope of Section.—This is the only section which provides for the issue of a summons under the Code and a summons to an assessor must comply with the terms of this section, **1 C. W. N. CXVI.** Under the 1872 Code, the scope of the corresponding section was limited to the service of summons on the *accused only*, but under this section, a summons may be (i) to the accused; (ii) to witness; (iii) to a person to show cause against some order; (iv) to a juror or assessor. As to form of summons to an accused person, *see* Sch. V, No. 1; and *see* Form No. XXXI as to witnesses, *see* also s. 205 and notes thereunder as to when a Magistrate may dispense with attendance of the accused.

2. Summons and warrant distinguished.—*See* Note 2, s. 75.

3. Some order must follow application for summons.—Where an application is made for process to compel the attendance of witnesses, it is the duty of the Court to grant or refuse it. It is improper to make an order merely directing the petition to be filed, **6 C. W. N. 548.**

4. Writing.—As to definition of writing, *see* s. 3(58) of the *General Clauses Act* X of 1897.

5. Circulars prescribing directions for issue of summons.—Summons issued under this section by Courts of Session, District Magistrates and first-class Magistrates may be signed and sealed by the Clerk of the Court, or, where there is no Clerk of the Court, by the *Sheristadar*, subject to the orders of the presiding officer of the Court.—*Bom. H. C. Cr. Cir., p.* 10.

In Madras, summonses issued to witnesses from the Magistrate's Court, may ordinarily be signed by the Chief Ministerial Officer of the Magistrate's establishment. "*By order of the Court*" should invariably be prefixed to the signature of the Ministerial officer in such a case.—*Mad. H. C. Cir., No.* 1302, *dated* 29*th April*, 1891.

A summons should contain the name of the father of the person summoned, his caste or tribe and his residence, so as to place his identity beyond all doubt. The Court from which the process is issued and the name of the district should also be set forth.—*Punj. Cir., Vol. II, p.* 151.

6. Seal.—Official seals of Sessions Judges and Magistrates are prescribed by Bom. Act V of 1883, which repeals Bom. Act II of 1870; in Madras by Mad. Act VI of 1865; under which the *seal* of every Court of Session is a circular one, two inches in diameter, and bears thereon the Royal Arms with the inscription, "THE COURT OF SESSIONS OF THE—— DIVISION;" seals have also been prescribed for all other Criminal Courts. For disobedience of a summons not sealed, *see* **Weir I, 99.**

7. Formalities and contents of valid summons.—A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when the attendance of the person summoned is required; and it should go on to say that such a person is not to leave the Court without leave, and if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned, **5 A. 7; 7 M. H. C. R. App. XLIII = Weir II, 38.**

Police to report apprehensions

62. Officers in charge of Police stations shall report to the District Magistrate, or if he so directs, to the Sub divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise

Notes —1. Scope and object of section—Prompt action by Magistrates.—The object of ss 62 and 63 is that the Magistrate should promptly exercise authority, if necessary, with regard to all arrests by the Police, and they seem to have been framed with this view, that as no person can be released without the order of a Magis trate, except on bail or recognisance the Magistrate should be responsible as well as the Police if a person illegally arrested remains unnecessarily in custody —*Punj Cr p* 174 *See* Rules 11—14 issued by the Chief Court of the Punjab —*Punj Cr, Vol. II pp* 164 165 *See* also **Ratanlal** at **pp 254, 259** and **231** as to the scope and object of this section This and the following sections, if properly worked, would be an effective safeguard against Police oppression

2 **Failure to report is an offence.**—Failure on the part of the Police officer to send the report under this section may be punishable under s 217, I P C

3 **'Or otherwise.**—These words have apparently reference to the provisions of s 59 (3)

Discharge of person apprehended

63. No person who has been arrested by a Police officer shall be discharged, except on his own bond, or on bail or under the special order of a Magistrate

Note.—For *bond see* Chapter XLII and for *bail, see* Chapter XXXIX

Offence committed in Magistrate s presence

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction he may himself arrest or order any person to arrest the offender, and may thereupon subject to the provisions herein contained as to bail, commit the offender to custody

Note.—This section does not empower the Magistrate to try the offender himself.—This section is clearly not intended to trench upon the great principle embodied in s 556 *viz*, that no Judge etc shall deal judicially with a case in which he is personally interested Therefore where a Magistrate while travelling in a Railway carriage requested the accused, who were fellow passengers to desist from smoking and on their contemptuously refusing to do so, arrested them and subsequently tried and convicted them under s 35 of *the Railways Act* IX of 1879 it was *held*, that in the circumstances of the case the Magistrate was legally and morally disqualified in exercising his judicial functions in relation to the offence imputed **Ratanlal 389**

Arrest by or in presence of, Magistrate

65. Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant

Note —Scope of Section —The special provisions in s 6 of the *Bombay Gambling Act* IV of 1887 must be read subject to the general provisions of this section and s 105 As a first-class Magistrate has power under s 6 of that Act to give authority, under a special warrant, to a Police-officer of the class designated in the section, to make the arrest and the search the Legislature must be presumed to have intended that the Magistrate of the first class should have the authority to make the arrest and the search himself, if necessary, **31 B. 438** and *see* s 105

Power, on escape, to pursue and re take

66. If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India

Note.—Section applies also to private persons making arrest —This and the following sections correspond with s 112 of the 1861 Code which had been omitted in the 1872 Code, but re-enacted in the 1882 Code They apply to Police officer as well as to *private persons* making arrests under the Code For definition of British India, see *General Clauses Act* X of 1897, s 3 (7) As to pursuit by Police-officers of an offender in other cases, *see* ss 54 and 58 and s 42 for demanding the aid of private persons

15. Service of Feudatory Court's processes.—The Police will not execute or serve in British territory any warrant or summons issued by Feudatory Chiefs or their Courts. Should any such process be sent to them, they must decline to serve them.—*C. P. Pol. Man., p.* 186.

16. Service by Police-Officer.—Under s. 11 of Act XXIV of 1859, every person appointed a Police-officer receives on his enrolment a certificate under the seal of the *Inspector-General* by virtue of which he is vested with the powers, functions and privileges of a Police-officer. Such certificate ceases to have effect whenever the person named in it is suspended or dismissed or otherwise removed from employment in the Police Force, and should thereupon be immediately surrendered to his superior officer or other person empowered to receive it. No person who has not been duly appointed as aforesaid can be *held* to be a Police-officer within the meaning of s. 44 of that Act. The distinction between the general Police and the village Police has been fully recognised in that Act.—*See M. H. C. Proceedings, 28th June,* 1867.

17. Madras rules for service of criminal processes.—The following rules regarding the service of criminal processes are in force in the Presidency of Madras.

1. (*a*) All criminal processes and those under Act XIII of 1859, issued by Magistrates shall ordinarily be served by the Police; the procedure regarding the service of summons and execution of warrants is laid down in the Code of Criminal Procedure, ss. 68 to 86.

Note.—The Police must also accept and serve summonses issued to witnesses from a Magistrate's Court when the summonses are signed by the Chief Ministerial Officer of the Magistrate's establishment instead of by the Magistrate himself.

(*b*) All processes issued by Cantonment Magistrates, including those issued in civil cases in conformity with Madras Act I of 1866 within Military Cantonments, will be served by the Police.

(*c*) It is not the duty of the Police to deliver certificates issued by Magistrates for the refund of fines to parties; nor should they be sent with parties who have been fined to their villages for the purpose of receiving the fine, or bringing the parties back if the fine be not forthcoming. The law requires that the persons fined should produce the fine himself directly the sentence is passed.

(*d*) It is not the duty of the Police to serve processes of the Salt and Abkari Department. Superintendents should instruct Inspectors to return such processes unless they are for Police constables themselves.*

2. Superintendents are requested to obtain service postage stamps from the District Magistrate and issue them to their Cusbah Station-house officers for use. Summonses should be returned, after service, by post-paid and not "bearing."

3. (*a*) A register of processes will be kept at all stations. Each sub-station will send a weekly extract to the Cusbah-station, and the Cusbah Station-house officer will forward the extracts received from out stations together with his own to the District Police Office through the Inspector of the Division.

(*b*) Warrants, though sent to other divisions for execution, should be entered in the register of the station where they were first received. The words 'Registered No. at station,' will then be written across the face of the process to obviate mistakes and double registration.

(*c*) Remand warrants will be entered in the register of processes; they will afterwards be handed over to the keeper of the jail along with the prisoners to whom they refer. A Remand Warrant ought to be addressed to the keeper of the jail in which the prisoners to be confined, and should remain in his custody as long as the prisoner is so.

(*d*) All unexecuted warrants and unserved summonses of one week must appear in red ink in the next, and all following weeks' returns till they are executed, when they will disappear from the return.—*Mad. Vol. I Man. Vol. I, pp.,* 46 and 47.

(*e*) Summonses should, as a rule, be served personally on the persons summoned; special care must be taken to have summonses for jurors and assessors served *personally*. If the Police really take pains, service can generally be effected in person, as rural witnesses do not often wonder much from their villages and usually return home in the evening. But, where the persons summoned cannot by the exercise of due diligence be found, the duplicates of summonses should be left for them with some adult male member of their families and it is only when these two courses fail that the serving officer must adopt the last course, namely, affixing the duplicates to the doors of some conspicuous part of the houses in which persons summoned ordinarily reside.

* Circular Memo. No. 1445, dated 29th April, 1897.

(i) *Must be in writing*—*See* s 3 (58) of the *General Clauses Act* X of 1897, for definition of writing *See* **Weir I, 86 and 6 Mad. H. C. R. App. X.**

(ii) *Must be signed*—Every summons should be signed in full by the officer by whom it is issued with the name of his office or the capacity in which he acts The practice of signing initials only or using a stamp is objectionable (*Punj Cir, Vol II, p* 151)

(iii) *Must be sealed*—When a summons was not sealed as required by Madras Act III of 1869, s 2 under which it was issued a conviction for disobedience thereto was held to be bad, **Weir I, 100,** *cf* **42 C. 708, 37 M. L. J. 538.**

(iv) *Must state the place at which the person sommoned is to appear*—The place at which the person summoned is to appear must be clearly specified **Weir I, 100; 81.** A person is not bound to obey a summons which directs him to appear at such place in camp as the Magistrate might be on the date fixed, **(1077) Colm. D. Crl. No 89** A Magistrate cannot issue a summons requiring a person to appear before the Police, **24 C. 320.**

(v) *Must state the date and time when the person must appear*—*See* **5 A. 7, Weir I, 100**

(vi) *Must direct person summoned not to depart without leave*—Where the accused who was summoned to appear and answer a criminal charge attended the Magistrate's Court but not finding the Magistrate present at the time mentioned in the summons departed after waiting two or three minutes it was *held* he was bound to wait a reasonable time and by not having done so, had rendered himself liable under s 174 I P C **10 B 93, 14 W. R. 20,** but *see* **20 M. 31, Weir I, 99,** where it was *held* that in the absence of a direction that he should not leave without permission, the person departing is not guilty

8 **Result of omitting formalities**—When these formalities are not observed conviction for disobedience to a summons under s 174, I P C, will not be sustained, **5 A. 7.** Every summons should be signed in full by the officer by whom it is issued with the name of his office or the capacity in which he acts The practice of signing initials only or using a stamp is objectionable (*Punj Cir Vol II p* 151) but having regard to the new *illustration* to s 537, *infra* it will purely be an irregularity and will not affect the validity of the proceedings, **8 A 293** *See* also **16 A. 59; 5 C. W. N. 447, 6 M. 396** and **11 C. 111 = L R. 11 I A. 186**

9 **Summons to appear at a place outside British India is bad**—It is no offence to disobey a summons which directs a person to appear at a place outside British India, **16 M. 463.**

10. **Accused must not be prejudiced by defective summons.**—Where a party summoned by a Municipality did not know the date of the alleged offence, *until he was under trial* it was *held* that opportunity should have been given him to adduce any evidence he might wish to call and that if he desired to have the witnesses for the prosecution recalled and cross-examined he must be allowed to cross-examine them **24 W. R. 55**

11. **Mamlatdar can try cases of contempt of his authority as Mamlatdar.**—A Magistrate is not barred by law from trying an accused person under s 174, I P C, for disobedience of a summons issued by him in his capacity of Mamlatdar, **18 B 380 (F.B.)** but *see* **14 W. R. 20** and notes to s. 487

12. **Substitution of letter for summons in certain cases**—In the case of first and second class Sirdars and other native gentlemen of high position, a letter signed by the Judge or Magistrate and to the same effect as Form I or XXXI, Sch V, may be substituted for the ordinary summons—*Bom H C Cr Cir, p* 10

13. **Process fees intended to cover all expenses**—The postage charges on all processes required to be transmitted by post, together with the registration fee if the cover is required to be registered should be paid by means of service postage stamps without any additional charge being levied from the parties at whose instance the process is issued The process fee is intended to cover all the expenses of serving the process—*C P Cr Cir, No* 6

14 **Process fee in Presidency towns**—Section 57 of the *Presidency Magistrate's Act* IV of 1877 provides—

"A fee of 8 annas must be paid for every summons or warrant issued by a Presidency Magistrate except in the case of a summons to attend and give evidence or to produce documents in which case there must be paid a fee of 4 annas Provided that such Magistrate *may* in any case remit any such fee if he is satisfied that the complainant is unable to pay the same and *shall* remit it when the complaint is made by a public servant in the execution of his duty"

5. **Procedure herein laid down does not apply to execution of warrants.**—*See* s. 46, *supra* as to how to make an arrest. The procedure for executing warrants is different from the method of serving summons. The former may be done (ss. 79 and 80) only by a Police-officer, while there is no such restriction in the case of service of summons. It might be effected by any authorised officer of Court, **27 C. 457.**.

6. **Service on the pleader of a party** is not sufficient in criminal cases, **6 C. W. N. 927**; *Cf.* **27 C. 985.**

7. **Has the process-server right to enter any house without permission?**—"I do not think that the fact of a subpœna being entrusted to a process-server gives him a general right of entry into any house without obtaining the permission of the owner or person in charge. Such a general power to enter any house at any time is not given by any of the provisions of the Code (Civ.) and would in my opinion be a serious violation of private rights. The mere fact that the owner asked the process-server to get out of his house would not be an offence," **28 M. L. J. 504.**

Service when person summoned cannot be found.

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a Presidency town, with his servant residing with him; and the person with whom the summons is so left, shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Notes.—1. Affidavit as to service of summons when necessary.—When the Police serve a summons outside the local limits of the jurisdiction of the Court from which it is issued, and in all cases in which it is probable that the Police-officer who serves a summons, will not be present at the hearing of the case, if the duplicate of the summons has not been endorsed in manner provided by s. 69 or 70, Cr. P. C., the Police-officer who has served such summons, shall make an affidavit, in the form annexed, before the nearest Magistrate; and such affidavit and the duplicate of such summons shall be returned into the Court out of which such summons issued :—

FORM OF AFFIDAVIT.

I, A , son of B , hereby solemnly declare that I did on the day of serve , son of , of , with the summons now shown to me, and marked A by delivery (or tendering) a duplicate to him (or by leaving a duplicate for him with an adult male member of his family residing with him, or by affixing a duplicate to a conspicuous part of his house or homestead).

Taken the day of 191 before me

(Signed)

Place *Magistrate.*

—*Reg. & Ord., N.-W. P., s.* 10, *p.* 293.

2. **Cannot be found by the exercise of due diligence.**—Before the Court can proceed against the accused, it must be shown by affidavit from the person entrusted with the service of the summons, that he has made his endeavours to effect *personal service* on him and that he has evaded such service or that he *cannot* be found. **1882 A. W. N., p. 170.** It is not in every case where the accused *is not found* that resort can be had for substituted service, but only where he *cannot be found* by the exercise of due diligence. *Cf.* the cases **19 C. 201; 21 M. 419, 324; 26 C. 101; 3 C. W. N. 307; 20 W. R. 23 (Civ.)** as to what is good service under Rule 17 of Order V of the *Civil Procedure Code* V of 1908.

3. **Service on adult male member of the family residing with him.**—Very often great injustice might arise from effecting service in this way, especially where there are quarrels and serious misunderstandings in a Hindu family, and in consequence, its members are no longer living in commensality, but each branch occupies a separate portion of the family dwelling-house.

4. **Outside the Presidency towns, service cannot be effected on a servant.**—*See* **1899 A. W. N. 13.**

Procedure when service cannot be effected as before provided.

71. If *service in the manner* mentioned in ss. 69 and 70 cannot, by the exercise of due diligence, be *effected*, the serving officer shall affix one of the duplicates of the summons, to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

(*f*) There should be great promptness in the service of summonses, in the return of originals to the Magistrates with necessary endorsement and in the execution of warrants (s 21 of *the Police Act* XXIV of 1859)

All cases of delay will be severely dealt with If the person wanted absconds 10 or 15 days at the most being sufficient to ascertain this, a proclamation for him should be applied for under s 87, Cr P C

(*g*) The Police should not of their own motion recognise the fact that the party appeared before the Magistrate or that his case has been disposed of It is the interest of such party for his own protection to obtain an order from the Magistrate to cancel the warrant. The Police holding a warrant are always protected under s 54 of the Police Act

(*h*) When requesting Magistrate to act under ss 87 88 Cr P C, the warrants should not be returned They must be retained in the station until they are executed [warrants can be returned only through the District Superintendent or the Assistant Superintendent of Police P O 162 (*b*)] An occurrence report must be submitted to the Magistrate explaining fully the attempts made to execute the said warrants and all particulars to prove to the Magistrate that the man is really absconding On this the Magistrate can issue his proclamation

(*i*) In charge sheet cases care should be taken that all the prosecution witnesses are present when the charges sheet is brought to the Magistrate or that recognisances are properly entered into under s 170, Cr P C—*Police Gazette dated 11th September*, 1897 For *Bengal* rules as to service of summons see *Calcutta Gazette*, 1892 Pt I p 943 For *Assam* rules see *Assam Manual, p* 187, for *the Punjab* rules see *Punjab Cir*, *Vol II, pp* 151—154

Summons how served

69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons

Signature of receipt for summons.

(2) Every person on whom a summons is so served shall if so required by the serving officer, sign a receipt therefor on the back of the other duplicate

(3) Service of a summons on an incoporated company or other body corporate may be effected by serving it on the secretary, local manager, or other principal officer of the Corporation or by registered post letter addressed to the chief officer of the Corporation in British India In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post

Notes. 1.—Mode of serving summons —*Cf R* 10 of Ord V of *Civil Procedure Code* V of 1908 If, however, the person refuses to take the summons, mere tendering amounts to sufficient service **1886 A. W. N 93.** *See* also **28 M L J. 505=16 Cr. L. J 477.** The mere showing to a witness of a summons is not sufficient service Either the original should be left with the witness, or should be exhibited to him and a copy of it delivered or tendered, **5 B. H. C R. Cr. Ca. 20.** If the person summoned refuses to take the copy it would be sufficient to inform him of its nature and throw it down in his presence—*Redpath* v *Williams* **3 Bing 443= 11 Moore 333** See *contra Aldred* v *Hicks* **5 Taunton 186** It is not necessary to leave it in his actual corporal possession But where the defendant was at an upper window of a house and the process server who was outside called out to him, telling him he had a writ against him and held up a copy for him to *see* and then threw it down in the presence of the defendant s wife, it was *held* this was not a sufficient service—*Heath* v *White*, **2 D.** and **L 46.**

2 Mere refusal to sign a receipt for summons is not an offence under s 173 or s 180, I P C, **20 C. 358.** *See* also **3 C 621** and **5 B H. C. R. Cr. Ca. 34.** Refusing to receive summons is no offence **5 M. 199. 40 A. 577.**

3 Service on public servant.—As to service on a servant of Government or of a Railway Company, *see* s 72 and *C H C Rules and Orders p* 4

4. Every summons under the Code must be served as provided by this section —This is the only section which provides for the procedure for the service of any summons. Therefore any other mode, *e g*, sending summons by post in a registered cover adopted for such service is illegal and not justifiable, summon to attend as an assessor must be served as provided by this section, **1 C. W. N. CXVI.**

When a person mentioned in clause (*b*) or (*c*) above, is required to attend at a Court beyond the limits of the districts or area in which he is serving, the Court issuing the summons, unless the case is one of extreme urgency, shall allow sufficient time for arrangements to be made for the performance of the duties of such person during his absence.

When a summons is to be served upon any person in the active service of a Railway Company, 'the head of the office' to whom the summons is ordinarily to be sent in duplicate shall be the officer named in Appendix B to these rules; and the Court issuing the summons, unless the case is one of extreme urgency, shall allow sufficient time for arrangements to be made for the performance of the duties of such officer during his absence. Notice of the intended arrest of a Railway servant or of a person working on a Railway in the service of a contractor shall be given in a similar manner, when circumstances permit, to the said company or contractor, —*All R. & O., pp.* 7-8.

Panjab.—(1) When the person summoned is in the active service of Government, or of any Railway Company or Administration, the Court or Magistrate issuing the summons shall ordinarily send it, in duplicate, to the head of the office in which the person summoned is employed, who will cause the summons to be served on the person named therein in accordance with the provisions of s. 72 of the Code of Criminal Procedure. This rule applies to every summons issued under the Code (s. 93). (2) When the summons has to be served on an incorporated company or other body corporate, such as Municipal Committee, service may be effected by serving the summons on the Secretary, Local Manager or the Principal of the Corporation or by registered post to the Chief Officer of the Corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post. (3) Whenever a summons to appear as a witness is issued to an officer of Police, it should be served upon such officer through the District Superintendent of Police or, in the case of an out-post, the Assistant District Superintendent in charge of the out-post to which the individual summoned may belong. (4) It has been brought to notice that considerable inconvenience results from the indiscriminate summoning of the superior officers of the Railway to give evidence on points of Railway practice, custom, orders, etc., which could equally well be done by subordinate Railway officials at or near the place where the trial is being held. Subordinate Courts should, therefore, in the exercise of their discretion, abstain from requiring the attendance of the Manager or other high officials of the Railway, unless in special cases in which their evidence is absolutely necessary. (5) To assist the Court in summoning subordinate officials who would most probably be able to give the evidence required with the smallest inconvenience to the Railway, a list of the superior officers under whose immediate orders the Railway subordinates are, is given in Appendix No. I to this volume, and all processes for the attendance of any subordinate official should ordinarily be served through his immediate superior, unless where a strict adherence to this rule would cause delay or inconvenience. (6) When a Criminal Court issues a summons for the appearance of a soldier in military employ, it should send it for service to the officer commanding the regiment in which such soldier is serving. The provisions of s. 82 of the Code of Criminal Procedure are wide enough to include persons in military employ; and whenever it is necessary to summon an officer or soldier or other persons in military employ, the summons should always be sent for service to the officer commanding the regiment in which such officer, soldier or other person is serving, unless there are special reasons which should be recorded for proceeding otherwise.—*Punj. Cir., Vol. II, pp.* 152-153.

Service of summons outside local limits.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is to be there served.

Notes.—1. Service on witness resident in Bombay.—In the Bombay Presidency summons issued by Magistrates for service on witnesses living in Bombay, should be sent for service to the Chief Presidency Magistrate and not to the Commissioner of Police—*Rule* 10, *Bom. Cr. O., p.* 8.

2. Witnesses resident in Native States.—The summons to a witness residing in a Native State, must contain a full description of the person summoned, so that he may be easily identified, such as his age, caste, father's name, village and the town well-known in its neighbourhood. It should also state the probable time during which he will be detained. In fixing the date for his attendance, reasonable time must be allowed for his being found and sent off. When practicable, his *batta* must accompany the summons. Summoning such witnesses for the preliminary inquiry should be avoided unless indispensable.—*B. H. C. Bk. Cir., p.* 10.

Note—The words *service in the manner* have been substituted for *signature* and the word *effected* for *obtained*

As to the form in which returns of service of summons are to be made see *Cal H C C O No* 9 *of 6th April* 1871

72. (1) Where the person summoned is in the active service of the Government or of a Railway Company the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed and such head shall thereupon cause the summons to be served in manner provided by s 69 and shall return it to the Court *under his signature* with the endorsement required by that section

Service on servant of Government or of Railway Company

(2) Such signature shall be evidence of due service

Notes—1 Under the 1872 Code the mode of service prescribed by this section was *optional* Now it is declared that it shall be the ordinary procedure

2 **Rules for service on public or Railway servants**—The following rules are current in different provinces regarding summoning public or Railway servants to give evidence in Criminal Courts

Madras—In every case where the attendance of a public servant summoned as a witness was reasonable and his conduct in the case is not condemned the Courts are required to give such public servant a certificate to that effect in order to establish his right to pay The practice where it exists of stopping the wages of public servants for the time they may be absent from duty in attendance as witnesses before Courts of Justice in obedience to legal process is forbidden and no departmental rules to the contrary can be recognised—(*G O* 9*th April* 1875 *No* 823 *Judicial*) *Madras Rules No* 8

Bengal—(*a*) Whenever a summons to appear as a witness in a criminal case is issued against an officer of Police it shall be served upon such officer through the Superintendent of the District or the Assistant in charge of the sub-division to which such officer may belong—*Cal H C C O No* 14 *of* 6*th December* 1866

(*b*) All summonses on Medical Subordinates at Sub-divisions must be served through the Magistrate or other executive head of the district in order to enable them in communication with the Civil Surgeon to make arrangements for the conduct of their medical duties during their absence—*Cal H C C O No* 1 *of* 10*th January* 1868

(*c*) Whenever it may be necessary to summon an officer or soldier in military employ to attend a Civil or Criminal Court as a witness the process-server who is to serve the summons must be instructed to take it under cover to the officer in command of the regiment or detachment with which the witness may be serving and to apply for his assistance in serving it With this assistance the process server shall then proceed to serve the process and shall make his return direct to the Court In such cases sufficient time should always be given to admit of arrangements be made for the relief of the witness summoned—*Cal H C C O No* 24 *of* 24*th June* 1878

(*d*) When Jail or other Departmental officers of Government resident in the station are summoned as witnesses arrangements should be made to send for them only when actually wanted—*Cal H C C O No* 8 *of* 22*nd August* 1878—See *Cal G R & C O p* 4

United Provinces—When a summons is to be served on a person in the active service of the Government the head of the office to whom the summons is ordinarily to be sent in duplicate shall be deemed to be—

(*a*) in the case of an officer or solider in military employment the officer in command locally to the corps or department in which such person may be serving

(*b*) in the case of a gazetted officer in the Department of Land Revenue and General Administration or in the Judicial department when his attendance is required by any Court beyond the limits of the district in which he is serving the Chief Secretary to Government

(*c*) in the case of a gazetted officer in any other department the head of that department

the strength of personal knowledge, *i.e.*, knowledge derived from testimony legally given before him, that an offence has been committed. The report of the Police or any statement not on oath or short of an actual formal complaint is not sufficient to give the Magistrate jurisdiction to issue a warrant, **13 W. R. 27; 4 B. L. R. App. 1.** A belief founded on private and anonymous information is not enough.

5. **Caution in issuing warrants against purdah woman.**—Unless and until a Magistrate has good reason to believe that there is strong likelihood of the charge being proved, an accused, if she be really a purdah woman of good position, should not be ordinarily compelled to appear in person in the first instance, **20 P. W. R. 1908 = 8 Cr. L. J. 454.**

6. **Essential requisites of a warrant.**—A warrant must comply strictly with the terms of the Act under which it is issued, *see* **37 C. 122.** A warrant therefore—

(i) *Must be in writing.—See* s. 3 (58) of the *General Clauses Act* X of 1887.

(ii) *Must be signed.*—(*a*) The affixing of a signature with a stamp and not with a pen would be more than a mere irregularity, **6 M. 396.** (*b*) The warrant must be signed in full. In **23 C. 896** it was laid down that a warrant merely initialled by a Magistrate is not legal. *Contra* see **8 A. 293.** *See* also **16 A. 59; 11 C. 111 = 11 I. A. 186; 23 P. R. 1910; 3 Pat. L. J. 493.**

(iii) *Must be sealed.*—A seal is an essential addition to a warrant under ordinary circumstances. The omission of a seal will, in the absence of a statutory provision to the contrary, render the warrant void. *In re Phips*, **11 W. R. 730 (Eng.); 9 Bom. H. C. R. 154; 18 B. 636 at p. 668; 42 C. 708.** It is not now necessary as under s. 159 of the 1872 Code, that the warrant should be sealed with the seal of the Magistrate, it should bear the seal of the Court.

(iv) *Must clearly identify the person to be arrested.*—A warrant should contain a distinct and unequivocal intimation to the person that he is the individual meant to be apprehended and must surrender to the officers; and it must be noted that the form of warrant provided by the Code requires that his residence should be inserted. Where, therefore, a warrant authorised the committal of James Hastings, without giving any description as to what James Hastings was indicated thereby, *held* such a warrant was illegal as it would justify the Police to arrest any one of that name whoever he may be and wherever he may be found, the number of persons liable to be arrested under it being limited only by the number of persons bearing that name, **9 Bom. H. C. R. 154** *following Hood's case* (**1 Moor. Cr. Ca. 281**), where the Christian name only of the person to be arrested was omitted, but a full description was given of him, still the Judges were unanimously of opinion that the warrant was bad. *See* also, **18 B. 636** and Notes 7 and 10 below. In all warrants and processes of every description, whether under the Code of Criminal Procedure or any other law in force, the father's name, caste, tribe or nationality and residence of the person to be arrested, summoned, etc., should be entered, so as to place his identity beyond all doubt. The warrant should also set forth the Court from which it issues, and the name of the district, *Punj. Cir., Vol. II, p.* 155.

(v) *Must specify the offence charged.—See* form of warrant No. II, in Schedule V. Where a warrant did not specify a punishable offence and where it had been issued upon a statement not sufficient to make out any offence; *held* the warrant was bad, **6 B. L. R. App. 129; 15 W. R. 4.** A warrant issued by a Magistrate for the apprehension of a party to answer a charge, should state the specific offence with which the party is charged and that information thereof was duly made on oath before the Magistrate, *Candle* v. *Seymour*, **1 Q. B. 889 = 10 L. J. M. C. 130.** Under the New York Code, s. 152, it is sufficient if a criminal warrant indicated with reasonable certainty the offence sought to be charged, *Pratt* v. *Bogardus*, **49 Barb. 87.** It is not necessary to set out the circumstances of the offence, *Atchinson* v. *Spencer*, **9 Wend 62**; nor the facts on which the charge is predicated, *People* v. *McLeod*, **1 Hill 377.**

(vi) *Warrant must name the persons who are to execute the warrant.—See* ss. 77, 78 and 79 and Notes thereunder. The name and designation of the person or persons who is or are to execute the warrant must appear in the warrant, *see* form of warrant. Where the name is left blank, the 'warrant is illegal, **14 Cr. L. J. 142 (Punj.).** A civil warrant addressed not by name, but to the bailiff of the Court' is not illegal, **1914 M. W. N. 498 = 15 Cr. L. J. 576.**

(vii) *Must indicate the authority of the Magistrate.*—The warrant should also set forth the Court from which it issues. Warrants issued by Magistrates acting by special statutory authority and out of the course of the common law ought to show on the face of them by direct averment or reasonable intendment the authority

Proof of service in such cases and when serving officer not present

74. (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by s 69 or s 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statement made therein shall be deemed to be correct unless and until the contrary is proved

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court

Note —*See* for form of affidavit Note 1 under s 70

B.—Warrant of Arrest.*

Form of warrant of arrest.

75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or, in the case of a Bench of Magistrates, by any member of such Bench, and shall bear the seal of the Court

Continuance of warrant of arrest

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed

Notes.—1. Form of warrant.—As to the form of warrant of arrest *see* Sch V, No 2 When any Act does not provide a form of warrant, the form to be used is the ordinary one prescribed by the Code of Criminal Procedure —*Per* STARLING J, in **18 B. 636.** Every warrant should state as shortly as possible, the special matter on which it proceeds Every warrant is to be in the form given in the second schedule or to the like effect A strict adherence to the form of warrants of arrest prescribed by the Code will tend to prevent their being granted irregularly and without inquiry as to whether the circumstances justify their issue —*Punj Cr Vol II p* 155

2 Warrant and summons to be distinguished.—A summons is always addressed to the person whose attendance is required, but a warrant is not an order served on any person it is simply an order to the Police to arrest a person, **5 W R. 71, C. L. J. 625**, 2 *see* also **28 P R. 1890** and **Ratanlal 152.** Great care should be exercised in having forms of warrants distinguished from forms of summons, and in making the Police and the public acquainted with the difference Different tinted paper and lithographed or printed forms should always be used The people of the country will gradually become familiar with the appearance of each sort of process and know how to act All vernacular warrants of commitment to jail should be drawn up in the Roman character, except in the case of Native Magistrates who are unable to read this character, and in no case should ordinary country ink be used in filling up the blanks in the printed form of warrant, or in warrants drawn up upon English paper —*Punj Cr*, *Vol II, p* 155

3. In what cases warrants may be issued —A warrant may be issued for the attendance of (1) an accused, (2) a person called upon to show cause against a Magistrate's order, or (3) a witness subject to provisions of s 90, but not for the attendance of a juror or an assessor, *see* s 90 Even in a *warrant case*, it is open to a Magistrate to issue a summons, *see* s 204 and Notes thereunder Great care should also be taken that a warrant, which always implies personal arrest and restraint, is never issued when a summons to attend would be sufficient for the ends of justice, and any attempt to coerce or restrain a party called upon to appear in obedience to a *summons* should be checked and punished It must be understood that the Police will carry out to the letter the instructions issued in the writ handed over to them, but the Magistrate is responsible for the consequences of an informal or illegal process bearing his seal and signature —*Punj Cr*, *Vol II, p* 156

4. Magistrate may issue warrants only on good and legal grounds —There is no doubt that the law is just as jealous of personal liberty in India as it is in England and that liberty cannot lightly be taken away except under circumstances which are clearly prescribed by positive law The Magistrate should arrest on

* These provisions apply to warrants issued under s 10 *Upper Burma Ruby Mines Regulation* XII of 1887 *see* sub section (2) of that section

11. Mode of executing warrants.—*See* s. 46 as to how an arrest is to be made. The person arresting must notify the substance thereof to the person to be arrested, *see* s. 80. It is also advisable that the officer's status must be notified unless his function is sufficiently indicated by his uniform or other sign of authority. *See Russell on Crimes, pp.* 734—736.

12. Procedure on execution warrant.—Person arrested must be brought before Court without delay, *see* ss. 81 and 85. When a prisoner is brought before a Magistrate, the Magistrate cannot lawfully commit to prison or *remand* him without sufficient grounds and in the complete absence of evidence, there can be no grounds, **5 B. L. R. 274 : 13 W. R. 27.**

13. Procedure when warrant of arrest not executed.—Warrants of arrest should be made returnable on execution, or alternatively after a given time, *e.g.*, six months. In the latter case they should be accompanied on return by a Police report as to whether the accused has been heard of, and is likely to come within reach. After re-issue for a certain number of times, the warrant thus returned should be put upon a dormant file, in capital cases, after seven years; in cases subject to transportation or imprisonment for not less than seven years, after three years; in less important cases, after a year. In the event of information reaching the Magistrate that the accused has been in the district, or where he could be arrested the warrant should be reissued at the Magistrate's discretion.—*Bom. H. C. Cr. Cir., p.* 11. No warrant of arrest in which arrest does not immediately follow shall be recorded as finally executed until six weeks have expired from the date of receipt of warrant at the Police station; and if the accused is not arrested within that period, intimation shall be given to the Magistrate having jurisdiction that the offender is not forthcoming, and suggesting the issue of a proclamation and attachment of property under ss. 87 and 88, *Pol.—Reg. & Ord., N.-W. P., p.* 288.

14. How long criminal warrant remains in force.—When the Legislature has not prescribed any period limiting the time during which a warrant is to be in force, the presumption is that it retains its validity until it is executed, *Dickenson* v. *Brown*, **Peak N. P. 307**; *Mayhew* v. *Parker*, **8 T. R. 110; 28 B. 129.** The force of a warrant of arrest continues until it is cancelled, in which case, it is at an end and cannot be re-issued, **1 C. W. N. 650.** A warrant, on which there is an endorsement for bail to be taken for the appearance of the accused on a certain date (s. 76), does not lapse on the expiry of that date, **7 Pat. 478**; after that date only the direction to take bail lapses, but the warrant continues in force until it is cancelled by the Court which issued it or until it is executed; therefore the arrest of an accused on the 25th October, on a warrant issued against him with an endorsement for bail to be taken for his appearance on the 20th October, is not illegal, and the rescuing and escape of the accused from custody are punishable under ss. 225 and 224, I.P.C., **13 C. W. N. 1091.** *See also* Note 8 under s. 76. Civil warrants, however, cannot be executed after expiry of returnable date. *Cf.* **31 C. 111.**

15. Effect of issuing illegal warrants.—Proceedings taken in pursuance of an illegal warrant are void, and consequently resistance to an officer executing a wholly illegal warrant is no offence. The accused is, therefore, justified in the use of such criminal force in making resistance as is necessary in the exercise of his right of private defence under s. 99, I.P.C., **11 C. W. N.** ... 78 ... **6 C. L. J. 127; 24 C. 320; 4 C. W. N. 83**; but not if the warrant w... ly irregular, **8 A. 293.**

... **cel warrant and issue summons.**—A... ugh a case may be one in which a warrant ... **instance** it is not necessary for the Magistrate to do so, and under this section he is at ... me and issue a summons, **20 P. W. R. 1908** and **1 S. L. R. 69 = 8 Cr. L. J.**

... **direct Sub-Magistrate to re-issue warrants previously cancelled.**— ... nts for the apprehension of some accused persons for trial and ... istrict Magistrate has no authority to direct the re-issue of ... *a vires*, **1 C. W. N. 650.**

... **xecuted.**—Warrants issued against Railway servants ... superior grade, who shall, if he finds on proceeding ... y servant would occasion risk or inconvenience, ... to the proper quarter to have the accused ... 156; *Bom. H. C. Cr. Cir., p.* 4; *Reg. &*

of the Magistrate, *Russell on Crimes*, *p* 738 The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court acting according to the course of the common law, but that which specially appears to be so and that nothing shall be intended to be within the jurisdiction of an inferior Court but that which is expressly so alleged, *Howard* v *Gossett*, **10 Q. B. 452; 28 C. 399; 2 Pat. L. J. 487.**

7. Warrant containing wrong description of person to be arrested cannot be executed.—A warrant which contains a wrong description of the accused is not a valid warrant. Where a warrant was made out against "*D*, son of *G*," but in the course of trial on the examination of the accused it was found that his father's name was different, the warrant was *held* invalid In such cases in order to have a conviction for an illegal disobedience of warrant, the *onus* is on the prosecution to show that the accused is the person against whom the warrant was issued, and not for the accused to show that he is not the person All *intendments* will be made against, and none in favour of the legality of a warrant issued by an inferior Court, **28 C. 399.** A warrant was issued to arrest *J H* for stealing a mare The constable arrested *R H* who was the party against whom information had been given and against whom the Magistrate intended to issue his warrant and who was supposed to be called *J H* while his name, however, was really *R H*, *J H* being the name of his father The person who made the charge before the Magistrate pointed out *R H* as the man who had stolen the mare and a person present said that his name was *J H*, and there was clearly evidence to go the jury that *R H* was the man intended to be taken up *Held* that the law would not justify the constable s act, the warrant being against *J* and not against *R*, although *R*,, was the party intended to be taken, that a person cannot be lawfully taken under a warrant in which he is described by name that does not belong to him, unless he has called himself by the wrong name, *Haye* v *Bush* **1 M. and G. 775.** A warrant reciting a complaint against *John R Miller* for a felony and commanding the officer to arrest the said *William Miller* is no justification for the arrest of *John R Miller*, though the person intended—*Miller* v *Foley*, **28 Barb. 630.** A misnomer of a person in a process on which an arrest is made, subjects the actors to an action for false imprisonment —*Scall* v *Ely*, **Wend. 552.**

8. General warrants are illegal.—General warrants are illegal and void *Money* v *Leach*, **1 W. Bl. 555.** The issuing of a general warrant which means a warrant to apprehend all persons committing a particular offence or class of offences is illegal, **9 B. H. C R. 154.** *See* also **33 A. 1,** where it was *held* that a warrant issued under s 3 of the *Public Gambling Act* 1867, for searching any house the Police officer to whom the warrant was issued might think proper to search was illegal No general warrants for arrest should ever be issued by a Court of Justice Every warrant should state as shortly as possible the special matter on which it proceeds A strict adherence to the form of warrants of arrest prescribed by the Code will tend to prevent their being granted irregularly and without inquiry as to whether the circumstances justify their issue *Punj Cir*, *p* 144

9. Blank warrants are illegal.—A warrant issued with a blank in it, and the blank afterwards filled up is illegal, *R* v. *Stockeley*, **1 East P. C. 310.** *See* also *Housin* v *Barrow*, **6 T. R. 122 =3 R. R. 135;** *R* v *Winwick*, **8 T. R. 454.** A warrant of committal contained the names of the persons to be arrested in the margin but not in the body which was in blank, *held* no answer to an action for false imprisonment, *Hodgins* v *Poe*, **16 W. R. 224 (Eng)** *See* also **14 Cr. L. J. 142 (Punj)**

10. Conditional warrant for arrest is illegal.—In **18 B. 636** the appellant and five other foreigners were ordered by a warrant, under Act III of 1864, to remove themselves from British India The warrant was in the following form —

Warrant—"In the exercise of the power conferred by s 3 of Act III of 1864, the Right Hon ble the Governor in Council is pleased hereby to direct that Alter Caufman *alias* Alter Goolyk do forthwith remove himself from British India by sea to Odessa

"And all officers to whom this order may be communicated are required to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said Alter Caufman *alias* Alter Goolyk in safe custody in the jail of Bombay, under s 4 of the said Act, until he shall be lawfully discharged therefrom." The warrant was signed by the Secretary to Government, and was directed to the Commissioner of Police and to the Superintendent of the Jail *Held*, that the warrants were not valid warrants For they were irregular in that they contained an order to the person named in them to do a certain thing, with a further conditional order for his imprisonment in the event of his not doing it Then in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorising his arrest and detention in jail. *Per* BAYLEY, J, at p 658 "The mischief of the form used is that on the face of it the determination as to whether the person to whom the order is addressed has obeyed it or not, is left to the officer in charge of the warrant, whereas it is the authority which issues the order which ought to determine that point" *Per* STARLING, J, at p 667 *See* also **4 Bom. H. C. R. Cr. Ca. 37; 6 Mad. H. C. R. App. XXIV.**

s. 9), if a constable, having arrested a man on a warrant, lets him go at large on a promise to return, he cannot re-arrest on the same warrant, but can lawfully hold him under the warrant if he voluntarily returns into custody. See *Russell*, p. 738. Where a person arrested by virtue of a criminal warrant, endorsed pursuant to a statute, is discharged from arrest by a Justice of the Peace of the country where he is arrested, on giving a recognisance, the warrant has spent itself, and the officer has no right to arrest the prisoner again without new process.—*Doyle* v. *Russell*, **30 Barb. 300.**

9. **Constables executing warrants should seek assistance from village officers.**—When a Magistrate issues a warrant for the arrest of any person to a Chief or Head Constable, this officer directs a constable to whom he endorses the warrant for execution to bring the person before him in order that he may himself take the bail bond and securities. This practice tells hardly against the accused persons; for he is generally arrested in his own village where he might easily obtain security if the constable executing warrant had authority to accept bail. Constables executing warrants should, in the matter of taking securities, and releasing the accused person from custody, as far as possible consult and seek assistance and advice from the village officials.—*Bom. Pol. Man., p.* 88.

Warrants to whom directed.

77. (1) A warrant of arrest shall ordinarily be directed to one or more Police-officers, and, when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no Police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrant to several persons.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by anyone or more, of them.

Notes.—1. Warrants by Presidency Magistrates should always be directed to Police-officers.—Where a search-warrant was directed to a person other than a Police-officer, although the latter was immediately available, the Calcutta High Court severely condemned the practice as it was in direct violation of the law. The Court remarked " that every provision in ss. 76-77 against the oppressive exercise of the right of search to property was here directly disregarded and when it is considered that houses may be broken open, female apartments entered, female apartments searched, and so on, under such warrants, the evil results of such a total disregard of the safeguard placed by law upon the right of search can hardly be aggravated." **8 W. R. 74** at **p. 78.**

2. **Generally warrants should not be directed to a private person.**—A Magistrate cannot issue a warrant to an unofficial person, except when he is without the assistance of competent Police-officers, and unless the urgency is imminent, **13 W. R. 27 = 5 B. L. R. 274.** Under *the Bombay Abkari Act*, a warrant may be executed either by a Police-officer or an Abkari-officer duly empowered in that behalf or if the officer issuing the warrant deems fit, by any other person.

3. **Duty of Police-officers on receiving warrants.**—Warrants should be directed to the senior officer of Police in attendance at a Court, by whom they should be registered in a book kept for the purpose. He should then endorse on such warrant the name of the officer who is charged with its execution (generally an officer in charge of a Police-station) and should despatch it without delay. The officer receiving the warrant may again transfer it for execution to another Police-officer, but in every instance a regular endorsement must take place, so that the name of the officer executing the process may be apparent on the order itself.—*Ben. Pol. Man.*, *2nd Ed.*, *p.* 396.

4. **Effect of omission of the name of the Police-officer to execute the warrant.**—Where warrant was issued, but the name and designation of the Police-officer or other person who was to execute the warrant was inadvertently omitted and the space in the printed form intended for this purpose was left blank, *held* that it was a defective warrant and the persons resisting such a warrant could not be convicted under s. 225-B, I.P.C., **14 Cr. L. J. 182 (Punj.).** *See* Note 1 to s. 79.

5. **Warrant directed to Police cannot by endorsement authorise private person to make arrest.**—Where a warrant is issued, directed to the Sheriff or any constable of the country, the justice cannot, by endorsement thereon, authorise a private person to make the arrest; the warrant itself must be directed to the person by whom arrest is made or it is no protection.—*Abbot* v. *Booth*, **51 Barb. 546.** *See* ss. 42 and 43, as to *aid* by private persons.

19 **When translation of warrant necessary** —Warrants of arrest issuing out of Magistrate's Court should be written "in the language in ordinary use in the district in which it is held"—that is to say (with certain exceptions) the language in which the proceedings of the several Courts are conducted But where a warrant is sent for execution to the Magistrate of a district where a different language is in ordinary use the warrant should be accompanied by a translation certified by the transmitting Magistrate to be correct into such other language or into English The warrant should always in such cases be accompanied by a letter in English requesting its execution —*Wilkins* 107 *see* also *Bom H C Cr Cir p* 10

20 **Courts should not issue judicial orders by telegrams.**—A Court should not issue a judicial order or communicate the purport of a warrant or process by telegram —*Reg & Ord N W P p* 71 *See* **2 C W N 498, 5 C W N 110** and **19 M 375**, as to how far Magistrates should act upon telegrams.

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court the officer to whom the warrant is directed shall take such security and shall release such person from custody

Court may direct security to be taken

(2) The endorsement shall state—

(*a*) the number of sureties

(*b*) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound and

(*c*) the time at which he is to attend before the Court

Recognisance to be forwarded

(3) Whenever security is taken under this section the officer to whom the warrant is directed shall forward the bond to the Court

Notes —1 Form of endorsement —*See* Sch V No 2 Prior to the 1882 Code there would be no forfeiture of the bond where there was appearance on the specified day (though the case was not called or taken up that day) and no appearance *thereafter* But the form of endorsement now contains the words *and to continue so to attend until otherwise directed etc*

2 **Analogous provisions** —S 170 provides for the taking of security by a Police-officer from an accused person for his appearance before a Magistrate and s 91 for the taking of a bond by the presiding officer of a Court for the appearance before himself of a person against whom he is empowered to issue a summons or warrant

3 **Deposit in cash in lieu of bond** — The Court or officer may allow a sum of money or Government promissory notes to be deposited in Court in lieu of executing a bond—S 513

4 **Bonds are exempt from stamp duty** —Bail bonds in criminal cases are exempt from Court fees (Act VII of 1870 s 19 cl 15) but not the bonds given by sureties **Ratanlal 126**

5 **Attendance before a Court only may be enforced** —The attendance must be before itself or some other *Court or Magistrate* A Magistrate has no power to issue a warrant for the production of a witness at an investigation by a Police-officer **24 C 320**

6 **Section applies to witnesses** — The words *for his attendance before the Court* have been substituted for the words *to answer the complaint* which was the language of the 1872 Code thus expressly extending the benefits of this section as well to *witnesses* as to accused persons **Weir II, 39**

7 **Magistrate may issue bailable warrant even in non-bailable case** —Where the circumstances leading to the complaint were suspicious and the accused was a man of position it was *held* that the Magistrate ought to have issued a bailable warrant and though the accused had not surrendered the Magistrate was directed by the High Court to release the accused on taking security when he appeared before him **(1911) 2 M W. N 432 = 12 C R L J 430**

8 **When warrant has spent itself, accused cannot be re arrested on its authority** —When the prisoner has been arrested by touching or confining his body and produced before the Court the warrant is exhausted **4 B L R App 1** A warrant cancelled cannot be re-issued **1 C W. N 680** According ' *tins* '

2. **What constitutes a valid notification.**—In **26 C. 748**, although the substance of the warrant was not notified, the warrant was shown to the person arrested in the hand of the Police-officer along with several other warrants. Their Lordships (PRINSEP and HILL, JJ.), remarked: "We are not satisfied that this in itself would be sufficient to make an arrest valid, without any notification of the substance of the warrant or an opportunity given to the person to be arrested by showing him the warrant, so that he might read it." *See* also **1914 M. W. N. 498 = 15 Cr. L. J. 676.**

3. **Arresting officer should have warrant with him.**—A Police-officer should not proceed to arrest unless he has a warrant in his possession, otherwise resistance offered to him would not be punishable, **5 A. 318; 27 A. 258.** The person sought to be arrested is entitled to see that the person arresting has authority, **10 C. 18; 13 B. 168; 23 C. 896; 26 C. 748.** A Police-officer who, without a warrant, arrests a person charged with a non-cognisable offence would make himself liable under s. 342, I.P.C., the detention being illegal unless the case is covered by s. 79, I.P.C. *See* **24 W. R. 51; 6 W. R. 88; 19 W. R. 36** and Note 7 to s. 46.

4. **Actual possession of warrant necessary to make arrest legal.**—In *Galliard* v. *Laxton*, **2 B. and S. 363**, an arrest on a civil warrant was *held* illegal where the warrant at the time of the arrest was at the Police station. This case was followed in *Codd* v. *Cabe*, **1 Ex. D. 352**, where a warrant had been issued against Codd and placed in the hands of one constable, another constable not being in possession of the warrant arrested him, but Codd did not demand to see the warrant, resisted the arrest and greatly injured the officer and was convicted, but the Court of Appeal set aside his conviction. These cases were followed in America where s. 173 of the N. Y. Cr. P. C. is almost similar to s. 80. In *People* v. *Shanley*, **40 Hun. 478**, defendant was indicted and convicted of an assault in the second degree for having resisted one *K*, a Police-officer, who attempted to arrest him for a misdemeanour, not committed in the officer's presence. A warrant had been issued and was at the time in the office of the chief of Police, but not in the actual possession of the Police-officer. The defendant knew that *K* was a Police-officer and had heard that the warrant had been issued. The Court charged that the warrant was in the constructive possession of the officer, and declined to charge that it was the duty of the officer to disclose to the defendant his authority and the process under which he arrested him. *Held* error, that the language of s. 173, Cr. P. C., regulating arrests by officers under warrant, required the officer to have the warrant in his actual possession ready to be shown to the defendant if required. *See* also *R.* v. *Chapman*, **12 Cox. 4** and *R.* v. *Carey*, **14 Cox. 214.**

5. **Warrant need not be parted with.**—The warrant is the justification of the arrest by the officer and need not be parted with. See *Russell on Crimes, p.* 736.

6. **Where arrest is under an order in writing under s. 56, notification of authority not necessary though desirable.**—This section applies only to the execution of a warrant of arrest, and there is nothing extending its provisions to an arrest made by the Police on *an order in writing*, delivered under s. 56. Therefore the fact that the Police-officer making the arrest does not notify to the person arrested the authority and cause of arrest would not make the arrest and detention unlawful, although it may be desirable or even obligatory that if called upon, the Police-officer should show the authority under which he is acting, **27 C. 320.** *See* Note 6 under s. 56.

7. **Protection offered to Police-officers acting bona fide.**—*See* s. 79, I.P.C., as to an officer entrusted with a warrant to arrest *A*, arresting *B* in the belief that *B* was *A*. If resisted by *B*, he may use all means necessary to effect his arrest. *See* **24 W. R. 51; 6 W. R. 88; 19 W. R. 36.**

8. **Provisions of this section not complied with.**—It cannot be said that no arrest can be lawfully made without compliance with the provisions of this section, because a Police-officer may be able to justify his action under section 46 (1) of the Code. Where a person attempts to rescue the person arrested he is liable to be convicted under s. 225 (*b*), I.P.C., **53 Cal. 831.**

Person arrested to be brought before Court without delay.

81. The Police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Notes.—1. Warrant of arrest is not a warrant of commitment.—When the prisoner has been arrested by touching or confining his body (s. 46) and produced before the Court, the warrant is exhausted. If the accused is to be further detained, it must be under a fresh warrant or order, such as an order of remand under s. 344. The warrant for further detention would be one of commitment directed to a jailor or other person having authority to receive and keep the prisoner, **4 B. L. R., Appx. 1.**

6. Only person named may execute warrant.—In English law, actual or constructive presence of the person named or designated is necessary, *R* v *Whalley*, **7 C.** and **P. 245.** It is not necessary that the bailiff should be actually in sight, but he must be so near as to be near at hand and acting in the arrest, *Blatch* v *Arthur*, **1 Cowp. 63.**

Warrant may be directed to land holders etc.

78. (1) A District Magistrate or Sub-divisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his district or sub-division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non bailable offence, and who has eluded pursuit

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on his land or farm, or the land under his charge

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest Police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76

Note.—Punishment.—Under the latter part of s 187 I P C, wilful omission to assist a public servant when bound by law to give assistance is punishable with simple imprisonment for six months, or fine of Rs 500 or both.

Warrant directed to Police-officers

79. A warrant directed to any Police-officer may also be executed by any other Police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed

Notes —1 Endorsement upon warrant without any name makes arrest thereunder illegal.—The endorsement referred to should be regularly made by name to a certain person in order to authorise him to make the arrest, and when there is no endorsement by a person having authority to do so the arrest is not legal so as to make any attempt at obstruction or escape an offence punishable within the terms of s 224, I P C **4 C. W. N. 85.** *See* Note 4 to s 77

2. Initialling endorsements is irregular.—In **5 C. W. N. 447** the Court, while it pointed out that *initials* ought not to be used to authenticate an endorsement upon a warrant, *held* that a warrant was not invalid when the endorsement was made by *initials* only such initials being shown to be those of the proper person to make the endorsement

3. Only Police-officer named can endorse warrant—When a warrant of arrest is directed to a Court Sub-Inspector for execution, a Court Head Constable cannot in his absence, by an order in writing signed by himself, endorse such warrant over to any process-serving peons for execution If such peons are obstructed in its execution, conviction under s 225 B I P C, will not stand **27 C. 457.**

4 Process-serving peons are not Police-officers to whom warrants can be endorsed over.—An arrest made by process-serving peons under a warrant properly endorsed in their name is illegal While s. 69 contemplates the service of summons by officers of the Court issuing it the terms of this section are express that no other person except a Police officer, is competent to execute a warrant of arrest under an endorsement from another Police-officer, **27 C. 457.**

5. Special warrant cannot be delegated—A special warrant issued under s 6 of the *Bombay Prevention of Gambling Act* (IV of 1887) must specify the officer to whom the authority is given and the only person who can execute the warrant is the officer therein named **3 S. L. R. 56 = 10 Cr. L. J. 3.**

Notification of substance of warrant

80. The Police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant

Notes —1. Public servant not notifying acts illegally—If a public servant executing a warrant of arrest does not notify as required by this section, he is not acting in the discharge of his public functions in a manner authorised by law, **10 C. 18, 13 B. 168, 23 C. 896,** *see* also **26 C. 748** *See* also **14 A. L. J. 731.**

*(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction.

Notes.—1. Outside the local limits.—Outside the local limits, but within British India. As soon as the boundary of British India is crossed in pursuit, the warrant ceases to have force; and the officer can only shadow his man and request the local authorities to arrest and secure the fugitive with a view to his rendition upon application duly made.

2. Competency to endorse warrants.—Power to endorse a warrant is common to all Magistrates.—*Sch. III, cl.* 2.

3. Arrest of person in jail.—As to the arrest of a person confined in jail, *see* s. 3 of *the Prisoner's Testimony Act*, XV of 1869.

4. Mode of executing warrants.—*See* ss. 78—80, as to *manner hereinbefore provided.*

5. Procedure for arrest of persons at Aden.—The Government of Bombay has laid down the following rules to be observed when application is made for the arrest at Aden of persons on their way to Europe:—

When the alleged offence has been committed outside the Bombay Presidency, the Government of Bombay will direct the Political Resident at Aden to arrest the offender on his arrival there, provided that the application for arrest is made in the name of the Government of the Presidency or Province within whose jurisdiction the offence has been committed. If the application is made by an officer subordinate to another Government, the Bombay Government will consult their legal advisers as to the property of complying with the application.

When arrest is to be made of an accused who is supposed to have sailed for Europe, District officers will be guided by the following principles:—

(1) If application is made for the arrest of a person supposed to have left Bombay by sea, no steps to effect an arrest should be taken unless it is clear that the case is *bona fide* a criminal one, and not a matter for which a civil action might be brought, and to which a criminal colouring has been given by the complainants for motives of their own.

(2) If it is desired to arrest a person at Aden, application should, as a rule, be made to this Government (N.-W.P.) which will communicate with the Government of Bombay.

(3) If for any reason it is not possible to apply to this Government, application should be made to the Commissioner of Police at Bombay, with explanation of the reasons necessitating a direct application.—*Reg. & Ord., N.-W.P., s.* 10, *p.* 361.

6. Section applicable to warrants issued under Act XIII of 1859.—The provisions of this section apply to warrants issued under s. 1 of *the Workman's Breach of Contract Act* XIII of 1859, and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them, **20 M. 235**; *ibid.* **457,** *followed in* **20 A. 124.** And a Magistrate to whom such a warrant is sent for execution has no discretion to decline its execution against a person residing in his jurisdiction, **33 P. R. 1898, p. 27.**

Warrant directed to Police-officer for execution outside jurisdiction.

84. (1) When a warrant directed to a Police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a Police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or Police-officer shall endorse his name thereon, and such endorsement shall be sufficient authority to the Police-officer to whom the warrant is directed to execute the same within such limits, and the local Police shall, if so required, assist such officer in executing such warrant.

* Sub-sec. (2) of the section and ss. 85, 86 and 155, so far as they apply to the Police in the Town of Bombay, have been repealed by the *City of Bombay Police Act*, Bombay Act IV of 1902, s. 2 (1).

2 | **Unnecessary detention after arrest illegal** —Detention by a Police-officer for over 24 hours is punishable under s 29 of Act V of 1861 as a wilful breach of the rule laid down by s 167 unless the detention is not *co itinuo is* 1 W R 5, 19 W R 36

Where warrant may be executed

82. A warrant of arrest may be executed at any place in British India

Notes —1 British India —*See* Note 1 to s 1

2 **Arrest outside British India illegal** —The grant of civil and criminal jurisdiction along the line of a Railway as is the case on other line running through Independent States *i e* to the Government of India upon lands within the limits of the Hyderabad State Railway does not deprive H H the Nizam of his sovereign rights over such land Therefore arrest under the warrant of a Magistrate in British India of a subject of the Nizam on the lines of the Hyderabad State Railway Administration is not justifiable **25 C 20 (P C) = 24 I A 137** Where an accused was first arrested by a Constable of the *Jeypore* State and then by a British Police Constable in *the Residency at Jeypore* it was *held* that the arrest was made outside British India **7 Bur 83**

3 **Warrant of arrest of witnesses outside British India illegal** —The issue of warrants for the arrest beyond the limits of British India of persons whose attendance is required to give evidence but who are at the time resident beyond the limits of British India is illegal and should not be resorted to as warrants for the arrest of a witness can under s 82 only be executed at some place in British India —*Punj Cir Vol. II p* 230

4 **If the person to be arrested is in a Native State** —*See* s 188 and Notes thereunder and *the Indian Extradition Act* XV of 1903 printed as Appendix II *See* also **25 C 20 (P C)**.

5 **When the person to be arrested is in a British possession** —When the arrest and return of a fugitive offender from any British possession to British India is desired the following procedure shall be observed —

Evidence should be taken that the person against whom the warrant is applied for has absconded then evidence that an offence has been committed by such person should be faithfully and minutely recorded under s. 512 of the Code of Criminal Procedure If the Court upon such evidence issues a warrant the warrant should be in the form prescribed by s 75 and directed as required by s 77 Evidence should be taken showing clearly that the offence charged is one to which Part I *of the Fugitive Offenders Act* applies or at least a certificate from the Magistrate should be appended to the warrant clearly showing that the offence charged therein is one punishable with rigorous imprisonment for a term of twelve months or more (*see* s 9 of Statute 44 and 45 *Vict c* 69) All the evidence should be taken if possible in the presence of the Police-officer to whom the warrant is addressed, and to whom it is desired that the fugitive offender should be delivered

A copy should be made of every deposition and every documentary exhibit and each copy should contain a declaration signed by the Magistrate as such that it is a true copy of the deposition taken by him self or an exhibit produced to him as the case may be The whole of the copy of the record thus made should then be entrusted to the Police-officer to whom the warrant is addressed who will be in a position to authenticate every portion of it when produced by him in the possession in which the fugitive offender is

' When the presence of the Police officer who is to execute the warrant cannot be obtained at the proceedings referred to then each copy must before being entrusted to the Police-officer be sealed with the seal of the Governor or Lieutenant Governor of the Province in which the proceeding was held Although when the documents can be authenticated by the oath of a witness in the possession from which it is desired to procure the delivery of the offender the seal of the Governor or Lieutenant Governor is not essential I think it expedient that the seal should be affixed whenever it can be conveniently done

If the Police-officer entrusted with the execution of the warrant is unable to identify the accused he should be accompanied by some person able to identify the accused to the possession from which the return of the accused is desired —*Reg & Ord N W P s* 10 *p* 361

Warrant forwarded for execution outside jurisdiction

83 (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same such Court may, instead of directing such warrant to the Police officer forward the same by post or otherwise to any Magistrate *or District Superintendent of Police or the Commissioner of Police* in a Presidency town within the local limits of whose jurisdiction it is to be executed

I.—CIRCUMSTANCES UNDER WHICH A PROCLAMATION MAY BE ISSUED.

Notes.—1. All Magistrates competent to issue proclamation.—Power to issue proclamation in cases judicially before them is common to all Magistrates.—Sch. III, cl. 4.

2. **Proclamation may issue in summons-cases.**—This section read with s 88 shows that even in summons-cases and as against witnesses a proclamation may be issued for the apprehension of a person against whom warrant has been issued, but it is necessary to comply strictly with the provisions of the law relating to the issue of a warrant in a case where summons is the ordinary mode of enforcing attendance (s. 90) to lay a foundation to proceed under this section, **5 N. L. R. 125 = 10 Cr. L. J. 306.** Under s. 172, Act X of 1872, proclamation was not issuable in summons-cases against accused and against witnesses.

3. **Inquiry necessary before issuing a proclamation.**—These processes of attachment and proclamation should not be issued whenever a warrant fails of its effects. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it, and if on his evidence, or in any other manner the Magistrate is satisfied that the accused is evading justice, then and then only can the *processes* of proclamation and attachment issue. The Magistrate must record the grounds which satisfied him that the accused was absconding or concealing himself to evade justice, **3 W. R. 63; 6 W. R. 73.**

4. **Fact of absconding must be judicially found.**—In order to lay sufficient foundation for the issue of a proclamation and the accompanying order of attachment under s. 88, a Magistrate must, on some sufficient materials, find judicially that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him, **10 B. L. R. Appx. 14 = 19 W. R. 12.**

5. **Previous issue of warrant is a condition precedent to issue of proclamation.**—The condition precedent to the issue of a proclamation is that a warrant must have been previously issued against the person whose attendance before the Court is required, and if the Court has no authority to issue warrant, the order for issue of proclamation and subsequent attachment of property is illegal as one made without jurisdiction, **15 P. R. 1893.** Where the Magistrate had no jurisdiction to issue the warrant which preceded the proclamation and subsequent attachment, the proceedings are illegal, **14 Bom. L. R. 889 = 1 Bom. Cr. C. 185 = 13 Cr. L. J. 796;** *see* also **4 M. 393.**

6. **What would amount to absconding.**—Absconding does not necessarily imply change of place, but may be effected by concealment. If a person, having concealed himself before process issues, continues to do so after it is issued, he absconds, **4 M. 393.** To be deemed an absconder it is not necessary that a person should be proclaimed as such under this section, but it should also be noted that an *absent* person should not be assumed to be an absconder without due inquiry and notice, **Weir II, 40.**

7. **Punishment for absconding.**—Absconding to avoid service of process, issuing from a public servant is punishable under s. 172, I P.C , with simple imprisonment for one month, or fine of Rs. 500, or both. Non-attendance in obedience to proclamation issued by a public servant is punishable under s. 174, I.P.C.

7-A. **Statement in writing must be made.**—Magistrate when acting under this section should invariably make an endorsement or statement in writing validating the proclamation, as required by sub-section (3). **6 P. R. 1917 (Cr.).**

7-B. Strict compliance with the provisions of this section is necessary to legalise issue of proclamation. **6 P. R. 1917 (Cr.).**

II.—MODE OF ISSUING A PROCLAMATION.

8. **Form of proclamation.**—As to the form of the proclamation requiring the attendance of an accused person or a witness, *see* Sch. V, Nos. 4 and 5, respectively.

9. **Not less than thirty days from the date of publishing.**—In the 1872 Code the language was " within a fixed period not less than thiry-days." The present Code cleared up the doubt as to the commencement of the period for the appearance of the person absconding by adding the words *"from the date of publishing such proclamation," i.e.*, from the date of the complete publication by doing all that is required by cl. (2) of this section, **10 B. L. R. Appx. 14 = 19 W. R. 12.**

10. **Effect of not giving thirty days' time.**—A proclamation issued under this section against an absconding person should give thirty days' time for his appearance from the date of the proclamation Where this is not done, the proceedings are liable to be set aside, **17 M. L. J. 438 = 6 Cr. L. J. 332; 19 M. 3.**

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or Police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the Police officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it

*(4) This section applies also to the Police in the town of Calcutta

Procedure on arrest of person against whom warrant issued

†**85.** When a warrant of arrest is executed outside the district in which it was issued the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a Presidency town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner or District Superintendent

Procedure by Magistrate before whom person arrested is brought.

86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court

Provided that if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant

(2) Nothing in this section shall be deemed to prevent a Police-officer from taking security under section 76

Note —Form of security bond *see* Sch V, No 3 In Bombay, Assistant District Superintendents of Police have been empowered to act under this section and can therefore take bail See *Bombay Gazette* 1875 p 439 *See* s 496, as to cases where persons arrested may be discharged on executing a bond without sureties

C —Proclamation and Attachment.

Proclamation for person absconding

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it, has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation,

(2) The proclamation shall be published as follows —

(*a*) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides,

(*b*) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village, and

(*c*) a copy thereof shall be affixed to some conspicuous part of the Court house

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day

* The letter "s and the words 'and Bombay were repealed by s. 2 (1) of *the City of Bombay Police Act*, Bombay Act IV of 1902

† *See* foot note under s 83, sub sec (2)

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(*a*) by seizure; or

(*b*) by the appointment of a receiver; or

(*c*) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any on his behalf; or

(*d*) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land-paying revenue to Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(*e*) by taking possession; or

(*f*) by the appointment of a receiver; or

(*g*) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to anyone on his behalf; or

(*h*) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock, or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under the section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure.

*(6-*A*) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of death of the claimant or objector, be continued by his legal representative.

*(6-*B*) Claims or objections under sub-section (6-*A*) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provisions of sub-section (2), in the Court of such Magistrate.

*(6-*C*) Every such claim or objection shall be inquired into by the Court in which it is preferred or made:

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate, as the case may be, subordinate to him.

* These sub-sections were added by the Cr. P. C. Amendment Act (XVIII of 1923), s. 13.

11. Provisions as to publication must be strictly followed.—The provisions of cl (2) as to the publishing of proclamations are imperative and failure to comply with them will vitiate the proclamation All the three modes prescribed must be adopted, **27 A. 572.**

12. Instructions regarding publication of proclamation—Police-officers will be held responsible that the provisions of this section relative to the publication of the proclamation are strictly complied with The Court-officer should submit a report that the copy for the Court house was duly affixed in the presence of witnesses, and the Police in the Mofussil will submit report in the same manner that one copy was posted up at the Police-station, and that the copy for the absconder s village was duly read out in a conspicuous part of the village, and that it was afterwards posted up at the ordinary place of abode of absconder The names of the principal residents should be always given as witnesses to the proclamation having been served properly On receipt of the returns, if everything is correct, the Court-officer should move the Magistrate to record a proceeding, stating that the proclamation was duly made and carefully declaring the date on which it was made, as the term of thirty days will run from the date so ascertained and declared If the accused does not appear within the time specified in the proclamation, the Magistrate should be solicited on its expiry, to record a formal proceeding declaring the property attached to be at the disposal of Government—*Beng Pol Code p* 280

13. Shall be read in town or village—*See* **19 M. 3** and Note 10 to s 88

14 Absence of statement in writing validating proclamation—Effect of.—When there is no endorsement or statement in writing made by the Court validating the proclamation, there is no proclamation according to law, **22 A. 216.**

15. Magistrate sought to carefully preserve the proclamations and see that the legal formalities are complied with—Magistrates ought to take particular care in cases where a Court is asked to confiscate private property to preserve proclamations and the records must be so clear as to satisfy the Court that all the legal formalities were duly observed Where therefore in consequence of the Lower Courts neglect to observe the imperative provisions of the criminal law these materials were not forthcoming, *held* that the order must be set aside and the property attached returned to the petitioner, **14 Bom. L. R. 163 = 1 Bom. Cr Ca. 104 = 413 Cr. L. J. 293.**

III.—CONSEQUENCES OF NOT OBEYING PROCLAMATION.

16. Held to be in contempt.—An accused person against whom a proclamation has been issued must, until he has surrendered, be regarded as in contempt, and the Court will not entertain any application on his behalf He should appear before the Magistrate and apply to him to be discharged, on the ground that the warrant is informal or otherwise offer some explanation by way of purging his contempt and at the same time, application might be made for the release of his property It will then be the duty of the Magistrate to determine *judicially* whether the warrants are valid and when he has done so the person against whom and whose property the warrants are respectively issued, may, if he be so advised, apply for the revision of the proceedings, **2 N-W. P. H. C. R. 441; 5 W. R. 71.**

17. Punishment for failing to attend in obedience to proclamation.—A warrant which directs the Police officer to apprehend an offender is addressed to the Police and not to the offender himself It is neither summons notice nor order to such offender, therefore where a warrant is issued against a proclaimed offender and he appears within the time limited by it he cannot be proceeded against under s 172 I P C but if he fails to attend in obedience to the proclamation he should be proceeded under s 174 of the same Code, **5 W. R. 71.** *See* also **7 N.-W. P. H C. R. 30; 9 W. R. 70, 28 P. R. 1890.**

18. Cost of proclamation when to be paid by witness—When a proclamation has been issued for an absent witness, if the witness shall afterwards appear, and the Court shall be of opinion that such witness had absconded or concealed himself for the purpose of avoiding the service of a warrant upon him, such Court may order the witness to pay the cost of the proclamation—*Wilkins*, 92

19. Proclamation and attachment may be ordered simultaneously.—A Magistrate may both issue a proclamation against an absconding offender under this section and also make an order under s 88 for the attachment of his property *simultaneously*, **29 C. 41.**

Attachment of property of person absconding

88. (1) The Court issuing a proclamation under s 87 may at any time order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person

10. Irregularly in publication of proclamation will vitiate order of attachment.—An accused person for whose arrest warrant had been issued having absconded, a proclamation was issued and affixed to the Court-house on the 6th November requiring him to appear on the 11th December, 1893, and his property was attached. The proclamation was not published at the village where the accused resided until the 15th of November. The accused surrendered on the 25th June, 1894, and applied for restoration of the property under s. 89, and an order was made by which the restoration of his property was refused. The accused preferred a petition to the High Court for the revision of that order. *Held*, that there was no legal proclamation under s. 87 of the Code, and that the order should be set aside, and the attachment declared void, **19 M. 3; 14 Bom. L. R. 163 = 1 Bom. Cr. Ca. 104 = 13 Cr. L. J. 293.** This should now be read subject to the provisions of s. 537 (*a*) which provides that no order passed by a competent Court shall be reversed in revison on account of irregularity in proclamation or order, etc.

11. Effect of not preserving proclamation.—*See* Note 15 to s. 87.

12. In spite of irregularity attachment to continue, so long as party is in contempt.—Where property was attached without observance of the due formalities prescribed by law, the High Court *declined* to quash the attachment, holding that the plea of informalities could be considered on the surrender of the fugitive, but cautioned the Magistrate against a *sale* until the needful formalities were carried out, **17 W. R. 10.**

13. During attachment, property cannot be attached by Civil Court.—In **9 C. 861**, it was *held* that after the date of attachment under this section, no title could be conferred by an attachment and sale, subsquently made in execution of a money decree by a Civil Court. *See* **5 Bur. L. T. 113 = 6 L. B. R. 57 = 13 Cr. L. J. 568**, where it was held that a mere seizure of property by the Police of an absconding accused without taking proceedings under ss. 87 and 88 does not confer any right in Government so as to defeat the claims of attaching creditors by any subsequent proceeding under ss. 87 and 88.

FORFEITURE.

14. Shall be at the disposal of Government.—A formal proceeding should be recorded declaring the property attached to be at the disposal of Government. But though at the disposal of Government, it should not at once be *forfeited* to Government. Forfeiture of property of an absconding offender, who appears within two years from the attachment of his property, should not be carried into effect until after a regular inquiry into the cause of the offender's absence, **6 W. R. 73; 3 W. R. 63.** Although an order may be passed through mistake or inadvertence declaring the property of the accused to be at the disposal of Government, yet when the accused does not attempt to show that he has not been evading justice, the Magistrate is competent to make the order—*Ibid.*

In **31 M. L. J. 120 = 17 Cr. L. J. 296 (F.B.)**, the effect of attachment of the share of a member of a Hindu joint family was considered. The attachment does not effect a severance of the share. It only secures to the Government the enjoyment of the income during its continuance.

15. Condition precedent to forfeiture.—Before the passing of an order declaring the property of an accused person who cannot be found, to be at the disposal of Government, there must be a proclamation specifying a time within which such person is required to appear. But before a Magistrate can issue such a proclamation, he must be satisfied that such person has absconded or is concealing himself for the purpose of avoiding service of the warrant, **6 W. R. 73.**

16. Forfeiture when to be declared.—Forfeiture of property of an absconding offender, who appears, within two years from the attachment of his property, should not be carried into effect until after a regular inquiry into the cause of the offender's absence, **3 W. R. 63.** The declaration of forfeiture directed to be made in s. 184, Act XXV of 1861, was intended to be in furtherance of a matter of procedure, and not simply as a mode of punishment for contempt of process; therefore where the person affected by the proclamation has come in, or has been brought in it ought not be made at all because, by that time its purpose has been effected though even possibly by other means than that of the process that was evaded, **10 B. L. R. Appx. 14 = 19 W. R. 12.**

16-A. Where property attached under Civil Court decree before attachment and proclamation under this section, no right accrues to Government.—The Police seized certain opium belonging to an absconding accused under s. 25 of the *Police Act* in August, 1911, but no proceedings were taken under s. 87 until December, 1911, and the property was held to be forfeited to Government under s. 88 in February, 1912.

*(6-*D*) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section 6-A may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

*(6 *E*) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government, but it shall not be sold until the expiration of six months from the date of the attachment,† and until any claim † preferred or objection made under sub section 6 A has been disposed of under that sub section † unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit

Notes.—1. Chapter XXXVI of the *Civ Pro Code*, Act XIV of 1882, ss 503, 504, now corresponds to Ord XL of the *Civ Pro Code*, Act V of 1908

2. Form of order of attachment.—As to forms of orders of attachment to compel the attendance of a witness or the appearance of an accused *see* Sch V, No 6

3. Section applies to witness.—The provisions of the section are applicable to an absconding witness against whom a warrant has been issued. The immovable property of such witness is now liable to attachment It was not so under Act X of 1872, s 353

4. What Magistrates empowered.—All Provincial Magistrates have power to attach and sell property in cases judicially before them —*Sch* III, *cl* 5

5. Proceedings of Magistrate not empowered void.—If any Magistrate, not being empowered by law, attaches and sells under this section, his proceeding shall be void —*S* 530, *cl* (*a*)

ATTACHMENT.

6. When attachment may be ordered—Having regard to the language "at any time" employed in the present Code attachment might even be simultaneous with proclamation under s. 87, **29 C. 417; 6 C. P. 38.**

7. Attachment must immediately follow proclamation.—A proclamation was issued under this section requiring the attendance of the applicants on a certain date They made no appearance and then an order was passed for the attachment of their property under s 88. They appeared before the attachment *Held*, that as the attachment of property is intended to enforce the attendance required by proclamation it was illegal to wait till the period specified in the proclamation has expired and to order attachment because the proclamation has not been obeyed, **6 C. P. 38**

8. Opportunity to show cause before attachment—An order of attachment made against an absconding offender without permitting him to show cause against it and after he is apprehended and brought to trial before the passing of the order, is bad The fact that the petitioner s plea had been overruled in his trial for the substantive offence with which he was charged is no justification for not giving him opportunity to show cause against the order of attachment **5 W. R. 8.**

9. What property may be attached.—There seems to be a conflict of view in the Madras High Court, as to whether or not the undivided interest of an absconding co parcener in the property of a joint Hindu family or the undivided property itself could be attached under this section *See* **Weir II, 43** and *footnote*, also **9 C. 861** and **28 P. L. R. 1915 = 16 Cr. L. J. 166** In **5 B. L. R. 382,** it was *held* that the unascertained share of a partner, in the assets of the partnership than in the hands of a Receiver appointed by the Court under a winding up order was not attachable such share not being "*properly belonging to the defendants*" But in **5 B. L. R. 386,** it was *held* that the share of a judgment debtor in partnership with another person who alone was in possession of the property at the time of attachment, was liable to attachment, but that the attachment must be by prohibitory order and not by seizure as under s. 271 of the old *Civ Pro Code* *See* now s 62 of the Code of 1908

* Added by Act (XVIII of 1923) † Inserted by Act XVIII of 1923

22. Title of vendee at magisterial sale is superior.—Where the property of an absconder (not his right title and interest) is attached by a Magistrate under s. 88, and during the subsistence of such attachment is again attached in execution of a money decree by a Civil Court and sold, the vendee at the Court sale has no superior title to that conferred on another vendee at the sale ordered by the Magistrate; for, so long as the attachment by the Magistrate continued, no title could be conferred by any attachment subsequently made, **9 C. 861.**

23. Sale of land-paying revenue to Government.—The following rule is in force in Bengal as to the sale of revenue paying land attached under this section:—"The High Court have represented that Collectors of districts who hold sales of land-paying revenue to Government from time to time, could more conveniently and advantageously hold sales of such attached land as is above referred to situated within their jurisdiction than could Magistrates, especially in cases where the Magistrate is in another district. The Board therefore direct that Collectors will, in future, comply with the requisitions of Magistrates to hold sales in such cases, and it is further directed that, in these cases, the procedure in respect of the advertisement, sale and delivery of possession in the case of sales in execution of decrees of Civil Courts under Act XIV of 1882 (the Code of Civil Procedure) may be strictly followed."—*C. O. No. 7 of 17th August*, 1876; *Cal. G. R. and C. O.*, *p.* 6

Restoration of attached property.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government, under sub-sec. (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

Notes.—**1. What Magistrates empowered.**—Power to restore attached property is common to all Provincial Magistrates.—*Sch.* III, *cl.* 6.

2. Scope of Section.—This section prescribes a remedy where there is a good and legal publication, but offers no facility for contesting the legality of the proclamation, **22 A. 216.**

This section applies where the validity of attachment proceedings is challenged on the ground (1) that accused did not abscond or (2) that the proclamation was defective, **39 P. R. 1917 (Cr.).**

3. Application for restoration need not be made by the person absconding.—Though the application under this section need not be made by the accused, it is none the less essential that the absconding accused should appear and prove the facts required, *viz.*, that he did not abscond or conceal himself for the purpose of avoiding the arrest, and that he had not notice of proclamation, facts peculiarly within his knowledge, **15 Bom. L. R. 175 = 2 Bom. Cr. Cas. 36 = 14 Cr. L. J. 237.**

4. Time limit for restoration.—The adverbial phrase "*within two years from the date of attachment*" in s. 89 qualifies not only the word "*appears*," but also the word "*proves*," which is connected with the word "*appears*" by the conjunction "*and*;" therefore it is not enough if the accused person appears voluntarily or is apprehended or brought before the Court within two years, **15 Bom. L. R. 175 = 2 Bom. Cr. Cas. 36 = 14 Cr. L. J. 237.**

Application under this section, if made after two years from the date of attachment, is not entertainable, **6 P. R. 1917 (Cr.); 26 Bom. C. R. 719.**

5. Evidence must be adduced in presence of person alleged to have absconded.—The words "*appears voluntarily or is brought*," etc., imply that the evidence to prove that the accused was absconding as well as his evidence in exculpation shall be heard in his presence, and a judicial determination shall be come to upon the point.

It seems anomalous that a person should be convicted of a criminal offence under s. 172, I.P.C., without an opportunity of giving an answer to the charge, and the intention of the section will be carried out if the Magistrate levies Rs. 1,000 (the extreme fine allowed by s. 172, I.P.C.) *plus* costs, and hand over the amount to Government, subject to withdrawal if in the end the absconded witness should be found and on trial not fined

Prior thereto, a creditor of the accused filed a suit and got the property attached before judgment in September, 1911, and in October, 1911, applied for proclamation and sale of the property, but the District Magistrate refused to hand over the property in obedience to the order of Civil Court. *Held* that the refusal of the District Magistrate to hand over the property was wrong. At the time of attachment and proclamation of sale in the Civil Court, no action had been taken under s. 87 or 88, and so no rights had accrued to Government under s. 88, and the subsequent establishment by Government of its rights should not be allowed to override the creditors' claims in October, 1911, **5 Bur. L. T. 113 = 6 L. B. R. 57 = 13 Cr. L. J. 568**

CLAIMS OF THIRD PARTIES.

Under the present amendment by the addition of sub-clauses **6-A** to **6-E**, provisions is made to deal with claims of third parties analogous to order **XXI, rr. 58** to **63** of the Code of Civil Procedure (1908) for the investigation of claims and objections. And so, such proceedings requiring the Magistrates to investigate the claims of third parties would be now judicial proceedings within the meaning of section 4 (M)

17. Remedy of aggrieved party is by civil suit.—Where the Magistrate errs the remedy of the aggrieved party is by civil suit against the purchasers, **7 W. R. 35, 27 A. 572, 20 M. 68, 4 L. B. R. 109**, a civil suit is maintainable by the real owner to recover the property attached and for damages done to the property while it was at the disposal of the Government, **28 C. 340.** *See* also **12 W. R. (Civ.) 329, 17 W. R. 10; 8 W. R. (Civ.) 207, 23 W. R. 30; 1904 A. W. N. 159.**

SALE.

18. Sale cannot be set aside in revision.—Where a sale has taken place and the purchasers have acquired some sort of title, it is not open to the High Court in exercising its revisional power to pass an order affecting the title of persons who are strangers to the legal proceedings in which the order is made, whatever irregularities there may have been in the proceedings, **22 A. 216.**

19. Suit lies to recover property from auction-purchaser.—Where the property of an alleged absconding offender is attached and sold by a Court purporting to act under this section and it turns out that the proclamation of sale is irregular and illegal, there is nothing to bar a civil suit by the owner of the property so sold to pursue the same in the hands of a purchaser, **1904 A. W. N. 159.** Where a proclamation failed to state the time within which and the place at which the absconding party should present himself to save the sale of his property, it was *held* that there having been no violation on the part of the accused of any of the conditions imposed by the proclamation of sale, no order for sale could legally issue, and inasmuch as there is no provision in the Code for restitution under such circumstances, the Civil Court has jurisdiction to entertain the suit for setting aside the illegal sale and for recovery of possession of the property, **27 A. 572.**

19-A. There was an agreement by *K* to sell the plaint property to the plaintiff dated August 2, 1916. The plaintiff's suit was filed on 24th August, 1917 and the decree passed in 1920 directed *K* to execute the sale deed and the plaintiff to recover possession. During the pendency of the suit A who was being prosecuted, absconded and the Magistrate issued a proclamation in January, 1917 and ordered him to appear during the next month. *K* having failed to appear, the property was attached in December, 1917 and sold in 1920. In a suit by the plaintiff to recover possession from the purchaser in the Criminal Court, *held*

(1) that the attachment of the Civil Court being prior in point of time will effect as against the attachment ordered by the Magistrate, (2) that an attachment confers no title but merely prevents alienation, (3) that the doctrine of *Lis pendens* applied and that plaintiff could therefore recover, **31 Bom. L. R. 315.**

20. Effect of sale of ancestral property.—In **19 P. W. R. 1908**, a Full Bench of the Punjab Chief Court *held*, that when ancestral property of a person subject to the Punjab Customary Law is attached and sold under this section only his life-interest is disposed of but not the right of inheritance after his death of his lineal descendants or collaterals. JOHNSTONE, J., *contra*, *held*, that upon such a sale the fee of the property is sold and nothing remains for the heir to inherit. The sale transfers the personal rights only of the absconder and after his death the reversioners succeed to the property and are entitled to recover it from the purchaser, **52 P. R. 1915 (Civ.).** The undivided interest of an absconding person in a joint Hindu family can be attached under s. 88. The share may be realised by a Receiver. But such attachment order does not effect severance of status, **31 M. L. J. 84; 120.**

21. Sale of land subject to lease.—When the land sold was subject to a lease, it was *held* that the sale should be subject to the right of lessees to remain in possession until expiry of the lease, **9 P. R. 1908 = 25 P. W. R. 1908 = 8 Cr. L. J. 260.**

5. **Conditions for issue of warrant under cl. (*b*)**—A warrant ought not to issue unless due service of summons is proved. A warrant of arrest cannot be issued in cases in which a summons should ordinarily issue unless the summons should be proved to have been duly served in good time; and a Police-officer's report that he served the summons is not evidence of summons under cl. (*b*) of this section, **3 L. B. R. 116.** A Magistrate ought not after the issue of a service of summons order the issue of a warrant unless he first placed on record his reasons for considering that the accused has been duly served and that in spite of such service he had failed to appear without reasonable excuse, **5 N. L. R. 125.**

6. **Warrant should never issue when summons would be sufficient.**—Great care should be taken that a warrant which implies personal arrest and restraint never goes forth when a summons to attend would be sufficient for the ends of justice; and any attempt to coerce or restrain a party who has been summoned only should be checked and punished. It must be understood that the Police will carry out to the letter the instructions issued in the writ handed over to them; and with the Magistrate will rest the responsibility of the consequence of an informal or illegal process bearing his seal and signature.—*Punj. Cir., Chap. XLI, p.* 144. *See* **3 L. B. R. 116.**

7. **Treatment of arrested witnesses.**—Witnesses brought up under arrrest should be dealt with, not as criminals, but simply as persons arrested on civil process.—*Wilkins*, 107. It is competent to the Magistrate to admit such witnesses to bail, **Weir II, 39.**

8. **"Absconded."**—As to the meaning of the word, *see* **4 M. 393** and Note 6 under s. 87. *See* for another definition, *Beng. Pol. Code, p.* 392.

Power to take bond for appearance.

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties for his appearance in such Court.

Note.—In **1901 A. W. N. 35** it was *held* that when a Magistrate suspected that a witness who was present in Court might in the future be kept out of the way by the accused, neither s 91 nor s. 496 justified his arresting her and placing her in the lock-up.

Arrest on breach of bond for appearance.

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

Note.—Proceedings may also be taken under s. 514 to forfeit the bond. Although a person might be able to show that he was not guilty of an offence, with which he had been charged, yet during the pendency of the charge a Magistrate could certainly require the accused person to give a bond for attendance and the accused person whether guilty or not was bound to obey the terms thereof, **17 A. L. J. 503.**

Provisions of this chapter generally applicable to summonses and warrants of arrest.

93. The provisions contained in this chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

Notes.—1. **Witnesses arrested may be admitted to bail.**—Having regard to the provisions of this section read with s. 76 it has been *held* that a Magistrate may admit to bail a *recalcitrant* witness arrested under s. 90, **Weir II, 39.**

2. **Shall apply to every summons**—including summonses to jurors and assessors under s. 326.

3. **Every warrant,** *i.e.*, warrant of arrest, search-warrant, warrant of commitment to custody, warrant of execution, warrant of release, etc.

or fined to a smaller amount To dispose of the case finally in the witness's absence might in some instances prevent the infliction of imprisonment where it was most deserved —*West's Bombay Code, Vol II, p* 979 Taking a witness's answer supposes the man makes his appearance, **2 W. R. 43.** Where a *recusant* witness *does not make his appearance*, the Magistrate may sell any part of the attached property and recover the amount of fine imposed on him and the fine is not illegal by reasons of the witness's answers to the charge not having been recorded —*Ibid*

6. Forfeiture of absconder's property.—*See* Note 14 to s 88

7. Claims of third parties to attached property.—*See* Notes 17—21 under s 88.

8. When sale has created title in a third party, it will not be set aside in revision.—*See* **22 A. 216; 27 A. 572** under Note 22 to s 88

9. What amounts to raising of attachment.—A Magistrate s direction to his subordinate to write to the Collector and authorise the taking off of a certain attachment will amount to an order releasing the property from attachment, **5 W. R. 8.**

10. Appeal.—Orders under this section are appealable—*vide* s. 405

11. Revision.—High Court may revise orders under this section, **19 M. 3; 22 A 216; 104 P. L. R. 1911 = 12 C. L. J. 142.**

D.—Other Rules regarding Processes.

Issue of warrant in lieu of, or in addition to, summons

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest,

(*a*) If, either before the issue of such summons, or after the issue of the same, but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons, or

(*b*) if, at such time he fails to appear and the summons is proved to have been duly served in time, to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure

Notes.—1. Form of warrant.—As to form of the warrant in the first instance to bring up a witness, *see* Sch V, No 7, *post*

2. Warrant cannot be issued unless summons be issuable —This section as to the issue of warrant is applicable only in cases where the Court is empowered to issue a summons When the accused is discharged under s 253, a District Magistrate has no authority to issue warrant for his arrest until the order of discharge is set aside and the case is taken to his own file, **15 P. R. 1893.**

3. Effect of not recording reasons in writings.—Where a Court issued a warrant for the arrest of a witness without recording its reasons in writing therefor, *held* that the warrant of arrest was illegal and vitiated the subsequent proceedings including conviction for resistance to an invalid process The adoption of a stereotyped printed form is not sufficient compliance with the imperative language of the section, **38 C. 789.** *See* also **5 N. L. R. 125** noted below *See* also **38 M. 1038** and **50 P. L. R. 1818**, but *see* **18 All. L. J. 1149** (*contra*). *Held*, by the Full Bench (CHATTERJEA, J, *dissenting*), that where the Magistrate has materials before him to which he has applied his judicial discretion and which are sufficient to justify the issue of a warrant in the first instance and states the reasons on which the Magistrate relied it does not become invalid merely by his omission to record separately the reasons for its issue under s 90 of the Code The words "after recording its reasons in writing" are not mandatory but directory. (**38 C. 789,** *overruled*) **51 C. 1 = 27 C. W. N. 857.**

4. When warrant is to be issued in the first instance, cl. (*a*)—A Magistrate cannot issue a warrant of arrest against a witness, unless he is first satisfied that the witness will disobey or has disobeyed the summons served on him **14 W. R. 20**; or unless due service of summons be proved, **7 W. R. 37,** or unless the Magistrate has reason to believe that the witness will not attend to give evidence without being compelled to do so, **4 B. L. R. Appx. 1 = 13 W. R. 1.**

such a power is presumed to exist). If the summons is not complied with, a search-warrant may be issued under s. 96, **15 C. 109; 36 P. R. 1914; 37 M. 112.** In **12 C. W. N. 1016 = 8 C. L. J. 320 = 8 Cr. L. J. 224,** however, the Calcutta High Court *held* that the provisions of s. 94 cannot be taken to apply to the case of an accused person on his trial to whom a notice has been issued to produce an incriminating document, having regard to the provisions of ss. 342, 343 among others and this view has been approved of in **38 C. 304.** In **41 C. 261,** the Calcutta High Court considered and distinguished the cases **in 12 C. W. N. 1016; 38 C. 304** and **16 C. W. N. 1078** and *held* that those cases did not lay down any general proposition that the powers conferred by ss. 94 and 165 did not extend to accused persons. 'The particular objection to the search which the learned Judges had in their minds was not that the search was made *in the house of an accused person*, but that it was made for *stolen property generally* whereas under s. 165 a search might be made only for a particular document or thing. It was further laid down that ss. 94 and 165 authorised the search of an accused's house for specific stolen property relevant to the case.

4. **Document or thing must be clearly specified.**—The document or thing must be clearly specified (*Cf.* the form of warrant No. VIII in Sch. V). A general direction to produce all papers relating to the subject in dispute will not be enforced. *See* **16 C. W. N. 1078 = 13 Cr. L. J. 764** where the words were 'stolen property relevant to the case.'

5. **Magistrate must judicially consider whether production is necessary or desirable.**—The question whether the production of a particular document or book is necessary or desirable for the purpose of any trial is one which must be decided by the Magistrate before he orders the production; and in determining that question he has to exercise his discretion judicially in the sense that he must satisfy himself, that the document or the book has bearing upon and is relevant to the case. When he has so satisfied himself, his jurisdiction to order its production comes into play and that carries with it the jurisdiction to allow the prosecution the right of inspection, **5 Bom. L. R. 980.** *See* also **15 C. 109.**

6. **Necessity for calling on parties to produce documents.**—In criminal as in civil cases, where documents are in possession of the adverse party, before secondary evidence of their contents can be given, the party offering it must prove that sufficient and timely notice to produce the documents has been given to the other party or his pleader in those cases in which notice is necessary. (*See* ss. 65 and 66 of the Indian Evidence Act, 1872.) The notice must be specific, *i.e.*, indicate the document to be produced and should be given at such time as to afford the party a reasonable opportunity for producing the document at the trial. The reason why notice to produce is required, is not to give the opposite party notice that the document will be used so that he may be enabled to prepare evidence to explain or confirm it, but merely to exclude the argument that the party desirous of proving the document has not taken all reasonable means to procure the original. *See* also *Russell on Crimes*, Vol. II, pp. 2073—2078. If the accused wishes to give evidence as to the contents of a document in the possession of the prosecutor, he must serve the prosecutor with a summons to produce, and a notice to produce is not enough as he is not a party to the proceedings. *Wills on Evidence*, 2nd Ed., p. 359. *See* also *Archbold*, pp. 375 and 376.

7. **In criminal cases no interrogatories or discovery.**—In Criminal cases neither party can obtain evidence from the opposite side by means of interrogatories or discovery of documents. *See* Halsbury's Laws of England, Vol. IX, p. 387.

8. **Right to inspect documents or things produced.**—*See* **15 C. 109** and Note 23 to s. 96.

9. **Every Court has power to have before it property which forms subject of charge.**—Apart from any question of evidence, every Court is entitled to have before it and to retain during the pendency of the proceedings, any property which forms the subject of the charge pending before it, or which has any connection with the offence which happens to be under investigation or inquiry. The accused was charged with criminal breach of trust with reference to a sum of Rs. 1,77,131-1-2 which was paid to him in 17 currency notes of ten thousand rupees each and the remainder in small cash. He admitted the possession of 15 of them, but said that he had given 10 out of the 15 to a third person, his solicitor. The solicitor who claimed a lien on the 10 notes changed some of them into cash and small currency notes. The prosecution insisted on the production of these notes including the five notes and the proceeds of the other five currency notes in the possession of the third person (solicitor), but the Magistrate refused to make an order to that effect on the ground that he had no power to compel their production. *Held*, that the Magistrate was wrong and that he had power to compel the production of the notes and of the proceeds, **19 C. 52.** *See* also *R.* v. *O'Donnell*, **7 C.** and **P. 138,** *R.* v. *Rooney*, **7 C.** and **P. 515; 3 C. 379; 12 Bom. H. C. 217.**

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

A.—Summons to Produce.

Summons to produce documents or other things

94. (1) Whenever any Court or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a Police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act 1872, ss 123 and 124, or to apply to a letter, post card, telegram or other document *or any parcel or thing* in the custody of the Postal or Telegraph authorities.

Notes.—1. Courts—"In this Court, the terms 'Court and 'Magistrate' are generally if not always used as convertible terms," **39 C. 953 (P.C).** *See* also the judgment of BRETT, J in **36 C. 433 at p. 467.** It was held in **36 C. 433** and **22 B. 949** that there should be some proceeding pending before an order could issue under s 94 or 96 (1) but the Privy Council in **39 C. 953** has laid down that Sch V, Form VIII contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an inquiry about to be made, *see* Notes 4 and 5 to s 96

2. What "documents or things" may be directed to be produced.—For definition of 'document,' *see* s 3 of the *Evidence Act*, 1872 and s 3 (16) of the *General Clauses Act* 1897 A document or thing' does not include woman' **11 C. W. N. 836** The later decisions of the Calcutta High Court (*see* **38 C. 304, 12 C. W. N. 1016 = 8 Cr. L. J. 224**) seem to lay down that this section does not deal with 'documents or things,' forming the subject of a criminal offence, *e.g*, stolen articles and 'documents or things, in the possession of the accused but it is submitted looking to the general words of the section and the fact that there is no other provision in the Code for serving notices on the accused to produce documents in his possession or power, that this section does deal with documents and things in the possession of the accused and with documents forming the subject of the criminal offence (*see* **5 Bom L R 980, 37 M. 112; 15 C. 109; 19 C. 52** and *see* Note 3 below). 'A Magistrate has the power of calling upon any person to produce any 'document or thing' in that person s possession or power, which has any connection with the offence which happens to be under investigation or enquiry Of course he cannot call for anything and everything from anybody and everybody The thing called for must have some relation to or connection with the subject matter of the investigation or enquiry or throw some light on the proceeding or supply some link in the chain of evidence It may be that the thing called for may turn out to be wholly irrelevant to the enquiry, but so long as it is considered to be necessary or desirable for the purpose of the enquiry, the power is there *Per* AMEER ALI, J, at p 64, in **19 C. 52.** The words 'document or thing are general and seem to cover *any document* the production and inspection of which are necessary or desirable or will serve the ends of justice **36 P. R. 1914**

3. Accused may be summoned to produce documents or things in his possession or power—*See* Note 2, *supra* Though in England no man could be compelled to produce evidence against himself, and consequently no order can be made on him to produce documents or other things (*see* Halsbury Laws of England Vol IX, p 387) it has been *held* that in India in view of the general words used in this section a Magistrate has always the power to issue a summons to the accused to obtain the production of a document or thing in his possession, **15 C 109** at pp **122, 123** and **135—141; 37 M. 112; 36 P R 1914** (*see* **19 C.**

8. **Complainant must be examined on oath before issue of search-warrant.**—If a complaint is laid before a Magistrate, he is bound to examine the complainant under s. 200 before taking any other step and a search-warrant issued on a complaint without examining the complainant would at least be irregular, **8 A. L. J. 517 = 12 Cr. L. J. 175; 8 M. L. T. 416 = (1910) M. W. N. 818 = 11 Cr. L. J. 535**, *see* Notes 5 and 6 above.

9. **Complaint necessary to issue search-warrant; telegram not a complaint.**—The only information on which a Magistrate can under this Code issue a search-warrant is set out in s. 190 and an application for a search-warrant, based on a telegram to the Police authorities, cannot be regarded as a complaint made with a view to a Magistrate taking action under the Code against the person whose house is to be searched, **22 B. 949**; *see*, however, Note 5.

10. **Condition precedent to granting search-warrant for production of documents or things in possession of parties.**—It is a condition precedent to the issue of a search-warrant under this section that the Court must have reason to believe that the person against whom the search-warrant is issued is not likely to produce the document or the thing in his possession as required by a summons or order under s. 94 or a requisition under s. 95 (1) *supra* served upon him, or that he is not likely to produce should such summons, order or requisition be served, **5 Bom. L. R. 1032; 15 C. 109** at **p. 134**. It is the duty of the Court in the first instance to consider if a summons to produce would not have the desired effect. *See* also **1917 M. W. N. 494** and **17 Cr. L. J. 60.**

11. **Search-warrant not to be granted solely for attaching property title to which is disputed.**—This section authorises and compels the production of property in respect of which a search-warrant is issued. But when property not alleged to be stolen is in the hands of third parties, such production can only be demanded for the purposes of evidence and ought not to be granted for the sole purpose of attaching property the title to which is in dispute, **Ratanlal 677.** An attachment before judgment is unknown to criminal law. *See* **19 C. 52** where the question whether a Court is competent to issue a summons under s. 94 merely with a view to take proceedings under s. 517 after close of trial is discussed.

12. **General search for fishing evidence not authorised.**—"It rather seems to me that this section contemplates the production of some specified or distinct thing or object which may be deemed essential to the conduct of any inquiry and the conviction of the accused party; such, for instance, as the bloody knife, a vessel containing poison, a forged document, a piece of stolen property, and so on, but it can scarcely have been the intention of the Legislature to empower Police-officers or other underlings to make harassing domiciliary visits to inquire minutely into the private concerns of individuals, and to seize any part of their papers under the bare chance that *something* might therein be proved tending to the conviction of any accused parties."—*Per* SETON KARR, J., **8 W. R. 74, p. 75.** In **16 C. W. N. 1078 = 13 Cr. L. J. 764**, it is laid down that the law does not empower a Police-officer to search an accused person's house for anything, but specific articles which have been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorised and the law cannot be got over by using such an expression as 'stolen property relevant to the case,' as the law requiries mention of specific things. The ruling in **39 C. 953** seems to imply that it is open to a Magistrate, to direct a 'general search.' The third paragraph of cl. (1) does not seem to be in any way qualified by s. 94. The ruling in **39 C. 953**, is however distinguished in **47 C. 597**, which holds that unless there are materials before a Magistrate connecting a person against whom the warrant is applied for with the offences alleged, upon which he can come to an independent decision on the point, he has no power to issue a search-warrant. He cannot grant such warrant simply because a Police-officer informs him that it is necessary and asks him to do so, *per* CHAUDHARI, J. A Magistrate has no power to issue a search-warrant under paragraph 3 when there is no inquiry, trial or other proceeding under the Code pending before him, but there is only some investigation into alleged offences being made by the Police.

13. **Search not confined to documents intended to be used as evidence.**—The section is somewhat obscurely worded; but it is apparent from cl. (3) that the Legislature did not intend to restrict it to documents forming the subject of a charge as distinguished from documents sought to be used as evidence in a criminal case, **8 Bom. L. R. 980; 36 P. R. 1914**, *see* Notes 2 and 3 to s. 94.

14. **Scope of search-warrant; documents or things in possession of accused.**—In **15 C. 109**, NORRIS, J., observes that the language of this section is extremely wide and does not follow the English Common law rule that no man should be compelled to produce evidence to criminate himself. This section authorises the production, and under certain circumstances the compulsory production of documents not only in the premises of an accused person, but also in the premises of any other person in the world. The same view is *held* in

10. No power to take security for production when required —It was *held* in **7 C. W. N. 512,** that if a Magistrate does not choose to take action either under this section or under s 96 *infra* to secure the production of property before the Court, no section of the Code enables him to demand security from the person in possession, for the production when required

11. No power to allow inspection without production before Court or officer.—It is not open to the Magistrate to issue an order allowing the prosecution to inspect the entries in the books of the accused relating to the subject matter of the charge at the offices of the accused s *attorneys* Such an order is not warranted by any section of the Code and is *ultra vires*, but he may cause their production under this section in Court for the purpose of using them as evidence to prove the guilt of the accused persons and in case of non production, issue a search warrant under s 96, **5 Bom. L R. 978.** A search might also be made under s 165

12. Disposal of property produced —The order under this section is quite irrespective of any which might afterwards be made by a Court under Chapter XLIII *as to disposal of property* *See* also **19 C 52.**

13. To the person in whose possession or power such document or thing is believed to be.—In the 1872 Code, the words were '*in whose keeping* The language employed here, though of the widest possible character, ought to be fairly construed The instrument need not be in the *actual* possession of the party, it is enough if it is in his power, which it would be if it were in the hands of a person in whom it would be wrongful not to give up possession to him But he must have such a right to it as would entitle him not merely to inspect, but to retain it Documents in Court by order are not regarded as in the possession of the party who had to file them in Court. *Russell on Crimes* p 2073-4 In regard to official papers, they must be *held* to refer only to the *head* of the department having custody of the document, but not a subordinate official The person in possession need not be a party to the proceeding A third party quite unconnected with the case, may be summoned to produce the document If the instrument be in the possession of a person in *privity* with the party, such as his attorney, banker, agent, servant, deputy or the like, such person need not be served with a *subpœna duces tecum* or even be called as a witness, but a notice given to the party himself will suffice Thus a notice to a shipowner to produce papers though the Captain has possession of them for his own protection or a notice to a Sheriff to produce a warrant, which is shown to have been returned to the Under sheriff, during the time the Sheriff remained in office, will justify the admission of secondary evidence (*Taylor*, p 434)

14. Order for production must be complied with even if owner claims a lien.—That the person in possession has a lien on the documents or things required to be produced is no sufficient reason for the non production, **19 C. 52** *See* also **3 C 379** and **12 Bom H. C. R. 217.**

15. Revision —S 435 gives the High Court ample powers to interfere in any case where a Magistrate has either refused to exercise a discretion vested in him by law, or has exercised that discretion in an improper manner Therefore when a Magistrate erroneously refused to make any order for the production of certain currency notes or their proceeds in the possession of the accused and his legal adviser, the High Court set aside the order and directed the Magistrate to proceed according to law, **19 C 52**

16. Person producing document not a witness —A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness —*Act I of* 1872 s 139

17. Particulars to be noted when public records called for —A Magistrate requiring the production in evidence of documents recorded in a Court of Justice or in the custody of any public officer, should in his communication to such Court or officer state clearly whether he requires the entire record or any particular paper or papers also at what time and place the papers, if not previously sent by post, must be produced, and whether any subordinate officer will be required to attend for the purpose of proving them The communication should be signed and sealed in the same way as a summons As a rule it is not desirable that a Magistrate should send for original papers in cases in which copies will serve the purpose and in which the person requiring the production of the papers is in a position to obtain certified copies (*Bom H C Cir No* 45, *Gaz*, 1879, *pp* 471—475)

18. Ss. 123 and 124 of the Evidence Act referred to above are as follows —

[123 No one shall be permitted to give any evidence derived from unpublished official records ing to any affairs of State, except with the permission of the officer at the head of

24. **Magistrate may conduct the search in person.**—Under s. 105, *infra*, a Magistrate who is competent to issue a search-warrant is also competent himself to conduct the search, **1884 A. W. N. 213; 36 C. 433; 39 C. 953 (P.C.)**

25. **Resistance to illegal search.**—Where a Police-officer deputed to make an investigation, but not empowered to enter a house in search of property, does make a search without a warrant, the illegality of such search cannot justify any resistance or obstruction under s. 99, I.P.C., unless it is shown that the officer has acted otherwise than in *good faith* and without malice, **7 B. H. C. R. Cr. C. 50; 19 M. 349; 23 C. 896; 28 C. 411; 23 C. 399; 35 C. 304; 18 A. 256; 16 P. R. 1904 = 1 Cr. L. J. 1091; 14 Cr. L. J. 142 (Pun.); 8 S. L. R. 1 = 16 Cr. L. J. 15.** Where on the complaint of the husband that his wife was wrongfully confined by his father-in-law, a warrant was issued under this section and the Police-officer attempting to execute the warrant was obstructed and criminal force used by the accused, *held*, that the accused were not guilty as the warrant was illegal, **11 C. W. N. 836 = 6 C. L. J. 127 = 6 Cr. L. J. 38.** But this case has been dissented from in **39 C. 403** and **16 C. W. N. 336 = 13 Cr. L. J. 186.** *See* Note 15 to s. 103.

26. **Searches under other Acts.**—The provisions relating to searches under this Code shall, so far as they can be made applicable, apply (1) to a search under s. 8, cl. (1) of Act XI of 1890 (*Prevention of Cruelty to Animals*); (2) to a search under Bombay Act II of 1890 (*Salt*), cl. 2; (3) to searches by officers authorised by rules under s. 7 of *the Indian Explosives Act* IV of 1884; (4) to search under *the Indian Arms Act* XI of 1878, which in Bengal must be conducted in the presence of some officer specially appointed by name or in virtue of his office by the Local Government, and all Magistrates and Police-officers not below the rank of Inspector have been so appointed—*Calcutta Gazette*, 1878, *Pt. I, p.* 1850. In the Chittagong Division, the order has been extended to Police-officers, not below the grade of Sub-Inspector—*Calcutta Gazette*, 1889, *Pt. I, p.* 83. Under s. 25 of *the Indian Arms Act*, a Magistrate must before causing search to be made record in writing the grounds of his belief that a person has possession of arms, etc., for an unlawful purpose, and when he conducts a search without so recording, the search is illegal and the Magistrate is guilty of a trespass if he enters into any building, **36 C. 433** approved on this point by the Privy Council in **39 C. 953.** Under this section a Magistrate has power to issue a search-warrant for the production of copies of the infringing book, proof, etc., for the purpose of making an order under section 10 of *the Indian Copyright Act* (III of 1914), **47 C. 164.**

27. **Definition of search-warrant under N. Y. Cr. P. C., s. 791.**—" A search-warrant is an order in writing, in the name of the people, signed by a Magistrate, directed to a Police-officer, commanding him to search for personal property, and bring it before the Magistrate." It may be issued upon either of the following grounds:—(1) When the property was *stolen* or *embezzled*, etc. * * (2) When it was used as the means of committing felony, etc. * * (3) When it is in the possession of any person, with the intent to use it as the means of committing a public offence, or in the possession of another, to whom he may have delivered it for the purpose of concealing it, or preventing its being discovered; in which case it may be taken, on the warrant, from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.

Notes.—(1) " A search-warrant issued upon information upon oath that certain goods have been stolen by *A* and were concealed in the house of *B*, commanding the constable to enter the said house in the day time and search for the goods stolen and bring them with *B* or the person in whose custody the goods should be found, before the justice is a valid process."—*Bell* v. *Clapp*, **10 Johns 263.** (2) A person who maliciously and without probable cause procures a search-warrant to be issued and executed is guilty of a misdemeanour—section 811. (3) A Police-officer, who in executing a search-warrant, wilfully exceeds his authority or exercises it with unnecessary severity is guilty of a misdemeanour—section 812.

28. **Delay in issue of search-warrant.**—Where in a case of trespass and theft, the complainant, at the time of applying for process, prayed for the issue of a search-warrant, but the Magistrate after repeated application made an order for the issue of the warrant more than three weeks after; *held* that the procedure was so dilatory that it could only tend to defeat the object for which such a warrant is issued, **22 C. W. N. 719.**

Power to restrict warrant.

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection, shall extend; and the person charged with the excecution of such warrant shall then search or inspect only the place or part so specified.

19 C 52, 41 C 261; but in **12 Cr L J 98 (C.)** it was *held* that a search warrant under this section cannot be addressed to an accused person on his trial for production of a document in his possession or power *See* Notes 2 and 5 under s 94 To issue a search warrant for the purpose of seizure of all letters books bills and books of account was a gross perversion of law **9 L B R 45 = 17 Cr L J 543** —Magistrate has no authority for issuing on the application of the complainant a search warrant ordering the summary seizure of all the goods of a certain description in the possession of the accused **17 Cr L J 60**

15 **No jurisdiction to take security for production** —Under the Code the Magistrate acting as a judicial officer has no jurisdiction merely to take security for the safe custody and production whenever required, of the property before a Civil Court **7 C W N 522**

*16 **Search for persons wrongfully confined** —See ss 100 and 101 as to the mode of conducting the* same When a warrant was issued purporting to be under this section while it ought to have been under s 100 the resistance to the execution of the warrant was *held* to be justified as the warrant was illegal **11 C W N 836 = 6 C L J 127 = 6 Cr L J 38** But this case was dissented from in **16 C W N 336 = 13 Cr L J 186** on the ground that the error was one of form only *see* also **39 C. 403.**

17 **Document cannot be seized except on search warrant** —A Presidency Magistrate on being asked by telegram from the District Magistrate of Agra to take possession of certain account books of one *D* living at Bombay and send them to him summoned *D* to produce them and when they were produced seized and sent them to Agra purporting to do so under the provisions of ss 96 and 99 *held* that as there was no search warrant neither s 96 nor s 99 applied **Ratanlal 680**

18 **Order on Police to take possession of documents without summons or search warrant illegal** —On a complaint before a Magistrate that the accused had fraudulently tampered with account books of a partnership business the Magistrate directed the Police to enquire and report and take possession of the *Khata* books *Held* that the order of the Magistrate was illegal and that if the production of the books was necessary he should have issued either a summons to produce under s 94 or a search warrant under this section **38 C 68**

19 **Rules regulating searches** —A search warrant should except under special circumstances be executed between sunrise and sunset If for special reasons a search warrant be executed between sunset and sunrise such reasons must be reported to the District Superintendent for the information of the Magistrate having jurisdiction —*Beng Pol Man 2nd Ed p* 402

20 **Disposal of things produced** —*See* s 517 *infra* and as to disposal of things found beyond jurisdiction *see* s. 99

21 **Inspection is confined to inspection of locality or place** —Having regard to the language of s 97 the word *inspect* must be confined to *locality* or *place* (*e g* for blood stains) but not to document or other thing **15 C. 109**

22 **Power to search includes power to take possession** —Having regard to the language of Form VIII Sch V which authorises the search for and *production* of the thing required the power to take possession is inherent in all cases of the issue of a search warrant. This holds good for searches conducted by the Police under ss 165 and 166 as the latter section provides for *forwarding the thing found see* **Ratanlal 667**

23 **Right of parties to inspect documents or things produced** —A Magistrate has power to grant inspection of documents but such inspection must be limited to books mentioned in search warrants **15 C 109** *See* Notes 2 and 5 to s 94 where this ruling is followed When once the documents or things are brought before the Court under an order duly made the Magistrate would have the power to allow the prosecutor the inspection thereof They stand when they are brought to Court precisely in the same position as when the documents or things are found either upon the person of a prisoner at the time of his arrest or at his house upon a search made by the Police and afterwards forwarded to the Court. It is reasonable that those who conduct the prosecution should have such inspection for the production of documents is for the purpose of taking them in evidence and this could not be done unless the prosecution had an opportunity of inspecting them **15 C. 109,** *followed in* **33 C W N 369** In this case the inspection was however directed to be limited to the inspection of the books named in the search warrant. *See* also **5 Bom L R 980** But it is not open to the Magistrate to issue an order allowing the prosecution to inspect the entries in the books of the accused relating to the subject matter of the charge at the office of the accused s attorneys **5 Bom L R 978** *See* Note 11 to s. 94 *supra*

Notes.—1. For Form of warrant to search suspected place of deposit, *see* Sch. V, Form No. 9. *See* **35 C. 1076** at **p. 1081** as to the difference between this and s. 96.

2. **Search-warrant issued by Magistrate not duly empowered.**—If any Magistrate, not being empowered by law, erroneously issues a search-warrant in good faith under this section, his proceedings shall not be set aside merely on the ground of his not being so empowered.—S. 529, *cl.* (*a*).

3. **Notification under s. 19 of the Sea Customs Act,** *e g.*, see *Fort St. George Gazette Notification, dated 5th April*, 1887, under which the bringing into British India by sea or by land of pieces of metal resembling in shape and in size and stamped either on the obverse or on the reverse in imitation of rupees, half-rupees, quarter-rupees and eighth-rupees is prohibited, as also pieces of paper or mixed metal which, not being coin as defined in the I.P.C., are intended to be used as money. But the bringing of such pieces into British India by a traveller in quantity, not exceeding one hundred pieces, and in good faith for his own use, is not to be deemed prohibited by the above notification.

4. **Exercise by executive officers of statutory powers.**—When executive officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising these powers in satisfying themselves that they have strictly complied with the provisions of the Act which created them, **36 C. 433** at **p. 450**; *see* also **31 B. 438.**

5. **Warrants may be endorsed over to another.**—A warrant issued under this section can be endorsed over to any other Police-officer of similar rank for execution, **3 S. L. R. 56=10 Cr. L. J. 3.**

6. **Warrant under s. 100 drawn upon printed form used under s. 98 with necessary alterations is legal.** *See* **39 C. 403; 16 C. W. N. 336 = 13 Cr. L. J. 186** where **6 C. L. J. 127 = 11 C. W. N. 836 = 6 Cr. L. J. 38** was *dissented* from.

Disposal of things found in search beyond jurisdiction.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things, shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary such Magistrate shall make an order authorising them to be taken to such Court.

Notes.—1. Power to endorse a search-warrant and order delivery of the thing found is common to all Provincial Magistrates. *Sch.* III, *cl.* 9

2. **Documents seized without search-warrant cannot be taken.—Ratanlal 880.** *See* Note 17 to s 96

Power to declare certain publications forfeited, and to issue search-warrants for the same.

***99-A.** (1) Where—

(*a*) any newspaper or book as defined in the Press and Registration of Books Act, 1867,

(*b*) any document, wherever printed, appears to the Local Government to contain any seditious matter, that is to say, any matter the publication of which is punishable under section 124-A of the Indian Penal Code, the Local Government may by notification in the *Local Official Gazette*, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter and every copy of such book or other document to be forfeited to His Majesty, and thereupon any Police-officer may seize the same, wherever found in British India, and any Magistrate may by warrant authorise any Police-officer not below the rank of Sub-Inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

* Sections 99-A to 99-G were inserted by the Press Law Repeal and Amendment Act XIV of 1922, 3rd Schedule.

Search of house suspected to contain stolen property forged documents, etc.

98. (1) If a District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging are kept or deposited in any place,

* "or, if a District Magistrate, Sub-divisional Magistrate or a Presidency Magistrate upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture, or production of any obscene object such as is referred to in s. 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place,"

he may by his warrant authorise any Police-officer above the rank of a constable—

(*a*) to enter, with such assistance as may be required, such place, and

(*b*) to search the same in manner specified in the warrant, and

(*c*) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials * " or of any such obscene objects" as aforesaid, and

(*d*) to convey such property, documents, seals, stamps, coins, instruments or materials* " or such obscene objects" before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in the some place of safety, and

(*e*) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents seals, stamps, coins, instruments or materials,* or such obscene objects knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged falsfied or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging,* " or the said obscene objects to have been or to be intended to be sold, let to hire, distributed, publicly exhibited, circulated, imported or exported"

(2) The provisions of this section with respect to—

(*a*) counterfeit coin,

(*b*) coin suspected to be counterfeit and

(*c*) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply, respectively, to—

(*a*) pieces of metal made in contravention of the Metal Tokens Act, 1889, or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878,

(*b*) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts and

(*c*) instruments or materials for making pieces of metal in contravention of that Act.

* The words in inverted commas were added by Act VIII of 1923

2. **Arrest of ward by District Court.**—For the purpose of arresting the ward, the District Court may exercise the power conferred on a Magistrate of the first class by this section.—Section 25 (2), *Act VIII of* 1890 (*The Guardian and Wards Act*).

3. **Habeas Corpus.**—*See* s. 491 for the powers which the High Courts of Calcutta, Madras and Bombay now have to issue directions in the nature of *habeas corpus; see* also s. 552 as to the powers of a Presidency Magistrate or District Magistrate to compel the restoration of abducted females, **16 C. 437.**

4. **Scope of this section not as wide as that of the writ of 'habeas corpus.'**—The accused were charged under s. 363, I.P.C, with kidnapping a minor boy. The Magistrate discharged them and refused to pass any order under this section. On a reference it was *held*, that the Magistrate was not bound to issue search-warrant and pass an order under this section in the absence of any reason to believe that the minor was wrongfully confined. The jurisdiction under this section is not as wide as that conferred by s. 491, **Ratanlal 839; 24 C. W. N. 104.**

5. Warrant wrongly issued under s. 96 instead of under this section was *held* illegal, *see* **11 C. W. N. 836 = 6 C. L. J. 127 = 6 Cr. L. J. 38** and Note 25 to s. 96.

6. **Presumption as to legality of warrant.**—Where upon an application under s. 522 a warrant was issued under s. 100 to compel the immediate appearance of a woman, but was drawn up on a form printed for use under s. 98 and the accused snatched away and destroyed it, *held* that it must be presumed that the warrant contained the substance of what is set out in s. 100 and that the portions which had to be altered were altered, and that the issue of the search-warrant was not illegal or without jurisdiction, **16. C. W. N. 336 = 13 Cr. L. J. 186; 45 C. 905.**

D.—General Provisions relating to Searches.

Direction, etc., of search-warrants.

101. The provisions of ss. 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants, issued under s. 96, s. 98, s. 99-A * or s. 100.

Notes.—1. S. 43. Any person may aid a person, other than a Police-officer, executing a warrant. **75.** Form of warrant of arrest **77.** Warrant shall ordinarily be directed to a Police-officer. **79.** Warrant may be executed by Police-officer to whom it is directed or by any other to whom it is endorsed over. **82.** Warrant may be executed in any place in British India. **83.** Warrant for execution outside jurisdiction may be forwarded by post. **84.** Procedure where a warrant is directed to a Police-officer for execution outside the jurisdiction of the Court issuing it.

2. **Search-warrant under Gambling Act may be endorsed over.**—A search-warrant under the *Gambling Act* III of 1867, is governed by this Code and may therefore be endorsed over by a Police-officer to whom it is directed to another duly empowered, **30 A. 60.**

3. **Application to searches under other Acts.**—Searches made under the provisions of *the Opium Act* I of 1878 must be made in accordance with this Code; *see* ss. 14, 15, 16 of that Act; but not the searches made under *the Excise Act*, **4 L. B. R. 121.** Sections 102 and 103 apply to the searches made under s. 6 of *the Burma Gambling Act* (I of 1899). *See* also **8 S. L. R. 213=16 Cr. L. J. 238** for application of these provisions to searches under the *Bombay Gambling Act*, 1897.

Persons in charge of closed place to allow search.

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place shall on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by s. 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of s. 52 shall be observed.

*Inserted by Act XIV of 1922.

(2) In sub-section (1) document includes also any painting drawing or photograph or other visible representation

99-B. Any person having any interest in any newspaper book or other document in respect of which an order of forfeiture has been made under section 99-A may within two months from the date of such order apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document in respect of which the order was made did not contain any seditious matter

Application to High Court to set aside order of forfeiture

Note.—Onus of proof —In an application under s 99-B of the Code to the High Court to set aside an order passed by Government under s 99-A the *onus of proof* is on the Government in the first instance to satisfy the Court that the prescribed publications contain seditious matter **47 A 298**

Hearing by Special Bench

99-C. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges

Order of Special Bench setting aside forfeitute

99-D. (1) On receipt of the application the Special Bench shall if it is not satisfied that the issue of the newspaper or the book or other document in respect of which the application has been made contained seditious matter of the nature referred to in sub-section (1) of section 99 A set aside the order of forfeiture

(2) Where there is a difference of opinion among the Judges forming the Special Bench the decisions shall be in accordance with the opinion of the majority of those Judges.

Note —When the Court is in doubt the order should be set aside **40 All 5 (F B), A I R 1927, All 649**

Evidence to prove nature of tendency of newspapers

99 E. On the hearing of any such application with reference to any newspaper any copy of such newspaper may be given evidence in aid of the proof of the nature or tendency of the words signs or visible representations contained in such newspaper which are alleged to be seditious matter

Procedure in High Court.

99-F. Every High Court shall as soon as conveniently may be frame rules to regulate the procedure in the case of such applications the amount of the costs thereof and the execution of orders passed thereon and until such rules are framed the practice of such Courts in proceedings other than suits and appeals shall apply so far as may be practicable to such applications

Jurisdiction barred

99-G. No order passed or action taken under section 99-A shall be called in question in any Court otherwise than in accordance with the provisions of section 99 B

C —Discovery of persons Wrongfully confined

Search for persons wrongfully confined.

100. If any Presidency Magistrate Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence he may issue a search-warrant and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith and the person, if found shall be immediately taken before a Magistrate who shall make such order as in the circumstances of the case seems proper

Notes —1 Under such circumstances that the confinement amounts to an offence.—Where a husband is charged with wrongfully detaining his wife it was *held* that notice must be issued upon him as he had a right to appear and show cause **2 C. W N 333 N, 29 P W R. 1910 = 11 Cr L J 450.**

3. **Inhabitants of the locality failure—failure to call them.**—The word 'locality' does not mean the same quarter of the town as the place searched, **4 Bur. L. T. 222 = 12 Cr. L. J. 479.** The stress is on the word 'respectable' and not on the word 'locality,' **11 Cr. L. J. 746 (Bur.).** Failure to call inhabitants of the locality as witnesses does not make a search illegal, **21 M. 83; 23 M. L. J. 445 = (1912) M. W. N. 1111 = 13 Cr. L. J. 763.** *See* also **19 M. 349** and **10 Bur. L. R. 253 = 1 Cr. L. J. 993.**

4. **Right of occupant to be present at search.**—The spirit of sub-sec. (3) of this section is that the 'occupant' of the place searched shall be present, which means that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it. But the right of presence given by this section applies only to the 'occupant' of the place searched or some person in his behalf, and the words 'occupant of the place' are not intended to cover every person who may happen to be in the place at the time, but they refer back to the person mentioned in s. 102, *i.e.*, a person residing in or being in charge of the place. Where, therefore, after the discovery of a gun and search of their persons, the accused, who were the occupants of the place, were sent out of the room and the search was continued, *held* there was a violation of the rule enunciated in this section, which was one not merely of technicality, but of substance, in that it was enacted to guarantee the reality of the search and that it was an irregularity which made it incumbent on the Court to scrutinise the evidence carefully, **41 C. 350.**

5. **Bengal rules as to sending for witnesses.**—The sending for shop-keepers selected arbitrarily by the Police and making them witnesses to the search of houses of accused persons, is a fruitful source of oppression and extortion. It is difficult to prescribe rules for the selection of witnesses to the search of houses for stolen property, but the District Superintendents can easily ascertain by questioning the witnesses sent in whether they have been unfairly selected. One respectable house-holder should not be summoned a second time till his neighbours have had their turns, unless good reasons be given for their exemption. Respectable shop-keepers are just as liable to be summoned as other respectable inhabitants of the place.—*Beng. Pol. Man.*, 2*nd Ed.*, *p.* 403.

6. **Cart is not a 'place.'**—An Abkari-officer suspecting the possession by the accused of liquor without license searched the cart in which the accused was travelling and found a bottle of liquor therein. On appeal by Government it was *held*, that a cart is not a 'place' as is contemplated by this section, and, therefore, the provisions therein contained cannot be applied to the search of a cart, **Bom. H. C. Cr. Rul., 18th June, 1885.**

7. **Refusal to sign search-list not punishable under s. 187, I.P.C.**—When a person called upon by an Abkari Inspector to attend a search, under this section, refused to sign the search-list and was thereupon charged under s. 187, I.P.C., with intentionally omitting to assist a public servant in the execution of this duty, *held* the conviction was bad, because the assistance which a person is bound, by the earlier part of s. 187, I.P.C., to render is *ejusdem generis* with the various forms of assistance referred to in the later part of the section and that it must have some direct personal relation to the execution of the duty by the public officer. The signing of the list, required by this section is an independent duty which is imposed on the witness, whereas the word *assistance* as used in s. 187, I.P.C., implies that the party who assists is doing something, which in ordinary circumstances the party assisted could do for himself, **26 M. 419 (F.B.).**

8. **Duty of prosecution to call witnesses present at search.**—The prosecution are in duty bound to call the persons who were present at the search unless they are of opinion that those persons would mis-represent facts and mis-state what had happened. The fact that some of these persons have formed an *opinion* unfavourable to the prosecution story is no reason for not calling them, as the witnesses are called upon to state what they *saw* and not what they *thought*, **9 C. W. N. 438.** It is wrong for a Judge in charging the jury to say that a Head Constable committed a breach of the Police Regulation in conducting a search with a loose shirt on, without examining him on the matter and taking evidence as to whether or not his body was examined before he began the search, **21 M. 83.**

9. **Value of search-list.**—A search-list prepared under this section is proper evidence as to matters which it should contain, *viz.*, the properties found and the place where they were found, **Weir II, 515** (but *see* **33 M. 413**); and should be duly proved and exhibited. Unless the list is signed by witnesses mentioned in the section, the search would not be legal, **4 L. B. R. 134 = 7 Cr. L. J. 411.**

10. **Additions to or omissions from search-list do not invalidate the search.**—After a search-list has been signed duly in accordance with sub-sec. (2), it is not proper to make additions thereto subsequently, but

Note.—Powers of the Police in Calcutta or Bombay—This section has not been made specially to apply to the Police in Calcutta or Bombay But under ss 96 98 and 100 Presidency Magistrates have power to issue search warrants to the Police In case of *search-warrants*, therefore there seems to be no doubt that the Police in Calcutta and Bombay are to be guided by the provisions of s 48

Search to be made in presence of witnesses

103. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend * and witness the search and may issue an order in writing to them or any of them so to do *

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

Occupant of place searched may attend.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request

(4) When any person is searched under section 102, sub-sec (3), a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person at his request

"(5) † Any person who without reasonable cause refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code."

Note.—The provisions of section 103, Cr Pro Code 1898 do not apply to a search conducted after the issue of a warrant under s 5 of the *Gambling Act* (III of 1867) **3 Lah 359.**

Notes —1 Selection of search-witnesses by whom to be made —This section does not justify the view that the persons called upon to witness search are to be selected by any person other than the officer conducting the search, **21 M. 83.**

2. Who are proper witnesses.—The provision is aimed against possible chicanery and unfair dealing on the part of the officers entrusted with the search warrants and was made to ensure confidence that anything incriminating which may be found in premises searched shall be really found and shall not be what is called 'planted' **5 Rang 291=103 9 C 557.** The section clearly contemplates the presence of two respectable witnesses of the locality unconnected in any way with the Government and its officers So the calling in of headmen of wards who are appointed by the Commissioner of Police and have certain Police duties to do or of the Village Munsiff and Karnam, is not sufficient compliance with the provisions of this section and the premises so searched could not be deemed to have been duly entered and searched, so as to give room for the presumption that the place was a common gambling house, **3 L. B. R. 229 = 4 Cr. L. J. 390**, but in **7 Bur. L. T. 143 = 15 Cr. L. J. 441,** it was *held* by a majority of the *Full Bench* that ward headmen in towns other than Rangoon should be considered competent witnesses of searches under this section The intention of the Legislature is that only those should be chosen as witnesses who can be reasonably relied on to secure the desired result and in whose trustworthiness and ability towards the carrying out of the particular duty required of them confidence can be felt, **4 L. B. R. 213 = 14 Bur. L. R. 81 = 7 Cr L. J. 479 ; 4 Bur. L. T. 91 = 12 Cr. L. J. 251;** but *see* **11 Cr. L. J 746 (Bur.)** and **U. B R. (1908) 2nd Quarter, p 1.** It is objectionable to be constantly calling the same person to witness the search and to do so is likely to prejudice the mind of a trying Magistrate against the prosecution, **4 L. B. R. 121.** In view of the provisions of s 6 (*d*) of the *Bombay Gambling Act* IV of 1897 and s 1 (2) of this Code, searches made under this section need not be conducted in the presence of *Mashirs* **8 S. L. R. 213 = 16 Cr. L. J. 233.**

* The words " and witness to do ' were added by Act XVIII of 1923
† This sub-section was added by the Cr P C Amendment Act (XVIII of 1923), s. 14

investigating or inquiring into any offence under it, its provisions must prevail, and the Criminal Procedure Code must give way. Accordingly, no provision of the Code as to the authority empowered to issue a warrant for arrest or search, or the persons to whom and the conditions under which such warrant may be issued, can apply for the purposes of s. 7 of *the Gambling Act*. The authority, the persons and the conditions must be respectively those specifically mentioned in s. 6 of the Act and no other. But the special provision in s. 6 of the Bombay Act would still be subject to the general provisions of ss. 65 and 105 of the Code. When the Legislature empowers an officer to delegate an authority to do a certain act to another person, it necessarily implies that the original authority to do such act is fully and completely in the officer himself, but that it is necessary for the exigencies of business that it should be done in the majority of cases by persons acting under authority derived from him, **31 B. 488.**

PART IV.

PREVENTION OF OFFENCES.

CHAPTER VIII.*

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for Keeping the Peace on Conviction.

Security for keeping the peace on conviction.

106. (1) Whenever any person accused † of any offence punishable under Chapter VIII of the Indian Penal Code other than an offence punishable under section 143, section 149, section 153-A or section 154 thereof, or of † assault or other offence involving a breach of the peace, or of abetting the same, ‡ *

* * * *

or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first class, and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace, such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties for keeping the peace during such period, not exceeding three years as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court § including a Court hearing appeals under section 407 § or by the High Court when exercising its powers of revision.

Notes.—1. For form of bond, *see* Sch. V, No. 10; for punishment for failure to furnish security, *see* s. 123; as to when the security period commences, s. 120; s. 349 for procedure when a second or third-class Magistrate is of opinion that a bond ought to be executed. Under s. 513 a deposit in money or Government Promissory notes might be made in lieu of executing the bond. For general notes on this Chapter, *see* p. 161, etc.

1-A.—The amendment of s. 106 has made an order under s. 106 impossible when the only section under which the accused are convicted is a section of the Penal Code read with section 149. The amendment as it stands must be read to indicate that there must be some substantive offence charged to be read with section 149 inasmuch as no offence is punishable under s. 149 alone. **3 P. A. T. 870.**

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* Sections 20 to 26 of *the Sindh Frontier Regulation* III of 1892 are to be read with and construed as part of this Chapter. *See* s. 21 of that Regulation and s. 3, *supra*.

† The words " any offence punishable under Chapter VIII . . . section 154 thereof or of " have been substituted in the place of the word " rioting " by Act XVIII of 1923.

‡ The words " or of assembling armed men or taking other unlawful measures with the evident intention of committing the same " have been omitted by Act XVIII of 1923.

§ The words " including a Court . . . . s. 407 " were added by Act XVIII of 1923.

such additions to an already completed list do not constitute a breach of this section so as to invalidate the whole search, nor is the omission of unimportant articles a circumstance invalidating the search, **7 Bur. L. T. 163 = 15 Cr. L. J. 523.**

11. Evidence other than the search-list may be adduced to prove particulars of search.—When a search has been conducted under s 103, evidence can be given regarding the things seized in the course of the search and regarding places in which they were respectively found, other than the list which the law in the section directs to be drawn up containing these particulars, **34 M. 349 (F.B)** **Weir II, 513** *overruled*, *see* also **Weir II, 776; 7 M. L. T. 362 = 11 Cr. L. J. 136; 33 M. 413.** The provisions of s 91 of the *Indian Evidence Act* could not have been intended by the Legislature to apply to mere observations of physical facts which, under the ordinary law, have to be proved by testimony in Court **7 B. H. C R. 45 at p. 63.**

12. As to other searches by the Police.—*See* ss 165 and 166, as to mode of making a search, *see* **27 C. 692.**

13. Liability for contravening the provisions of this section.—Police-officers might be prosecuted under s 166, I P C, or under the Police Act, **3 S. L. R. 31 = 12 Cr. L. J. 489.** But if the officer, without calling upon two witnesses searches a house, no obstruction or resistance will be justified so as to bar a conviction under s 353, I P C, **19 M. 349.**

14. Resistance to illegal search.—Where a search was conducted without a warrant only one search witness was brought and a constable scaled the outer wall and effected a burglarious entry into the house and the persons conducting the search were assaulted, *held* that the constables conducting the search were not acting in the discharge of their duties as public servants and that the accused who caused hurt to the constables could not be convicted under s 332, I P C, **37 A. 353; 18 A. 246,** *followed* *See* Note 25 at p 141 **42 A. 67.**

E.—Miscellaneous.

Power to impound document, etc, produced

104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code

Notes.—1. Impounding of documents when illegal—When a Magistrate had no authority to summon a person in whose charge the document, *e g* account books or other thing was, this section did not apply so as to justify the sending of the books out of his jurisdiction, **Ratanlal 880.**

2. Impounding by a Magistrate not seized of the case, illegal.—Under this section a District Magistrate could not impound any document which has been produced in a pending case before a Subordinate Magistrate, **1 A. L. J. 607.**

3. Procedure on impounding.—"A note upon the document or thing impounded or attached to it should be made and signed by the presiding officer, and it should not be allowed to pass out of the custody of the Court, except by its written order," **All. H. C. Bk. Cir, p. 6.**

Magistrate may direct search in his presence

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant

Notes.—*See* ss 96—103 as to competency of Magistrates to issue search warrants By s 529 the issue of a search warrant by an unauthorised Magistrate is not on that ground alone invalid

1. Competency of Magistrate to direct searches—Having regard to the ordinary powers of a Magistrate as specified in the third Sch. X (8) and s 96 any Magistrate has in the circumstances stated in the preceding ss 94 and 96, power or authority as such Magistrate to direct a search, **39 C. 953 (P.C.)** *overruling* **36 C. 433.**

2. Magistrate directing search acts *judicially*—A Magistrate directing a general search in view of an enquiry under this Code acts in this discharge of his judicial functions and may appeal for protection to Act No XVIII of 1850 (*An Act for the protection of judicial officers,*) **39 C. 953 (P.C.)** *overruling* the opinion of the majority in **36 C. 433.**

3. This section empowers a Magistrate to himself conduct a search under the Bombay Gambling Act (IV of 1887).—As the Bombay *Prevention of Gambling Act* has provided for the manner or of

II.—NATURE OF OFFENCES FOR CONVICTION OF WHICH SECURITY MAY BE REQUIRED.

8. **The offence for which the person is convicted, is the essential element.**—Under this section, it is the *offence* for which the person is *convicted,* and not the facts as put in evidence at the trial which determines whether or no security can be demanded, **Weir II, 48.**

9. **What are 'offences involving a breach of the peace.'**—We have no definition of the term '*breach of the peace,*' but it would embrace most of the offences against public tranquillity dealt with in Chapter VIII, I.P.C. It has been *held* in **4 Bom. L. R. 78,** that public peace can be broken by angry words as well as by deeds. Acts which do not amount to a breach of the peace in private, may amount to such in a public place. In **33 A. 771,** however, it was *held dissenting* from the Calcutta and Madras rulings, that the word '*involve,*' connotes inclusion not only of a necessary, but also of a probable feature, circumstance, antecedent condition or consequence. In this case the evidence showed that the accused were prepared to accompany the removal of the land-mark by a breach of the peace and were prevented from doing so by the other side running away, and therefore the offence came within terms of this section, though the breach of the peace was not an ingredient of the offence proved. Also in **42 A. 345,** it is *held* that upon a conviction for criminal trespass, where the intention of the trespass is to commit a breach of the peace, an order under this section can be lawfully passed (**18 A. L. J. 300**). In **43 B. 554,** it is *held* that the expression "other offences involving breach of the peace" in the section includes offences which were offences because a breach of the peace had occurred or because a breach of the peace was likely to occur. In **22 Bom. L. R. 166,** SHAH, J., expressed the view that he was inclined to hold the above expression to refer to offences of which a breach of the peace is an essential ingredient. The cases in **26 M. 469; 29 M. 190; 30 C. 93; 35 C. 315,** seem to hold that the expression "other offence involving a breach of the peace" means an offence of which a breach of the peace is a necessary ingredient and that there must be a finding that a breach of the peace has occurred; but in **44 M. L. J. 485,** in a case in which the accused was convicted of an offence under s. 323, I.P.C., and ordered to give security under this section without an express finding that the accused caused a breach of the peace, MR. JUSTICE SPENCER, *held* that the offence of which the accused had been convicted implied the use of violence and a breach of the peace and that the order for security was proper. In **2 Lah. 279** it is *held* that the said expression means an offence in which a breach of the peace is an ingredient and not merely an offence provoking or likely to lead to a breach of the peace. From the note in the Select Committee's report it appears that with certain exceptions convictions for offences under Chapter VIII, I.P.C., should justify magisterial action under section 106. The present amendment in clause (1) seems to favour the view that the expression "offence involving a breach of the peace, means an offence into which breach of the peace necessarily enters as an ingredient or element."

And so in **23 A. L. J. 1053** it was held that in the absence of a finding that an assault which took place, involved breach of the peace or public tranquillity, a Magistrate cannot, merely on the ground that the parties were on bad terms, bind the accused down, and therefore an order under s. 106 can only be passed when in a case of causing simple hurt or assault, breach of the peace is involved (**44 M. L. J. 485** distinguished). *See* also **46 A. 105** *held,* that a canvasser who had assaulted an elector because he refused to vote as he was wanted to vote was rightly bound over to keep the peace under s. 106 of the Code after conviction under s. 323, I.P.C. (**43 C. 671** *distinguished*) **46 A. 105. 44 M. L. J. 486** (Ramaswamy Thevan) was approved in **47 M. 846** and it was *held* that s. 146 implies that offences against public tranquillity and the offence of assault involved a breach of the peace and proof of mere commission of one of these offences is enough to make the provisions of the section applicable.

10. **Does Criminal trespass involve a breach of the peace?**—Where a person was convicted of criminal trespass and the Magistrate added to the sentence an order that the prisoner should give recognisance to keep the peace. *Held,* that there was nothing illegal in the Magistrate's order, the conduct of the accused clearly pointing to an intention to commit a breach of the peace, **20 W. R. 37; 7 W. R. 14; 7 C. W. N. 25.** The accused was convicted under s. 448, I.P.C., his intention in committing the trespass being to have illicit intercourse with the complainant's wife; it was *held* that the conviction not being for any of the offences mentioned in this section, the order for taking security was bad in law. In distinguishing this case from **7 W. R. 14** and **20 W. R. 37,** the Court observed: "In both these cases this Court found that the intention of the accused in committing the trespass was to commit a breach of the peace, the trespass, as the facts of the cases showed, having been committed openly by a number of men. Those cases therefore will come within the provisions of the law, authorising security being taken for keeping the peace. In the present case, the intention of the accused as

2. Order for giving security is in discretion of Magistrate.—The taking of security to keep the peace is a matter within the discretion of Magistrate, provided he has materials upon which to proceed, **23 W. R. 58**; but (*i*) an order ought not to be made when a sentence of imprisonment or transportation for a long term (seven years) is passed, **5 L. B. R. 34 = 10 Cr. L. J. 69.** (*ii*) *Disputes regarding land or water*—Where there are such *bona fide* disputes, proceedings should be taken under Chapter XII, s 145, and not under this section, **3 C. W. N. 297** and **453.** (*iii*) *Where the result of taking security from one party would be to prevent the exercise of lawful rights*—Where on the complainant trying to take possession of land in the occupation of the accused, the accused used more force than was necessary to prevent the complainant's party from doing so, *held*, that, although the accused were rightly convicted of the offence of rioting under s 147, I P C., they should not be bound down under s. 106 to keep the peace, as that would have the effect of preventing the accused from resisting any further attempt by the complainant to take possession of the land, **11 C. W. N. 840. = 6 Cr. L. J. 40.** An order under s. 106 should not be passed when it would practically prevent the party from exercising his legal rights, **11 C. W. N. 1128**; or the other may also be bound down under s. 107, **11 C. W. N. 176.** *See* Note 14 at p 146

I.—CONDITIONS PRECEDENT FOR REQUIRING SECURITY UNDER THIS SECTION

3. Security demandable only on conviction.—The section refers only to parties convicted of assault, rioting, etc., and cannot be applied to cases where there is only a possible apprehension of a future breach of the peace, **24 W. R. 10.** No order requiring personal recognisance to keep the peace can be passed under this section unless the accused has been convicted of rioting or any other offence, **21 W. R. 37; 22 W. R. 79.** Security cannot be demanded when there is no conviction, but the only fact found is that the accused threatened to beat the complainant, **25 C. 628**; or that the accused provoked another to commit an assault, **Weir II, 48.**

4. Security cannot be demanded on acquittal—Security cannot be demanded from an accused person when he is discharged or acquitted of the offences mentioned in this section *Mad H C Pro*, 19*th May*, 1874, **3 C. L. R. 72,** *see* also **11 C. W. N. 413** and **25 C. 628.**

5. Only the person accused and covicted can be required to give security.—(*i*) *Witness cannot be directed to give security*—A witness for defence in case of rioting was ordered to give security to keep the peace on the conclusion of the trial, as the presiding Magistrate had no doubt left on his mind from the evidence given by the witness that he was one of the rioters in the case *held* that this procedure was illegal so far as the witness was concerned, **5 M. 380.** (*ii*) *Complainant cannot be directed to give security*—Where a Magistrate convicted the accused under s 323 I P C, and called upon both the complainant as well as the accused to furnish security under this section, *held* the Court had no jurisdiction to call on the *complainant* to furnish security under this section, but if it desired to bind him over must proceed under other sections of this Chapter, after recording separate proceedings, **3 P. R. 1902.**

6. Order for security must be made at the time of passing sentence in presence of accused.—An order for recognisance or for security under this section must be passed *at the time of deciding the original case* If no such order is then made, subsequent proceedings must be taken under s 107 and the parties summoned to show cause, **15 W. R. 58**; also **8 P. R. 1883.** Although it is competent for a Magistrate upon conviction and sentence for *assault*, to order the accused to furnish security under this section, yet, having committed to do so at the time of passing sentence, he cannot afterwards upon receiving some further credible information (other than that which he derived from previous trial) that the parties are likely to commit a breach of the peace pass an order under this section, **3 N.-W. P. H. C. R. 96; 22 P. R. 1901; 15 W. R. 56.** The order under this section, must therefore be made in the presence of the accused An order directing a recognisance bond to be taken and made in the absence of the accused and upon the suggestion of his adversary was set aside, **3 B. H. C. R. Cr. Ca. 1.**

7. Breach of the peace must be reasonably probable.—To justify an order under this section, there must be a *reasonable probability* of a breach of the peace being committed and not merely a *bare possibility*, **20 W. R. 37.**

Where there is no conviction, but strong grounds for apprehension of a future breach of the peace, the Magistrate must act under s 107 or apply to the officer having authority to proceed under that section—*Pro. M S C*, 18*th January*, 1862.

17. Order for taking security to be passed only by convicting Magistrate.—Before an order under s. 106 can properly be made, the conviction must be by a Magistrate of the class mentioned in it, and not by any other and the order must be passed by the Magistrate who convicts and passes sentence. Therefore, where a third-class Magistrate convicted the accused and then referred the case to the District Magistrate, and the latter bound down the accused to keep the peace under this section, his order was held to be illegal, **21 C. 622** and *see* Note 22. *See* also **22 P. R. 1901** where it was *held* that a confirmation by the Appellate Court of at least a part of the sentence is a condition precedent to an order under cl. (3).

18. Proceedings of Magistrate not empowered void.—If any Magistrate, not being empowered by law, demands security to keep the peace, his proceedings shall be void, *see* s. 530. cl. (*c*); and also where a Magistrate not empowered tries and convicts the accused and then refers the proceedings to a qualified Magistrate for passing orders under this section, an order by the other Magistrate to keep the peace is illegal, **21 C. 622.**

19. Magistrate not competent must refer whole case to competent Magistrate.—If a non-qualified Magistrate is of opinion that an order must be made under this section he should refer the whole case to the proper authorities for passing sentence under s. 349, **35 C. 1093.** Whether an Appellate Court can pass orders under this section in appeals from conviction by Magistrate not qualified, *see* Note 25.

20. Competency of Sub-divisional Magistrate with second-class powers to award imprisonment for more than six months in default of security.—A Sub-divisional Magistrate invested with the powers of a Magistrate of the second class, can pass an order under this section binding over a person to keep the peace for a period exceeding six months. The fact that the order carries with it an alternative sentence of imprisonment in case the security is not filed which will be beyond his ordinary powers under s. 32, cannot have the effect of limiting the powers conferred on the Court of the Sub-divisional Magistrate under this section. So long as the order requiring the applicant to furnish security was passed by a Court which had authority to do so under this section, and the period for which security was required did not exceed the limits he was authorised by law to impose, the liability of the applicant to be detained in prison unless he furnished the security, is something independent of the powers of the Magistrate in the matter of passing substantive sentences of imprisonment, **37 A. 230.**

IV.—POWER OF APPELLATE COURT TO DIRECT SECURITY.

21. Competency of Appellate Court to require security.—Clause (3) follows the Full Bench decision in the case of **4 A. 212** and supersedes the case of **16 C. 779; Ratanlal 906; 1 M. L. J. 252; 17 A. 67.** The essentials for justifying the Appellate Court to require security are, *firstly* that the accused must have been tried and convicted by a Court of the description mentioned in the first paragraph of the section (but *see* Note below); *secondly* the conviction must be for the offences referred to in the section, **29 M. 190,** and *thirdly* there must be an express finding that such an offence has been committed, **29 C. 393;** and *see* Note 7. It can exercise the power after the judgment in appeal provided the appeal, proceedings are not terminated by that time. **30 Bom. L. R. 373.**

22. Competency of Appellate Court to require security when conviction is by second or third-class Magistrates.—The present amendment of clause 3 expressly empowers Appellate Court hearing appeals, under s. 407 to pass orders, under s. 106 requiring security under clause 3. Therefore **21 C. 628** and **35 C. 434,** holding to the contrary are no longer good law. The present amendment follows the Allahabad and Bombay rulings. *See* **33 A. 48; 33 B. 33; 37 M. 153 (F.B.); 43 A. 372 = 19 A. L. J. 133.**

23. Order by Appellate Court under this section does not amount to enhancement of sentence.—The exercise by Appellate Courts of the power given by cl. (3) requiring the appellant to find security to keep the peace after the expiration of the sentence, would not amount to an enhancement of the sentence in the proper sense of the term, **21 P. R. 1905 = 34 P. L. R. 1905 = 2 Cr. L. J. 190.**

24. Appellate Court can cancel security order.—By virtue of s. 423, cl. (*d*), the Appellate Court has power to set aside an order for security under this section, even while upholding the conviction, **30 C. 101.** But to enable it to do so, the substantive sentence must be appealable, without taking into account the order under this section, *see* s. 415.

found by the Courts below, was only to have illicit intercourse with the complainant's wife," **25 C. 628.** In **4 M. L. T. 468** also, it was *held* that an order cannot be made under this section against a person convicted under s 448, I P C, even though it is found that committing the offence the accused did acts amounting to a breach of the peace In **4 L. B. R. 277,** it was *held* that security cannot be demanded from an accused convicted of house trespass with intent to commit theft, *see* also **7 C. W. N. 25; 1885 A. W. N. 302; 42 A. 345.**

11. Assembling armed men.—This does not include the offence of *being an armed member of an unlawful assembly, nor joining such an assembly*, **3 P. R. 1890, 126 P. L. R. 1910 = Cr. L. J. 680.** In **5 C. W. N. 250,** complainant's party erected huts on newly formed *chur* lands Accused s party came in large numbers armed with deadly weapons Someone of the accused gave order to beat the other party and break down their huts, thereupon complainant's party took to flight and their huts were broken down On conviction, an order under this section was made against the accused and in revision it was argued on their behalf that there might be cases of unlawful assembly in which no *breach of the peace* occurred, because the assembly did not go so far *Held* that in a case like the present where armed men had assembled with the intention of committing breach of the peace and an order to beat persons in possession had actually been given the provisions of this section applied

12. Security cannot be ordered in convictions for theft.—A Presidency Magistrate directed an accused person, convicted and sentenced to be imprisoned for an attempt to commit theft, to be brought before the Court on the expiry of the sentence, to furnish security for good behaviour *Held*, that the order was illegal, as theft is not one of the offences contemplated by this section **Ratanlal 622;** *see ibid*, **48.** Where an accused person is convicted of theft under s 379, I P C, a Magistrate cannot on the evidence that there was an *intention* of committing a breach of the peace direct him to execute a bond under this section, **1 C. W. N. 186; 29 C. 393.** A person convicted under s 392, I P C, cannot be bound over under this section, **18 M. L. T. 121 = 16 Cr. L. J. 611.**

13. Conviction for theft, mischief and unlawful assembly.—Where the accused were convicted under ss 379, 426 and 143, I P C., and were called upon to give security under this section, *held* that the order requiring the accused to give security was bad, as none of the offences necessarily involved *a breach of the peace* *Query*, whether in a case in which a person is not accused of an offence involving a breach of the peace, etc, but in which there is nevertheless *an express finding* that a breach of the peace has been committed, the accused could be called upon to give security to keep the peace **26 M. 469,** also **29 M. 191.** It has been *held* that in such cases the findings must be clear and explicit and that a mere conviction under ss 143 and 376 is not in itself sufficient to sustain an order under this section, **8 C. W. N. 517** and summary at **p. CCX; 27 C. 983; 35 C. 315; 7 C. L. J. 172; 7 Cr. L. J. 200; 26 C. 576; 29 C. 393.** Where a party entitled to joint possession but being out of possession went with 30 or 40 servants armed with *lathis* to take possession of the property and got possession without having had to use any force and was convicted under s 143, I P C, an order under s 106 was *held* to be justified, **11 C. W. N. 176; 5 C. W. N. 250.**

14. Criminal Intimidation.—In the 1882 Code the word '*intimidation*' was qualified in consequence of **2 A. 351** by the phrase "*by threatening injury to person or property*" But these words have now been omitted, so as to enlarge the operation of the section If the finding be that the accused was guilty of *criminal intimidation* the section expressly requires that the conviction must also be for that offence in order to sustain an order under the section, **8 C. W. N. 517**

14-A. A conviction under section 323 I P C., indicates a breach of the peace and if the circumstances indicate that such a breach is likely to recur an order under this section is desirable, **51 All. 540.**

15. Security cannot be ordered on conviction of merely causing disturbance to religious worship, s. 296, I P.C.—Where the accused were convicted of the offences under ss 296 and 298 of the Penal Code, and were required to give security to keep the peace *Held*, that the act of the accused in instigating others to beat tom toms in front of a Hindu temple and thereby causing disturbance to people engaged in religious worship did not come under any of the offences enumerated in this section Mere provoking another to commit an assault is a different thing from committing an assault oneself, **Weir II, 47.**

III.—COMPETENCY OF MAGISTRATES TO DIRECT SECURITY.

16. Bench of Magistrates with first-class powers competent to pass orders of security.—Under s 15, if anyone of a Bench of Magistrates has first-class powers, the Bench is competent to make an order under this section, **21 W. R. 12; 2 C. L. R. 348 at p. 349.**

Notes.—1. Analogous provisions—New York.—Under s. 84 of the New York Criminal Procedure Code an information laid on oath before any Magistrate that a person has threatened to commit a crime against the person or property of another and supported by the evidence of witnesses is sufficient to enable the Magistrate, to issue a warrant for the arrest of the person complained of. The warrant must, however, contain the substance of the information. Section 85—When the information is laid before a Magistrate, he must examine on oath the complainant and any witnesses he may produce, and must reduce their examination to writing and cause them to be subscribed.

English Law.—If a person has just cause to fear that another will do him some bodily harm, as by killing or beating him or his wife or his child, he may demand the surety of the peace against such person, and it is the duty of a Justice of the Peace to bind over such person, if the applicant proves an oath that he is actually under such fear and has just cause to be so.—*Halsbury's Laws of England*, Vol. IX, p. 414.

2. Procedure.—The Magistrate should on receipt of credible information issue an order under s. 112 calling upon the person informed against to show cause, and serve the order on the person under s. 115, then hold an inquiry as to the truth of the information, under s. 117, and either direct the person to give security under s. 118, or dicharge him under s. 119. *See* s. 112 as to contents of the preliminary order, s. 121 as to contents of bond and s. 123 for procedure on default of giving security. If the Magistrate requires a person to execute a bond extending over a year he must follow the provisions laid down by cl. (2) of s. 123. See *supra*. The mere fact that the accused says that he is willing to give security to keep the peace is not the kind of proof, required as a condition precedent to the taking of security. **27 P. R. 1917 (Cr.).** But *see* **50 All. 599 ; 50 All. 120.**

3. Difference between ss. 106 and 107.—Under s. 106, the order can be passed on conviction of any of certain specified offences; while under s. 107 formal proceedings must be taken as in trials in summons-cases to prove that it is necessary for keeping the peace that the person summoned shall execute a bond. In the former case, the Magistrate has adjudicated on the evidence in the presence of the person to be bound over, and facts are established to require security, because he has convicted the accused of a breach of the peace or an intention to commit a breach of the peace, etc., whereas under the present section, the Magistrate proceeds on information, the value of which must be tested in the presence of the person concerned, who shall also have an opportunity of showing that it is not reliable, **3 C. L. R. 72,** *see* also **1 C. L. R. 48** and **21 W. R. 6.** A Magistrate possessing knowledge of certain facts from sources outside the record, should not base his judgment upon those facts, for passing an order under this section. **14 A. L. J. 769 ; 21 Cr. L. J. 511.**

I.—CIRCUMSTANCES UNDER WHICH PROCEEDINGS MAY BE TAKEN UNDER THIS SECTION.

4. Breach of the peace must be imminent.—It must appear to the Magistrate that a likelihood of a breach of the peace is *imminent*, the object of the bond being to prevent an imminent breach of the peace between parties who have quarrelled and to secure peace until the lapse of a reasonable time, allowing them to cool down, and not to protect a town from any possible misconduct at some future time on the part of notoriously turbulent and dangerous bad characters, who may have kept the town in ferment in past years, **7 N.-W. P. H. C. R. 233.** There must be something more than a bare possibility, there must be a reasonable likelihood of a breach of the peace, **20 W. R. 57.** An hasty speech likely to break the peace does not justify an order under this section against the speaker, particularly when all fear of a breach of the peace passes away before the order is passed, **31 P. W. R. 1907 = 7 Cr. L. J. 232 ; 9 M. L. T. 271 = (1911) 2 M. W. N. 235 = 12 Cr. L. J. 104.**

5. Security cannot be asked in anticipation of breach of the peace.—A person applied to the Police for assistance to protect him whilst distraining the crops of certain ryots for arrears of rents. On this fact being reported to the Magistrate, he required the applicant to furnish security to keep the peace, as he thought that any riot which may result from the resistance of the cultivators would be attributable to the applicant: *held* that the order was illegal, and as the Magistrate had not found that the applicant himself was likely to commit a breach of the peace, he ought not to have held the applicant reasonable by anticipation, **3 C. L. R. 280.** The mere fact that the Magistrate apprehended breach of the peace because certain persons opened a cattle market on their own land not far from the place where one already existed is not sufficient to issue an order under this section, **16 A. L. J. 279.** *See* also **23 A. L. J. 300.**

6. Security when occasion for breach of the peace has passed away.—The facts which might be taken to establish the probability of certain persons disturbing the public tranquillity at a particular *annually*

V —MISCELLANEOUS PROVISIONS

25 **Section applies to European British Subjects** —The words *any person accused* are wide enough to include this class of people also *Cf* **36 C 163**

26 **Conviction may be in summary trial** —The conviction may be in a summary trial **1886 A W N 181,** provided the Magistrate has jurisdiction **3 N W P H C R 96** But a Magistrate should not instead of trying the accused for an offence constituted by all the facts proved content himself merely by charging and trying him for an offence that can be tried summarily **27 C 983**

27 **Proceedings should be taken under this section, when juvenile offender sentenced to whipping** —Where a juvenile offender is sentenced to whipping for causing hurt with a dangerous weapon the Magistrate should not pass an order under s **31** of *the Reformatory Schools Act* directing delivery of the youthful offender to his parents on their giving a bond but should proceed under this section **3 L B R 30**

28 **Order for security abates with annulment of conviction** —Where conviction is annulled on appeal the order directing the appellant to find security abates *ipso facto* and it is not competent to the Appellate Court to order the security to be continued **1895 A W N 141, 30 C 101, 7 N -W P H C R 373, 22 P R 1901**

B —Security for keeping the Peace in other Cases and Security for Good Behaviour

[For general notes on this Chapter see *supra*]

Security for keeping the peace in other cases

107. (1) Whenever a Presidency Magistrate District Magistrate Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion breach of the peace or disturb the public tranquillity the Magistrate* if in his opinion there is sufficient ground for proceeding* may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of such Magistrate s jurisdiction and no proceedings shall be taken before any Magistrate other than a Chief Presidency or District Magistrate unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate s jurisdiction

Procedure of Magistrate not empowered to act under sub-sec (1)

(3) When any Magistrate not empowered to proceed under sub section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody such Magistrate may, after recording his reasons issue a warrant for his arrest (if he is not already in custody or before the Court) and may send him before a Magistrate empowered to deal with the case together with a copy of his reasons

(4) A Magistrate before whom a person is sent under sub-section (3) † may in his discretion detain such person in custody ‡ pending further action by himself under this Chapter *

* The words if in his opinion there are sufficient grounds for proceeding are added by Act XVIII of 1923

† The words sub-section (3) were substituted for the words this section by Act XVII of 1923

‡ The words pending ... Chapter were substituted for the words until the completion of the inquiry hereinafter prescribed

called upon to enter into recognisance. *See* also 32 A. 571, where a Magistrate had bound over certain Muhammadans believing that they would disobey an order prohibiting them killing cows in a private place, the order was set aside, 30 A. 181 *followed.* But an act innocent in itself may become wrongful if done with the deliberate intention of wounding the religious feelings of neighbours of another religion, 33 A. 775; 21 Cr. L. J. 453; 16 A. L. J. 279; but it is *held* "under section 107 there may be cases in which a Magistrate of the first class upon mere information that a person is likely to disturb the public tranquillity without any information being given of that person's intent to do any wrongful act, may issue a notice in writing to such person giving the substance of the information received without specifying any definite acts which that person intends to commit." 16 A. L. J. 567.

12. **The wrongful act must be likely to occasion a breach of the peace.**—This section clearly contemplates that the Magistrate should have some tangible evidence that some definite act is contemplated, which act, if committed, is likely to cause a breach of the peace. Therefore the fact (*a*) that the accused had attempted to get up false cases and that he would probably continue to do so, 64 P. R. 1887; or (*b*) that he sings ballads in the street (because singing in the street is not in itself a wrongful act, nor would a possible obstruction in the streets by crowds collecting, constitute a wrongful act by the singer likely to lead to a breach of the peace), 13 P. R. 1889; or (*c*) that he is on bad terms with others, 7 C. P. Cr. 9; or (*d*) that being rightfully entitled to land, but wrongfully kept out of possession, he has granted leases of it and the lessee proceeds to take possession peaceably and not accompanied by force or violence, 25 C. 798; or (*e*) that he has made a hasty speech likely to break the peace, particularly when all fear of a breach of the peace passes away before the order is passed, 31 P. W. R. 1907 = 7 Cr. L. J. 232; or (*f*) that the accused used their influence for the purpose of stopping the services of the village barber, washerman and others from being rendered to the complainant, 7 C. W. N. 32; or (*g*) that the accused joined in the service held in a mosque, not appropriated in any particular sect, and in the *bona fide* performance of his devotions, said *Ameen* in a loud tone, 15 P. R. 1902 (F.B.); 17 P. R. 1887; or (*h*) that the accused boycotted the servants of a Zemindar, the feelings between whom and his tenants were strained, 14 Cr. L. J. 238 (A.); or (*i*) that the acccused used mere ideal threats and bombast, 9 M. L. T. 271 = (1911) 2 M. W. N. 235 = 12 Cr. L. J. 104; or (*j*) that the accused is a quarrelsome, headstrong and contumacious person; 21 P. R. 1888; or (*k*) that the accused constituted themselves a Committee in order to persuade the authorities to allow them to carry on a procession along a certain route, and to enforce as against any other person who might contest the same, their right to do so, 37 A. 33 does not in itself legally afford grounds for binding him over to keep the peace; but where the accused had during a period of extremely strained communal feeling enunciated the principle that it was the Hindus inherent right to pass with music before all mosques............and he organised a movement with this object held (1) that it was a proper case in which action under this section ought to be taken; (2) that the statements made to the District Magistrate and the Police Superintendent by the accused were admissible in evidence against him under section 11, Evidence Act, 32 C. W. N. 477, nor does the fact that those others have been punished for offence against him and bound over to keep the peace afford such ground, 7 C. P. Cr. 9, *see* also 3 C. W. N. 463. It is not open to a Magistrate to draw up proceedings against persons under this section merely on the basis of general or vague statements, 22 Cr. L. J. 745.

13. **Past wrongful acts do not justify proceedings.**—It cannot be presumed from the fact that the person has done a wrongful act in the past that he is likely to do the same again, 6 Bom. L. R. 663. A complaint was made to a first-class Magistrate against certain persons that they were constantly creating disturbance in the bazaars. He thereupon called on them to show cause why they should not be bound over to keep the peace, and on their failing to do so required them to enter into a bond of Rs. 50 each, etc., *held* cancelling the order, that the act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time of the information given and not merely one a repetition of which may be expected or apprehended from past misconduct of the kind without anything further, Weir II, 49.

14. **Party acting within right ought not to be called upon to give security.**—Where there is likelihood of a breach of the peace resulting from a wrongful act of the aggressive party, in cases of disputes regarding land, the proper course for the Magistrate to follow is to institute proceedings under s. 145, and not to require the party who acts properly and within his rights to give security to keep the peace, 3 C. W. N. 463. One of several co-owners of land without the consent of the other co-owners, proceeded to take the measurement of the lands for the purpose of ascertaining how much land had been *diluviated* and what rent the tenants were liable to pay. This action was objected to by the other co-owners, the result being a likelihood of a breach of the peace. *Held,* that

recurring festival, would afford no ground after such festival had passed without the public tranquillity having been disturbed, binding over such persons to keep the peace with a view to possibility of their creating a disturbance at the next recurrence of the festival **26 A. 190.** But this case cannot be regarded as laying down a rule that security should not be taken in a case of this kind after the occasion has passed on which ill feeling between parties first came to a head Where therefore, the evidence showed that the affair between the Hindus and Muhammadans, in itself rendered it probable that breaches of peace will take place and it was in fact likely that there would be a breach of the peace in the near future *held* that the District Magistrate was justified in taking security from the applicants, **8 A. L J. 1080 = 12 Cr. L J. 493.** *See* also **7 C. L. R. 352; 6 Bom. L. R. 663; 22 M. L J. 251 = 13 Cr. L J. 143** A finding that the object of the persons bound over was to disturb the public tranquillity by wounding the religious feelings of the Muhammadans of a certain locality without committing a breach of the peace is a good ground for an order under s 107, **14 A. L J. 430 = 17 Cr. L. J. 301.**

7. Likelihood of violence to particular person.—Where the evidence shows that there is an apprehension of the accused using violence towards a particular person or particular persons, he ought to be bound over under this section to keep the peace but he ought not to be proceeded against under s 110 on the fanciful reasoning that a riot or a single murder directed against a single person *is hazardous to the community*, **27 A. 92.**

8. Mere enmity between factions insufficient to sustain order under this section.—An order under this section could only be passed if there was evidence that the persons sought to be bound over were about to commit a breach of the peace and not otherwise. An order under this section merely on the ground that there was *enmity* between the parties is bad, **1 A. L. J. 418.** There is no sufficient reason for taking security from either party merely, because bad feeling exists between two sets of a population **126 P. L. R. 1911 = 43 P. W. R. 1911 = 12 Cr. L. J. 186.**

9. In disputes among joint owners, proceedings against both.—When one of two contending parties, entitled to joint possession, has been bound over on conviction under s 106, it was *held* that as this latter order would have the practical effect of preventing that party from taking possession of the property—the subject of the dispute—it would be desirable that the other party also should be bound down in a proceeding under this section, **11 C. W. N. 176 = 5 Cr. L. J. 19.** *See* Note 4, s 123

10 Proceedings need not be deferred because civil proceedings pending.—Where on the sale of a *Putni Durputnidar* under the defaulting *Putnidar* wrongfully insisted on collecting rents from the tenants, *held* he was rightly bound over under this section when it was found that his act was likely to cause a breach of the peace The fact that he had instituted a civil suit to set aside the sale made no difference, because his acts were unlawful under the *Putni Regulations*, until the sale had actually been set aside, **9 C. W. N. 792.** When two parties had both applied to the Land Registration Court for registration of their names as proprietors of an estate and pending these proceedings, proceedings were instituted under this section against one of the contending parties and it was contended on their behalf that there being a *bona fide* dispute between the parties as to title and possession, the proceedings under the section taken against one party alone to the exclusion of the other would prejudice the former in the Land Registration proceedings *held* that such a consideration was foreign to the inquiry under s 107, the only question being whether such party being out of possession was seeking to obtain possession by unlawful means which were likely to cause a breach of the peace, **11 C. W. N. 121 = 4 Cr. L. J. 456.**

10-A. Under this section when once the prosecution has made out a reasonable case for dealing with two or more accused in the same enquiry, any evidence which would be relevant if the accused person or persons were being tried of being habitual offenders, would be admissible, **17 A. L. J. 147,** and the evidence of witnesses who spoke to only some of the account doing a particular act was relevant to prove the common purpose animating all of them, **51 Mad. 515**

II.—DOING A WRONGFUL ACT.

11. There must be a definite wrongful act.—The word "*wrongful*" was first inserted in the 1882 Code in consequence of the ruling in **10 B. L. R. 441 = 19 W. R. 47.** The law now expressly declares that the act which may probably occasion a breach of the peace must be some *definite wrongful* act, **64 P. R. 1887; 6 Bom. L. R. 862, 7 C. W. N. 32; 33 A. 775; 7 A. L. J. 1161 = 11 Cr. L J. 719.** It was never intended that a person should be prevented by a Magistrate from exercising his rights Where the exercise of the civil rights of one party is likely to induce another party to commit a breach of the peace, it is the latter *alone* who should be

19. **When dispute as to land is not *bona fide* action may be taken under this section.**—When certain persons, wrongfully and without any *bona fide* claim to possession, sought to eject another by force from the possession of certain land and a breach of the peace was imminent, it was *held* that a Magistrate might legally take action against the aggressors under this section and that it was not necessary, on the finding that the claim was not *bona fide* to take proceedings under s. 145, **28 A. 406.** In a proceeding instituted under this section, the Magistrate found that one *M* was the aggressor and was trying his best to disturb the peaceful possession of *S* on certain lands in dispute. Upon this finding an order was made for taking security from *M*: *held* the finding was not such as would justify the order, though the Magistrate was competent to act under this section, if he thought proper, **7 C. W. N. 746.** Where in a case of a dispute as to land a Magistrate, without instituting proceedings under s. 145, found that the parties were not in possession and on that ground issued an order under s. 144, restraining them from the exercise of certain rights claimed by them in regard to the land in dispute and also proceeded to bind down the petitioners to keep the peace under this section, it was *held* that the order under this section was improper under the circumstances, **7 C. W. N. 142.** When there is no dispute as to 'land' this is the proper section, **36 A. 143.** *See* also **25 A. 537; 22 Cr. L. J. 86; 22 Cr. L. J. 574.**

20. **When dispute as to land is *bona fide*.**—When there is a *bona fide* dispute as to the right to the possession of land between two rival parties giving rise to a likelihood of a breach of the peace, it is unfair to bind down only the party who happens to be in possession under this section to keep the peace. The proper order in such a case would be to bind down both the parties under this section or institute a proceeding under s. 145, *infra*, **12 C. W. N. 606 = 7 Cr. L. J. 403; 11 C. W. N. 176,** but s. 145 ought to be preferred, *see* **35 C. 117; 16 C. W. N. 384 = 13 Cr. L. J. 142.**

21. **When right determined by Civil Courts proceedings should be under this section.**—Where rights of contending parties are determined by Civil Courts, Magistrate should proceed under this section and not under Chapter XII, **6 C. 835; Ratanlal 462.**

22. **Joint and exclusive possession of land.**—When parties are quarrelling over land one of whom claiming to be in exclusive possession and the other in joint possession and there is every likelihood of a breach of the peace taking place, the proper procedure for a Magistrate is to proceed under s. 145, and not under this section, **1 C. L. J. 632 = 2 Cr. L. J. 658; 5 C. L. J. 447 = 5 Cr. L. J. 344.**

IV.—JURISDICTION OF MAGISTRATES IN RESPECT OF PROCEEDINGS UNDER THIS SECTION.

23. **Magistrate cannot call on a person residing in another district to furnish security.**—The terms of this section do not authorise a Magistrate to bind over a person not residing within the limits of his district. Were it otherwise, a Magistrate in one district may take recognisance from a person in any other part of British India in which this Code is in force and *vice versa.* Moreover, a person summoned into one district from another might be subjected to unnecessary expense and inconvenience in obtaining sureties from the district in which he resides, to say nothing of the cost of witnesses he might wish to bring thence to show that the information given to the Magistrate was incorrect or untrue, and that he was not liable to be called upon for recognisances, **6 A. 26 (F.B.); 10 C. L. R. 430; 11 C. 737; 12 C. 133; 23 B. 32** and **14 A. 49.**

24. **Temporary residence sufficient to give jurisdiction.**—If during the temporary residence of accused, he commits any act likely to cause a breach of the peace, a Magistrate has jurisdiction, although the accused permanently or habitually resides in another district, **24 C. 344; 22 Cr. L. J. 109.**

25. **Power to proceed against persons outside jurisdiction specially conferred on Chief Presidency Magistrates and District Magistrates.**—"As this section stood proceedings could not be taken against a person outside the jurisdiction, although he might be instigating a breach of the peace within the jurisdiction, but as such extended power requires careful exercise, we have provided that the power to taking action in such cases shall only be exercised by Chief Presidency Magistrates or District Magistrates."—*Sel. Com. Rep.*, *see* **20 A. L. J. 523.**

26. **How far District Magistrate can delegate his special powers to a Subordinate Magistrate.**—Proceedings against a person residing in another jurisdiction must take place and be brought to a conclusion before the District Magistrate himself. Even on the direction of the District Magistrate, a Subordinate Magistrate has no jurisdiction to draw up a proceeding under s. 107, against a person residing in another jurisdiction **13 C. W. N. 580 = 9 Cr. L. J. 148;** but after initiation of proceedings against a non-resident, the District Magistrate may transfer proceedings to Subordinate Magistrate, **31 C. 350,** if he is competent to conduct the proceeding, **37 A. 20; 41 M. 246.**

under ss 90 and 188 of *the Bengal Tenancy Act*, the unauthorised act of the one co-owner who was surveying being illegal the order binding over under this section the objecting co-owner was bad, inasmuch as they were justified in their resistance to the survey, **9 C. W. N. 618 = 2 Cr. L. J. 338; 34 C. 935.** When a party has the right to take a procession along a particular road, he cannot be properly bound down because someone else proposes to interfere with that right The proper course in such a case is to bind down the other party, **12 C. W. N. 703 = 7 Cr. L. J. 504; 22 M. L. J. 251 = 11 M. L. T. 32 = (1912) M. W. N. 47 = 13 Cr. L. J. 143; 15 Cr. L. J. 661 (M.)** *see* also **A. I. R. 1929 Lah. 138.** Where a *Zemindar* sends people to a *Mokhassa* village, to induce the tenants to break their engagements with the *Mokhassadar* and thus to oust the latter from possession, the *Mokhassadar* is entitled to object to their trespass and to protest against such improper proceedings Such protest on the part of the *Mokhassadar* or his agent will not justify a Magistrate in binding him over under this section, **14 M. L. J. 491.**

III.—BREACH OF THE PEACE LIKELY TO ARISE FROM DISPUTES RELATING TO IMMOVABLE PROPERTY.

15. Jurisdiction under this Chapter not ousted by Chapter XII.—The jurisdiction vesting in a Magistrate under Chapter XII does not necessarily oust the jurisdiction which he possesses under this Chapter **Weir II, 50; 39 C. 150 (F.B.), 36 M. 315.** Where a dispute likely to cause a breach of the peace is with reference to immovable property, *held*, that this fact would not preclude the Magistrate from proceeding under this section and that in cases like these the Magistrate is not bound to act only under ss 144 and 145, but has a discretion to proceed either under those sections or under this section, **32 C. 966.** *See* also **7 C. W. N. 746; 26 M 471** (where **25 C. 559** was *doubted* and *distinguished*); **5 N. L R. 94; 7 C. W. N. 142; 25 A. 537; 9 A. L. J. 693 = 13 Cr. L. J. 566; 9 C. W. N. 551 = 2 Cr. L. J. 272; 28 A. 406; 34 A. 449; 39 C. 150 (F.B.); 39 C. 469; 36 A. 143; 16 Cr. L. J. 211 (M.).** But it is obviously undesirable to combine proceedings under s 107 with proceedings under s 145 and to act against both opposing parties in the same proceedings, **8 S. L. R. 907 = 16 Cr. L. J. 235.**

In **28 Bom. L. R. 488** it was *held* that in a dispute regarding land if it appears that one of the parties is likely to break the King s peace before the decision of the Civil Court, the Magistrate can pass an order under s 107 of the Code

16 **Care should be taken that proceedings under s. 107 are not used to enable one of two contending parties to get possession of immovable property.**—Proceedings under this section are only intended for the security of the public peace, and not for the purpose of enabling one of the two contending parties to help themselves in recovering possession of immovable property, after having their adversaries' hands tied down by an order under this section. If it is thought necessary that an order should be made relating to the possession of immovable property which is the subject matter of dispute between contending parties, the proper course is to institute proceedings under s 145 and then the parties would have notice of the case they have to meet, and each party could put forward evidence to prove his possession of the land in dispute, **25. C. 798; 3 C. W. N. 463; 20 Cr. L. J. 194.**

17. Effect of possession in a proceeding under s. 107.—In a case of apprehended breach of the peace, persons entitled to the possession of the subject matter of dispute ought not to be called upon to furnish security inasmuch as they cannot be considered as aggressors and wrong-doers in defending rights which had been found in their favour Their willingness to submit to arbitration does not deprive them of any advantage that they might have derived from the result of a criminal prosecution and of the fact that possession had been found with them, **3 C. W. N 299.**

18. Section 145 imperative while this section discretionary [illegible]
leaves it to the Magistrate to dema [illegible]
upon him to institute proceedings [illegible]
297, there being a dispute as to land, the Magistrate issued a notice under this section One of the parties moved the High Court, contending that proceedings should have been taken under s. 145, and not under this section, *held* that it was not competent for the High Court to direct the Magistrate to proceed under s 145 The Court at the same time expressed an opinion that in disputes concerning land, provisions of s 145 are more suitable, but with this expression of opinion, left it to the Magistrate to consider whether it was necessary to institute such proceedings *See* also **3 C. W. N. 463; 6 C. W. N. 883** and **7 C. W. N. 29** and **746.**

(whom he had previously admitted to bail on their appearance) and remanded them to custody, *held*, that the re-arrest and remand were illegal as none of the special circumstances referred to in clauses (3) and (4) existed in the case and the Magistrate was therefore bound to release them on bail under s. 496, the provisions of which were imperative, **32 C. 80.** *Quære* whether under s. 115, and proviso to s. 114, the Magistrate has such power to re-arrest and remand persons whom, on their appearance, he had previously admitted to bail, **32 C. 80.** In **36 M. 474**, it was *held*, however, that the clear words of cl. (4) of this section which provides that a Magistrate before whom a person is sent may in his discretion detain such person in custody until the completion of the inquiry hereinafter prescribed cannot be qualified by s. 496. That section does not give an absolute right to bail to any person who appears or is brought before a Court and is not charged with a non-bailable offence, but must be read along with any other provision giving a special right of detention to the Court and cl. (4) of this section gives such power.

34-A. Where there is no final order by a Magistrate under this section the High Court will not interfere in revision (1916) **M. W. N. 37.** High Court in **27 C. W. N. 23** interfered in revision in the preliminary stage in s. 107 with proceedings on the ground that the materials on which the order was based was clearly insufficient.

34-B. Jurisdiction in appeal.—A District Magistrate has no jurisdiction in affirming a conviction of riot to order the accused to give security to be of good behaviour nor has he jurisdiction to order that a particular individual should be a surety, **16 A. L. J. 280.**

34-C. A Magistrate cannot alter order as to security.—Where one month after passing an order requiring the accused to furnish security in a certain sum to keep the peace, the Magistrate directed the accused to furnish security in a larger sum: *held* that the order was *ultra vires*, **20 Cr. L. J. 486.**

34-D. To justify an order under section 107 there must be evidence on the record that the persons from whom security is demanded are likely to commit a breach of the peace. Mere consent of the persons to be bound down is not sufficient. The likelihood of a breach of the peace must be established by independent testimony on oath, **21 Cr. L. J. 176.** But see the judgment of WALSH, J., in **21 A. L. J. 881** modifying his judgment in **21 Cr. L. J. 176 = 54 I. C. 784** and holding that a Court is perfectly entitled to act on a solemn and free consent amounting to a plea of guilty given before it by the accused, **46 A. 109.**

Security for good behaviour from persons disseminating seditious matter.

108. Whenever a Chief Presidency Magistrate or District Magistrate or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who within or without such limits, either orally or * in any other manner intentionally disseminates or attempts to disseminate, or in anywise abets the dissemination of—

(*a*) any seditious matter, that is to say, any matter the publication of which is punishable under section 124-A of the Indian Penal Code; or

(*b*) any matter the publication of which is punishable under section 153-A of the Indian Penal Code; or

(*c*) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code;

such Magistrate † if in his opinion there is sufficient ground for proceeding † may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties for his good behaviour for such period, not exceeding one year as the Magistrate thinks fit to fix.

* The words "in any other manner intentionally" were inserted by Act XVIII of 1923.
† The words "if ....proceeding" were inserted by Act XVIII of 1923.

27 **Procedure where defendant lives outside jurisdiction**—The proper course for a Magistrate to pursue when he believes that certain persons who are resident beyond the limits of his district are likely to commit a breach of the peace within his district is to cause information of the fact to be given to the Magistrate within whose district such persons reside and to produce evidence in support of such view in order that proceedings may be taken against them by a Court which has jurisd ction **11 C 737, 12 C 133**

28 **On transfer, Magistrate has jurisdiction to amend proceedings**—A Sub-divisional Magistrate instituted proceedings under this section and on objection being taken to his jurisdiction the District Magistrate transferred the case to a Magistrate outside the sub-divisioı and holding his Court at the Head quarters of the district. On the case being taken up certain objections regarding the incompleteness of the preliminary order instituting proceedings were taken The Mag strate thereupon amended the proceedings and drew up fresh proceedings but still relying on the same information Objection was then taken to the jurisdiction of the Magistrate to draw up fresh proceedi gs *held* that he had jurisdiction **29 C 389**

29 **European British subjects—jurisdiction of Magistrates limited by Chapter XXXIII** which *see*

30 **Person not immediately concerned cannot be bound over for acts of servants or partisans**—If the Magistrate does not find that the person called upon to furnish security is himself likely to cause a breach of the peace he cannot order him to furnish security **3 C. L R 280, 10 B L R 441 = 19 W R 47, 1881 A W N 182, 17 W R 54, 4 P R 1912** A non resident *Zemindar* cannot be bound over because his local agents are committing acts likely to cause a breach of the peace unless it can be shown that he is inst gating them to commit such acts **10 C L R 430** *See* also **11 C. 736; 39 C 150 (F B)**. Persons who do not go to the place where a breach of the peace is apprehended can be bou d under this section **1 Pat L J 361**

30 A. A District Magistrate has no jurisdiction to order security for good behaviour being given while affirming a conviction for riot **16 A L J 280**

Nor has he jurisdiction to order that a particular individual should be a surety *Ibid*

30 B How far the principle of autrefois acquit is applicable—A Magistrate is not entitled to institute proceedings under this section upon facts and information which have already been the subject of inquiry under this section or in connection with charges under the Penal Code brought against persons who have been discharged in those proceedings **41 M 246**

V—POWER OF MAGISTRATES NOT EMPOWERED UNDER SUB SECTION 1

31 **Has reason to believe**—The power to proceed under sub-sec. 3 ought to be used with the greatest caution The discretion of the Magistrate is very much limited by the language *has reason to believe* and not *is informed* as in sub-sec. 1 The question is not whether there was *belief* but whether there was *reason to believe* and not merely to *suspect* **6 B 402**

Cf—A person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise s 26 I P C

32 The words *or a Court of Session or the High Co irt* have been omitted before *has reason to believe* apparently as being unnecessary the Select Committee remarking We can find no reason for conferring powers under sub-sec. 3 of this clause (formerly s 108) which relate to inferior Courts on Courts of Session and High Courts So we have limited the sub-section to Magistrates not empowered to act under sub-sec. (1).

VI—SCOPE OF SUB SECTIONS (3) AND (4)

33. **Power of District Magistrate to detain in custody**—Where an accused is not sent before a District Magistrate by another Magistrate acting under cl (3) so as to bring the case within cl (4) such District Magistrate s order detaining the accused in custody is illegal Even if s 36 can be construed as giving powers which are not specially referred to in Sch III having regard to the terms of cl (3) the power is not one which can vest in the Magistrate to whom the accused is sent **31 M 616 (F B)**. *See* **32 C 80**

34 **Jurisdiction to remand person into custody—Right of person arrested to bail.**—Only in the special circumstances referred to in cls (3) and (4) does the law empower a Magistrate to detain a person against whom proceedings have been instituted under this section in custody until the completion of the enquiry Where a Magistrate on the report of the District Superintendent of Police directed the re-arrest of persons

Notes.—1. Section aimed at vagabondism.—The power conferred by this section is for the summary disposal of cases of vagabondism, where sturdy rogues are found to be lurking about, **1 Oudh S. C. No. 73.**

2. **The provisions of ss. 109 and 110 require to be carefully worked.**—It must appear from the proceedings whether the accusation which the accused has to meet is one under this section or under the next. The two sections must be carefully worked and care must be taken not to abuse them. Criminals released from jail must be given a fair chance of returning to honest ways, but when well-known habitual offenders are found under distinctly suspicious circumstances lurking at night in suspicious places, in possession of house-breaking instruments or implements for coining, travelling on the railway for no ostensible purpose except crime, or in possession of suspicious property which cannot be accounted for, such men should be put up before the Magistrates and an order, if possible, obtained.—*Mad. Pol. Man., p.* 89.

3. **Under what circumstances this section applicable.**—This section provides for taking security not from persons suspected of a particular offence, but from persons lurking within the Magistrate's jurisdiction who have not ostensible means of subsistence or cannot give a satisfactory account of themselves, **Ratanlal 63.** Magistrates are competent to put in force the provisions of this section whenever they have credible information that the accused had no ostensible means of livelihood or was unable to give a satisfactory account of himself, **31 C. 557; 6 A. L. J. 253;** and will be within the limits of their jurisdiction in trying a case irrespective of the manner in which it comes before them, **26 M. 124.** Clause (*b*) covers not only vagrants, but also suspected person and persons of any class who cannot give a satisfactory account of themselves, **13 Cr. L. J. 239 (C.).** A person who gives a false name and delivers letter secretly, containing incitement to commit crime or demanding money for the means of committing crime comes within the provisions of cl. (*a*), **15 Cr. L. J. 255 (C.).**

It is now held that the fact that a person while going away from a village gives a false name in the first instance and then gives the correct name, does not of itself amount to taking precautions to conceal his presence with a view to committing an offence, **21 A. L. J. 857.**

4. **Want of means of subsistence is not an offence.**—Inability to give a satisfactory account of oneself or want of ostensible means of subsistence does not amount to an offence, *see* s. 4 (*o*), **3 N. L. R. 51 = 5 Cr. L. J. 434;** or the fact that the person was concealing himself in order to avoid observation, **39 C. 456.**

5. **Mere want of means of subsistence is not enough.**—Evidence of mere want of ostensible means of subsistence is not of itself a sufficient reason for making a final order under s. 118. Otherwise jails would be quite full, especially in times of famine and scarcity. A Magistrate, however, is bound by this section to consider whether the order is really necessary in order to secure good behaviour which is a matter for the Magistrate's own judicial discretion, **Ratanlal 723.** So long as a young man out of employment is staying in his father's house and that father is a man of substance, able, if necessary to support him, he cannot be said to be without ostensible means of subsistence. The whole object of cl. (*b*) of this section is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction, **39 C. 456.**

6. **Meaning of 'give a satisfactory account of himself.'**—A Municipal peon whose residence and occupation were well-known, was said to prowl about night and was a companion of scoundrels and was armed with and using a *lathi*, was called upon to furnish security for his good behaviour. *Held* that words 'give a satisfactory account of himself,' did not mean to satisfy the Magistrate that he spends his time, or at least his leisure hours, in a satisfactory manner, and that the proceedings under this section could not be supported, **8 A. L. J. 1097 = 12 Cr. L. J. 536.** Where a person was found not in his own father's house, but in another district in the house of a man who was suspected of being a dangerous political conspirator, and to have collected a large amount of seditious literature. *Held, distinguishing* **16 C. W. N. 499,** that order of the Magistrate requiring such person to give an account of himself was justified. Section 109, cl. (*b*), applied not only to vagrants or vagabonds, but also covered cases of suspected persons who cannot give a satisfactory account of themselves, **13 Cr. L. J. 239 (C.), 53 C. 345=30 C. W. N. 380.**

7. **What are not sufficient grounds for demanding security.**—(i) *Doing no work.*—The law requires that before a man is called upon to give security, it should be proved that he has no ostensible means of substance. The mere fact that a man "*does not work*" coupled with admission of previeus conviction for bad livelihood, does not justify a Magistrate in directing him to furnish security for good behaviour, **5 C. W. N. 28.** (ii) *Belonging to a wandering trible.*—That a person belongs to a wandering tribe is not a sufficient reason for bringing his case under the purview of this section, **Weir II, 53.** (iii) Nor that he was once before convicted of bad livelihood, **5 C. W. N. 28.** (iv) Nor that he belonged to a gang which frequented *melas* and carried on games which might

No proceeding shall be taken under this section against the editor proprietor printer or publisher of any publication registered under and* edited printed and published in conformity with the rules laid down in the Press and Registration of Books Act 1867 † with reference to any matter contained in such publication ‡ except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf

Notes —1 Seditious speech to be judged from substance, not words—Meaning of Swaraj —The test is whether the person proceeded against has been disseminating seditious matter and whether there is a fear of a repetition of the offence In each case it is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances **11 Bom L R 743 = 10 Cr L J 379** Where the petitioner preached the promotion of *Swaraj held* there was nothing to bring the petitioner within the meaning of s 124 A I P C as *Swaraj* meant no more than home rule under the present Go ernment and hence the petitioner could not be bound over under cl (*a*) of this section **34 C 991** But *see* **32 M 3** as to the meaning of the word Swaraj *See* also **19 Bom L R 211**, *Emp* v *Balgangadhar Tilak*

2 **What amounts to promoting enmity between classes, s. 153 A, I P C** — To sustain an order under this section it is not sufficient that the language used was highly offensive to one community but it must be shown that he intended to provoke feelings of hatred or enmity between two communities It is not necessary however that he should have succeeded in exciting such feelings if a deliberate intention to do so can be inferred **4 Bur L T 84 = 12 Cr L J 248**

3. **What kind of evidence of intention or otherwise is necessary** —In **43 C. 591 = 20 C W N 199 = 23 C L J 105** the distinction between s 108 (*b*) and s 153-A I P C was pointed out and it was *held* that under s. 108 (*b*) one has only to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred and once such words are present it is not further necessary to prove the intention as under s 153-A I P C In **25 Bom L. R, p 97**, the applicants were proceeded against under this section as the author printer and publisher in respect of a pamphlet which offended against 124 A and 153 A I P C There was no direct evidence to connect any of the applicants with the pamphlet in question *Held* that the evidence in the case was insufficient to prove the first applicant to be the author The second applicant was the printer and disseminated the pamphlet yet he was not shown to have any knowledge of the matter published in it The third applicant was liable to be dealt with under this section and as publisher he could be presumed to have the necessary knowledge of the contents of the pamphlet **47 B 438**

4 To take action under this section it should be proved that if not prevented the accused would continue to act in the way in which he had done **30 All 854**

Security for good behaviour from vagrants and suspected persons

109. *Whenever a Presidency Magistrate District Magistrate Sub*divisional Magistrate or Magistrate of the first class receives information—

(*a*) that any person is taking precautions to conceal his presence within the local limits of such Magistrate s jurisdiction and that there is reason to believe that such person is taking such precautions with a view to committing any offence or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself such Magistrate may, in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding *one year* as the Magistrate thinks fit to fix

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* The words ed ted pr nted and publ shed were subst tuted for words or printed or publ shed by Act XVIII of 1923

† *S e* Act XXV of 1867 s 20 of wh ch empowers Local Governments to make rules As to rules in force in Madras, see *Fort St George Gazette* 1891 Pt I p 137

‡ The words w th referen e publ cat on ere nse ted by Act XVIII of 1923

2. **Magistrates specially empowered.**—In the Town of Madras the Commissioner of Police is empowered to act under this section by virtue of *Madras Act* III of 1888, s. 7. (*See* also the old Act, *Madras Act* VIII of 1867, s. 4.) In the Punjab, all first-class Magistrates have been empowered to act under this section—*Punj. Gazette, 3rd February*, 1882, *Pt. I, p.* 32.

3. **Proceedings of Magistrate not empowered.**—If any Magistrate, not being empowered by law in this behalf, demands security for good behaviour, his proceedings are void, s. 530 (*d*). For the effect of a transfer by a Magistrate not empowered to transfer, *see* s. 539 (*f*). The Magistrate must be competent both when he commences the investigation and at the date when he passes the final order, where, therefore, a Magistrate who, when he commenced the proceedings under s. 110, was a Sub-divisional Magistrate ceased to be so when he made the order, the order was held to be invalid, **17. Cr. L. J. 141. 33 In. Ca. 317 (All.)**.

4. It is not open to the trying Magistrate to put any arbitrary limit on the number of witnesses whom defence desires to adduce, **20 C. W. N. 408.**

5. **Proceedings under this section no bar to conviction under s. 401, I.P.C.**—An order under section 110 of the Code against an accused and detention in jail for failure to furnish security do not bar a subsequent trial and conviction under s. 401, I.P.C. Evidence of previous conviction of theft, and of being bound under section 110 is not admissible on a subsequent trial under s. 401, I.P.C., to prove either the commission of such offence or bad character, **147 C. 154.**

6. **No review under section 437 of proceedings under this section.**—Merely because the District Magistrate happens to take a different view of the evidence from that taken by the trial Magistrate it will not entitle him to review the order under section 437, **44 A. 691.**

I.—PERSONS OVER WHOM JURISDICTION MAY BE EXERCISED.

7. **Section aims at persons leading habitually dishonest lives committing crimes against property.**—'This section only relates to the calling upon of persons of habitually dishonest lives, etc., find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced, and not the security of persons alone is jeopardised. Mere proof that an accused person has been previously guilty or acts of violence will not justify a Magistrate in ordering him to furnish security under this section, **2 A. 835.** *See* also **6 W. R. 6; 12 C. 520; 10 B. 174;** Punj. Cir., Chap. XLIV, p. 167. This section ought not to be put in force when the information is as to the likelihood of a breach of the peace, **6 A. 132.**

7-A. **Repute and evidence of repute.**—The repute necessary to be proved under s. 110 of the Code need not necessarily be proved by the evidence of immediate neighbours, but that the evidence of witnesses living sufficiently near to be in a position to know the accused's real reputation was admissible. Also *held* it was not necessary for the Magistrate to make a local enquiry and examine witnesses other than those sent up by the Police, **2 Rang. 686.**

8. **Persons must be within the local limits of the Magistrate's jurisdiction.**—*I.e.*, any person residing within such limits is found to be a person answering to one of the descriptions given in clauses (*a*) to (*f*). The section does not apply to a person residing outside such limits, but who is by habit a robber, etc., *within* the jurisdiction of the Magistrate taking cognisance of the case; and therefore a Magistrate is not competent to issue a warrant under this section against persons residing in another jurisdiction, because the reputation a person may have must necessarily be reputation in the neighbourhood of his residence and not at some place far away from his home, **27 C. 993** at **p. 995.** Proceedings taken against a person outside are void, **3 C. L. J. 195 = 3 Cr. L. J. 246; 14 Bom. L. R. 889 = 1 Bom. Cr. Ca. 784 = 13 Cr. L. J. 796** and **12 P. R. 1901.** But in **36 M. 94, 26 C. 993** was dissented from, and it was *held* that the scope of the section was not restricted to persons residing within the Magistrate's jurisdiction but applied to all persons who were within the local limits at the time the Magistrate took action. *See* also **14 A. L. J. 1074.** In **10 C. W. N. 1022** it was also *held* that the words '*within the local limits of his jurisdiction*' are not equivalent to '*residing within the limits.*' It is sufficient to give the Magistrate jurisdiction if the evil habits of the accused were practised and evil reputation acquired within the local limits of his jurisdiction. *See* Notes 7 and 9 below.

9. **Permanent residence not necessary.**—The expression "any person within the local limits" has been expressly adopted to exclude the necessity of proving anything approaching permanent residence, and to leave it in the power of the Magistracy to deal with what are perhaps the most dangerous habitual criminals, who wander from place to place and have no well-known residence, where the Police or the

under certain circumstances be illegal, **6 A. L. J. 253.** (v) *Being a gambler or opium smoker*—The mere fact that the accused is a gambler or opium smoker is not in the absence of previous bad conduct sufficient ground for requiring him to give security for good behaviour **1 Bur S R. 246** (vi) *Being a player of ring game*—Where the accused in proceedings taken under this section admitted before the District Magistrate that he had no obstensible means of subsistence except through the play of what is known as ring game and was bound over under this section, *held following* **6 C L. J. 703** that the chief element of ring game was one of skill and was not an offence under the *Gaming Act* and therefore the petitioner could not be said to have no ostensible means of livelihood, **40 C 702.** In **15 Cr L. J. 276 (C)** a contrary view was adopted (vii) *Previous connection with a conspiracy*—The fact that the accused had previously been connected with any criminal conspiracy or might still be in correspondence with any criminal outside the jurisdiction would not be relevent under s 109 but might from the basis of a substantive proceeding under s 110 **39 C. 56,** clause 45 (*a*) refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest **18 Cr. L J. 825; 17 All. L. J. 432, 891. 18 All. L J 321**

8 **Person proceeded against need not be resident within the Magistrate s local jurisdiction**—To give jurisdiction to a Magistrate u der this section, it is not necessary that the accused person should have a residence within his jurisdiction **Weir II 53** Where a person put before a Magistrate under sub-sec (*b*) was discharged on the ground that he was not properly arrested and so not properly brought before the Court *held* following **26 M. 124** that the Magistrate was bound to decide whether the accused was or was not guilty of *vagabondism,* and it was immaterial for that purpose how he was brought there **31 C 557.** *See* also **13 Cr L J. 239 (C.)** But a Magi trate cannot call upon a person to give any account of his presence outside the jurisdiction of the Magistrate taking proceedings under this section **39 C. 456**

8 A If a man as taking precautions anywhere in order to conceal his presence within the jurisdiction of a Magistrate, he has jurisdiction to demand security from such a person though his residence is well known, **26 All. L. J. 1257=50 All. 909.**

9. Proceedings of Magistrates not empowered—If any Magistrate not empowered in this behalf demands security for good behaviour has proceedings are void s 530 (*d*).

Security for good behaviour from habitual offenders

110. Whenever a Presidency Magistrate District Magistrate, or Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

*(*a*) is by habit a robber, house-breaker or thief or forger, or

(*b*) is by habit a receiver of stolen property knowing the same to have been stolen, or

(*c*) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

*"(*d*) habitually commits or attempts to commit, or abets the commission of the offence of kidnapping, abduction, extortion, cheating or mischief or any offence punishable under Chapter XII of the Indian Penal Code or under section 489 A, section 489 B, section 489 C or section 489 D of that Code," or

(*e*) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or

(*f*) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix

Notes.—1. For the nature of the preliminary order, *see* s 112, for inquiry into the truth of the information s 117, for final order, ss 118, 119, s 120, as to when the period for good behaviour commences, s 121 for contents of bond and s 514 for procedure on forfeiture of bond For form of bond, *see* Sch V, No 11 and s. 407 for appeal and *infra,* for notes generally

* This clause was substituted for the original clause by the Cr P C Amendment Act (XVIII of 1923), s 18

14. Offences involving a breach of the peace, cl. (e).—This means offences in which a breach of the peace is an *ingredient* and not offences provoking or likely to lead to a breach of the peace. Therefore a person addicted to acts of immorality in attempting to seduce married women and behaving indecently and immodestly towards them, cannot be bound over under cl. (*e*) of this section, **30 C. 366; 38 C. 156.** *See* **25 C. 628,** and Notes 11 and 12 to s. 106.

15. Habitual offender, cl. (d).—The fact of a person having been convicted on a former occasion will not justify his being treated as an *habitual offender* under this Chapter, unless it be shown that since his release he has indicated an intention of returning to a dishonest course of livelihood—*Oudh S. C. No.* 70; **23 P. L. R. 1907; 29 P. R. 1910 = 196 P. L. R. 1910 = 11 Cr. L. J. 637.** *Habit* is to be proved by an aggregate of acts. **6 M. H. C. R. 120; 29 Cr. L. J. 574,** and to constitute a person an habitual offender, it is necessary that the subsequent offence charged should have been committed by the accused after the previous conviction, **Ratanlal 143.** The finding that an accused person, is by general repute, a habitual offender committing mischief and that he protects thieves is sufficient to warrant action under this section. It is not necessary for the purposes of the section that specific instances should be given, **9 Bom. L. R. 164 = 5 Cr. L. J. 178.** *See* also **20 C. W. N. 725.**

15-A. General reputation.—The General reputation of a man is that which he bears among his fellow-townsmen or his neighbourhood but evidence of general repute is evidence of a definite fact and is in no sense hearsay evidence, **26 A. L. J. 519; 29 Cr. L. J. 738.** A person cannot be put upon security merely because he was suspected by the Police six times of having committed various burglaries, **9 Lah. 586.**

16. Person of desperate and dangerous character, cl. (f).—" A man of desperate and dangerous character " in cl. (*f*) means a man who has a reckless disregard of the safety of the persons or the property of his neighbours, and under that clause, evidence of general repute, is not admissible. Evidence of acts of extortion committed by a person unless those acts were accompanied by acts causing danger to the person and property of other persons, is not sufficient to bring his case within cl. (*f*) of this section, **11 C. W. N. 789 = 6 Cr. L. J. 1.** *See* also **6 W. R. 6.** That a person is a nuisance to his neighbours, declines to pay his debts and abuses people who sell goods to him and makes indecent overtures to school boys who pass by his shop does not bring him within the scope of cl (*f*), **16 Cr. L. J. 582 (A.).**

17. Being a bad character or mere association with bad characters not within the terms of this section.—The finding that a person is a man of bad character does not bring him within this section, **8 M. L. T. 246 = 11 Cr. L. J. 638.** The mere association with bad characters is not sufficient, unless the association is to commit theft or dacoity, to bring him under this section. The facts that a landlord has tenants of bad character, that he lends money or paddy when the latter are in difficulty, and because they are the tenants and that he settles disputes between two men, one of whom is a thief and the other is not, do not subject him to a proceeding under this section, **6 C. L. J. 711.** *See* also **23 P. L. R. 1907; 12 Cr. L. J. 542 (Oudh).** *See* also **30 P. L. R. 1916; (Cr.) 19 A. L J. 951.**

18. Person bringing false claim does not come under this section.—Taking for granted the fact that the accused has been habitually committing extortion is that he was in the habit of bringing false claims by forged entries, it is not sufficient to demand security from him under this section, **25 P. R. 1884;** nor the obtaining of decrees by means of forged documents, **21 P. R. 1914 = 16 Cr. L. J. 136.**

19. Person earning livelihood by prostitution of wife.—The fact that the accused was a bad character and earned his living through prostituting one of his wives is not a good ground for demanding security from him, **5 P. R. 1892.**

When a particular offence is charged it cannot be proved by the evidence of general repute, **15 A. L. J. 208.** *See* also **(1918) M. W. N. 751; 19 A. L. J. 39.**

20. Habitual forger.—The fact that the accused is a habitual forger, does not bring his case within the purview of this section, **28 P. R. 1900.**

21. Suspected dacoit.—The fact that the accused has been arrested on suspicion of the commission of a dacoity and was released, does not justify an order under this section, **1 Bur. S. R. 422.** Similarly, where a person was tried on a charge of dacoity and acquitted, he cannot be proceeded against under this section, either on matters deposed to and disbelieved at the trial or on the evidence of persons stating that they began to suspect him since the dacoity case, **11 C. W. N. 129 = 4 Cr. L. J. 464,** *see* also **11 C. W. N. 413 = 5 Cr. L. J. 191; 11 A. L. J. 461 = 14 Cr. L. J. 407; 15 O. C. 263 = 13 Cr. L. J. 760; 15 Cr. L. J. 255 (C.); 43 A. 186.**

Magistracy could be sure at any time of finding them, **9 Bom. L. R. 244 = 5 Cr. L. J. 247; 36 M. 96.** *See* also **17 Cr. L. J. 319.** The words were construed to mean any person who is within the local limits at the time when the Magistrate takes action under the section It is not necessary that the suspect should be a resident within the local limits. But the suspect must be within the local limits when the Magistrate takes action, **14 Bom. L. R. 889 = 13 Cr. L. J. 796.** In **9 Bur. L. T. 39 = 17 Cr. L. J. 88,** it was *held* (not following **27 C. 993**) that a Magistrate is competent to take proceedings against a person who resides within his jurisdiction though he happens to be outside when arrested *See* also **17 Cr. L. J. 390 (A.)** where **36 M. 96** was followed

10. Occasional residence may be enough.—Where a Zemindar has a residential house within the jurisdiction of the Magistrate, and he occasionally, if not often, goes there to transact his business, the Magistrate has jurisdiction over him for the purposes of this section, provided the acts which call for proceedings under this section are committed by him while he so resides Where, therefore the Zemindar had been actually abetting other people to commit offences involving a breach of the peace in order to compel their *raiyats* to pay enhanced rents, *held* that such abetment brings him within cl (*e*) of this section, **31 C. 419, 38 C. 156; 23 C. W. N. 100; 20 A. L. J. 49.**

11. What does not amount to residence.—(1) *Detention in Police custody* would not constitute residence within the meaning of this section, even where such detention is legal, **23 B. 32; 43 P. R. 1885.** (2) *Persons undergoing imprisonment*—The words of s 110 " any person within the local limits of his jurisdiction, are obviously not intended to apply to persons undergoing imprisonment whether the jail happens to be within the local limits of the Magistrate's jurisdiction or not A Magistrate has therefore no jurisdiction to commence the proceedings against a person who is undergoing imprisonment, **4 L. B. R. 148 = 7 Cr. L. J. 447.** In **9 Bur. L. T. 39 = 17 Cr. L. J. 88 = 32 In. Ca. 680 (F.B)** the case in **4 L. B. R. 148** was overruled and it was *held* that the words ' any person within the local limits of his jurisdiction ' in s 110 apply to a person undergoing a sentence of imprisonment in a jail within the local limits of the Magistrate s jurisdiction But *see* **46 C. 215** which holds that the words " any person within the local limits " in section 110 of the Code do not imply residence but extend to the case of a person who has left the territorial jurisdiction of the Magistrate and has been brought back within the same in Police custody and is in jail under the Defence of India Act on the date of the institution of the proceedings

II.—CONDUCT COMING WITHIN THE PURVIEW OF THIS SECTION.

12. What amounts to habitually harbouring thieves, etc., cl. (c)—The acts *which* amount to harbouring must be done with the intention of screening the offenders from punishment and with the object of preventing him from being apprehended If a person from mere motives of humanity and without any intention of enabling the fugitive to escape from justice, were to give food to a man who is starving or surgical assistance to one who was wounded even with a full knowledge of his character, he commits no criminal act so as to bring himself within the purview of cl (*c*) of this section This clause is designed to meet only the case of professional receivers of stolen property who assist the thief by protecting him from discovery and arrest and by helping him to dispose of the stolen property, **(1910) U. B. R. Cr. P. C 4 = 11 Cr. L. J. 490, 22 A. L. J. 678**

13. When a person is said habitually to commit extortion, cl. (d).—Persons can only be said to commit habitual extortion when they are in the habit of committing extortion as individual members of the community, and not when certain acts amounting to extortion are committed by them merely as *burkundazes* or agents of a Zemindar, because the moment they are divested of their capacity, it would no longer be their interest to do such acts on behalf of the Zemindar and they certainly could not be likely to commit them in their individual capacity Where, therefore, certain persons committed certain acts amounting to extortion, the proper way of dealing with a case of this kind is to prosecute the perpetrators of these extortions, or those under whose orders they acted, for specific acts of aggression, and not to proceed against them under this section which is intended for prevention of crime and not for punishment of offences, **27 C. 781.**

13-A. Habit.—The word habit implies a tendency or capacity resulting from the frequent repetition of the same acts The words " by habit " and " habitually " imply frequent practice or use Those words are used in this section, in the sense of depravity of character, as evidenced by the frequent repetition or commision of offences mentioned in the section Where the conduct of the accused appeared only from a certain land dispute, held that they cannot be said to be habitual offenders, **6 Pat 1 = 100 I. C., 967.**

information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Note.—Merely informing an accused, that he was suspected to be a habitual thief is not a sufficient notice as required by section 112. There must be something in the nature of an indictment of charge containing substantial particulars indicating the grounds upon which the Police have given information to the Magistrate. It is only after the Magistrate has made the order required by section 112, which is really a notice in writing that the actual hearing under section 110 can by law take place at all, **18 A. L. J. 673; 43 M. 450.** An order not setting forth the substance of the information received is illegal, **30 Cr. Law. J. 839.** For meaning of the words "substance of the information" *see* **33 C. W. N. 852**; **A. I. R. 1929 Cal. 739.**

Procedure in respect of person present in Court.

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

Note.—Is present in Court.—As when a person is arrested under s. 55 under circumstances similar to those described in ss. 109 and 110 and brought before Court, *see* **2 B. L. R. Appx. 28.** Even if persons are illegally arrested, the Magistrate may proceed to initiate proceedings under the power conferred by the section, **12 Cr. L. J. 533 (B.)**

Summons or warrant in case of person not so present.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court:

Provided that whenever it appears to such Magistrate, upon the report of a Police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

Notes.—1. Form.—As to the form of the summons on information of a probable breach of the peace, *see* Sch. V, No. 12.

Under the 1872 Code the procedure was slightly different. The Magistrate issued a summons setting forth the particulars referred to in s. 112 and if the person summoned did not attend, a warrant might then be issued for his arrest, provided that a warrant might as under the proviso to this section, in certain circumstances be issued at once.

2. Shall issue a summons.—After dismissing a charge of criminal trespass and mischief, the Magistrate recorded an order in the presence of both parties, calling on them to show cause, on day fixed, why they should enter into recognisances to keep the peace, it was *held* it was not necessary also to issue a summons to them, **2 B. L. R. Appx. 28.**

3. Duty of Magistrate before issuing warrant.—The grounds on which the Magistrate found his order for issuing a warrant must, in all cases, be recorded.—*Punj. Cir., Chap. XLII*, *p.* 166. In ordering the arrest of a person under this section, the Magistrate must act upon recorded information. It is not enough for him to express a belief that such a course is necessary. Not only must he have "reason to fear the commission of a breach of the peace," but that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such a person, **6 A. 132 at p. 138 ; 14 A. 45.** *See* also observations of KNOX, J., in **36 A. 262.** Where the District Magistrate ordered the detention in custody of an accused person not sent before him under sub-sec. 3 of s. 107, *held*, that the order was made without jurisdiction. Even assuming that the proviso to this section applied in the case of a person before the Court, the order could not be supported under this section as the Magistrate has not followed the procedure prescribed, **31 M. 315 (F.B.).**

4. Warrant must be accompanied by preliminary order.—On a Police report that 16 persons should be bound over for good behaviour, the Joint Magistrate instead of sifting the evidence against each and

* Ss. 112 to 125 apply to all cases requiring security for good behaviour *under Upper Burma Frontier Crossing and Disturbed District Regulation* IX of 1887, *see* s. 5 (2), and under s. 6 of *the Punjab Frontier Crossing Regulation* VII of 1873.

22. **Proceedings against Zailadars, etc., in Punjab must be with District Magistrate's permission.**—Proceedings under this section shall not be taken against a Zailadar, Ala Lambardar Adn Lambardar, or Inamdar without the special order of the District Magistrate When such proceedings are instituted against a person of one of the abovenamed classes they shall be dealt with when practicable by the District Magistrate himself.—*Punj Cir No II of* 1898

22-A. Where a Magistrate makes an order in favour of one set of persons in a case under section 145 of this Code, any order made by him under this section against the other set is illegal when there is nothing to justify making such an order in proceedings taken under a different section, **14 A. L. J. 794**, *see* also **144 P. L. R. 1917 (Cr)**

22-B. Proceedings against persons, not confederates.—Proceedings against a man for *Badmashi* should be confined to him alone unless the case is that he has a confederate or partner to whom all the evidence is equally applicable, **20 A L J. 881.**

It is not permissible to take proceedings under s 110 of the Code against several persons jointly unless they are confederates or partners and against whom all the evidence is equally applicable **45 A. 109** A joint notice to show cause to more than one person is undesirable, **51. All. 663.**

23. **'Habitual criminal.'**—For the purpose of jail discipline, these words shall mean a prisoner so classed —

(1) By the Court or Magistrate that heard the case—

(*a*) because he has been convicted of an offence punishable under Chapter XII or XVII of the I P C, with three years imprisonment or upwards and has been previously punished on conviction for an offence under either of these Chapters and similarly punishable, or

(*b*) because from the circumstances of the case the Sessions Judge or Magistrate believes the prisoners to depend on crime as a means of livelihood or to have attained such an eminence in crime as to warrant his being classed with habitual or class B criminals

(2) By the District Magistrate or any Magistrate empowered by him on this behalf, the classification being made in accordance with the principle suggested for guidance of the Courts in clauses 1 (*a*) and (*b*) of this definition

(3) Subject to the control of the District Magistrate by the officer in charge of the jail when the prisoner is—

(*a*) sentenced or believed to be liable to punishment under s 75, I P C

(*b*) under sentence enhanced by reason of more than one previous conviction or

(*c*) known to have been repeatedly imprisoned for similar offences, or

(*d*) a member of a criminal tribe

Government of India Resolution, dated 14*th December*, 1886, *Punj Cir*, *p* 317, *Oudh Cr Dig p* 16

See Note 13 under s 55, *supra* for the definition of 'habitual criminal' under the New York Cr Pro Code, which is simpler than this

23-A. Previous Conviction.—Previous conviction of theft and similar offences should be taken into consideration as indicating the character of the accused **51 All. 663**, so also the fact that a person has been bound over previously under this section may be proved as one of the grounds on which the accused is believed to be an habitual offender **51 All. 275.**

24 Sureties.—The mere fact that sureties are residents of different Police districts and who helped accused in this defence will not make them improper as sureties, **16 All. L. J. 263.** Sureties should not be rejected on the ground that they do not show that they have sufficient control over the accused, **43 C 1024, 44 Bom. 385, 25 C. W. N. 140.**

111. [Omitted by Act XII of 1923]

112.* When a Magistrate acting under section 107, section 108, section, 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the

Order to be made

* Ss 112 113 115 and 117 do not apply to an enquiry under s 42 of the *Punjab Frontier Crimes Regulation* III of 1901

disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded :

Provided that—

*(*a*) no person against whom proceedings are not being taken under section 108, section 109, or section 110, shall be directed to execute a bond for maintaining good behaviour, and

* (*b*) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112 : "

(4) For the purposes of this section the fact that a person is an habitual offender † " or is so desperate and dangerous as to render his being at large without security hazardous to the community " may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Notes.—1. Meaning of 'or otherwise.'—The word '*otherwise*' would ordinarily mean something *ejusdem generis* with *general repute*, such as *hearsay*, not amounting to general repute. But it seems difficult to interpret the word in the sense in which the law would ordinarily read it. It seems to be the intention of the legislature that the Magistrate should use a very large discretion as to the evidence which he may admit in proceedings under s. 110, **1904 A. W. N. 104.** The word *otherwise* might also refer to evidence of specific instances. In a proceeding under section 36, of the Legal Practitioners' Act, 1879, the Court may properly apply as regards the nature of evidence adducible, the provisions of section 117 (4), **40 A. 153; 17 A. L. J. 147.**

2. Scope of sub-sec. (5).—Sub-sec. (5) refers to such cases as where several persons are charged with being concerned in a wrongful act that may occasion a breach of the peace (s. 107) or in an act regarding the dissemination of seditious matter (s. 108), but not to proceedings under s. 110, **4 L. B. R. 46 = 6 Cr. L. J. 284.** *See*, however, Note 39 at pp. 171-172.

3. General repute.—Evidence that the accused has a general reputation as a thief or robber may be allowed but no evidence to the effect that he is a bad character or that he has the general reputation of being a bad character should be allowed, **26 A. L. J. 519.**

Order to give security.

118. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties the Magistrate shall make an order accordingly.

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or of a period longer than, that specified in the order made under section 112:

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive:

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

* Added by Act XVIII of 1923.

† Words in the inverted commas were added by Act XVIII of 1923.

proceeding under s 112 issued non bailable warrants wholesale under the *proviso* to this section and they were not accompanied as required by s 115 by copies of the order passed under s 112 *Held* that the proceedings of the Joint Magistrate were illegal **Weir II, 55** *See* Note 2 under s 115

5 **Proviso limited to cases under s 117** —The words *reason to fear the commission of a breach of the peace* seem to limit the Magistrate s power under the *proviso* to cases under s 107 This proviso is not a substantive provision standing by itself but relates to the circumstances set out in this section Therefore it does not give power to re arrest persons who had been already discharged after giving security bonds **A I R 1929 Pat 654**

6 **Magistrate cannot issue warrant against person not within his jurisdiction** —A Magistrate can not legally issue a warrant under this section for the arrest of a person who has already left the local limits of the Magistrate s jurisdiction To give the Magistrate jurisdiction the person proceeded against must be actually and physically present in the district in which the Magistrate exercises his jurisdiction **14 Bom L R 889 = 1 Bom Cr Ca 185 = 13 Cr L J 796**

Copy of order under s 112 to accompany summons or warrant

115. Every summons or warrant issued under section 114 shall be accompanied by copy of the order made under section 112 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with or arrested under the same

Notes —1 Copy of the order must be served —The serving officer in certifying service must also certify to delivery of the copy of the order *See* ss 70 and 71 as to service of summons

2 **Omission to send copy of order** —The omission to send the copy of the order with summons does not invalidate the proceedings It is an irregularity cured by s 537 **11 Bom L R 740 = 10 Cr L J 375** But *see* **Weir II, 55, 17 M L J 438**

Power to dispense with personal attendance

116. The Magistrate may if he sees sufficient cause dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace and may permit him to appear by a Pleader

Notes —1 Appearance by Pleader when permissible —Where the person against whom proceedings have been taken under s 107 is residing at a distance and there are no special circumstances making his personal attendance necessary the Magistrate would be wisely exercising his discretion if he allowed him to appear by a Pleader **12 C 133**

2 **Section applies only to bonds to keep the peace** —It should be noted that this section applies only to a case under s 107 but not to cases under ss 108 109 and 110 Personal attendance cannot therefore under this section be dispensed with when the matter of complaint falls under s 108 or s 109 or s 110

Inquiry as to truth of information

117. (1) When an order under section 112 has been read or explained under section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with or in execution of a summons or warrant issued under section 114 the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary

(2) Such inquiry shall be made as nearly as may be practicable where the order requires security for keeping the peace in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases except that no charge need be framed

*(3) Pending the completion of the inquiry under sub-section (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or

* Added by Act XVIII of 1923

(3) If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Imprisonment in default of security.

123. (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given, commences, he shall, except in the case hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

Proceedings when to be laid before High Court or Court of Session.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the *Sessions Judge* or, if such Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring *from the Magistrate* any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

* (3-A) If security has been required in the course of the same proceedings from two or more persons in respect of anyone of whom the proceedings are referred to the Sessions Judge or the High Court under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security.

*(3-B) A Sessions Judge may in his discretion transfer any proceeding laid before him under sub-section (2) or sub-section (3-A) to an Additional Sessions Judge or Assistant Sessions Judge, and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

Kind of imprisonment.

(5) Imprisonment for failure to give security for keeping the peace shall be simple.

(6) Imprisonment for failure to give security for good behaviour † "shall, where the proceedings have been taken under section 108 be simple and, where the proceedings have been

* Sub-sections (3-A) and (3-B) where inserted by the Cr. P. C. Amendment Act (XVIII of 1923), s. 21.

† Words in the inverted commas, substituted by XVIII Act of 1923

Note—There must be an enquiry, the mere fact that the person was prepared to execute the bond does not make the order legal **117 I C. 807 = A. I. R. 1929 Lah. 504**

Discharge of person informed against

119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry shall release him, or, if such person is not in custody, shall discharge him

Note.—Discharge means 'permission to depart.'—The term discharge may have two meanings S 119 indicates that its meaning in that section is non technical The discharge under this section is merely a permission to depart The jurisdiction given by s 437 should not be applied to cases under this Chapter at any rate where before making an order under s 119 the Magistrate has called on the person into whose conduct the inquiry is made to establish his defence **33 M. 85, 36 M 315.** The word discharge is used in contradistinction to the word 'release, **1899 A. W. N. 203** But in **35 B 401** it was *held* that there was no valid ground for departing from the ordinary sense of the word *See* Notes 131 and 132, *supra*

C.—Proceedings in all cases subsequent to order to furnish security.

Commencement of period for which security is required

120. (1) If any person in respect of whom an order requiring security is made under section 106 or section 118, is at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence

(2) In other cases such period shall commence on the date of such order unless the Magistrate for sufficient reason, fixes a later date

Note.—Object of sub-section (2)—It is not the object of sub-sec. (2) to enable a postponement of the operation of the second order for security to keep the peace passed while the first order is still subsisting The object is to allow the Magistrate in this manner to give time to a person bound over, to obtain security instead of at once proceeding to order imprisonment as if in default, **4 C. W. N. 121.** This is shown by s 123 which provides that the security must be given *on or before* the date on which the period for such security *commences* *See* **24 A. L. J. 327.**

Contents of bond

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond

Note.—This section lays down definitely what would constitute a breach of the bond given.—The breach must be confined to those acts and cannot be extended to the commission of any other acts, but at the same time it has nowhere been laid down in the Code that the person giving the bond should actually be convicted before proceedings are taken against his surety **50 All 666.**

Power to reject surety

***122.** (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him

(2) Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him

* Substituted for the old section by Act XVIII of 1923

order for detention of the accused on their failure to furnish the bonds required, **1899 A. W. N. 151.** He is bound to find the special ground, on which the order is passed having special reference to s. 110. Mere finding in general terms that it is for the interests of the community at large that the defendant should be bound over to be of good behaviour is not sufficient, **27 C. 656.** *See* also **4 L. B. R. 135 = 7 Cr. L. J. 412; 5 S. L. R. 87 = 12 Cr. L. J. 410.** Where, however, a Magistrate after making an order requiring security for good behaviour for a period of three years, directed that in default of finding security, the accused should be rigorously imprisoned for three years and the Sessions Judge acting under this section *confirmed* the said order, it was held that although the order of the Magistrate was bad and so far as the direction of imprisonment for three years was concerned made without jurisdiction, yet it might under the circumstances be taken to be the order of the Sessions Judge who was the proper person to make such an order, **1903 A. W. N. 28.**

8. Judge may remand for taking further evidence.—The law is now altered by the introduction of the words "*from the Magistrate*" after the words "*requiring*." **24 C. 155** is therefore superseded and the Sessions Judge is now competent to remand the case to the Magistrate for further evidence, though the Sessions Court is not prevented from itself taking such further evidence.

9. Judge must himself consider the fitness of the sureties.—As the Judge's order is necessarily an original order of the Sessions Court, the adequacy of the security should be decided by that Court as appears from sub-sec. (4). The Magistrate has no jurisdiction to inquire into the witness of the sureties, **5 S. L. R. 87 = 12 Cr. L. J. 410.**

10. No power to refer case to Joint Sessions Judge.—Under the present amendment a Sessions Judge may transfer any proceedings laid before him under sub-section (2) or sub-section (3-A) to an Additional Sessions Judge or to an Assistant Sessions Judge, though a direct reference by a Magistrate under this section to an Additional or Assistant Sessions Judge may not be legal.

11. Judge must show in his judgment that he has considered the case of each individual.—Though it may be open to doubt whether the provisions, of ss. 367 and 424, apply to orders under s. 123 (3), the Judge in writing his order should show that he has considered the case of each individual prisoner as it is his duty to do. Even if the order need not contain all the details required by s. 367, still each prisoner has a right to have his case considered on its own merits and the order must show that this has not been lost sight of, **37 C. 91.**

12. Term of imprisonment should generally be same as the period for which the security is demanded.—Although a Sessions Judge is competent to award any term of imprisonment not exceeding three years, yet it is *advisable* that the term of imprisonment in default ordered under this section should *always* be the same as the period for which security is directed to be given, **28 A. 422; 4 L. B. R. 135 = 7 Cr. L. J. 412.**

13. Magistrate dissatisfied with Sessions Judge's order should move High Court through Public Prosecutor.—If a Court of Session refuses to confirm the order of the District Magistrate under this section, he cannot refer the case to the High Court under s. 438. His proper course is to ask the Public Prosecutor to move the High Court for the revision of the same, **23 C. 249; 28 A. 91.**

III.—CLAUSE (4).

14. Procedure when security tendered to Superintendent of Jail.—The new cl. (4) deprives Superintendents of Jails of the power they formerly had of releasing persons if the security tendered was to their satisfaction. This power has now been taken away, being inconsistent with s. 122.

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taken under section 109 or section 110"* be rigorous or simple as the Court or Magistrate in each case directs

Notes.—1. For form of warrant of commitment on failure to find security to keep the peace and for good behaviour, and to discharge a person imprisoned on failure to give security *see* Sch V, Nos 13, 14 and 15 *see* s 125 for discharge of sureties

2 **As to punishment for escaping, etc.,** *see* ss 224 and 225, I P C

I.—DUTIES OF REFERRING MAGISTRATES.

3. Reference to Sessions Court necessary only when security for over a year is required and default is made.—The whole section has reference only to the case where default is made in furnishing the security required If that security is given, the section does not apply and no reference to the Court of Session is necessary, **23 C 621, 15 A L. J. 822.** When a Magistrate makes an order requiring an accused to give security for over a year, the Magistrate is not himself empowered to pass an order for imprisonment in default of the security being given All he is empowered to do is to issue a warrant, directing that the accused be detained in prison pending the orders of the Sessions Judge, **4 L. B R. 135 = 7 Cr. L. J. 412; 6 P. R. 1914 = 142 P. L. R. 1914 = 16 Cr. L. J. 337.** When a Magistrate passes a sentence of imprisonment and makes an order under s 106 to furnish security to keep the peace for over one year, he should submit the proceedings under sub-sec (2) for the order of the Sessions Judge as soon as possible after passing the sentence and the Sessions Judge has jurisdiction under sub-sec (3) to deal with the case even before the expiration of the sentence of imprisonment **5 L. B. R. 34 (F.B.).** Apparently the Magistrate could act under this section when the sureties tendered have all been rejected under s. 122 pending the orders of the Sessions Judge the Magistrate can accept security The purpose of the security sections is not that the person proceeded against should be sent to or kept in jail unless they are unable to give security and the reference to the Sessions Judge automatically ends with the acceptance of security by the Magistrate, **29 Cr. L. J. 236.**

4. Magistrate cannot himself pass order of imprisonment and then refer to Sessions Court.—The Magistrate cannot sentence the accused to imprisonment and then send his order for confirmation to the Sessions Judge, **1899 A. W N. 151.**

5. Recording of evidence by Presidency Magistrate when referring case to High Court —A Presidency Magistrate is not absolved from duty of recording evidence in a case when he makes a reference to the High Court, **13 C. W N. 318 = 10 Cr. L J. 122,** *distinguishing,* **33 C. 136.**

II.—POWERS AND DUTIES OF SESSIONS JUDGES AND HIGH COURTS UNDER 123 (3) ON REFERENCE.

6. Notice must be given to person directed to furnish security and he must be heard—Where a Sessions Judge without giving notice to the accused made an order directing certain persons to be rigorously imprisoned for three years in the event of their failing to furnish security and tried to support his procedure on the ground that the Code had made no provision for giving notice to the accused before disposing of references under this section and that it was his usual practice to take up references at the first convenient opportunity and that it was not usually practicable to intimate the date of the hearing to the person concerned, the High Court condemned such procedure as one which might result in *the denial of justice* and utterly unwarranted by law and set aside the order made by the Judge and directed re-hearing after notice, **25 A. 375.** On a reference under this section, a Sessions Judge is bound to give notice to the defendant, **27 C. 656**, and also to hear the pleader appointed by him who *(though not accused of any offence)* is ordered to give security for good behaviour under s 118, **23 C. 493; 4 C. W. N. 797; 27 C. 662, 3 L. B. R. 43; 21 A. 107; 15 P. R. 1900; 16 B. 661; 5 L. B. R 33 (F.B.), 35 B. 271.**

7. Judge must deal with the merits and pass his own order.—The Judge is bound to go into the merits if so required, **35 B. 271; 12 C. W. N. 463.** When a case is referred to a Sessions Court under this section, it becomes the duty of that Court to pass its own order on the proceedings of the Magistrate, stating the period for which the security is to be given and the prisoner is to be imprisoned in default, **6 C. P. Cr. 27.** It is the duty of the Judge in a case of reference to consider the evidence and to pass an order after doing so and not as mere matter of course, **29 P. R. 1910 = 196 P. L. R. 1910 = 11 Cr. L. J. 637.** He should not pass an order confirming some other order which the Magistrate may have passed, since the Magistrate has no power to pass an

* This Amendment was effected by Act X of 1926

discharged. An attempt was made to obtain evidence against them sufficient for a conviction under s. 400, I.P.C., but that evidence was not forthcoming. Thereupon as the Police information in the case gave the District Magistrate reason to believe that it was necessary to bind over some of these persons to be of good behaviour, he took proceedings against five out of the eight and after the usual procedure made an order binding them over: *held*, that the order of the District Magistrate was good. The case in **11 C. W. N. 413 = 6 Cr. L. J. 191** does not lay down any general rule that proceedings under s. 110 should not be instituted with a view to bind down persons on an indefinite charge after prosecution against them on definite charges under the I.P.C., have failed, **32 A. 55.** *See* also **6 A. L. J. 487.** The Oudh Chief Court set aside an order under s. 110 against a person who, after acquittal of a charge of dacoity, was charged by the Police under s. 110 on practically the same evidence as was offered at the trial, **17 Cr. L. J. 184 = 33 In. Ca. 24.** But *see* **43 A. 2, 186.**

It is impossible to accept the proposition that the evidence going to show that a substantive offence has been committed or which might form the basis of a charge of a substantive offence, is necessarily to be excluded in proceedings under s. 110 and cannot form the basis of an order under s. 112 and s. 118 of the Code, **47 A. 733;** *see* **47 M. L. J. 689.**

3. **Section 110 ought not to be used to harass individuals to satisfy private vengeance.**—A Magistrate cannot be too cautious in making sure that provisions intended for securing the peace of the community are not utilised for creating private vengeance under the ægis of a Crown prosecution, **38 C. 156.** The law enabling security to be taken from a person who is proved to be by common report a habitual thief is no doubt a salutary law, but it is a hard law that can be used for oppressive purposes, unless the Magistrates who are called upon to apply it exercise their judicial discretion in a judicious manner, **5 P. R. 1892.** It is to be feared that it is often resorted to as a means of ensuring the punishment of the person suspected, but not proved to have committed offences such as theft, etc., and it is notorious that accusations of bad livelihood are constantly made merely with the object of blackening an enemy's character and of satisfying feelings of spite and hatred. Under these circumstances it is incumbent on Magistrates to exercise the greatest caution and impartiality and to be careful not to be influenced by outside gossip and vague rumour, **4 P. R. 1898; 38 C. 156.**

4. **Section 107 ought not to be used so as to prevent persons from lawfully exercising their rights.**—The provisions of Part B of Chapter VIII are not to be arbitrarily used to prevent persons from legally exercising their rights of property, nor is a person in a high position to be subjected to the indignity of being called upon to find sureties to an excessive amount simply because of that position, **6 A. 26 (F.B.).** *See* also **11 C. W. N. 840; 12 C. W. N. 703; 34 C. 935.** S. 107 is not intended to prevent a private person from exercising his right of property, because another person would be likely to commit a breach of the peace if he did so. **19 W. R. 47 = 10 B. L. R. 441; 15 P. R. 1902 = 104 P. L. R. 1902 (F.B.); 6 Bom. L. R. 862; 12 C. W. N. 703 = 7 Cr. L. J. 504; 15 Cr. L. J. 661 (M.).** It is illegal and contrary to the provisions of s. 107 to take recognisances from one person in order to prevent another from committing a breach of the peace, **17 W. R. 54; 4 P. R. 1912 = 125 P. L. R. 1912 = 11 P. W. R. 1912 = 13 Cr. L. J. 126.** The preventive jurisdiction of a Magistrate under s. 107 must be exercised with caution. Where its exercise may lead to the infringement of an undoubted civil right, where on obligation, which the law of the country imposes, becomes incapable of being enforced owing to the exercise of such a jurisdiction, and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way, and the illegal denial of the corresponding obligation of the other party, the Magistrate should not bind down the party who has the legal right in him. In a proceeding under s. 107, if there are doubts as to the existence of the respective rights and obligations of the parties, the Magistrate should bind down both parties, so that his order may not be detrimental to either. Where, however, no doubt exists, the party in the wrong should be bound down. An attempt to ascertain legal rights of the parties should always be made by the Magistrate, before he binds down one or the other party under s. 107, **34 C. 935.** *See* also the cases cited in Notes 15—22 to s. 107.

5. **Chapter not intended whereon to give time to Police to work out a substantive case.**—The petitioners were detained in the Ludhiana lock-up, pending the completion of the Police inquiry into a number of charges of dacoity committed in the Delhi District, and in various districts of N.-W.P. in which they were believed to be implicated. The attention of Government having been drawn to the delay which had taken place in bringing them to trial, orders were given that they should either be brought to trial or discharged within one month from that date. Thereupon the District Superintendent of Police represented to the District Magistrate that no trial for the substantive offences could be launched immediately, as the attendance of the absent witnesses could not be secured, and proposed that the accused should be brought to trial for bad livelihood under the

GENERAL NOTES TO THE CHAPTER.

ANALYSIS

I.—OBJECT OF CHAPTER.

Notes.—1. Object of proceedings is prevention of offences, not punishment.—The object of proceedings under s 107 is not to punish persons for what they might have done, but to prevent them from committing a breach of the peace, **9 C W. N. 898 = 1 C. L. J. 616; 27 C. 781.** A Magistrate when passing an order in terms of section 110, should not have any direct intention of inflicting punishment, for the object of the section is the prevention, not the punishment of crime, and with that object it authorises Magistrates to take from certain persons good and sufficient security for their good behaviour, **1 C. L. R. 268; 7 A. 67.** Nor should there be excessive exercise of power, beyond what is absolutely necessary, **6 A. 214 at p 219; 26 M. 471.**

(*a*) *Provisions of the Chapter are not to be used for punishing past offences*—The object of this Chapter is the prevention and not the punishment of crime, and it is solely for the purpose of securing future good behaviour that the provisions of section 110 can be used Any attempt to use it for the purpose of punishing past offences is wrong and not sanctioned by law Where a person is actively being prosecuted on a substantive charge and has given bail which the Magistrate deems sufficient for his appearance when required, the Magistrate cannot proceed against him simultaneously under this section **1 C L. R. 268** at **p. 271; 2 C 110; 7 A. 67** at **p. 72; 10 B. 174, 7 C. L. R. 352.** It is wrong to use these sections so as to add to the punishment for past offences The object of taking security from a person is solely to secure his good behaviour in future, **10 B. 174; 2 A. 835; 13 C. W. N. 318 = 9 Cr. L. J 439 = 10 Cr. L. J. 122.**

(*b*) *Chapter not confined to cases where actual offences have been committed*—The power contained in section 110 is a preventive power and not a punitive one, therefore its exercise is not to be confined to cases in which positive evidence of the commission of crime is forthcoming against the persons charged, **3 M. 238; 10 M. L. T. 333 = 12 Cr. L. J. 328.** In such cases, evidence of general repute, though unsupported by evidence of particular instances of crime is admissible. (*See* also **27 C. 781; 43 P. R. 1885; 31 C 350; 9 Bom. L. R. 164 = 5 Cr. L. J. 178) 23 A. L. J. 18.**

2. Security for good behaviour may be required on failure of charge of substantive offence.—Eight persons were sent up for trial on a charge of dacoity, but the evidence against them being insufficient were

4 N.-W. P. H. C. R. 117; 6 C. 14; 14 A. 45 at p. 46; 17 C. W. N. 238 = 16 C. L. J. 467 = 14 Cr. L. J. 5; 38 C. 166. The powers should therefore be exercised always with careful discretion by the Magistracy, though its exercise is not to be confined to cases in which positive evidence is forthcoming of the commission of crime by the persons against whom this section is sought to be enforced.

9. One whose term has just expired should not be called upon to enter into fresh recognisance.—*R*, who was bound over under this section for a term of three years and which term had expired on the 13th of June, 1905, was on the 20th of June, 1905, called upon to show cause why he should not execute fresh bonds to be of good behaviour. *Held*, that the interval of a week was not long enough to give *R* any opportunity of showing that he was willing to adopt an honest livelihood and that evidence relating to events prior to 13th June, 1905, was inadmissible in support of a fresh order under section 110, **1906 A. W. N. 30 = 3 A. L. J. 29 = 3 Cr. L. J. 96.** *See* also **1905 A. W. N. 34.** There should be new proof of bad livelihood or that the person is not capable of following an honest calling, **6 W. R. 18; (1911) 2 M. W. N. 355 = 12 Cr. L. J. 359.** Such proceedings must be confined to facts and circumstances alleged against him after release from his last security, **19 C. W. N. 223 = 16 Cr. L. J. 312; 28 A. 306.** If on being set at liberty he should return to his former course of life and continue to be a person of such a character whom it is dangerous to the society to leave at large, he may then be brought before a Magistrate and after evidence of his proceedings had been laid before that officer, a further order might be made requiring him to give fresh security.—*C. H. Pro., 29th July*, 1862. *See* **12 C. 520 and 17 Cr. L. J. 85 = 20 C. W. N. 725.**

10. Sufficient locus penitentiæ must be allowed.—"The mere fact of previous convictions of offences involving dishonesty is not sufficient to justify the putting in force the powers under section 110, unless there is additional evidence to show that the person complained against has done some Act, or resumed avocations, that indicate on his part an intention to return to his former course of life, and to pursue a career of preying on the community. The greatest thief is entitled to a *locus penitentiæ*, when he has served out his punishment; it is only when he outrages that grace which is extended to him, and thereby shows that he is unreformed that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for society that he will not commit further depredations upon it," **2 A. 835 at p. 837; 11 C. W. N. 238; 16 C. L. J. 467 = 14 Cr. L. J. 5.** Where a person who was imprisoned for one year for failure to furnish security under this section, was required again after the expiry of 15 months from his release to furnish security under s. 110, *held* that the order was bad, the accused not having had sufficient *locus penitentiæ* and that the bad reputation which he had before imprisonment had still followed him and permeated the evidence of many of the witnesses, **31 C. 783; 10 M. L. T. 333 = 12 Cr. L. J. 328; 1911 M. W. N. 356 = 12 Cr. L. J. 359; 28 A. 306; 9 B. L. R. Appx. 30 = 18 W. R. 44; 15 W. R. 18; 6 W. R. 18; 19 C. W. N. 223; 16 Cr. L. J. 312;** and *see* **2 A. 835, 18 Cr. L. J. 710.**

11. Points to be noted in fixing security.—(*i*) *Object of security.*—Proceedings under section 110 are intended to be precautionary and not punitive—and therefore security should not be required to a very large amount, **31 C. 350.** The object of taking a bond is not to obtain money for the Crown, but to prevent crime, **36 C. 562.** The object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law, **6 P. R. 1914 = 142 P. L. R. 1914; 8 S. L. R. 173 = 16 Cr. L. J. 100.**

(*ii*) *Term of security should cease with necessity.*—The order for security should not be for the extreme term of one year, except when it is absolutely necessary, *e.g.*, where disturbance of the peace is expected in a *mela* or fair which is to last for not more than a fortnight, taking security for one year is not only unnecessary, but excessive, **6 A. 214,** also *Punj. Cir., Chap. XLV., par* 12*a. a.* *See* also **16 Cr. L. J. 614 (M.).**

(*iii*) *Magistrate demanding sureties in addition to heavy recognisance acts illegally.*—The powers given by section 110 should be exercised with extreme discretion. Where a Magistrate required six of the prisoners before him to find two sureties in Rs. 500 each for their good behaviour, and also to furnish their own recognisances, three to the amount of Rs. 1,000, two of Rs. 500 and one of Rs. 250 all to be deposited in cash, the High Court quashed the order directing the prisoners to deposit cash and to provide sureties as bad in law; and in lieu thereof directed six of them to enter into bonds for their good behaviour in the amount which they were directed to deposit in cash, **6 C. 14 = 6 C. L. R. 128.**

(*iv*) *Such conditions only ought to be imposed as the accused has a fair chance of complying with.*—The power given by section 110 is one that should be exercised discreetly, and in fixing the amount of security, the Magistrate should consider the station in life of the person concerned and should not go beyond a sum fo

Code so as to give time for the preparation of the case against them under the Penal Code Orders were thereupon issued for the trial of the accused for bad livelihood which resulted in security being demanded from them, failing which they were sentenced each to one year's rigorous imprisonment In setting aside the order on revision the Chief Court observed "We are of opinion that the proceedings should never have been instituted in the L. District and were not authorised by Chapter VIII, but were an *abuse of the provisions of that* Chapter The object of that Chapter is not the punishment of offences, but the prevention of crime, and it is clear that there was no risk of crime being committed in the L District by presons who were brought in custody from different places with a view to an inquiry in that district into offences alleged to have been committed by them While s 110 applies to persons within the local limits of a Magistrate s jurisdiction who belong to any of the classes there described it does not follow that it was contemplated that the Police should be at liberty to bring persons from distant places to a place within those limits for the purpose of inquiry as to offences committed elsewhere and then to ask the Magistrate to exercise his jurisdiction under this section, on failure to prove the specific offences charged Much less can it be supposed that for the purpose of preventing the prisoners from being returned as detained in the lock up pending inquiry for a lengthened period the Police could ask the Magistrate to institute proceedings under this section, on the same evidence which would afterwards be used to prove the specific offences charged with a view to their being required to furnish security and imprisoned on their failure to do so This appears to have been the sole object of the proceedings in the present case * * * The jurisdiction given by this section is in terms confined to persons within the limits of the Magistrate s jurisdiction, and certainly cannot have been meant to extend to persons who were within those limits merely because they had been brought there in Police custody, especially as it is clear that there was no risk of those persons, however criminal their character, committing the offences to prevent which security may be required, while they remain in Police custody"—*Per* BARKLEY, J, in **43 P. R. 1885.** This section is not intended to afford the Police a means of keeping a suspected person under detention until they are able to work out a case against the accused, **10 A. L J. 351 = 13 Cr. L. J 827.**

II.—POINTS TO BE NOTED BY MAGISTRATES.

6. Provisions of the law must be strictly attended to — We think it very desirable that Magistrates should in the performance of their duties, attend strictly to the provisions of the law This is desirable on many grounds and if there were no other reason for desiring it, on this ground alone, that it would save a number of references which take up a considerable portion of the time of this Court, and which are rendered possible merely because Magistrates do not pay that attention which they might reasonably be expected to pay to the express provisions of the law, **8 C. 724.**—" The Judges have reason to believe that the provisions of this Chapter are not generally understood or observed and the attention of Criminal Courts is accordingly invited to them It should be noted that by the present Code the power of demanding security for good behaviour has been considerably curtailed, and that certain conditions which were not required by the previous Code (Act X of 1872), must now be complied with before process can issue and before a final order can be passed, calling upon a person to furnish security of either sort' —*Punj Cir p* 165

7. Procedure laid down must be carefully followed.—It is generally in respect of cases coming under section 110 that the neglect of the provisions of the Code has come to notice In the first stage of the proceedings in this class of cases and before actual inquiry is made in the presence of the accused three points need attention—(1) the information, (2) the order thereon, stating the substance of the information (s 112) The order should set fo th a definite period for which the security is required, **3 M. 238**; (3) communicating the same to the accused (ss 113 and 115) The information is the foundation of the whole proceeding, and the fact that the Magistrate is acting upon information should be recorded. No information should be acted upon unless it comes from a trustworthy source, and is such that, if substantiated and not rebutted, it will justify a finding that the person charged answers to one or more specific descriptions given in this section.—*Punj Cir, p* 165, *Oudh Cr Dig, p* 4

8. Magistrates must exercise their powers with discrimination and discretion after very full and searching inquiries—As the powers of Magistrates under Chapter VIII are very great, so they require to be exercised with sound discrimination and discretion, and in cases under s 110 after a very full and searching inquiry, **1889 A. W N. 114.** S 110 arms the Magistrate with very powerful means for securing the interests of the community from injury at the hands of hardened offenders of the most dangerous classes But its good effect will be lost, if it is applied too freely and to persons whose cases are not within the spirit of its provision,

and definite, directly affecting the person against whom process is issued, and should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet, **6 A. 26 (F.B.)**; **8 S L. R. 207 = 16 Cr. L. J. 235.** Information that the accused have committed "*diverse acts of oppression*" is too vague to enable proceedings under section 110 being taken, **7 C. W. N. 32**; **16 P. R. 1888** and **6 A. 214.** To justify an order under section 107 there should be evidence of some specific conduct on the part of the accused from which a reasonable and immediate inference could be drawn that the accused was likely to commit breach of the peace; and it is only upon information of this character that a Magistrate should institute proceedings under s. 107. The mere finding that the accused is a bad character, and it is not right in any way to leave such a person without a guarantee of good behaviour, is wholly insufficient to justify an order under that section, **21 P. R. 1888.** To constitute a proper foundation for an order under section 107, it is necessary that the Magistrate should adjudicate upon legal evidence before him that the person against whom the order is made is likely to commit a breach of the peace; and the Magistrate should give notice to the party who is to be affected by the order, of the particular conduct on his part which is complained of. When such notice was given and the ground of complaint to which such notice had reference was found by the Magistrate to be unfounded it was *held* the Magistrate could not pass an order on an entirely different ground, on the assumption that it was likely that the party charged would commit a breach of the peace, **21 W. R. 6**; *see* also **25 A. 375**; **27 C. 656**; **23 C. 493**; **10 A. L. J. 353 = 13 Cr. L. J. 844**; **12 A. L. J. 336.**

14. Before issuing notice under s. 107, the Magistrate must be satisfied of a likelihood of a breach of the peace.—In the absence of any evidence rendering a breach of the peace probable, a Magistrate is not justified in calling upon parties to show cause why they should not enter into recognisances, and, on their failure, to make an order under this section, **24 W. R. 23.**

15. Information may be from any source.—Where on an application by the accused to be enlarged on bail, the Magistrate made an order to the effect—"*refused, as the accused is said to be a dangerous or violent man who might use his liberty for the purpose of intimidating witnesses*"—*held*, rejecting a transfer-application on this ground, that there is no limit to the nature or source of information on which a Magistrate might initiate proceeding under this section and that the provisions of ss. 190 (*c*) and 191 were probably not applicable to such proceedings, **27 A. 172.** The information required by a Magistrate before issuing an order under section 110 may, to some exent, be of a hearsay and general description, but when the party to whom the order is directed appears in Court in obedience thereto, the inquiry must be conducted on the lines laid down in s. 117, **6 A. 132.**

(*i*) *Report of Sub-Magistrate.*—The power of taking action under s. 107 is a discretionary power and there is no irregularity in the procedure of a Magistrate calling for a report from a Subordinate Magistrate before acting *in manner hereinafter prescribed, i.e.*, by s. 112, **Weir II, 52.** Such report of the Subordinate Magistrate is credible information to authorise a Magistrate to proceed under this section, **2 M. H. C. R. 240**; *see* also **10 W. R. 41,** but if unsupported by other evidence, it cannot form a sufficient ground for final adjudication under s. 118, **6 B. H. C. R. Cr. Ca. 1**; **5 B. H. C. R. Ca. 105.**

(*ii*) *Police report.*—Although Police reports in themselves may be sufficient information on which a Magistrate may issue a summons, they are in no sense evidence upon which he can determine under s. 117 whether it is necessary to take a bond to keep the peace or for good behaviour, **4 B. L. R. 46 = 12 W. 60 (F.B.)**; **10 W. R. 41.** But a petition which was declared by the Police to be false and was unsupported by any complaint or solemn affirmation was *held* not to come within the words "*any report or other information which appears credible and which the Magistrate believes*" (which was the language of the corresponding section, s. 491 of the 1872 Code) so as to warrant a Magistrate demanding security to keep the peace, **8. W. R. 85.** When it appears that any person is likely to commit a breach of the peace, etc., it is the duty of the Police to lay information before the Magistrate having jurisdiction. In laying such information, the Police should set out carefully the evidence on which they rely, or the circumstances leading to the information—*C. P. Pol. Man.* 1, *p.* 55.

(*iii*) *Complaint.*—It has been *held* that a Magistrate acts without jurisdiction in making an order under section 107 when there is no complaint before him of a breach of the peace being likely to be committed by such person, and without taking any evidence in the matter, **17 W. R. 35.** A statement by a complainant (believed by the Magistrate) that he expected the defendant at any time to make an attempt on his person or property is a sufficient information for the Magistrate, to act upon, **7 W. R. 30.** It is not necessary to call witnesses in support of an information laid before a Magistrate, previous to issuing a summons to show cause

which there is a fair probability of his being able to find security The imprisonment, it must be remembered, is provided as a protection to society against the perpetration of crime by the individual, and not a punishment for a crime committed, and being made conditional on default of finding security, it is only reasonable and just that the individual should be afforded a fair chance of at least complying with the required conditions of security, **4 M. H. C. R. Appx. XLVI.** A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security The imprisonment, in default of finding security is provided as a protection to society against the perpetration of crime by the individual, and not as punishment for a crime committed, **2 C. 384 = 1 C. L. R. 95.** *See* also **16 B. 372; 22 W. R. 37; 23 A. 80; 19 W. R. 1; 1 P. R. 1883; 14 C. W. N. 709 = 11 Cr. L. J. 243;** *Punj Cr, p* 168; **24 P. R. 1900.** Character and reputation are not the sole considerations for determining and fixing the amount of security It should be fixed after considering the station in life of the accused, **5 S. L R. 10 = 12 Cr. L. J. 110.** In a case of apprehended breach of the peace, a Magistrate bound over the parties in sums of money aggregating on the whole to Rs 60,000 or upwards The High Court quashed the order, holding that it was altogether unreasonable, **2 C. 110; 1 C. L. R. 48; 1900 A. W. N. 204; 19 W. R. 1; 6 C. 14 = 6 C. L. R. 128, 1 P. R. 1883; 28 P. R. 1901.** The Magistrate must look to the means of the party himself, not to that of his master, **22 W. R. 74; 30 P. R. 1890; 24 and 17 P. R. 1900.**

(*v*) *Arbitrary conditions ought not to be imposed*—Where, in the case of a man who had never been convicted of any offence, the Magistrate orders that security shall be given of a description which it must necessarily be difficult to find, and directs that, in default of giving security, the imprisonment shall be rigorous, such an exercise of his discretion is wholly unreasonable and bad, especially when the Magistrate indicates no reason why, with a view to the prisoner s good behaviour, it is desirable that the imprisonment shall be of the more severe kind The petitioner was charged with having received stolen goods, and bail was refused by the Magistrate, but was ordered to be taken by the High Court Bail was accordingly given by the petitioner and accepted by the Magistrate, but before the former could reach his house the Police made a report that he was of bad repute etc., and proceedings were commenced against him by the Magistrate who, after taking the evidence of a large number of witnesses made an order directing the petitioner (who was the son of a wealthy *Zemindar*) to find security in the sum of Rs 20,000 and sentenced him, in default, to one year s imprisonment of which 10 months were to be rigorous The petitioner was subsequently acquitted by the Sessions Court of the charges on which he had been committed by the Magistrate, but the order to find security being confirmed by the District Magistrate, to whom it had been appealed, the High Court, on an application under its revisional powers *held*, that the proceedings under section 110 were wholly mistaken and bad and quashed the order for security, **1 C. L. R. 268.** *See* **2 C 110.** It his highly improper to frame an order for security with the express intention of preventing the applicant from furnishing it, **8 Bur. L. T. 53 = 16 Cr. L. J. 553.**

(*vi*) *Grounds as to amount of security must be stated on requisition from the High Court*—On a requisition from the High Court, a Magistrate is bound to state the grounds upon which he fixed the amount of security **2 C. 384 = 1 C. L. R 95.**

III.—INFORMATION ON WHICH PROCEEDINGS MAY BE INITIATED.

12.—There must be sufficient information before taking action under this Chapter.—A Magistrate has no jurisdiction to act under this Chapter, until he has such information before him as will suffice for his making an order in writing setting forth its substance and the further particulars required by s 112, **12 A. L J. 336 = 15 Cr. L. J. 695.** No person is to be called upon to show cause why an order should not be made against him until there is before the Magistrate some information which the Magistrate has reason to believe, **36 A. 262.** It is the duty of the Magistrate to see that he has clear and definite information effecting such person so that it may afford notice to such person of what he is to come prepared to meet **8 S. L. R. 207 = 16 Cr. L. J. 235.** Even when immediate arrest of the suspect is considered expedient, there must be before the Magistrate a report or information and the substance of the report or information must be recorded by the Magistrate. The Code gives the Magistrate no power to issue summons warrant or order of detention until he had first upon his table something recorded by him in writing showing the gounds upon which he is taking action No possiblity is given or intended to be given for persons to be detained by orders of a Magistrate, until the Magistrate has first by a separate order in writing shown that he has considered the order which he is about to make and until he has reason to believe that such an order is required in the interests of the public, **36 A. 262.**

13. Information must be based on tangible facts so that the party called upon, may have notice of the particular conduct charged against him.—Information of the kind mentioned in section 110 must be clear

19. Order must set forth the substance of the information.—This should be stated with sufficient fulness for the accused person to have a clear understanding of the matter that he has to meet in his defence.—*Punj. Cir., Chap. XLIV, p.* 166. The parties are entitled to something more than a mere assertion that the Magistrate has been informed that a breach of the peace is likely to occur, in order to enable them, if they are able to do so, to bring evidence to rebut the truth of such information, **6 A. 214; 11 C. 13.** It should appear on the face of the Magistrate's preliminary order that he had received credible information that the persons ordered to enter into their recognisances were likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace, **6 W. R. 93; 2 R. 524.**

(*i*) *Each accused entitled to know the nature of information against him.*—Every person to whom summons has been issued to show cause is entitled to proper information as to the materials upon which process has been granted against him and to a reasonable interval within which to prepare himself to meet such information by evidence or otherwise as he thinks fit. Moreover, his case should be considered by itself and on its own merits, and except in rare instances, it should not be mixed up with, and should never be prejudiced by that of other persons, **6 A. 214.** *See* also **1 C. L. R. 130; 18 W. R. 2; 2 B. L. R. Appx. Cr. 7; Weir II, 55.**

(*ii*) *Charge must be communicated to accused*—An order under s. 110 should not be made unless the charge which the accused has to meet is communicated to him. A person to whom notice is issued under s. 110 cannot be bound down for reasons stated in s. 110 (*f*), **8 Bur. L. T. 53 = 16 Cr. L. J. 553.**

20. Order must contain particulars of security.—In framing the order, the particulars of the security required should be stated, bearing in mind provisions of s. 118—*Punj. Cir., Chap. XLIV, p.* 166, **20 W. R. 36.** As the amount of the bond is to be fixed with due regard to the circumstances of the case and is not to be excessive, it should appear upon the record that the security demanded is not disproportionate to the ability of the accused person to furnish it, having regard to his status in life.—*Punj. Cir., Chap. XLIV, p.* 168, **16 B. 372.** The summons (Act X of 1872) should distinctly specify the amount and nature of the security and the time for which the same is to run; where these particulars were omitted, the High Court set aside the orders of the Magistrate, **20 W. R. 36.** An order was made requiring the suspect to give a bond to be of good behaviour for Rs. 1,000 with four sureties; *held*, that particulars as to whether each and all are liable for Rs. 1,000 on occasion arising, or Rs. 1,000 between them should have been stated in the orders so as to prevent misunderstanding later, **6 P. R. 1914 = 142 P. L. R. 1914.** *See* also **8 S. L. R. 173 = 16 Cr. L. J. 100.**

21. Effect of omissions and irregularity in the order.—*See* s. 537—(*i*) The omission to set out the substance of the information, in the summons though very important, and necessary to be carefully complied with, will not of itself be sufficient to set aside the order of Magistrate, unless the accused had been prejudiced thereby, **15 W. R. 43; 1881 A. W. N. 155; 6 A. 214; 8 C. 724 C. W. N. 331 = 13 Cr. L. J. 784, 20 W. R. 36.** (*ii*) Omission to set out the amount of the recognisance and surety is an irregularity which does not vitiate further proceedings, **8 C. 724.** *See* also **20 W. R. 36; 1891 A. W. N. 40.**

V.—PROCEDURE IN INQUIRY UNDER S. 117.

22. Inquiry must be held and it must be a judicial inquiry.—In the absence of any admission by the accused that he was a person likely to commit a breach of the peace, within the meaning of s. 107, the Magistrate cannot on the strength of his own statement bind over a person without any inquiry as to the truth of the information upon which action has been taken under that section, **37 A. 30.** The inquiry to be *held* by a Magistrate in cases under this section is a full judicial inquiry, evidence being taken in the presence of the party charged and opportunity given for the cross-examination of witnesses. **18 W. R. 2; 4. M. H. C. R. Appx. XXII; 13 W. R. 24.** The power given by s. 107, for taking security is no doubt given for the suppression of crime, but when once the case has come into Court, s. 117 provides that the inquiry is to be conducted as a judicial one, and it then becomes a judicial proceeding pure and simple, **10 P. R. 1899.** It is highly injudicious and calculated seriously to prejudice the accused in their defence, if the Magistrate should during the pendency of the proceedings against the accused and while some of his witnesses are still to be examined, to call upon the defence witnesses already examined to show cause why they should not be prosecuted under s. 193, I.P.C., **16 Cr. L. J. 114 (C.).**

Where the Sessions Judge in an appeal under s. 110, treated the expressed readiness of the accused to furnish security as a plea of guilty and declined to decide the appeal on the merits, *held*, that the procedure

under that section, **11 W. R. 6.** The complaint must, however, be on oath, **8 W. R. 79.** A complaint which is not supported by an oath is not sufficient information, **8 W. R. 85; 6 Bom. H. C. R. 1.**

(*iv*) *Personal knowledge*.—When a Magistrate proceeded upon his extra judicial knowledge only, the order was set aside, **22 W. R. 79.** A Magistrate, it seems cannot act on his own personal knowledge and initiate proceedings as he is disqualified to inquire into the truth of the allegations and cannot make over the inquiry to another Magistrate as the police of the law is that the Magistrate who initiates the proceedings ought to complete it

(*v*) *Statements not on oath*.—A statement by a private person not on oath is not credible information **6 Bom. H. C. R. 1; 8 W. R. 85.**

(*vi*) *Hearsay evidence*.—Conversations out of Court with persons, however respectable are not legal or proper material upon which a Magistrate should adopt proceedings, **6 A. 132, 136.**

16. But it is desirable that there should be formal evidence.—The Magistrate may record evidence before making the preliminary order, **Weir II, 51.** The reference to *further evidence* in s 117, indicates that some evidence may be taken before a preliminary order under s 112 is framed Moreover, both ss 109 and 110 show that the Magistrate's action must be based on information received, and there is no reason why the Magistrate should confine himself to the information contained in the Police papers He can, if he thinks fit, take information on oath in the presence of the accused, before deciding whether he will take action under ss 109 and 110 Magistrate would generally exercise a wise discretion by taking some evidence on oath, before framing the order under s 112, **1905 U. B. R. (Cr. P. C.) 29 = 2 Cr. L. J. 462.**

17. Magistrate not bound to reveal sources of information.—A Magistrate initiating proceedings under section 110 is not bound to inform the person concerned, the source of his information, nor the nature of such information, because the information is no evidence against the accused The information may, to some extent, be of a hearsay and general description, **6 A. 132; 27 A. 172.** All that the Magistrate is bound to state is the substance of the information, **29 C. 392.** It is not necessary to give a *list of witnesses* in support of the proceedings either in the report or in the order under s 112, **35 C. 243.**

IV.—PRELIMINARY ORDER AND ITS CONTENTS.

[*See s* 112 *for contents of order, ss* 113 *to* 115 *for service of order and issue of process*]

18. Magistrate must make preliminary order.—A Magistrate acting under Chapter VIII has no power to act until after he has recorded an order in writing under s 112, **36 A. 262.** An order of a Magistrate under s 118 cannot be supported when it appears that the procedure prescribed by sections 112 and 117 was not followed by him, **Weir II, 56; Ratanlal 421; 11 C. 13; 5 M. 380; 21 W. R. 6; 26 M. 471.** Omission to issue preliminary order renders all further proceedings *void*, **36 M. 282.** In **10 O. C. 363 = 7 Cr. L. J. 94** and **1891 A. W. N. 40,** the failure to record an order was treated as a mere irregularity

(*i*) *Order under s* 118 *cannot be made summarily on evidence given at previous conviction*.—*P* was convicted of dishonestly receiving stolen property He confessed on his trial that he had twice previously been convicted of theft He was sentenced to be imprisoned and on the expiration of the term of imprisonment, to furnish security for good behaviour *Held* (with some hesitation), that there was evidence as to general character adduced before the Magistrate justifying him in dealing with *P* under s 505, Act X of 1872, *held* also, that the order requiring security should not have formed part of the sentence for the offence of which *P* was convicted A proceedings should have been drawn out representing that the Magistrate was satisfied from evidence adduced before him in the case, that *P* was by habit an offender within the terms of section 505, Act X of 1872, and therefore security would be required from him and an order should have been recorded to the effect that, on the expiry of the imprisonment, *P* should be brought up for the purpose of being bound over, **1 A. 666.** Where an accused person was convicted of theft and sentenced to two years' rigorous imprisonment and was further ordered to enter into his own recognisance for Rs 50 and find two sureties each for a like sum for his good behaviour for one year after the expiration of sentence and in default to suffer rigorous imprisonment for one month, *held*, that the latter part of the order was bad, **9 C. 215.** *See* also **2 B. L. R. Appx. 23.**

(*ii*) *Security cannot be demanded on acquittal on same evidence*.—When a person had been acquitted on a charge of dishonestly receiving stolen property, he should not be ordered to give security under section 110 on the evidence taken at that trial An order should be made under s 112 and a proceeding *held* under s **117, Oudh S. C. No. 70.**

Kookor Singh is remanded "for such evidence as he can bring," but there was nothing to show that the petitioner was made aware of the Magistrate's object or intention in making the order. On the day appointed a pleader appeared on the petitioner's behalf and tendered a list of 16 witnesses for the defence, but the Magistrate, observing that the case had stood long enough, refused to allow any further adjournment, and overruling certain objections advanced by the pleader, ordered the petitioner to give security. This order was based on the very same evidence that was taken in the previous case which was set aside by the High Court. The Magistrate, instead of avoiding the errors pointed out by the High Court, repeated them with additional illegality. The order of the Magistrate was, as a matter of course, set aside by the High Court, JACKSON, J., remarking: "The proceedings unfortunately show not the slightest trace of a desire to afford the accused those advantages to which every person on his trial is entitled. Magistrates who act in the manner exemplified in this case ought to bear in mind that they not only violate their duty as judicial officers bound to do justice indifferently, but even contravene their own object, as administrative officers, by rendering the supposed offenders objects of sympathy, as well as by ensuring their escape at any rate for the moment." *See* also **41 C. 808**, where the order requiring security was set aside as the person proceeded against was not given time to bring his witnesses and to have their evidence recorded.

28. **Magistrate bound to procure the attendance of defence witnesses.**—A Magistrate is bound by s. 257, to compel the attendance of any witness for the defence, unless he considers that the application is made for purposes of vexation or delay; and in case he refuses, the order must show in writing the ground of refusal as applied to each particular witness, **26 B. 418.** But where the defence cited 1,760 witnesses and the trying Magistrate put a time-limit and only 741 witnesses were examined during 237 sittings by which time, the time-limit had expired, *held*, that the Magistrate was justified in putting a time-limit, **35 C. 243.**

29. **Persons proceeded against have a right to be defended by pleader.**—Persons against whom proceedings under this Chapter are initiated are *accused persons* within the meaning of the Code and have a right to be defended by a pleader and notices as to the date of hearing should be given them, **25 A. 375; 23 C. 493; 16 B. 661; 33 P. R. 1905; 36 C. 163.**

30. **In cases for keeping the peace, the procedure for summons-cases must be adopted.**—*See* s. 117 (2). In cases of persons being called upon to furnish security to keep the peace, the inquiry must be made in the same way as in a trial in a summons-case and the findings must be based on legal evidence. Evidence of general repute is not admissible in such cases, **25 A. 273.** *Procedure laid down by s. 242 must be followed.*—A Magistrate proceeding under s. 117 must proceed as nearly as practicable in the same way as under s. 242 and state to the accused the particulars of the matter against them and ask them if they could show cause why they should not be required to execute bonds. It is misleading to ask the accused "Are you willing to execute the bond required or do you wish for further inquiry." Such a question is not calculated to ascertain the truth of the information against the accused, **34 M. 139.** A proceeding under s. 107 does not terminate in an acquittal or discharge in the ordinary sense of the words. **36 M. 316.** *See* also **37 A. 30.** As to form of judgment, *see* **37 C. 91.** *See* Note 165 below.

31. **In good behaviour cases, procedure for warrant-cases shall be adopted.**—(1) *Ss. 251—258 must be followed.*—Under s. 117 (2), a case under s. 110 is to be conducted as if it were a warrant-case and the procedure to be observed is laid down in ss. 251—258. Therefore an accused person cannot be called to enter on his defence until the prosecution closes its case, **10 A. L. J. 383.** (2) *Accused entitled to recall prosecution witnesses for Cross-examination.*—Section 256, has been *held* not to apply to an inquiry under s. 117, **35 C. 243**; but this is erroneous, **25 M. L. J. Shu. No. 18; 4 Bur. L. T. 24 = 12 Cr. L. J. 89** and *see* also critical Note in **13 C. W. N. CLXXXVII; 12 C. W. N. CXCI.** *See* Note 165 below; **52 C. 470** and **52 C. 632.**

32. **Mode of recording evidence.**—*See* ss. 355 and 356, as to recording evidence in summons-cases and warrant-cases respectively. S. 362 does not apply to a Presidency Magistrate holding an inquiry under s. 110, **33 C. 1036**, but this was *distinguished in* **13 C. W. N. 318 = 9 C. L. J. 439 = 10 Cr. L. J. 122**, where it was *held* that a Presidency Magistrate was not absolved from the duty of recording evidence in a case where he makes a reference to the High Court under s. 123 (2), but the record of evidence in such a case need not be as great as in a similar case from a Mofussil Court. *See* note 165 below; **52 C. 470 and 52 C. 632.**

33. **Magistrate ought not to examine any and every witness the Police or anyone else may from time to time produce.**—In a proceeding under section 117 it is erroneous on the part of the Magistrate to admit rash evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under s. 540, for which valid reasons must be recorded, **10 A. L. J. 383 = 13 Cr. L. J. 772.** The Magistrate

was irregular and the Sessions Judge ought to have heard the appeal In cases under ss 107 and 110 it is the duty of the Magistrate to hold an inquiry and not to bind an accused merely because he agrees to furnish security, **24 A. L. J. 317.**

23. Place of inquiry.—In regard to the place of the trial, Magistrates of districts should continue to arrange for cases being taken up by the Magistrates on tour during the cold weather season in the *neighbourhood* of the homes of persons accused, provided that care is taken that all preliminary measures required by the law previous to the commencement of the inquiry are duly observed, and that accused persons are summoned and not brought up under warrant, except in cases in which a warrant may lawfully issue —*Punj Cir, Chap XLIV, p* 169 District Superintendents of Police shall arrange in consultation with the Magistrate of the district, that, so far as possible, prosecutions for bad livelihood shall be made when Magistrates are in camp in the vicinity of the ordinary residence of the persons to be prosecuted —*Punj Rul and Ord Chap XLIV, para* 69, *p* 392. The inquiry should be held if possible, in the village where the parties reside so as to avoid witnesses being needlessly harassed and to enable the accused without difficulty to procure the attendance of persons willing to speak in his favour If the order requiring security is necessary, the Magistrate should give the accused reasonable opportunity of procuring the attendance of his sureties if any, **1 Bur. S. R. 546.**

24 Inquiry held outside the Magistrate's local jurisdiction void.—An inquiry under section 110 should not be conducted by a Magistrate at a place outside the local limits of his jurisdiction, where he has no power to conduct such proceedings, and if he does take such proceedings the order is void, **3 C. L J. 193 = 3 Cr. L. J. 246.**

25. Reasonable time must be allowed to parties to show cause—Where parties required to show cause why they should not furnish security to keep the peace on the 9th, were served with notices on the 5th and 7th *idem* it was *held* that the time allowed was too short for the purpose and consequently the order for requiring security was set aside Under ordinary circumstances a Magistrate is bound to assist both the parties in summoning their witnesses, **22 W. R. 70, 20 W. R. 18, 1 C. L R 130, 3 C. L R 72, 10 W R. 1; 24 W. R 30, 30 C 508.** Every person to whom summons has been issued to show cause is entitled to proper information as to the materials upon which process has been granted against him and to a reasonable interval within which to prepare himself to meet such information by evidence or otherwise as he thinks fit **6 A 214.** The accused must have sufficient time to bring his witnesses and have their evidence recorded If the accused has not had this opportunity the order against him must be set aside, **41 C. 806**

26. When appearing to show cause, party must be ready with his evidence.—It is quite clear that the Code requires that all the steps necessary to bring witnesses before the Court should be taken in such time as to admit of the evidence being recorded on the day on which the party comes into Court and in fact that showing cause, is not the mere putting in a written or making a verbal statement, but the supporting of that statement by such evidence as the party may be able to produce He (the party) may bring with him his witnesses if he likes If he has doubts as to his ability to produce them he may apply for summons in such time as to enable him to bring his witnesses into Court on the day fixed **23 W. R. 9.** If he has been unable to bring the evidence with him on account of the shortness of the notice or other reasonable cause, it is his duty when he appears to apply for summons to the witnesses he proposes to call, **9 Bom. L R. 1335.** If however, the party against whom the order is made, admits the truth of the information upon which it is based it would seem to be unnecessary to proceed with the inquiry, **11 W. R. 50.**

27. Persons proceeded against must be given a fair opportunity to enter into their defence.—Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary, that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet. **11 C. 13; 3 C. L. R 72; 20 W. R. 18, 41 C. 806.** An order for security cannot be passed *ex parte* **1 C. L. R. 48, 1 C. L. R. 130** illustrates how Magistrates in the Mofussil sometimes disregard the provisions of law which they are appointed to administer In that case the proceedings of the Magistrate were once quashed by the High Court, and the petitioner was released, but he was immediately re-arrested and placed on bail on the 18th May On the 21st the Magistrate ordered that the case should be heard on the following day, *i e*, the 22nd, and accordingly on that day accused was further examined In his examination the accused said that he was at enmity with the *Darogah* on account of the demand he made upon him (*Darogah*) for some articles of food supplied that his witnesses will not come at his request, and that he had not applied for *tulub* (process), nor had he given a list of his witnesses. The Magistrate ordered on the same date (22nd May) that the petitioner do remain in (*hujut* lock up) till the 4th June. There was a note no record signed by the Magistrate to the effect that

to such cases as where several persons are charged with being concerned in a wrongful act that may occasion a breach of the peace (s. 107) or in fact regarding the dissemination of seditious matter (s. 108) not to proceedings under s. 110, **4 L. B. R. 46 = 6 Cr. L. J. 284.** (*c*) In **13 C. W. N. 244 = 10 Cr. L. J. 460,** a father and three sons were charged under cls. (*a*) and (*f*) of s. 110 and the evidence against them was all same and it was proved that the four were associated together: *held*, that the case was one in which the evidence could be rightly dealt with together and any minute inquiry into the complicity of each accused was unnecessary. (*d*) *Association as servants of common master.*—When several persons serving under a common master, tried to extort *kabuliyats* at enhanced rates from his tenants, *held* (HENDERSON, J., *dissenting*) that though each of the acts was not done by all of them together, yet s. 117 (4) would justify a joint inquiry under section 107, in spite of the fact that the acts imputed to them were committed by them not as individual members of society, but as servants of another person, **9 C. W. N. 898 = 1 C. L. J. 616 = 2 Cr. L. J. 554.** *See* also **8 C. W. N. 180; 27 C. 781.**

40. What is not association.—(*a*) *Parties in conflict with each other.*—A joint trial of parties who have been in conflict with each other is illegal, **25 M. 61 (P.C.),** *applied* **31 M. 276; 5 N. L. R. 65; 27 C. 781.** *See* also **11 C. W. N. 472 = 5 C. L. J. 231 = 5 Cr. L. J. 197; 8 S. L. R. 207 = 16 Cr. L. J. 235.** (*b*) *Belonging to one tribe and village.*—In the absence of any evidence to prove that the accused constituted a gang, the mere fact that they belonged to one tribe and village with a bad name is not sufficient evidence of association, and therefore there cannot be a joint inquiry against all the accused, **1 P. R. 1895.** (*c*) Where four men were charged with being thieves by habit, it was *held* to be an error to try them all together. The question whether a person is by habit a thief or not is personal to himself and forms a matter separate by itself, **4 L. B. R. 46 = 6 Cr. L. J. 284.** (*d*) *Opposing factions not to be dealt with in one proceeding.*—Where, according to the nature of the information received by the Magistrate, there were two opposing parties inclined to commit a breach of the peace; *held*, applying by analogy the principles relating to the trial of members of opposing factions engaged in a riot that the Magistrate acted irregularly in taking steps against both parties jointly, and in holding the inquiry in a single proceeding. Such a procedure is not *ipso facto* null and void, but only where the accused have been prejudiced by it, **9 A. 452; 11 C. W. N. 472 = 5 C. L. J. 231 = 5 Cr. L. J. 197.** *See* **8 C. W. N. 180 = 1 Cr. L. J. 58; 9 C. W. N. 898; 14 C. 358; 11 Bom. L. R. 740; 8 S. L. R. 207 = 16 Cr. L. J. 235.** Two persons cannot be tried together unless their association in the same offences is made out, **21 P. R. 1914.** In **14 A. L. J. 268 = 17 Cr. L. J. 165 = 33 In. Ca. 645** it was *held* that it was illegal to try two contending parties together as it was impossible to say that the two contending parties were associated together.

41. Joint trial not necessarily illegal.—A joint inquiry in the case of persons belonging to opposing factions is not *ipso facto* illegal; and even in cases where one and the same proceeding taken by the Magistrate under ss. 107, 112, 117 and 118 improperly deals with more persons than one, the matter must be considered upon the individual merits of the particular case. Such an inquiry would at most amount to an irregularity which, according to the particular circumstances, might or might not be covered by the provisions of s. 537, **9 A. 452.** Where there is no evidence of *habitual association*, beyond the fact of the two accused being master and servant, a joint trial is illegal, but the order need not be set aside, unless the accused was actually prejudiced, **9 O. C. 69 = 3 Cr. L. J. 290; 5 C. W. N. 249; 29 C. 779; 6 A. 214; Ratanlal 585; Weir II, 55; 10 C. L. R. 335.** *See*, however, **6 Bom. L. R. 34,** where **27 C. 781** is *distinguished.*

42. Prosecution must establish what each individual has done.—In proceedings instituted against more persons than one, it is essential for the prosecution to establish what each individual implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. In holding such an inquiry it is improper to treat what is evidence against one of such persons as evidence against all, without discriminating between the cases of the various persons implicated, **9 A. 452; 6 A. 214.** An order requiring certain persons to furnish security to keep the peace can only be justified upon the finding that each of these persons is likely to commit a breach of the peace, etc., **37 A. 33.** The facts from which, for the purposes of section 107, it may be reasonably inferred that the person sought to be bound down, was likely to disturb the public peace, must be facts of a definite nature and must show that such persons are individually, not collectively, connected with them, **8 C. W. N. 180.** Thus where a Magistrate bound down 26 persons to keep the peace, after recording evidence as to 11 of them only, the order was set aside as to the persons not affected by the evidence, **10 C. L. R. 335.** Where the evidence against certain persons was that they were *Mewatis* of a particular place and that *Mewatis* of that place were looked upon with terror by the other inhabitants of the neighbourhood and that they were dangerous characters, but there was no evidence against each member of the gang, *held*, that before any of them could be called upon to give security, there should be evidence forthcoming tending to establish one

trying a case under s. 110 is bound by law to hear those witnesses only whose list is sent up by the Police along with the case, and as soon as the witnesses in support of the case have been heard, he has to ascertain the names of persons likely to be acquainted with facts of the case and shall summon only such of them as he thinks necessary He is not bound by law to, and should not, save in every exceptional cases, call the other witnesses that the Police or anyone else may, from time to time, choose to produce **12 A. L. J. 262=15 Cr. L. J. 363.**

34. Evidence may be recorded in part by one Magistrate and in part by successor.—The provisions of s 350 apply to an inquiry instituted under s 107 with a view to enforcing the giving of security to keep the peace, and in such a case where the Magistrate by whom a part of the evidence is taken is succeeded by another Magistrate while the inquiry is pending, the person called upon to show cause why he should not give security may insist upon the recalling and re examining of the witnesses whose evidence has already been taken by another Magistrate, **4 C. L. R. 432**; *see* Notes under s. 350

35. Magistrate cannot, when inquiry is pending, send the case under s. 202 for report.—A Magistrate before whom an inquiry is pending under this section is not competent to take action under s 202 of the Code after the person who was the subject of the inquiry has been called upon to show cause why security to keep the peace should not be taken from him, **1896 A. W. N. 140.**

36. Magistrate initiating proceedings cannot send up the case to another Magistrate.—Proceedings under section 110 should be disposed of by the Magistrate who initiated them He has no jurisdiction to send up the case to another Magistrate The Code requires that he should pass the final order himself either discharging or taking security from the accused, **14 Bom. L. R. 713 = 13 Cr. L. J. 743.** In this case the Magistrate sent up the case to the District Magistrate for action under Regulation XII of 1827 and the order of the District Magistrate was quashed

37. Joinder of charges.—The main principle applicable to a criminal trial, regarding joinder of charges and joint trial of accused persons should be applied to inquiries under this Chapter, **8 C. W. N. 180; 14 C. 358, 6 P. R. 1896; 6 A. 214.** But in **11 C. W N. 789 = 6 Cr. L. J. 1,** it was *held distinguishing* **25 M. 61 (P.C.)** that the law as to joinder of charges against a person accused of definite offences have no application to an inquiry under section 110

VI.—JOINT INQUIRY.

[*See s* 219 *for misjoinder of persons and s.* 117 (4) *for trial of persons associated together*]

38. Generally every person has a right to have his case inquired into separately.—Upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified to insist that his case shall be tried separately from the cases of other persons similarly circumstanced Where an order has been passed undes this section requiring more persons than one to show cause why they should not severally furnish security for keeping the peace, the provisions of s 239 read with s 117 are applicable subject to such modifications as the latter section indicates and to such procedure as the exigencies of each individul case may render advisible in the interest of justice, **9 A. 452.** The main principles applicable to a criminal trial regarding the joint trial of accused persons should be applied to inquiries under this section Where both the parties to a proceeding under this section were tried together (some among them having also been examined as witnesses in the case) and were bound down as the result of that trial, *held*, there was misjoinder of the nature condemned by the Privy Council in **25 M. 61,** such as could not be cured by s. 537, **8 C W. N. 180,** *see* also **14 C. 358.** Every case should be considered by itself and on its own merits, and except in rare instances it should not be mixed up with, and should never be prejudiced by, that of other persons, **6 A. 214, 9 A. 452; Ratanlal 685; Weir II, 55; 1891 A. W. N. 28; 10 C. L. R. 335.** Separate proceedings should be instituted against each person charged under section 109 unless there be such a connection between the parties as might indicate the necessity for a contrary course, **Weir II, 51; Ratanlal 556; 9 A. 452; 6 A. 214** and **6 P. R. 1896; 20 A. L. J. 881; 45 A. 109, 27 C. 781; 47 M. L. J. 689.**

39. Persons associated together may be dealt with jointly.—(*a*) When two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just S 117, cl (4). The words '*associated together*' apply to persons acting in concert whether that concert is due to mutual agreement amongst themselves or the order of a common master, **9 C. W. N. CCXXX.** The Magistrate has a discretion to deal with the matter jointly or separately, even where association of the several accused is clearly established, **27 C. 781; 6 C. 96, 1891 A. W. N. 28; 15 O. C. 253 = 13 Cr. L. J. 760; 9 C. W. N. 898 = 1 C. L. J. 616 = 2 Cr. L. J. 534.** *See* also **6 M. H. C. R. 120.** (*b*) S 117 (4) refers

12 A. L. J. 937 = 16 Cr. L. J. 705. It is only evidence of specific conduct on the part of the accused from which the reasonable and immediate inference that he is likely to commit a breach of the peace, will justify a Magistrate in adjudicating under this section, **22 W. R. 79.** What the nature of the facts should be, depends upon the circumstances of each case. But when the nature of the Magistrate's information requires it, *overt acts* must be proved before an order can be passed under s. 118, and such an order cannot be passed against any person simply on the ground that another is likely to commit a breach of the peace, **9 A. 452; 20 W. R. 57; 24 W. R. 30; 32 W. R. 79; 10 B. L. R. 441 = 19 W. R. 47.** A previous conviction before it can be used must be strictly proved, **20 C. W. N. 725.**

(*a*) *Evidence in keeping the peace cases.—See* Notes 4—9, *supra.*

(*b*) *Statement of persons not called as witnesses and observations on such evidence.*—"Conversations out of Court with persons, however respectable, are not legal or proper material upon which a Magistrate should adopt procedings under s. 110. The information to be required by a Magistrate, before issuing an order under s. 112, may be, to some extent, of a hearsay and general description, but when the party to whom the order is directed appears in Court in obedience thereto, the inquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character that he is, therefore, necessarily liable to be called upon for sureties. of the peace or for good behaviour. There must be satisfactory evidence in the case that he has done something, or taken some step that indicates in intention to break the peace. Though the task of preserving order in a certain district may be extremely difficult and an anxious one, the law does not empower any Court to put a man in prison simply because he has an evil reputation. If respectable persons, who can prove facts which would constitute the credible information legally necessary to justify issue of process and requirement of security, have not the courage to come forward and assist the Magistrate in the prevention of the breaches of the peace or of crimes by giving evidence in Court, it is unfortunate, to say the least of it; but the Magistrate is not, therefore, entitled to act upon inadequate proof obtained *aliundi*, which he himself described as not so strong as it ought to be. If, in the interest of public order or security to property, the attendance in Court of such persons was necessary, the Magistrate had the power, if he chose to exercise it, of compelling their appearance."—*Per* STRAIGHT, J., **6 A. 132 at p. 136.**

(*c*) *Police Report.*—A Magistrate should take *evidence* as to the general character of a person charged with bad livelihood and not convict him on the report of a Police-officer, which is not evidence, **5 W. R. 2.** The report of an Inspector of Police and the evidence given by him are not sufficient to justify an order binding a person to keep the peace, **10 W. R. 55.** *See* also **5 B. H. C. R. Cr. Ca. 105.** But when the Police have adduced satisfactory evidence that a person has no ostensible means of subsistence, a Magistrate should not discharge the accused merely on the ground that the statement by the accused to the Police cannot be proved, **3 N. L. R. 51 = 5 Cr. L. J. 434.**

(*d*) *Report of a Subordinate Magistrate is not sufficient.—See* **6 Bom. H. C. R. Cr. Ca. 1; 5 Bom. H. C. R. Cr. Ca. 105.**

(*e*) *Approver's evidence is not enough.*—In proceedings under section 110, the uncorroborated evidence of a person who had been an approver in a previous case is useless and should not be admitted **5 L. B. R. 72 = 10 Cr. L. J. 355.**

(*f*) *Extra-judicial knowledge of Magistrate is no evidence.—See* **22 W. R. 36 and 79; 24 W. R. 30; 6 A. 132; 37 A. 30.** A Magistrate should not base his judgment upon his own knowledge of certain facts which he obtains from sources outside the record, **37 A. 33 and 14 A. L. J. 769.**

(*g*) *Record of previous convictions is no proof.*—The mere record of previous convictions, on account of which the person has undergone punishment, does not satisfy the requirements of section 117, and it is wrong to use these provisions so as to add to the punishment for past offences. The object of taking security from a person is solely to secure his good behaviour in future, **10 B. 174; 2 A. 835; 6 W. R. 6.** *See* also **13 C. W. N. 318 = 9 C. L. J. 439 = 10 Cr. L. J. 123.** *See*, however, **2 B. L. R. Appx. 28.** Where the accused were charged with unlawful assembly and trespass and the Magistrate acquitted the accused, but eventually ordered the parties to execute bonds and furnish security, refusing to take further evidence and relying on the evidence which had been given before him in the original case in the presence of the accused; *held*, that the proceedings were irregular, and that the order was bad, **22 W. R. 9.** Where a Magistrate bound down a person to keep the peace on the strength of the evidence taken before him in another case in which he (the accused), was acquitted, it was *held* that the Magistrate ought not to have admitted this evidence, **24 W. R. 4.**

or more of the points set out in section 110 against each of the accused **1905 A. W. N. 41 = 2 A. L. J. 174 ; 37 A 33.** *See* also **14 A. L. J 430** and **656.**

43. Magistrate must come to a separate finding against each.—Where a Magistrate bound down a party consisting of 17 persons without coming to a separate finding as regards each of them individually the order was set aside **35 C 929 ; 1 P. R. 1895 , 37 A. 33.** Each accused is entitled to an entirely independent examination of his own case, **25 P. W. R. 1909 = 10 Cr. L. J. 591.** The judgment must show that the Judge has considered the case of each individual prisoner, **37 C. 91.** *See* also **9 M. L. T. 271 = 12 Cr. L J. 104.** While it may not be contrary to law to have a joint trial in all cases , it is incumbent on the Magistrate to exercise great care and caution in dealing with the evidence and to insist that definite evidence be given against each person charged, **15 O. C. 263 = 13 Cr. L. J. 760.**

VII.—EVIDENCE.

44 There must be evidence before final order can issue.—No final action should be taken and no order having the effect of a conviction as against the accused should be passed without final evidence being recorded **30 M. 330; 35 C. 674; 37 A. 30.** Very clear and full evidence, with as much detail as is possible should be required before making an order under section 110, **1889 A. W. N. 114.** An order to execute a bond for good behaviour cannot be made under section 110 in the absence of any evidence, as that section and s 117 prescribe inquiry and proof that it is necessary before the person arranged is ordered to execute a bond **Ratanlal 585.** Legal evidence must be recorded, **8 B. H. C. R. Cr. Ca. 162.** *See* also **20 W. R. 18; 21 W. R. 6 , 10 P. R. 1899.** In a proceeding under section 107 it is incumbent on the Magistrate to adjudicate judicially on evidence given before him as to the necessity for taking security to keep the peace, **2 N.-W. P. H. C. R. 431.**

(*a*) *Admission does not dispense with proof*—Where the Magistrate treated the statement by the accused s vakil, as an admission of an intention on the part of his clients to commit a breach of the peace and had bound them over, the order was set aside, **30 M. 330 , 6 B. H. C. R. Cr. 1** and **5 B. H. C. R. Cr. Ca. 105.** Without recording evidence it is illegal to bind down a person even though he may agree, **35 C. 674** Accused called upon to show cause under s 110, said he could furnish no securities nor show cause why he should not be bound over as ' *I am of bad character and have been to jail*' and the Magistrate made an order under s 118 , *held*, the order of the Magistrate was bad as the mere admission of the accused that he is of bad character and that he had been to jail does not show that he is an *habitual thief* The Magistrate is bound to inquire into the truth of the information upon which action has been taken, **3 Bom. L. R. 269.** The entry of ' accused examined no defence" is not a sufficient compliance with the provisions of this section, **4 Bur. L. T. 24 = 12 Cr. L. J. 89.** *See*, however, **11 W. R. 50.**

(*b*) *Statement by accused s vakil does not dispense with proof*—*See* **30 M. 330.**

(*c*) *Failure to show cause does not dispense with proof*—Showing cause is not the mere putting in a written statement or making a verbal statement, but the supporting of that statement by such evidence as the party may be able to produce, **23 W. R. 9 at p. 11.** When an order to show cause is made under section 112 and the accused does not show cause, a Magistrate cannot make an order under s 116 in the absence of evidence as ss 112 and 117 prescribe inquiry and proof that is necessary before the person arranged could be directed to execute bond, **Ratanlal 585.** The order under section 112 is not in the nature of a *rule nisi*, **9 A. 452; Ratanlal 58 ; 9 A. 42**

45. That a person is dangerous and desperate character must be based on evidence.—Evidence of general repute under s. 117 (3) is not admissible to prove that a person is a desperate and dangerous character under cl (*f*) of this section, **34 M. 255 ; 13 Cr. L. J. 9 (All.) , 5 C. W. N 249.** Definite evidence must be adduced to prove some specific act tending to show that the accused is a desperate and dangerous character to the knowledge of individuals, **29 C. 779.** Where accused were charged with having made themselves very objectionable in the neighbourhood by annoying villagers in various ways by knocking at their doors at night or throwing brick bats on the roof and also with annoying respectable women, *held*, that acts of this description, even if proved, do not come within the terms of this section, as they do not constitute conduct so as to render them liable to give security for good behaviour by reason of their being at large without security hazadrous to the community, **5 C. W. N. 249.** *It is not sufficient to ground a finding under cl (*f*) on vague and general evidence that some one was robbed or beaten and people say that the accused was responsible, **9 O. C. 69.** *See* also **4. C. W. N. 97 ; 11 C. W. N 789 = 6 Cr. L. J. 1; 23 A. 273; 13 C. W. N. 244 = 10 Cr. L. J. 460; 34 M. 255** and Note 52 below

46. Nature of evidence.—Enquires under this chapter are governed by the ordinary rules of evidence and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under s 117,

VIII.—EVIDENCE OF GENERAL REPUTE.

52. **Evidence of general repute may be adduced only to prove that a person is an habitual offender.**—*See* s. 117 (3). A provision of law which is an exception to the general rules of evidence must be only applied to the cases to which it is confined by the Legislature, **34 M. 255.** Evidence of general repute can be allowed only in cases when security for good behaviour is demanded from habitual offenders, **25 A. 273; 29 C. 779; 34 M. 255.**

(i) *General repute inadmissible in cases when person is called upon to keep the peace.*—In a case where a person is to be called upon to furnish security to keep the peace, evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace. Such evidence can be adduced only when a person is called upon to furnish security under s. 110, **25 A. 273;** *see* **21 P. R. 1888.**

(ii) *General repute inadmissible to prove that a person is a desperate and dangerous character under s. 110, cl. (f).*—Evidence of general repute cannot be allowed to prove a charge under s. 110, cl. (*f*) of being a desperate and dangerous character, **34 M. 255; 5 C. W. N. 249; 13 Cr. L. J. 9 (All.).** *See* Note 45.

53. **General repute is the reputation which a person bears in the place in which he lives.**—The following observations of PETHERAM, C.J., and BEVERLEY, J., deserve careful perusal. " Evidence of general reputation is admissible in a case of this kind under the concluding part of s. 117. Now the evidence of associating with *badmashes* on this record falls pretty much in the same category as evidence of a general repute because the evidence of consorting with *badmashes,* except in one or two instances which I shall mention later on, is really evidence which is supposed here to be evidence of repute. Now as to that after considering the evidence very carefully and putting the greatest value upon it, we think that none of it is practically evidence of general repute at all. What it is, is that it is evidence that there were rumours in this City of Patna that this particular man had committed acts of extortion on various occasions: that he had *badmashes* in his employ to assist him in that way, and generally that he was a man of bad character. It is hardly necessary to say that evidence of rumour is mere hearsay evidence and hearsay evidence of a particular fact. *Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen,* and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is that the body of his fellow-townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character; but to say that, because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind, those rumours are in themselves evidence under this section, is to say what the law does not justify us saying, and consequently we think that the evidence of general repute in this case is evidence of little or no value. And, in addition to the evidence which is supposed to be evidence of repute, there are whole pages of evidence, which is hearsay evidence on the face of it, and there is line after line of evidence, in which witnesses deliberately state, and are allowed deliberately to state, things which they heard from other people, which can be no evidence of repute, and no evidence of the circumstances." **23 C. 621 at p. 628; 1903 A. W. N. 181; 10 O. C. 132.** The general repute of a person includes what is generally said of him in the neighbourhood in which he lives, **10 O. C. 168 = 6 Cr. L. J. 256.** Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs or the personal opinion of the witnesses who are examined. The test of the admissibility of evidence of the former kind is whether it shows the *general* reputation of the man not necessarily the opinion of the entire community to which he belongs, but at least the opinion of a considerable number of persons. It must not be merely the repetition of what one or two persons have said to the witness. A witness to general repute when he gives his own opinion may be asked to give the grounds of his opinion and to give the names of the persons whom he has heard speak against the character of the persons concerned, **12 A. L. J. 937 = 15 Cr. L. J. 705.** Where it is sought to prove the reputation of a person, the evidence which is required is the evidence of respectable persons who are acquainted with the person on his trial, who live in the same neighbourhood and are aware of his reputation and should ordinarily not be officials, **8 Bur. L. T. 53 = 16 Cr. L. J. 853.** Statements to the effect that rumours unfavourably to the character of the accused have begun to get about in consequence of their intimacy with criminal classes though admissible to prove general repute are of little value, **12 Cr. L. J. 542 (O.).** When the person against whom a proceeding is instituted is a well-known resident of a city, his fellow-citizens, though not living in the neighbourhood, are

47. Can accused examine himself as a witness?—Having regard to the conflicting nature of the authorities, it is highly doubtful whether a person against whom proceedings have been taken under this section is an accused and whether he is a competent witness on his own behalf, as under s 342, no oath should be administered to an accused

48. Evidence must be confined to the substance of the information set out in the preliminary order.—A Magistrate should base his order upon the substance of the information given in the summons, and where he found that the grounds of complaint referred therein were unfounded, it was *held* that he could not proceed to adjudicate that an entirely different ground existed, upon which it was likely that a party charged would commit a breach of the peace, **21 W. R. 6.** Under such circumstances, he is bound to discharge the accused under s 119, the case not having been proved In **17 C. W. N. 331 = 13 Cr. L. J. 784,** it was *held* that ss 117 and 118 were not strictly limited by the precise terms of the order drawn up under s 112, if, however, the person eventually bound down could show that he was misled or prejudiced by the terms of the order drawn up under s 112, there would be a clear case for granting him relief In this case it was stated in the preliminary order that as it appeared to the Magistrate that *K* was '*by general repute*,' a thief and a burglar ' he was called upon as such to furnish security ' It was alleged on behalf of the defence that he ought to have been called upon to show cause as being '*by habit*' a thief and that as he was not so addressed he could not be bound down But the evidence was directed to show *K* was a habitual thief and the cross examination was directed to the evidence to that effect and it was *held* that the accused had not been prejudiced *See* **14 Cr. L. J. 65 (M.)** The further evidence that the Magistrate is authorised to take under cl (1) of s 117 is evidence *ejusdem generis* with the evidence described in the words which immediately precede it, that is, bearing upon the truth of the information upon which action has been taken, **36 A. 239.**

49. Onus of proof.—An order passed by a Magistrate requiring any person to " show cause ' why he should not be ordered to furnish security for keeping the peace is not in the nature of a *rule nisi*, implying that the burden of proving innocence is upon such person The *onus* of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security, **9 A. 452; 7 C. P. Cr. 9; 4 B L. R. 46 (F.B.), 2 N.-W. P. H. C. R. 431.** The *onus* lies on the party on whose complaint the summons was issued, **12 W. R. 60; 2 N.-W. P. H. C. R. 431.**

(*a*) *Where evidence on both sides is interested and weak prosecution must fail*—The burden of proving an accused s bad character lies on the prosecution, and, therefore, when the evidence on both sides was of an indifferent and interested character, the prosecution must fail Cases should be decided on evidence taken in Court and not on personal knowledge of the Magistrate, **27 C. 781; 9 A. 452.** Evidence should, as a rule, be tested by its quality rather than by its quantity, and where the quality on both sides is indifferent, the prosecution must fail Where the quality is good on both sides, it must also fail if the evidence for the defence altogether outweighs that for the prosecution **4 P. R. 1898;** Appeal Court must consider all the evidence when evidence has been let in by the defence, and it is also the duty of the Appellate Court to go through the evidence of the defence and consider it, **17 C. W. N. XX.**

(*b*) *When the evidence is good and equally balanced, prosecution must fail*—When the evidence is equally balanced no order for security should be made, **11 A. L. J. 461 = 14 Cr. L. J. 407, 10 A. L. J. 383 = 13 Cr. L. J. 772.**

50. Magistrate must carefully test the evidence for the prosecution.—" In dealing with cases under this Chapter, Magistrates ought, especially where no conviction is proved to take great care to test the evidence for the prosecution It is not sufficient simply to record the statement of three or four persons that the individual charged has the reputation of being an habitual offender, but the Magistrate should ascertain what the witnesses' means of knowing anything about the accused are whether the accused is known to have associated with criminals, whether he has frequently been known to have been near the place where thefts, etc, have been committed, whether he has any and what means of livelihood, whether there has been any quarrel in which the accused was concerned which would supply a motive for bringing a false charge, and whether any instances of the commission of offences by the accused, even if no conviction has been had, are known to the witnesses"— *Per* AGNEW, J, *in Cr Ref* 5 *of* 1891 *Spl Court Lower Burma See* also **Ratanlal 639.**

51. How evidence should be recorded.—*See* Note 32 above

the object of the proceedings is to *deter* and not to punish. A convict just released from jail should not, as a rule, be put upon security until there has been a fair opportunity of judging whether the punishment he has already undergone is not in itself a sufficient deterrent against relapse into evil courses.—*Punj. Cir., p.* 167.

61. **Magistrate must state his reasons for the order.**—*See* s. 118. It is not sufficient that the Magistrate is morally satisfied, but the Magistrate should give reasons for his finding based on legal proof the accused should be bound over, **10 B. 174.**

62. **Persons other than the party proceeded against cannot be bound over by the final order.**—(*a*) *Witness.*—A witness for the defence in case of rioting having admitted being present at or near the scene of the riot, but denied that the accused took any part in it, the Magistrate after finding the accused guilty and without further proceeding called upon both the accused and his witness to enter into bonds to keep the peace for one year; *held*, that this procedure was illegal so far as the witness was concerned, **5 M. 330.** But if the Magistrate desires to put him on recognisance to keep the peace, he must first be called upon to show cause under this section and evidence must be taken in his presence on the question whether there was reasonable ground for believing he was likely to commit a breach of the peace, **4 B. L. R. (F.B.) 46.** (*b*) *Complainant.*—So also it is illegal to bind down a complainant, **3 P. R. 1902.** (*c*) *Principal cannot be bound down when notice issued to agent.*—Where the manager of an indigo factory is obliged to enter into recognisances to keep the peace, there is no reason, nor has the Magistrate any authority, to extend the order to the proprietor of the factory also. The statements, made by both the contending parties before the Magistrate, must be regarded as evidence upon which the Magistrate may act, if he thinks it sufficient, without taking further evidence upon the subject, **18 W. R. 11.** *See* also **38 C. 156.**

63. **Compensation cannot be awarded.**—*See* s. 250. An application to take proceedings under this Chapter, does not amount to an accusation for an offence and the Magistrate in such cases does not pass any order of acquittal or discharge within the meaning of s. 250 and, therefore, a Magistrate is not authorised to award compensation under s. 250 if he dismisses the application, **15 A. 205; 7 A. L. J. 743; 36 A. 332; 37 P. R. 1884; 16 P. R. 1893; 4 P. R. 1896; 33 P. R. 1902; 25 B. 48.**

64. **Can Court enhance security?**—It is competent to the Court calling upon persons to furnish security to enhance the amount of such security, provided the persons from whom security is demanded have an opportunity to appear and show cause against the order for enhancement of such security, **1895 A. W. N. 241,** but *see* Note 59.

64-A. **Magistrate cannot postpone proceedings.**—An order postponing proceedings instituted under s. 491, Act X of 1872, until the person called upon to show cause shall have established in a Civil Court the title claimed by him to the disputed property, with reference to which there is a breach of the peace, amounts to a discharge, and the Magistrate cannot order the person so called upon to attend daily at his Court on a personal recognisance pending such adjournment, **5 C. L. R. 366.**

X.—ENFORCEMENT OF THE FINAL ORDER—GIVING OF SECURITY AND ORDER OF IMPRISONMENT.

[(*a*) *For enforcement of final order—see* ss. 118, 120 and 123.]

65. **On failure to furnish security, the accused must be forthwith committed.**—If for any cause the accused has not a reasonable opportunity of furnishing sureties with which he ought, under normal circumstances, to come already furnished, the only legal method of giving him time for this purpose is to postpone the making of the final order under s. 118 for such period as may be deemed necessary. After the order is passed it is illegal to allow time to find sureties.—*Punj. Cir., Chap. XLIV, para.* 13 (*a*), *p.* 168. The Court should on non-compliance to furnish security by the date fixed commit the accused to custody. Where a person ordered to execute a bond and find sureties for good behaviour on 17th December, 1907, was sentenced to imprisonment for default on 24th February, 1909, *held*, the order for imprisonment was illegal, **6 M. L. T. 308 = 10 Cr. L. J. 481.** If from any cause the accused has not had a reasonable opportunity of furnishing sureties, with which he ought under normal circumstances to come already furnished, the only legal method of giving him time is to fix a later date as provided for by s. 120 (2).

competent witnesses to prove his general repute, **11 C. W. N. 789 = 6 Cr. L. J. 1.** Where a large body of apparently respectable witnesses of the immediate neighbourhood testify to the character of the accused as against the evidence of Police-officers, an order under this section is not justifiable, **37 P. W. R. 1910 = 11 Cr. L. J. 603; 483 P. W. R. 1914 = 16 Cr. L. J. 106.** Where in consequence of a series of dacoities having taken place in certain villages, a proceeding under s 110, is instituted against a person for being a robber by habit, the evidence of general reputation coming from the people of the villages where dacoities had taken place, is certainly to be treated as evidence of general repute as required by s 117, although that person did not live amidst those people, **35 C. 243.** Where evidence of the prosecution is of a very vague character, and when it is a question of establishing a case of this sort merely upon the evidence of bad repute, the Court may reasonably be required to take into consideration the value and weight of evidence as to repute tendered on behalf of the prosecution as compared with the evidence for the defence In any inquiry into general repute, evidence of accused s own caste fellows and neighbours is the best sort of evidence available **12 Cr. L. J. 542 (O).** *See* also **30 P. L. R. 1916; 2 R. 696, 2 R. 641.**

54 The evidence of bad repute must be otherwhelming.—When security is demanded from a person on the evidence of general repute only, that repute must be universal and there should be no doubt about it, **48 P. W. R. 1914 = 16 Cr. L. J. 106; 2 P. R. 1897** and **4 P. R. 1898.** For a man of a bad general reputation, it is not necessary that there should be no one to give him a good character, but it is necessary that the evidence should be so strong as to leave no doubt what a man's general reputation is When as good witnesses come forward to state that a man s reputation is good as those who state the contrary it can hardly be held safely that that man's general reputation is bad, unless there is something to corroborate the evidence of witnesses against him, **2 P. R. 1898;** *see* also **12 P. R. 1892.** Where there is nothing but evidence of general repute to go upon, that evidence must be so general and overwhelming as to leave no practical doubt that the accused has been in the habit of committing thefts and robberies or other offences of the kinds specified and before making an order for security, the Magistrate must be satisfied that, as a matter of fact, the suspected person has committed several offences in the past and is ready to commit them again when opportunity offers, **Ratanlal 639.**

55. General reputation must be proved by evidence in the ordinary way—not necessary to adduce evidence of specific acts—The evidence that is required to justify an order under s 110 and s 120 is not necessarily the evidence that the accused has committed definite criminal offences for each of which he would be individually brought to book, but evidence sufficient to prove in a judicial inquiry that he comes within the category of one of the sub-secs (*a*) to (*f*) of s 110 and a Magistrate trying a case of this kind must find it as a fact to be proved in the ordinary way by evidence of general repute or otherwise, that the accused does come within this classification, **10 P. R. 1899.** Where persons were proceeded against under that section on the ground that they were thieves and dacoits by habit and the only evidence against them was the evidence of certain respectable persons none of whom knew personally the individuals charged and who only stated that they heard that the accused were thieves and dangerous characters, but could not mention the names of the persons from whom they received the information, *held* such evidence could not be relied upon as it would work serious prejudice to the accused, **29 C. 779, Ratanlal 44; 8 P. W. R. 1817 (Cr.).** Where actual convictions are not relied on, great care should be taken to test evidence on behalf of the prosecution with a view to ascertain what the witnesses' means of knowing the facts stated by them may be, *viz.* the accused's movements, his constant companions, his way of earning livelihood, his antecedents, etc., **2 Bom. L. R. 57; 35 C. 243,** and the mere statement of the accused "I am of bad character and have been to jail' is not by itself sufficient, **3 Bom. L. R. 269.** The finding that the person proceeded against was a man of bad character does not bring the case within the section, **8 M. L. T. 246 = 11 Cr. L. J. 638.** But the finding that an accused person, is by general repute, a habitual offender committing mischief and that he protects thieves is sufficient to warrant action under the section It is not necessary for the purposes of the section that specific instances should be given, **9 Bom. L. R. 164 = 5 Cr. L. J. 178.**

(*i*) *Witness as to general repute must speak from personal knowledge*—A vague and general statement that a man is an habitual offender is not sufficient evidence on which an accused person might be bound over under the section, and the evidence of the repute of an accused person must be that of persons who are speaking to matters within their personal knowledge, **1 A. L. J. 616.** For a finding that a person is by habit a thief, evidence should be of such a nature as to show reasonable and definite grounds for such a conclusion, **8 C. W. N. 543.** Where witnesses are examined as to general character, their testimony is not of much value as to the habits of the suspected person, unless they can, in support of their opinion, adduce

at once liable to be *detained in prison* till he does furnish it; no warrant for his detention is necessary, **Ratanlal 511.** *See*, however, **Ratanlal 432.** But where a person is not already undergoing imprisonment, a warrant is necessary for his detention under cl. (2) of section 123 pending *reference to the Court of Session.*

72. **If person undergoing imprisonment for default in furnishing security is sentenced to imprisonment, the sentence must commence at once.**—*See* s. 397. Imprisonment ordered in default of security is not a punishment for another offence. Therefore when a sentence of imprisonment on conviction for an offence is passed upon a person already imprisoned under this section, the commencement of the sentence on conviction ought not to be postponed until the termination of the imprisonment under the security order, **1 Bur. S. R. 464; Ratanlal 970; 5 Bom. L. R. 26.** *See* **27 M. 525; Weir II, 452; 31 M. 515; 37 B. 178; 8 N. L. R. 20=13 Cr. L. J. 189; 7 S. L. R. 203 = 15 Cr. L. J. 592; (1914) M. W. N. 500 = 16 Cr. L. J. 137; 16 Cr. L. J. 622.** The two sentences of imprisonment must run concurrently, **34 B. 326.** Nor can a sentence under section 123 run concurrently with any other sentence under s. 35, *see* **4 Bom. L. R. 876; 6 Bom. L. R. 1098.** But in **30 A. 334**, it was *held* that if a person undergoing imprisonment on failure to furnish security is convicted and sentenced to a term of imprisonment, the latter sentence should follow the first. *See* also **1 Patna L. J. 212.**

XI.—PROCEEDINGS UNDER DIFFERENT SECTIONS NOT TO BE MIXED UP.

73. **Magistrate cannot proceed under s. 107 on proceedings instituted under s. 110.**—Where a Magistrate finds that s. 110 with reference to which he issued notice under s. 112, is inapplicable, he ought not to deal with the case as one under s. 107 without first issuing a fresh notice under s. 112, with reference to the altered view of the circumstances. The notice issued with reference to s. 110 (*e*) cannot be *held* to be sufficient as a preliminary to making an order under s. 107. The facts necessary to be proved to make the accused liable under s. 110 (*e*), are different from those necessary to be proved in order to make them liable under section 107, and the party proceeded against should have notice of the facts on which the Magistrate proposes to proceed against him. The omission to issue such fresh notice is a non-compliance with an express provision of the law, rendering the subsequent proceedings invalid, **30 M. 282.**

74. **Magistrate ought not to issue order under s. 110 after instituting proceedings under s. 107.**—When the notice was to show cause why a person should not be bound down to keep the peace, he cannot be directed under s. 118 to execute a bond for good behaviour, **25 C. 798**; but where the evidence was recorded at length and the parties had opportunity to cross-examine and were not prejudiced, *held* the irregularity was cured by s. 537, **14 Cr. L. J. 65 (M.).**

75. **Amalgamation of ss. 109 and 110 not legal.**—*B* was ordered by a first-class Magistrate to execute a bond for good behaviour with one surety for six months under s. 109 (*b*), and a similar bond for one year under s. 110. *B* having failed to execute the two bonds was sentenced to rigorous imprisonment for six months and one year, respectively. *Held*, reversing the order requiring the bond for six months, that the Magistrate could not legally amalgamate ss. 109 and 110, and require the execution of two bonds for good behaviour for an aggregate period of 18 months, and in default commit the man to rigorous imprisonment for 18 months; and that at any rate, in such a case the provisions of s. 123, sub-sec. (2), should have been observed, **Ratanlal 946.** There is no provision of law for taking a bond under ss. 109 and 110 together, **6 M. L. T. 158 = 10 Cr. L. J. 253; 11 Cr. L. J. 50 (M.); 38 M. 555 and 566,** *footnote.* Where it was not clear that the accused was aware whether the case he had to meet was one under s. 109 or s. 110, an order requiring security was set aside, **11 C. 13.**

76. **Inquiries under ss. 109 and 110 not to be conducted together.**—A person called upon to give security under s. 109 and another person required to give security under s. 110, cannot be dealt with together in one and the same inquiry under s. 117. Proceedings under ss. 109 and 112 cannot be amalgamated with proceedings under ss. 110 and 112, the scope of the two proceedings being essentially different, **8 O. C. 91 = 2 Cr. L. J. 224; 11 Cr. L. J. 50.**

77. **Order under s. 110 cannot be passed during continuance of order under s. 109.**—Sections 109 and 110 have the same object, and an order under s. 110 is not valid during the continuance of an order under this section, the evidence required to secure an order under either section being of the same nature, **8 C. W. N. 543.**

78. **Inquiries under s. 107 and under s. 145.**—*See* Notes under Heading III above. A Magistrate is not justified in passing an order under s. 107 in proceedings commenced under s. 145, *see* **14 A. L. J. 794.**

66. Security cannot be asked till expiry of imprisonment if person ordered to give security has been 'sentenced' to imprisonment.—Section 120 authorises that the period for which security is required in an order under s 118 shall commence on the expiration of any sentence which the accused may be sentenced to or may be undergoing at the time when the order under s 118 is made But it is premature and illegal to pass against him an order under s. 123, while such imprisonment lasts. The order under s 123 should not be passed until the expiry of any term of imprisonment which a *person* may be undergoing, **4 Bom. L. R. 934.** *See* **24 W. R. 13; 1 A. 666; 9 C. 215.** *See* also **5 L. B. R. 34,** where it was *held* that the order of the Magistrate that security should be furnished within a month from the date of order, while the substantive term of imprisonment was seven years, was illegal Under ss 120 and 123 a convict undergoing a sentence of imprisonment cannot be obliged to give security for good behaviour until the period of that imprisonment ends, nor can the order for imprisonment in default be made till *then* **Ratanlal 765.** A Magistrate cannot make an order for imprisonment in anticipation of default to give security under s. 118, **Ratanlal 511; 432.** In the case of a person convicted of an offence and sentenced to imprisonment as a punishment, the order requiring security should not direct, that he should execute the bond to keep the peace *at the end of the term* of imprisonment to which he has been sentenced The person convicted is at perfect liberty to execute the bond at once or at any time during the term of imprisonment, **7 N.-W. P. H. C. R. 328.** Nor can the Magistrate direct that the security should be given within a month while the term of imprisonment has still to run, **5 L. B. R. 34 (F.B.).** If, in the meantime, he is convicted of another offence and sentenced to a fresh term of imprisonment the order should not be passed until the expiry of both imprisonments, **Ratanlal 774;** *see* also **4 Bom. L. R. 934.** A sentence on imprisonment on default of furnishing security cannot be made to run concurrently with some other sentence which the accused is already undergoing **16 Cr. L. J. 272 (M)** But in **4 L. B. R. 205 (F.B.) = 7 Cr. L. J. 472** it was *held* that there was no strong objection to an order for inprisonment being made before the expiry of the substantive sentence of imprisonment.

67. Commencement of a second order for security made during pendency of a previous order.—A Magistrate required a person to give security to keep the peace for one year During its subsistence he required the same person to give further security for one year the latter order to take effect on the expiry of the term of security already taken under the previous order, *held*, that such a postponement is not contemplated by law but if on the expiry of the first order the dispute still existed, then further security can be demanded on fresh proceedings being taken, **4 C W. N. 121.** But in support of such fresh proceedings, evidence relating to events prior to first period ought not to be admitted, **1905 A. W N. 34; 1906 A. W. N. 30** and **28 A. 306.**

68. The period of imprisonment in default of security should be the same as the period for which security is demanded.—An order requiring the accused to execute a bond in the sum of Rs 30 with surety for the same amount, that he would be of good behaviour for a period of *six months* in default to be kept in rigorous imprisonment for *three months*, or until such time as he executes the required bond is wrong and bad in form **Ratanlal 584** A Magistrate is not competent to award a shorter term of imprisonment in default of security than that for which security is required, but if he thinks that the term should be shortened, his proper course is to report the matter to the District Magistrate, who will take action under s 124, **Ratanlal 668.** An order passed by a Joint Magistrate directing that a person do give security for a period of more than one year, and that on failure to give the security, he should be imprisoned for two years was *held* to be bad on the face of it and not cured by the District Magistrate reducing on appeal the period for security to one year and, the period of imprisonment also to one year, as the provisions of cl. (2) of this section are imperative, **Weir II, 57; 23 A. 422.**

69. Order directing imprisonment until giving of security is bad.—An order directing an accused person to be imprisoned *until* he gives security is bad, a definite period for such imprisonment should be stated in the order, **8 C. 644.**

70. Direction for solitary confinment is not legal.—In the order of rigorous imprisonment passed on the accused on their failing to furnish the security demanded under s 118, a Magistrate has no power to direct that the accused should be kept in solitary confinement for a portion of the period of imprisonment, **36 A. 495.**

71. No fresh warrant necessary to detain person ordered to furnish security if he is already undergoing imprisonment.—In cases where a prisoner is required to furnish security for good behaviour for a certain period on the expiration of his sentence of imprisonment, the period for which such security is required commences on the expiration of the sentence If when it commences, the prisoner does not furnish security, '

87. **Imprisonment cannot be awarded in anticipation of default.**—A Magistrate cannot award imprisonment in default of furnishing security for good behaviour in anticipation of such default being made, **Ratanlal 396** and **408**, but *see* **4 L. B. 205.** It is not competent to a Magistrate to pass an order for the imprisonment of the accused made in anticipation of his default to give security under s. 188, **Ratanlal 408.** The imprisonment is provided as a protection to society against the perpetration of crime by the individual and not as a punishment for a crime committed, **1 C. L. R. 95.**

88. **Punishment for escape from lawful custody.**—An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour is now an offence punishable under s. 225-B, I.P.C., **8 C. 331** is superseded by the addition of that section to the Penal Code. *See* Note 4 to s. 55.

XIII.—INQUIRY INTO FITNESS OF SURETIES.

[*See s.* 122 *for power to reject sureties.*]

89. **Magistrate who passed the order under s. 118 must himself conduct the inquiry and cannot delegate.**—A Magistrate who has passed an order under section 118 cannot delegate his function to a subordinate to inquire into the sufficiency or otherwise of the security tendered, and decide the question on the report of the subordinate. The Magistrate that passed the order ought himself to make the inquiry and pass decision on the sufficiency or otherwise of the security, **27 A. 293 ; 26 A. 371 ; 25 A. 272 ; 1898 A. W. N. 154 ; 1 A. L. J. 601 = 1904 A. W. N. 231 ; 15 O. C. 263 = 13 Cr. L. J. 760 ; 2 S. L. R. 11** and **15 ; 5 S. L. R. 87 = 12 Cr. L. J. 410 ; 15 Cr. L. J. 727 (A.) ; 12 A. L. J. 1004 = 16 Cr. L. J. 54; 16 Cr. L. J. 455 (A.)**; *per* RYVES, J. (COXE, J. *contra*) in **37 C. 91 ; 42 C. 706.** In **9 C. W. N. XXIII**, it was *held* that when questions of fact are raised, the Magistrate ought to enquire into the sufficiency of the security himself and not be guided merely by the report submitted by the Police. *See* also **11 O. C. 5** and **3 C. L. J. 575 = 3 Cr. L. J. 468.** He cannot send the security-bond to a Tahsildar for report, **18 P. R. 1906 = 14 P. L. R. 1907 = 5 Cr. L. J. 148 ; 6 P. R. 1914 = 142 P. L. R. 1914 ;** or for attestation, **6** and **7 P. W. R. 1907 = 56** and **57 P. L. R. 1907.** *See* also **20 C. W. N. 1133 = 24 C. L. J. 51.**

90. **Inquiry into fitness of surety is a judicial proceeding and must be properly conducted.**—In an inquiry under this section into the fitness of a surety, the Magistrate has power to record evidence upon oath or solemn affirmation, so that any false statement made therein, will render the deponent punishable under s. 193, I.P.C., **26 A. 371.** *See* also **1898 A. W. N. 154 ; 1903 A. W. N. 36 ; 8 S. L. R. 173 = 16 Cr. L. J. 100.**

91. **Evidence must be taken before rejecting sureties.**—A conclusion arrived at by the Magistrate merely on the strength of a Police report, in respect of which there has been no formal inquiry in Court is not warranted by law. There must be some sort of independent inquiry by the Magistrate showing that a judicial discretion has been exercised as to the question of the fitness of the proposed surety, **27 A. 293** *followed*, **12 A. L. J. 1004 = 16 Cr. L. J. 54 ; 42 C. 706.** A Magistrate cannot refuse a surety merely relying on a Police report. If any information was derived from the Police report, it is the duty of the Magistrate to take evidence as to what is the basis of the report and should come to a decision thereon himself, **15 O. C. 263 = 13 Cr. L. J. 760 ; 13 A. L. J. 469 = 16 Cr. L. J. 455.** A Magistrate cannot properly base his order on an adverse opinion formed on statements (*e.g.*, statement of Police Inspector) which no judicial tribunal could accept as evidence, **8 S. L. R. 173 = 16 Cr. L. J. 100.** The Magistrate must not deal with the application in a summary manner and reject sureties for the reason they have produced no evidence as to character, **8 S. L. R. 173 = 16 Cr. L. J. 100.** A Magistrate cannot rely on his own knowledge, dispense with an inquiry and take no evidence at all. He should examine the sureties as to their fitness and take such evidence as the accused may give and base his decision on the evidence so recorded, **7 S. L. R. 94 = 15 Cr. L. J. 378.** The Magistrate has a wide discretion to accept or reject a certain surety, but the discretion must be exercised only after a satisfactory inquiry in accordance with law, **12 A. L. J. 1004 ;** mere conjectures and surmises are not enough to reject a surety, **10 C. W. N. 1027 = 4 Cr. L. J. 169.** Sureties ought not to be rejected on the strength of the reports received from the Tahsildar and Inspector of Police, without giving them an opportunity of meeting any allegations that may be made against them, **15 Cr. L. J. 727 (A.).** When the Magistrate has received information adverse to the fitness of the surety, that must be brought to his notice.

92. **Grounds for refusing sureties must be based on evidence and must be valid and reasonable.**—Mere conjectures and surmises are not sufficient, **10 C. W. N. 1027 = 4 Cr. L. J. 169.** The judgment ought not to be based on mere personal knowledge, **7 S. L. R. 94 = 15 Cr. L. J. 378 ; 14 C. W. N. 709 = 11 Cr. L. J. 243 ;** nor

XII.—BAIL AND DETENTION IN CUSTODY.

[*See* s 107 (3) and (4) for procedure and detention in custody when Magistrate is not empowered to act, and s 123 (2) for detention in prison pending orders of Sessions Judge, s 114 for immediate arrest when a breach of the peace is apprehended and ss 496—502 for general provisions as to bail]

79. **Generally the person proceeded against has a right to be let on bail.**—The terms of s 496 are wide enough to entitle a person proceeded against under this Chapter VIII (*B*) to claim bail as of right, **12 Cr. L. J. 533 (B)** *following* **6 N-W P. H. C. R. 366** When proceedings has been instituted against a person under s 107, it is only in the special circumstances referred to in clauses (3) and (4) of that section that the law empowers a Magistrate to detain the person in custody until the completion of the enquiry, s 496 is imperative and under its provisions the Magistrate is bound to release such person on bail or recognisance, **32 C. 80; 22 M. L. J. 357 = 13 Cr. L. J. 447.** A Magistrate is not competent to refuse bail unless the law expressly sanctions the refusal, **1 C. L. R. 130.** *See* also **6 A. 132; 14 A. 43; 11 C. W. N. 121 = 4 Cr. L. J. 456.** In **36 M. 474** it was *held* that s 496 does not give an absolute right to any person who appears or is brought before a Court and is not charged with a non bailable offence, but that section must be read along with any other provision giving a special right of detention to the Court as s 107 (4), *see* also **31 M. 385 and 17 Cr. L. J. 77.**

80. **Condition cannot be attached to letting on bail.**—When the Magistrate in allowing bail to the petitioners, made it conditional on their undertaking that no attempt would be made by them or their agents to realise rent by force and nothing would be done to induce a breach of the peace, *held*, that the condition could not be imposed under section 107 and should therefore be struck out of the bail bond, **11 C. W. N. 121 = 4 Cr. L. J. 456** For power to grant bail, *see* **12 Cr. L. J. 533 (Bom.)**

81. **Bail cannot be asked for before initiation of proceedings.**—No bail should be called for from a person against whom proceedings under s 107 are contemplated, but not initiated, **11 C. W. N. 415 = 5 Cr. L. J. 194.** The most that can be required of him is to furnish recognisance, and that only when there is any likelihood of his absenting himself from Court

82. **Jurisdiction of Magistrate to order detention in custody pending enquiry.**—(*a*) *Good behaviour cases* —It is illegal for a Magistrate to order detention at the request of the Police, of persons who were reported to him, as persons against whom an inquiry under s 110 ought to be made Nor is he authorised to order further detention without recording his reasons for so doing A Magistrate has no jurisdiction of any kind to act under this section until he has such information before him as will suffice for his making an order in writing, setting forth its substance and other particulars required by s 112 **12 A. L. J. 336 = 15 Cr. L. J 696.** *See* also **36 A. 262.** (*b*) *Keeping the peace cases* —*See* s 107 (3) and (4), proviso to s 114 and Notes 33 and 34 to s 107

83. **Unnecessary detention in prison may vitiate inquiry.**—Detention in jail of a person against whom an inquiry under Chapter VIII is in progress is an illegality which vitiates the trial, **16 Bom. L. R. 943 = 2 Bom. Cr. Ca. 261.**

84. **Person proceeded against under this Chapter cannot be remanded under s. 167.**—S 167 which authorises a Magistrate to remand an accused person to Police custody pending investigation does not appear to apply to cases under Chapter VIII, *per* KNOX, J, in **36 A. 262.** *See* also **12 A. L. J. 336 = 15 Cr. L. J. 696.**

85. **Re-arrest of person admitted to bail.**—Having regard to the language of the *proviso* to section 114, it was doubted in **32 C. 80** whether a Magistrate had power under the *proviso* to re-arrest a person who had already appeared and been admitted to bail. The *proviso* seems to limit the Magistrate's power to cases under s 107

86. **Committing to custody pending receipt of report as to adequacy of security illegal.**—The practice of sending a person to jail against whom an order under ss 110—118 has been passed, pending the receipt of a report from the Revenue and Police-officers is illegal Imprisonment should follow failure to furnish adequate security, and should not precede a finding that the security is inadequate, **18 P. R. 1906 = 11 P. L. R. 1907 = 8 P. W. R. 1907 = 5 Cr. L. J. 148; 16 Bom. L. R. 943 = 2 Bom. Cr. Ca. 261.** *See* also **12 A. L. J. 336 = 15 Cr. L. J. 696.**

Magistrate is at liberty to take into consideration the '*moral unfitness*' of the person as well; then again there is a marked difference of opinion as to whether a Magistrate can refuse to accept a surety because he is not in a position to exercise control over the principal.

Calcutta.—*The primary test is whether the sureties are able to pay the sums for which they become bound, but there may be other objections as well, which must be dealt with in each case as it arises.*—The question whether a person tendered as security in a case is fit or not, is one of pure fact in each case and must be decided according to the particular circumstances of each case. If his position in life is from a monetary point of view unsatisfactory, having regard to the amount of the security demanded, nothing more is necessary He must be discarded. Otherwise no hard-and fast rule can be laid down, that any given set of circumstances or that a particular degree of distance, either of affinity or topographically in the place of residence of the parties, can in any way decisively help in answering the question whether the security offered is sufficient. Unless the action of the local authorities who are responsible for the public peace appears to be arbitrary or extravagant the High Court will not interfere, **13 C. W. N. CLIX**; **13 C. W. N. 80 = 8 C. L. J. 243** *approved*. It was *held* in **6 C. W. N. 593**, *followed in* **35 C. 400** that in accepting a surety, the question is not whether or not a surety can supervise a person for whom he stands surety, but, whether he is a person of sufficient substance to warrant his being accepted and therefore, such objections to the acceptance of sureties tendered as (*i*) that they were unfit to control the defendant, or (*ii*) that they were not residents of the village, or (*iii*) that the two sureties were members of the same firm are not valid It is not necessary that a surety should live in the neighbourhood of his principal so as to keep his eye on him The facts that the sureties offered were not resident in the village where the principal lived and that they were related to one *C* who was suspected to have in his possession properties stolen by the principal, were not grounds for rejecting the sureties, **9 C. W. N. XXIII.** Where a Magistrate refused to accept sureties upon the grounds (*i*) that three out of four sureties were not residents of the village where the defendants lived, (*ii*) that none of them had sufficient movable property, (*iii*) that all of them were reported to be of bad character, (*iv*) that three of them were relations of a person who was suspected of receiving , *held*, that grounds (*i*), (*ii*) and (*iv*) were not sufficient, that ground (*iii*) might be sufficient, but the Magistrate in determining that question, could not act on a report submitted by the Police, but must hold an inquiry in respect thereto, **3 C. L. J. 575 = 3 Cr. L. J. 468.** In deciding whether sureties tendered in bad livelihood cases are to be accepted or refused, the first matter to be enquired into is the ability of the sureties to pay the sums for which they become bound, but there may be other objections to be considered, but any such objections must be dealt with in each case as it arises; **6 C. W. N. 593** and **35 C. 400** *followed*, **13 C. W. N. 80 = 8 C. L. J. 243 = 8 Cr. L. J. 383** *approved* Where no other cause of unfitness is made out, when they are pecuniarily fit, they must be accepted, **37 C. 446**; **17 C. W. N. CXX.** In **41 C. 764**, after reviewing some of the decisions, the Court was of opinion that the law now appears to have come back to the point at which it originally stood in the statute book, and in the judgment in **22 W. R. 37.** "The statute merely says that the Magistrate may refuse to accept any surety offered under this Chapter, for reasons to be recorded by him that such surety is an unfit person and in **22 W. R. 37** it is laid down that the ground of refusal must be valid and reasonable That is all." The Court was further of opinion that the head note to **37 C. 446** is rather misleading, for it is set out that where a surety is competent in a pecuniary sense, the fact that he is not in a position to exercise control over the person bound down so as to ensure good behaviour in future is not a sufficient ground for rejection But the Judges never laid down any such doctrine. They say there may be other objections to a man becoming surety although he is pecuniarily fit for the position; but that it is not possible to specify, and such an objection must be dealt with in each case as it arises *See* also **12 C. W. N. XCIX.** It is not proper to call upon sureties to state in writing what influence they have over the accused and they cannot be rejected if they fail to do so, **37 C. 91.** *See* **20 C. W. N. 1133.**

Allahabad.—*The test is whether the surety can exercise proper influence over the person who has been bound over*—In accepting a surety, if the Magistrate is satisfied that he can exercise proper influence over the person who has been bound over, it is immaterial where that person may reside, **8 A. L. J. 785 = 12 Cr. L. J. 472**; mere solvency of the surety is not the only test of his fitness The Magistrate has also to consider the ability of the surety to guarantee the good conduct of the principal, **20 A. 206.** "One object in obliging men to produce sureties for good behaviour is that the sureties should have an interest in seeing that the man does behave well, and that they should also be in a position to exercise some influence over the man for whom they are to be sureties As a rule, the latter object could not be effected if the sureties were men from a great distance, and if they were persons, who from their age, or social position, or otherwise were unlikely to be able to exercise influence over the person for whom they were put forward as sureties," **1895 A. W. N. 143.** "The object of

upon the reports of the Police and subordinate officers 12 A. L. J. 1004 = 16 Cr. L. J. 54 The ground on which a Magistrate has power to refuse to accept any surety must be a valid and reasonable one, 22 W. R. 37; 41 C. 764. As long as the security is good and sufficient and the sureties are of a satisfactory class, they cannot be rejected, 7 N.-W. P. H. C. R. 249. The discretion conferred upon a Magistrate by this section is a wide one and the High Court will not lightly interfere with any reasonable exercise of the same Where the Magistrate himself, from the circumstances on the record had not drawn the inference that the sureties offered would not exercise proper control over the person bound over, or that they had offered themselves only in order to assist the accused in pursuing a career of crime, the High Court in revision set aside the order rejecting them as sureties, 15 Cr. L. J. 727 (A.) Mere reluctance to be surety constitutes no valid objection unless the Magistrate is satisfied that he is not a free agent 8 S. L. R. 173 = 16 Cr. L. J. 100.

93. Magistrate must not reject sureties because they do not conform to an arbitrary standard not set up in the preliminary order.—If the Magistrate considers it necessary to limit the class of sureties he should so state in his preliminary order It is obviously unfair to a suspect to call on him to produce sureties of a certain class and then to reject the persons offered because they do not conform to an arbitrary standard not set up in the order, 8 S L. R. 173 = 16 Cr. L. J. 100. It is obviously unfair to an accused person to order him to produce sureties living in his neighbourhood and then to reject the man offered because they are his neighbours, nor is it reasonable to reject a surety merely because he is of the same caste as the suspect unless the preliminary order imposes such a limitation

94. Duty of Magistrate having private information adverse to the surety.—Where the Magistrate stated in his explanation as a reason for rejecting sureties that he relied on an inquiry instituted by himself in which he heard various matters which showed that the sureties were generally speaking bad characters, *held* that the order was bad The Magistrate in rejecting sureties under s 122 has to record his reasons for doing so From this it seems to follow that the reasons must have been carefully considered and tested This is best done by their being brought to the notice of the persons who are refused as sureties and by their having an opportunity for controverting them The Magistrate before rejecting the sureties in this case for the reasons alleged, should have brought them to their notice and heard what they had to say on their own behalf, 14 C. W. N. 709 = 11 Cr. L. J. 243. Sureties ought not to be rejected on the strength of Police reports without giving them an opportunity of meeting any allegations that may be made against them, 15 Cr. L. J. 727 (A.)

95. Burden of proof as to fitness of sureties.—Although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection S 122 recognises only one ground, *i e*, the ground that for reasons to be recorded by the Magistrate such surety is an unfit person ? The reason given by the Magistrate must therefore be a positive reason for believing the surety to be unfit. It is not sufficient for the Magistrate to say that he is not satisfied with the evidence called by the accused If he is not so satisfied he must make further inquiry and come to a definite conclusion one way or the other No presumption ought to be made against a witness's credibility merely because he has offered to be a surety for a bad character The presumption ought to be the other way, for otherwise no *respectable person will undertake the responsibility*, 8 S L R. 322 = 16 Cr. L. J. 479.

96. Effect of omission to state reasons for refusing sureties.—Where the Magistrate failed to record any reasons for his refusal to accept the sureties and in his explanation stated he was not able to remember the exact circumstances, *held* that the sureties must be accepted, 13 C W. N. XXVII.

97. Surety once accepted can afterwards be rejected and security-bond cancelled.—Under the present amendment a Magistrate may reject any surety previously accepted, provided he follows the procedure laid down under the new amendment.

XIV.—CONDITIONS AS TO FITNESS OF SURETY.

98. Test as to fitness of sureties.—*See* s 122 It is difficult to reconcile the various views as to the imposition of limitations on the qualifications as to the fitness of a surety All that the Legislature says is that a Magistrate may refuse to accept any surety on the ground that such person is an unfit person, s. 122 The Legislature has not particularised any kind of unfitness Has the word '*unfit*' reference only to the pecuniary position of the person offered? Though there are some decisions which lay down that the principal thing is to see whether the proposed surety is a man of substance, the generally accepted view seems to be that the

sureties are in other circumstances suitable, **25 A. 181; 6 P. R. 1914 = 142 P. L. R. 1914.** Sureties ought not to be rejected on the ground that they are the caste-fellows or relatives of the accused, **16 Bom. L. R. 138 = 2 Bom. Cr. Ca. 188 = 15 Cr. L. J. 268.** *See* also **10 C. W. N. 1027 = 4 Cr. L. J. 169.** In **41 C. 764**, the reason given by the Magistrate for refusing to accept the brothers as sureties being that the person bound down was a notorious dacoit and there was a consensus of opinion that the brothers would not be able to keep him in control, was accepted by the High Court. *See* also **8 S. L. R. 173 = 16 Cr. L. J. 100; 22 Cr. L. J. 22.**

101. Whether condition that sureties should or should not be of a particular class may be imposed?—In **1 Bom. L. R. 520**, the Magistrate added a condition to his order that the 'surety' must be not from *Kaharal* and must not be *Kunbi* by caste, as those persons assist accused often for the sake of money, the High Court annulled it as illegal. In **Ratanlal 876**, the Magistrate ordered the accused to give the security of 'two respectable landholders'; on revision the words 'persons of respectability and substance' were substituted. There is no objection to the condition requiring the sureties to a bond to belong to the landholding class, **16 Bom. L. R. 138 = 15 Cr. L. J. 268.** In **20 A. 206**, it was *held* that the provision in s. 112 directing the Magistrate to specify in his order the character and class of the sureties required, enables the Magistrate, for example, to require landholders as sureties and in such a case to refuse to accept pleaders or others as sureties. In **18 P. R. 1906 = 5 Cr. L. J. 148**, it was *held* that a Magistrate had no power to order that security be given by any particular person or class of persons, or to prohibit the acceptance of security from *lambardars, inamdars* and *chowkidars.* But *see* **3 S. L. R. 168 = 11 Cr. L. J. 198; 3 S. L. R. 239 = 11 Cr. L. J. 417; 8 S. L. R. 229 = 16 Cr. L. J. 252; 8 S. L. R. 322 = 16 Cr. L. J. 479; 8 S. L. R. 173 = 16 Cr. L. J. 100.**

102. Prior conviction is no disqualification to be a surety.—The fact that the proposed surety has on one occasion been convicted of offences under ss. 147 and 325, I.P.C., does not of itself render him for ever afterwards unfit for being a surety, **26 A. 189; 18 A. L. J. 324; 25 C. W. N. 140; 20 Bom. L. R. 190.**

103. Other illegal limitations.—A Magistrate cannot direct the exclusion of immovable property from the security to be furnished, **18 P. R. 1906 = 14 P. L. R. 1907 = 5 P. W. R. 1907 = 5 Cr. L. J. 148**; or order that the surety should pledge all his proprietary rights in a land, **7 N.-W. P. H. C. R. 249.** The fact that a person offering himself as surety for the good behaviour of another has given evidence in favour of that person in a proceeding under s. 109 or s. 110 which resulted in the passing of the order requiring security would not at all be a good reason for refusing to accept the surety, **16 Cr. L. J. 727 (A.).** *See* also **17 Cr. L. J. 91 and 97.**

XV.—BOND AND ITS FORFEITURE.

104. Form and contents of bond.—*See* Sch. V, Form X at p. 52-A for a bond to keep the peace under s. 107, Form XI for a bond for good behaviour under ss. 108, 109 and 110. Where a bond is not executed till after the date on which the period for which the security is required commences, it should state plainly the date on which the period expires, **4 Bur. L. T. 270 = 13 Cr. L. J. 62**; it is a serious mistake to make each of the sureties liable for the full penalty of the bond, **U. B. R. (1897—1901) 1, 119** *followed in* **4 Bur. L. T. 270 = 13 C. L. J. 62.** A surety cannot be made liable for an amount larger than the one for which the principal has executed the bond, **5 Bur. L. T. 101 = 13 Cr. L. J. 485.**

105. Minors cannot execute bonds under this Chapter.—*See* clause 3 of s. 117 and **4 L. B. R. 12 = 6 Cr. L. J. 123.**

106. No Court-fee payable on bond.—No Court-fee is payable on security-bonds for keeping the peace by, or for good behaviour of, persons other than the executants.—*Gazette of India*, 1889, *Pt. I, p.* 506.

107. When sureties indispensable.—For bonds under ss. 109 and 110 surety is not optional, but indispensable; while for bonds under ss. 106, 107 and 108, the bond may be with or without sureties.

108. Taking sureties without personal recognisance is illegal.—There is no provision of law empowering a Court to call upon a person to provide sureties for good behaviour without his giving his own bond at the same time, **27 A. 262.** Where preliminary notice to the accused was issued by a Magistrate calling on them to furnish sureties only for their good behaviour, but not personal recognisances, but when the accused appeared before the Magistrate, he directed them to give personal recognisances as well as sureties for a period more

requiring security to be of good behaviour is, not to obtain money for the Crown by the forfeiture of recognisances, but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order It is, therefore, reasonable to expect and require that sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety Of course, Magistrate must not act arbitrarily in these cases, they must be guided in each case by the facts of the case," **20 A. 206 ; 1898 A. W. N. 199 , 12 A. L. J. 1004 = 16 Cr. L. J. 54.**

Sindh.—*Conditions as to character and status may be imposed, but the power must be reasonably exercised so that if the suspect have a bona fide intention to be of good behaviour, it will not be impossible for him to find sureties*—S 112 gives the Magistrate power to define the class of sureties and it is open to him to require that they shall be *landholders*, in the neighbourhood of the accused either holding 100 acres of land, or paying income-tax and able to control the accused, **8 S. L. R. 229 = 16 Cr. L. J. 252**, or that they should not be of inferior standing to the suspects, and of respectable character, **8 S. L. R. 173 = 16 Cr. L. J. 100.** In **8 S. L R 322 = 18 Cr. L. J. 479**, the word 'standing' was criticised as being too vague Sureties cannot be rejected on the ground, that they will not be able to influence the bad characters by example and precept, **1 S. L. R. 14 = 9 Cr. L. J. 256** nor can they be rejected on the ground of relationship, **1 S. L. R. 3 = 9 Cr. L. J. 247.** It is open to a Magistrate to require "respectable or suitable" sureties and a Magistrate may fairly demand a reasonable degree of social importance and influence in the sureties A Magistrate is justified in using and applying his knowledge of his division when acting under s 122 and if he knows that the inhabitants generally of a village bear a bad character, he is justified in rejecting such surety provided he records his reasons **3 S. L. R. 163 = 11 Cr. L. J. 198.** It is competent to a Magistrate to direct that the sureties shall be of the class of Zemindars holding 20 acres of land round Larkana, **3 S. L. R. 239 = 11 Cr. L. J. 417.** *See* also **1 S. L. R. 46 = 8 Cr. L. J. 166.**

Burma.—In British Burma, the following rules as to sureties are in force:—(*a*) The Court will reject as sureties all officials of the Courts and any relations of such officials, except in a case where they may be nearly related to or neighbours of the persons called upon to give security (*b*) The Court will also reject as sureties all persons who the Court knows or has reason to believe are making a profession of becoming sureties for others in consideration of payment (*c*) The officials of all Courts are prohibited under pain of dismissal from receiving any commission on the amount of the surety bond in cases where they are admitted as sureties—*British Burma Gazette, Pt III p* 3 The sureties required are persons who are in a position to influence the person proceeded against and likely to be able to restrain him and who if they fail to do so can forfeit the amount in the bond **8 Bur. L. T. 53 = 16 Cr. L. J. 853.** In imposing limitations on sureties Magistrates should not act arbitrarily, **U. B. R (1914), 4 Cr. 144.**

Bombay.—*Ability to control the accused is not a desirable condition*—The condition attached to a surety bond that he should be able to control the accused is not a desirable condition, **16 Bom. L. R 138 = 2 Bom. Cr. Ca. 1888 = 15 Cr. L. J. 268.**

99. Whether Magistrate may restrict the locality of sureties?—A Magistrate has no right to impose an arbitrary condition not essential to restrain a party from the infringement of the law, *e g*, a condition requiring the accused to furnish two sureties being persons of respectability and substance not related to him, and, residing within one mile of his house **22 W. R. 37 ;** *followed in* **10 C. W. N. 1027 = 4 Cr. L. J. 169 ; 33 P. R. 1880 ; 6 O. C. 199.** A Magistrate has no jurisdiction to put such restriction on the nature of the sureties as to direct that they should be local, until and unless such objection is subsequently taken by the Police, **15 Cr. L. J. 254 (C.)** The Allahabad view is that some such limits may be imposed, but they must not be too narrow Where the sureties were limited to the *Mirzapore Municipality*, the High Court while being of opinion that the Magistrate was competent to assign some geographical limits within which the sureties must be residing *held* that the limits imposed by the Magistrate were too narrow, and extended it by adding the words "*or to some place in the immediate neighbourhood*" **24 A. 471, 1898 A. W. N 199 ; 12 A. L. J. 1004 = 16 Cr. L. J. 254.** In **14 Cr. L. J. 214 (A.)** residence within nine miles was considered to be an arbitrary limit *See* also **7 A. L. J. 993 = 11 Cr. L. J. 536** and **10 A. L. J. 354 = 3 Cr L. J. 831**, where a limit of five miles was imposed by the Magistrate, but was set aside by the High Court The **22 W. R. 37** case was not approved, by EDGE, C J, in **1895 A. W. N. 143** and **20 A. 206.** Where several sureties are required it is not necessary that each one of them should live in the immediate neighbourhood of the accused, **17 Cr. L. J. 95.** *See* also **22 Bom. L R. 190.**

100 Relationship is no disqualification.—The fact that the sureties offered are the relations of the accused, far from being a disqualification is a circumstance which would be an additional qualification if the

entail forfeiture. *See* Form X, Sch. V. All that is required is that the person bound commits a breach of the peace or does any act that may probably occasion a breach of the peace. It was contended that having regard to the language of the penultimate clause of s. 502 of Act X of 1872 that there must be evidence that the party bound down had committed an offence. *Held* "whatever may be the extent of the application of this very wide language (s. 502), we are satisfied that it is intended merely as an illustration of some modes in which the peace may be broken, and is not to be read as a definition of the acts which will give rise to the liability to the penalty of the bond, so as to confine the liability to occasions on which some actually punishable offence has been committed, or to render it incumbent on the prosecution in calling upon the defendant to show cause why the penalty should not be levied, to establish the actual commission of an offence. All that is necessary to show is that some act was done which was likely in its consequences to provoke a breach of the peace, and it is not material to consider whether the person bound did the act himself with his own hand, or made use of other persons to do it," **2 M. 169 at p. 173.**

114. Breach may be committed anywhere.—If in one district *A* executes a bond to keep the peace towards *B* and afterwards *A* is convicted of having assaulted *B* in another district, *A* would forfeit the bond and the Magistrate of the former district could proceed against him under this section, **2 B. L. R. Appx. Cr. 11.** This term also covers the dishonest receipt of stolen property in a Native State by a British subject, **28 P. R. 1910 = 199 P. L. R. 1910 = 45 P. W. R. 1910 = 11 Cr. L. J. 635.**

115. Procedure on breach.—*See* s. 514. (*a*) *Principal should not be forthwith committed to prison.*—When a person forfeits his bond by reason of his conviction for an offence involving a breach of the peace he cannot be forthwith committed to prison for the unexpired portion of the term for which security had been taken, but the amount of his forfeited bond might be exacted, **28 A. 629.**

(*b*) *Opportunity must be given to him to show cause.*—A Magistrate ought not to forfeit a recognisance to keep the peace, unless the person charged with the breach has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued, **4 C. 865 = 4 C. L. R. 243 (F.B.).**

116. Must the forfeiture be enforced immediately?—(*a*) Yes, according to *Punjab* and *Calcutta.* The spirit of s. 514 is, that if a Magistrate, who convicts a person of an offence which involves the forfeiture of his bond under s. 107, does not make any order for forfeiture, he must be taken to have decided not to take action on the bond in respect of that particular breach of the peace, and cannot thereafter consider and add to his order by directing forfeiture of the recognisance, **13 P. R. 1913 = 7 P. W. R. 1913 (F.B.) = 14 Cr. L. J. 67**; *following* **26 P. R. 1904; 1 C. L. R. 134**; and *dissenting* from **26 A. 202.** If therefore a Criminal Court, knowing that the person charged before it is under security to be of good behaviour, in sentencing that person in the case before it makes no reference to any confiscation of security and takes no steps towards its confiscation, it is not competent for that Court or any Court in a subsequent and separate proceeding to take such steps, **6 P. W. R. 1915 = 16 Cr. L. J. 194.** (*b*) *Contra Allahabad.*—The mere fact that no immediate action under s. 514 is taken against a person under recognisance to keep the peace or against his surety on a conviction of the former for an offence involving a breach of the peace, is no bar to the taking of such proceedings at a subsequent time, as *e.g.*, after the time for appealing has expired or after an appeal by the principal has been dismissed, **26 A. 202; 3 C. L. R. 406.**

117. On forfeiture, are both principal and surety liable to pay?—The bond contemplated by ss. 112 and 118 where there are sureties, is one bond for one amount, and is discharged on forfeiture, by payment, of the amount due by either the principal or the surety, **25 P. R. 1894.** A person bound over under s. 109 having committed an offence, the Magistrate required him to pay Rs. 100, the amount of penalty and make the sureties too to pay a like amount *held*, that the language of ss. 109 and 110, leaves no doubt that the sureties to be required under these sections are sureties in the ordinary sense of the term. They undertake that their principle will be of good behaviour and in case of a breach, the principal and sureties are jointly and severally liable for sum named in the bond and no more. The penalty is not required to be paid twice over, once by the principal and once again by the surety, **1905 U. B. R. (Cr. P. C.) 31 = 2 Cr. L. J. 463.** *See* also **U. B. R. 1904, at p. 13,** which was *dissented* from in **36 C. 562,** where it was *held*, that both the principal and surety are liable to pay as the object of the surety-bond is to prevent crime and not to obtain money for the Crown and that form XI, Sch. V, confirmed the view that the object of requiring a surety is to get an additional security for the principal's securing the peace and not to recover the bond amount, **4 L. 462; 5 L. 448.** In this case 36 Cal. 562 was *dissented* from

than one year and the Sessions Judge noticing this irregularity while acting under clause (2) of this section, ordered the accused to furnish sureties only, *held* that such an order was not contemplated by the Code and therefore bad. There is no provision of law empowering a Magistrate to call upon a person (not a minor) to provide sureties only for his good behaviour, without his giving his own bond at the same time, **27 A. 862.** The Rulings in **18 W. R. 61; 7 W. R. 23; 18 W. R. 67** are no longer law, in virtue of the first proviso to s 118.

109. Separate bonds from accused and his sureties ought not to be taken.—There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally, exceeding in the aggregate the amount for which the accused is liable, **30 P. R. 1890.**

110. When cash deposit instead of recognisance may or may not be accepted.—*See* s 513 (*a*) In cases of *good behaviour bonds* under ss 108 109 and 110, deposit of cash or Government promissory notes cannot be accepted in addition to or in lieu of bond. The provisions of s 513 are not applicable to bond for maintaining good behaviour. An order requiring persons to deposit cash in lieu of entering into a bond as security of their future good behaviour is bad in law, **6 C. 14; Ratanlal 671.** *See*, however, **7 W. R. 30.** (*b*) In cases of *keeping the peace bonds*, deposit may be accepted instead of personal recognisance by the principal. (*c*) No deposit can be accepted from a surety in lieu of bond **32 B. 449.**

111. Breach of bond for good behaviour.—Where a person bound over is not shown to have committed an offence, or to have attempted to do so or to have abetted such a thing, his bond for good behaviour could not be forfeited under s 121. Section 121 is explicit and so far as bonds for good behaviour are concerned, is exhaustive though it might not be so as regards bonds for keeping the peace **5 P. R. 1910 = 8 P. W. R. 1910 = 11 Cr. L. J. 252.** Where an accused person was ordered to give security for good behaviour under s 109, for one year, and within the year he was found in possession of costly cloths for which he could not satisfactorily account he cannot be directed to pay the penalty of the bond, unless there was proof that any actual theft of the clothes had taken place **Weir II, 57.** A conviction under s 13 of *the Gambling Act* III of 1867 would work a forfeiture, **1906 A. W. N. 13 = 3 Cr. L. J. 91.** So also dishonest receipt of stolen property in a Native State, **28 P. R. 1910 = 11 Cr. L. J. 635.** In **15 P. R. 1910 = 14 Cr. L. J 575,** it was observed that when men stood surety in respect of s 110 they undertook liability for such good conduct only on the part of the person for whom they stood surety as is indicated by the circumstances under which the security was demanded, and that it would be impossible to work the security system in any other way, as no man would ever undertake to be a surety if thereby he were compelled to undergo liability for any conceivable form of offence committed by the person for whom they stood as surety. In this case *A* was required to give security for being suspected as a thief and notorious receiver of stolen property and *B* a resident of another village was accepted as *A's* surety. *A* was subsequently convicted under s 326 I P C on a serious charge of violence. It was *held* that the man who stands surety for another should always be treated in a considerate manner and it is contrary to all principles of justice that he should be held liable for a sudden act of violence especially when he was a resident of another village and has no possible opportunity of controlling the everyday life of the offender. In **10 P. R. 1915 = 7 P. W. R. 1914 = 16 Cr. L. J. 549,** it was *held* that the report of the above case was misleading and that the Chief Court had not overlooked the provisions of section 121 and laid no hard and-fast rule as to forfeiture and all that the ruling indicated was the necessity for moderation and reasonable exercise of discretion in determining the extent if any, to which a conviction would justify the rigorous measures of forfeiture. In this case the principal was placed on security under s 110 not merely as being a receiver of stolen property, but also as being a dangerous man and dacoit and therefore his conviction for a bad offence under s 325, I P C., was *held* to entail forfeiture. *See* also **6 P. R. 1915 = 16 Cr. L. J. 287.** A bond under section 110 can be forfeited on a conviction under section 323, I P C **4 L 452.**

112 Breach of bond for keeping the peace—Section 121 deals with the description of bonds, one for keeping the peace and the other for good behaviour. A bond to keep the peace cannot be enforced on conviction of *any* offence other than an offence connected with a breach of the peace itself. Thus a conviction for theft or one for wrongful confinement and extortion will not justify a forfeiture of such bond, **15 W. R. 72.** Nor one for abduction of a female, **7 P. R 1905.** Nor a secret attempt to poison a person, **22 P. R. 1911 = 13 Cr. L. J. 605** *See* also **19 W. R. 48** and Notes to s. 514.

113. Not necessary that some offence should be committed to entail forfeiture of bond for keeping the peace—It is clear from the terms of the bond for keeping the peace that no offence need be committed as

125. Under s. 528, District Magistrate, etc., may withdraw or recall cases under this Chapter.—*See* s. 528 and Notes thereto.—Under s. 528, a District Magistrate or Sub-divisional Magistrate has power before the completion of the inquiry to withdraw or recall any case falling under this section from a Subordinate Magistrate and try it himself. So can a Chief Presidency Magistrate in a Presidency town.

126. Jurisdiction of High Court to transfer cases under this Chapter.—*See* s. 526. Excepting Punjab and Bombay it is *held* that proceedings under this Chapter may be transferred by the High Court.

(*a*) *Cases under s.* 107.—**32 A. 642; 41 C. 719.** In **17 C. W. N. 536 = 14 Cr. L. J. 382** the undesirability of transferring preventive proceedings from one district to another was pointed out.

(*b*) *Cases under s.* 110.—Proceedings may be transferred from one district to another, **28 C. 709; 11 C. W. N. CCXXXI; 32 A. 642.** In **16 A. 9; 31 A. 47; 19 A. 291** it was laid down that proceedings cannot be transferred to a different district as no Magistrate other than one within whose local jurisdiction the person is found, against whom proceedings are instituted, has jurisdiction.

Contra, see **25 B. 179; 154 P. L. R. 1914 = 15 Cr. L. J. 563.**

127. Transfer must be to a competent Magistrate.—The transfer may give local jurisdiction, **24 A. 151**; but if the Magistrate to whom the case is transferred is not competent as being duly empowered he cannot conduct the proceedings. It was *held* in **37 A. 20** *distinguishing* **24 A. 151,** that the District Magistrate cannot transfer the proceedings under this section to a Magistrate who is not competent to conduct proceedings under this Chapter, *e.g.*, a Magistrate with second-class powers. In **24 A. 151** the transfer was to a Magistrate of the first class competent to conduct the proceedings, but without local jurisdiction. A Magistrate of the first class having jurisdiction throughout a district, but not specially empowered under this section cannot exercise jurisdiction in a case under it upon a transfer thereof to him by the District Magistrate under s. 192, **Ratanlal 838; 22 C. 898.**

128. Transfer by a Magistrate having no power.—When a Magistrate having no power to transfer a case under s. 110, transfers the case erroneously and in good faith to another Magistrate, the proceeding before the latter Magistrate will not be void, as such transfer would only amount to an irregularity which would be covered by the provisions of s. 529, cl. (*f*), **35 C. 243.** *See* also **4 C. W. N. 821** and Notes under s. 529.

129. Duty of Magistrate to adjourn to enable person to apply for transfer.—*See* s. 526 (8) and Notes thereto, and **11 C. W. N. CCXXXI; 41 C. 719; 1 P. L. R. 1913 = 254 P. L. R. 1912 = 13 Cr. L. J. 746.**

130. Is power of transfer taken away after Magistrate 'has taken action'?—*See* s. 117 (1). Proceedings under s. 110 had been started against *G* and two others before a first-class Magistrate of *M.* When the case came on for hearing, two of the persons admitted the facts alleged against them and offered to find security. Thereupon the Magistrate informed *G*, although no evidence had been recorded against him, that unless he also admitted and furnished necessary securities, he would be dealt with severely and would be sent to jail. Upon an application for transfer, *held*, that having regard to the fact that the Magistrate concerned has 'acted' within the meaning of this section, the High Court has no power to make an order for transfer, **19 A. 291.** It was *held* in **14 Bom. L. R. 713 = 13 Cr. L. J. 748** that a first-class Magistrate who had initiated proceedings and taken evidence was not competent to send up the case to the District Magistrate. The Ruling in **19 A. 291** was under s. 117 of the old Code. The word '*acted*' is now omitted, and for it the words '*has taken action*' have been substituted in the present s. 117. The result seems to be that there will be no difficulty now in transferring a case before a Magistrate 'has taken action,' *i.e.*, recorded evidence under the section.

XVII.—FURTHER INQUIRY AND RE-INQUIRY.

131. Can further inquiry be directed under s. 437 in cases of discharge under this Chapter?—*See* s. 437 and Notes thereto. There are conflicting decisions as to whether further inquiry under s. 437 could be directed in the case of a person discharged under s. 119, but *see* the amendment of s. 436 and Note 21 to s. 436. *See* also **2 R. 30; 46 A. 285.**

Madras, Punjab and **Upper Burma** *hold* that no order for further inquiry can be made. A person proceeded against under this Chapter is not an accused person within the meaning of s. 437 and the order of discharge under s. 119 is not the same as 'discharge' in s. 437, **33 M. 85; 7 M. L. T. 104 = 11 Cr. L. J. 251; 6 P. R. 1911 = 153 P. L. R. 1911 = 30 P. W. R. 1911 = 12 Cr. L. J. 232 (F.B.)** *approving*, **131 P. L. R. 1905 = 42 P. R. 1905** and *overruling* **24 P. R. 1903 = 20 P. L. R. 1904 = 1 Cr. L. J. 96** and **33 P. R. 1905 = 149 P. L. R. 1005 = 2 Cr. L. J. 716.**

Held, that a bond for good behaviour under s 110 is for one amount and is discharged on forfeiture by the payment of that amount either by the principal or by the surety In no case can a larger amount be recovered either from principal or the surety or from both (36 C 562 *not followed*) **4 Lah. 482.**

118. Bond cannot be enforced more than once.—Where a bond has been forfeited and a portion of the penalty recovered, it cannot again be enforced on a subsequent conviction **11 P. R. 1839.** A bond cannot be renewed without fresh proceedings being taken under s 112, **7 M. L. T. 90 = 11 Cr. L. J 244; U. B. R. I. 159 = 14 Cr. L. J 430.** A Magistrate may remit any portion of the full amount under s 514 (5), but such a remission is clearly an extinction of the liability of the parties to it for the amount remitted and once the bond is forfeited there is an end of it, **(1913) U. B. R. I. 159 = 14 Cr. L. J. 430.**

119. Bond not according to law cannot be enforced.—Where a bond was executed under a mistake in the form of bonds under s 107 while a bond under s 110 had been ordered, *held* that the bond was void and the error not cured under s 537, **32 P. R. 1903.**

120. Bond cannot be forfeited for offence committed before execution.—When the offence was committed prior to the date on which the bond was executed the bond could not be forfeited by reason of the commission of the offence, **22 P. R. 1914 = 15 Cr. L. J. 605.**

121. Surety bond executed during inquiry remains in force until execution of the final bond.—A bond executed by a person who stood surety for the appearance of the accused up to the conclusion of the case under this section is in force, where a Magistrate holds the case proved against the accused, until the accused has appeared with his sureties and executed his bond, **32 P. R. 1914 = 16 Cr. L. J. 74**

122. Forfeiture of bond for good behaviour under the English Law.—"The use of the expression '*good behaviour*'" involves no obscurity to anyone acquainted with its history By the Statute 34 Edw III Chap I, Justices were empowered "to bind over to the good behaviour towards the Sovereign and his people all of them that be not of good fame to the intent that the people be not troubled or endamaged, nor the peace diminished' It was realised that the expressions '*not of good fame*' and '*good behaviour*' left much to be determined by the Magistrate himself, but it seems to have been very early accepted as settled law that a recognisance for good behaviour would not be forfeited by barely giving fresh cause of suspicion of that which perhaps may never actually happen, for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended, yet it would be hard upon such suspicion without the proof of any actual crime, to punish them by forfeiture of the recognisance (Stephens, Vol IV, Bk VI, Chapter XIII). The common law, therefore interprets a recognisance for good behaviour in terms even less wide than s. 121, Cr P C and s 23 of the Sindh Regulation III of 1892 The expression '*to be of good behaviour*' when used in a recognisance had under the common law a well recognised and limited meaning long before it was introduced into the Statute Book, and here are no grounds whatever for supposing that the Indian Legis lature intended to widen this meaning further than they have done in clear terms in s 121, Cr P C and s 23 of the Sindh Regulation," **7 S. L. R. 194 = 15 Cr. L. J. 544**

123. Deposit of security amount by principal with surety.—*See* Note 162

XVI.—TRANSFER.

124. Under s. 192, District Magistrate, etc., may transfer cases of which he has taken cognisance.—It was *held* in **35 C. 243** that s 192 applied to any case cognisable by a Criminal Court, and was not restricted to criminal cases only —(*a*) *Cases under s* 107 —The object of s 107 is merely to restrict the initiation of proceedings against persons residing outside the districts, and not to restrict the power of the District Magistrate to transfer such proceedings to a Subordinate Magistrate after initiation **31 C. 350.** But the transfer cannot be made to a Magistrate (*e g*, with second-class powers who is incompetent to conduct proceedings under this section, **37 A. 20.** *See* **8 C. 831; 22 C. 898** and **24 A 151** *See*, however, **13 C. W. N. 580 = 9 Cr. L. J. 148.** (*b*) *Cases under s* 110 —A District Magistrate is competent under s 192 to transfer a case under s 110 **35 C. 243; 24 A. 151; 37 A. 20.** It was *held* in **1 S. L. R. 2 = 9 Cr. L. J. 246** *following* **31 C 350** and **24 A. 151** that it was competent to a District Magistrate to transfer proceedings which had been properly instituted before a competent Magistrate, to a Magistrate subordinate to himself who would then be compe tent to proceed with the inquiry even though he was not competent to institute the same

were not *bona fide*. *See* also 22 C. 131; 20 B. 543; 17 P. W. R. 1910 = 11 Cr. L. J. 389; 8 S. L. R. 207 = 16 Cr. L. J. 335. The High Court may stay further proceedings, 14 C. W. N. CLXVII.

141. High Court will interfere only on strong and clear grounds—The power to demand security from certain classes of persons suspected, is a power that is almost as much of an executive as of a judicial nature. It is a preventive jurisdiction. The District Magistrate who is the chief executive officer of a district is primarily responsible for the maintenance of the law and order in his district, and the jurisdiction with which he is invested in regard to suspected persons mentioned in the section is a very large one. The provisions of the Code indicate that the Legislature intends the responsibility for the due exercise in individual cases of this particular kind of preventive jurisdiction to rest chiefly with the District Magistrate, and it would be going counter to the spirit of the Code in this respect, to give to persons ordered to furnish security, a remedy in the nature of an appeal to this Court, which has not been granted to them by the Legislature. Therefore the Chief Court would interfere with the orders passed by a Magistrate only on the very clearest and strongest grounds, grounds which demonstrate that there has been in the particular case miscarriage of justice. The Chief Court on the revision side will be bound by the findings of facts of the District Magistrate and will not treat an application for revision as a *quasi* appeal, 23 P. R. 1889. When the judgment of a District Judge deciding an appeal under section 110 is very short and does not show that the evidence was all examined and carefully weighed, the High Court will interfere in revision, 13 Cr. L. J. 9 (A.). *See* also 6 A. L. J. 487 = 9 Cr. L. J. 598; 8 P. R. 1904; 42 P. R. 1885; 12 Cr. L. J. 542 (Oudh). The High Court very seldom interferes with orders under this section in revision, except where the circumstances are very exceptional. So where the applicant was sent to jail while the inquiry was in progress, the High Court *held* that it was an illegality which prejudiced his interest in the inquiry, 16 Bom. L. R. 943 = 16 Cr. L. J. 91. If there is no evidence on the record, the order will be set aside on revision, 34 P. W. R. 1912 = 195 P. L. R. 1912 = 13 Cr. L. J. 720. When there is nothing on the record to show that an inquiry as required by s. 117 was *held*, the order must be set aside, 37 A. 30. That the accused was convicted at a trial is no foundation for proceedings under this section.

In 22 A. L. J. 678 it was *held* that the High Court would rarely interfere in revision in cases under s 110, but it had to be satisfied that the evidence was of a character which would reasonably support the inference that it was necessary in the public interest to send a man to jail or to bind him down.

142. Order refusing to accept sureties.—The question as to whether a particular person is fit or not is for the Magistrate to decide; the matter is left to his discretion, 8. C. L. J. 243 = 13 C. W. N. 80. The discretion conferred upon a Magistrate by s. 122 is a very wide one and the High Court will not slightly interfere with the same, 12 A. L. J. 1004 = 16 Cr. L. J. 54; but if the discretion has not been judicially exercised the High Court will interfere, 15 Cr. L. J. 727 (A.). When no reasons were given why a surety was rejected, the High Court directed the sureties to be accepted, 13 C. W. N. XXVII. *See* Notes under Heading XIV.

143. Complainant has no right of audience in the High Court.—Where a rule is issued on a Magistrate to show cause, and the order sought to be set aside is one only intended to secure the peace of the district by binding down the petitioner, the Magistrate is the only party entitled to be heard. Any other party interested in the result of the order, cannot appear, 25 C. 798.

XX.—NATURE OF PROCEEDINGS UNDER THIS CHAPTER—WHETHER PERSONS PROCEEDED AGAINST ARE "ACCUSED" PERSONS?

144. Is a proceeding under this section 'criminal,' a 'trial' or an 'inquiry' and the person proceeded against 'an accused.'—It is hard to reconcile the various decisions as to the nature of the proceedings under this Chapter and the status of the person proceeded against. All the cases bearing on the subject, have been brought together here.

The procedure prescribed by s. 117 for conducting inquires under Chapter VIII is that for conducting trials. Persons ordered to give security may, under s. 123, be imprisoned. An order under s. 106 (3) is treated as an enhancement of sentence, s. 423 (1) (*b*). Taking into consideration these facts, it was *held* in 28 M. L. J. 307 = 1915 M. W. N. 224 = 16 Cr. L. J. 303, *follwing* 27 M. 510, that proceedings under this Chapter are of a criminal nature.

145. Proceeding in a criminal trial within the meaning of s. 15 of the Letters Patent.—In the above case of 28 M. L. J. 307, it was further *held* that though the definition of 'inquiry,' s. 4 (*p*) be used as a test, such proceedings might fall within the scope of 'an inquiry' rather than of 'a trial,' it was not to be supposed that when the Letters Patent were enacted in 1815 this definition was in the mind of the Legislature and therefore

The fact that the word 'accused' is nowhere used in Chap. VIII, coupled with the provisions of s 119 by which in proceedings of this kind the final order must always be one of discharge, when a case for requiring security is not made out, is sufficient to show that the provisions of s 437 were not intended to apply to proceedings under this Chapter (1914) U. B. R. 3 = 15 Cr. L. J 531. *See* also 36 M. 315.

Bombay, Allahabad and **Calcutta** *hold* that further inquiry may be directed *See* **18 B. 661; 35 B. 401; 1899 A. W. N. 203; 21 A 107, 24 A. 148; 36 A. 147; 23 C 493, 4 C. L R. 452, 27 C. 656, 36 C. 163.** In **1900 A. W. N. 206; 27 C. 662; 33 C. 8** and **13 C. W. N. CCLXI,** however the contrary view was *held* *See* also the article in **3 C. W. N. CLXV,** where the conclusion in **21 A. 107** is questioned **19 A L. J. 985** *following* **21 A. 107.**

132. Is s 403 or s. 494 a bar to a re-inquiry on the same facts?—It was *held* in **36 M. 315** approving **33 M. 85** that neither s 494 nor s 403 applies to security proceedings under Chap VIII S 495 applies only where the proceedings can end in acquittal or discharge of the accused A proceeding under this Chapter does not terminate in either of the two ways Proceedings drawn up against certain petitioners terminated in their discharge as the Police report dated 27th July, on which proceedings were instituted did not exist. The Police report was dated 29th July, but were referred to in the proceedings by mistake as of the 27th July Another *Magistrate drew up fresh proceedings on the Police report of 29th July, held that the present proceedings* based on a Police report which was not the foundation of the former proceedings were not invalid, **14 Cr. L. J. 189 (C)** *See*, however, **35 B. 401.** *See* also Note 57 above

XVIII.—APPEAL.

133, 134; 135; 136 Appeal lies against orders requiring security to keep the peace as well as against orders requiring security for good behaviour.—Under the old Act distinction was made between an order for security to keep the peace and an order for security to be of good behaviour but now by the amendment to s 406 all orders under s 118 whether to give security for keeping the peace or for good behaviour are made appealable. Under s 406 an appeal ordinarily lies to the Court of Session against an order of any Magistrate *except the Presidency Magistrate from whose order an appeal lies to the High Court So under the* present amendment **27 A. 623; 11 Bom L R. 740, 25 C. W. N. 383,** have become obsolete *See* s 406 and Notes thereon

137. No appeal against order of Sessions Judge made on a reference from Subordinate Magistrate.—*See* s 123 (2), (3). No right of appeal lies from the order of a Sessions Court fixing the period of detention on an accused person refusing to furnish security, **24 W. R 12.** When the Sessions Judge confirms the order of the Magistrate, the order of the Magistrate merges into that of the Sessions Judge and there is no appeal, **23 P. R. 1886; 15 P. R. 1900; 1893 A W. N. 183, 35 B. 271** and Note 134 The order is not a conviction on a trial held by a Sessions Judge, nor a sentence of a District Magistrate subject to confirmation of the Sessions Judge, and therefore under s. 404 no appeal would lie to the High Court from an order made by District Magistrate under this section and on reference confirmed by the Sessions Judge, **9 C. 878; 24 W. R 12.**

138. Appeal against order directing forfeiture of bond—*See* ss 514 and 515 and Notes thereto

139. No appeal lies to the Privy Council—*See* **18 C. L. J. 119 = 14 Cr. L. J. 598** under s 41 of the Letters Patent, *see* Appendix.

XIX.—REVISION.

140 All orders subject to revision by High Court.—'We have considered the question whether these orders should be subject to appeal or revision and we have come to the conclusion that they ought to be subject to revision, as the High Court can then act of its own motion as well as on the petition of the party aggrieved In case there should be any doubt on the point, we have provided in s. 439 (6) that all orders under the Code (not expressly excepted) made by an inferior Court shall be subject to revision by the High Court."—*Sel Com Rep* Orders passed by District Magistrates are not appealable but the High Court can revise them on the same principles as apply generally to the revision of other non appealable orders **10 P. R. 1899.** *See* Notes to s 439 For instance of a case where on merits High Court will interfere, *see* **17 Cr. L. J. 461.** *See* also **14 A. L. J. 215.**

(*i*) *High Court may set aside the initial order*—The High Court has power to revise the initial order under section 112 if sufficient grounds are shown, **18 P. W. R. 1910 = 11 Cr. L J. 338;** even if the Magistrate has before him a Police report *prima facie* sufficient to justify the commencement of the proceedings, **17 C. W N. 238 = 16 C. L. J 467 = 14 Cr. L. J. 5.** In this case the High Court was of opinion that proceedings

by this section is the bond which has been given by the person against whom the order has been passed under s. 118 and not the bond of the surety, **8 A. L. J. 658 = 12 Cr. L. J. 480.** *See* also **16 P. R. 1905 = 120 P. L. R. 1905 = 2 Cr. L. J. 278.** Where a Deputy Magistrate directed the petitioner to furnish security for good behaviour and accepted the sureties tendered, but the matter somehow coming to the notice of the Deputy Commissioner, the latter officer cancelled the order of the Deputy Magistrate on the ground that the security was insufficient and ordered the issue of warrants for the petitioner's arrest. *Held,* that the order of the Deputy Commissioner was inconsistent with the spirit of this section read with ss. 124 and 126 and was illegal. If the Deputy Commissioner was dissatisfied with his subordinate's inquiry as to the sufficiency of the security, he should have *held* such inquiry as he thought necessary, after notice to the parties concerned and reported the matter to the High Court. The law gives him no power to deal with it himself, **8 O. C. 245 = 2 Cr. L. J. 507.** *See* also **7 O. C. 113 ; 1 C. W. N. 394.**

4. **On cancelling bond, further inquiry cannot be directed.**—A District Magistrate cannot after setting aside an order to give security for good behaviour, direct further inquiry as there is no provision of law authorising District Magistrate to direct 'further inquiry' in proceedings for security for good behaviour, **33 C. 8.**

5. **Magistrate cannot institute proceedings under s. 476, infra.**—As laid down in **34 C. 1,** a District Magistrate has full power to cancel the bond for reasons which appear to him to be sufficient; but that section does not give him a right to hear an appeal against the order of a Subordinate Magistrate passed under s. 107, so as to justify the District Magistrate to institute proceedings under s. 476. In such a case a proceeding under s. 125 is not a judicial proceeding, **37 C. 72.**

6. **Magistrate must give opportunity to the parties concerned to represent their case.**—A District Magistrate fixed a date for hearing of a petition to cancel the bond, and no intimation was given to petitioners that they would be heard in camp. On the said date, the case was called, and the petitioners could obviously put in no appearance. The petition was dismissed. *Held,* that the Magistrate should have heard them, having given them a date for appearance, **53 P. L. R. 1914 = 15 Cr. L. J. 143.** In **16 A. L. J., p. 469** the point whether an order under section 125 of the District Magistrate was a judicial act or whether it was merely an executive function was raised, but was not decided and it was *held* that while making an order under section 125, a Magistrate ought to hear the applicant or his pleader before the application is rejected. *Inter alia* it was also remarked that application for revision made to the High Court in respect of orders to give security to keep the peace ought not to be rejected solely on the ground that the applicant has not first made an application to the District Magistrate.

7. **Effect of cancellation.**—Cancellation of the bond by the District Magistrate under this section will discharge the accused and his surety from all liability. The District Magistrate will ordinarily cancel the bond, if there is no ground for thinking that a breach of the peace or other offence is likely, or the bond has been wrongly taken, **1905 A. W. N. 143.**

8. **Cancellation by Magistrate not authorised void.**—If a bond to keep the peace is cancelled by any Magistrate, other than a District or Chief Presidency Magistrate, the cancellation is void, s. 530, cl. (*f*).

9. **Where proceedings under section 107 were started in one district and transferred to another.**—A District Magistrate under section 125 means the District Magistrate of the district to which proceedings are transferred from another district; where proceedings under section 107 were started in one district and transferred to another, the District Magistrate of the latter has alone jurisdiction under section 125, **23 C. W. N. 958.**

Discharge of sureties.

126. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit requiring the person for whom such surety is bound, to appear or to be brought before him.

* **126-A.** † "When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section (3) of section 122 or under section 126, sub-section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such person,"

* Sub-section (3) of s. 126 has been re-numbered as s. 126-A, by Act XVIII of 1923.

† Words in the inverted commas were substituted by Act XVIII of 1923.

the proceedings of a Magistrate under this Chapter are proceedings in a criminal 'trial' and any order passed in appeal or revision in connection with such a proceeding is also an order in a criminal 'trial' and there is no appeal against such an order under s 15 of the Letters Patent, **27 M. 510** *followed*

146. Order of imprisonment on failure to give security is not a conviction of an offence within the meaning of s. 75, I.P.C.—A previous order under this section requiring the accused to give security for good behaviour cannot be taken into consideration for the purpose of enhancing sentence, when the accused is convicted of an offence under the I P C. An order under this section not being a conviction, s 75, I P C, is not applicable, **1 Bur. S. R 490.** *See* also **1893 A. W. N. 43.**

147. The person proceeded against is not an accused within the meaning of s. 167.—*See* **36 A. 262; 5 Bom. L. R. 27; 32 C. 80** and Note 16 to s 167

148. A proceeding under this Chapter is a 'case' within the meaning of s. 192—*See* **28 C. 709; 29 C. 389; 31 C. 350; 35 C. 243, 24 A. 151** and Note 124

149. The person proceeded against is not an 'accused' within the meaning of s. 250.—No compensation can be awarded under s 250 to a person proceeded against under this Chapter *See* **25 B. 48; 15 A. 365; 7 A. L. J. 743; 36 A. 382; 4 P. R. 1896, 33 P. R. 1902** and Note 11 to s 250

150. Person proceeded against is an 'accused' within the meaning of s. 340.—*See* **23 C. 493; 21 A. 107; 18 P. R. 900** and Note under s 340

151. Whether person proceeded against is an 'accused' within the meaning of s. 342?—*See* Note 47

152. A proceeding under this Chapter is an 'inquiry' within the meaning of s. 350.—*See* **4 C. L. R. 452; 23 W. R. 62** and Note 5 to s 340

153. A person 'discharged' under this Chapter is not 'acquitted' of an offence within the meaning of s 403—*See* **33 M 85; 36 M. 315; 27 C. 662, 14 Cr. L J. 189 (C)** Note 10 to s 403 and Note 132.

154. Is an order of imprisonment under s. 123 same as sentence of imprisonment under s. 397?—It has been *held* in **27 M. 525; 31 M. 515; 14 P. R. 895; Ratanlal 1970; 34 B. 326; 7 S. L. R 203 = 15 Cr. L. J. 592; 8 N. L. R. 20 = 13 Cr. L. J. 169,** that a person undergoing imprisonment under this section for failure to furnish security to be of good behaviour is not *undergoing a sentence of imprisonment* within meaning of s 397, so that the term of imprisonment for an *offence* cannot be made to commence on the expiration of the period for which he had been committed, such a person is merely *committed to prison* and not *sentenced* *See* **5 M. H. C. R. Appx. XLVI.** *Contra* **30 A. 334, Ratanlal 774.** The words "committed to prison" in sub-sec. (1) and "detain in prison in sub-sec. (2) are equivalent to a sentence of imprisonment, **30 A. 334.**

155 Proceeding under this Chapter is not a 'trial' within the meaning of s. 410.—*See* **9 C. 878,** where it was *held* that no appeal lay against the order of a Sessions Judge directing imprisonment under s 123

156. Whether the person proceeded against is an 'accused person,' within the meaning of s. 437?—*See* Note 131 and Notes 21 and 22 to s 437

157. A proceeding under this Chapter is a 'charge' within the meaning of s. 443.—*See* **36 C. 163,** where it was *held* that the party against whom proceedings under s 107 are instituted is an 'accused person' and his case comes under s 443 if he is an European British subject *See* Note 4 to s 443

158. Whether proceedings are 'criminal cases' within the meaning of s. 526?—*See* **41 C. 719; 28 M. L. J. 307 = 16 Cr. L. J. 303,** Note 126 and Note 11 to s. 526 In **5 P. R. 1914 = 15 Cr. L. J. 563,** it was *held* that proceedings under s 110 not being a 'criminal case' the Chief Court of Punjab had no jurisdiction under s. 526 or under s. 33 of the Punjab Courts Act to transfer the proceedings The observations of the referring Judge in *Cr M case* 28 *of* 1913 and **25 B. 179** were approved The Calcutta and Madras view was not *followed.* *See* the referring judgment of RATTIGAN, J, in **16 Cr. L. J. 249.**

159. Proceeding is a 'case' within the meaning of s. 528—*See* **8 C. 851** and **35 C. 243** and Notes under ss 192 and 528

XXI.—MISCELLANEOUS.

160. Disqualifying interest of Magistrate to take proceedings under this Chapter.—When a Magistrate imports his own personal knowledge of the character of a party in addition to other information, in instituting proceedings under this section, he is not competent to inquire into the truth of the information under s 117, **29 C. 392; 27 P. R. 1903.** *See* also **2 A. 405; 4 P. R. 1898.** If a Magistrate institutes proceedings on materials based on his own knowledge of the character of a party, he is not a proper person to

Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.—If the assembly is an unlawful assembly within the meaning of s. 141, the offender will be punishable under s. 145.—S. 151, I.P.C.

3. **An order by a superior Police-officer lawful.**—An order to disperse passed by an officer superior in rank to an officer in charge of a Police-station is a lawful order within the meaning of this section, **7 B. 42.** *See* s. 551.

4. **Disturbance of public peace.**—Where the object of three persons was to draw a crowd, and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, *held*, that the gathering constituted an unlawful assembly, **7 B. 42.**

5. **Relations of Subordinate Magistrates to Police.**—In all cases of an unlawful assembly, a riot or a disturbance of the peace having occurred, or being apprehended, the Police will take the initiative; but if they find themselves not strong enough for the occasion, immediate application is to be made to the nearest Magistrate, which, under the terms of Act V of 1861, means all persons within the general Police district exercising all or any of the powers of a Magistrate and, therefore, includes the *Tahsildars*, who are bound, on requisition from the Police-Inspector, to appoint from the residents of the neighbourhood as many special Police-officers as the said Inspector may deem necessary. All revenue *chaprasis*, and messengers of all kinds, may legally be appointed special Police-officers. Thus, the whole resources of the Civil Government are at once on a special occasion brought to the assistance of the Police for the purpose of restoring public order.—*Punj. Pol. Cir., Chap. XXVIII, p.* 318; *Punj. Cir.*, 320.

6. **Lawful assembly may be commanded to disperse.**—S. 151, I.P.C., clearly contemplates lawful assemblies as the explanation shows; and a perfectly innocent and lawful assembly may be lawfully commanded to disperse by a Magistrate, **22 P. R. 1887.**

7. **Duty of Magistrates under English law.**—In *R.* v. *Pinney*, **3 St. Tr. (U.S.) 11,** it was laid down that the general rules of law require of Magistrates that at the time of riots they should keep the peace, restrain the rioters and pursue and take them; and to enable them to do this, they may call on all the King's subjects to assist them, which they are bound to do upon reasonable warning, and in point of law, a Magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to give them to those who might not know their use, and who might be under no control, and, who, not being used to act together might be cut off from the rest of the Police, and the arms, by these means get into the hands of rioters. It is no part of the duty of a Magistrate to go out and head the constables, or to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; not to keep a body of men as a reserve to act as occasion may require. Nor is a Magistrate bound to ride with the military; if he gives the military officers orders to act, that is all that is required of him. *Russell*, 431—439.

Use of civil force to disperse.

128. If upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a Police-station, whether within or without the Presidency towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in His Majesty's Army or a Volunteer enrolled under the Indian Volunteers' Act, 1869,* and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

* Act XX of 1869, *see* s. 24 of this Act which empowers Volunteers to prevent disturbance of the public peace, disperse unlawful assemblies and apprehend certain suspected persons. *See* also s. 42, *supra*, and ss. 31 and 32 of *the Police Act* V of 1861, s. 49 of *the Madras Police Act* XXIV of 1859 and ss. 27 and 68 of Bom. Act VII of 1867.

and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security Every such order shall, for the purposes of ss 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118 as the case may be

Notes.—1. On application of surety the Magistrate is bound to cancel—When an application is made by a surety under this section, the Magistrate has no option but to cancel the surety bond, but not until the principal appears or is brought before him The principal if then unable to give fresh security will be committed to jail under s 123 (1)

2. Appeal.—An appeal will lie under s 406 from orders made under this section in respect of security-bonds for good behaviour, since orders under this section are deemed to be made under s 118

3. Effect of cancellation.—When the effect of an order discharging a surety is to remit the suspect to prison for a term exceeding one year, the Magistrate is bound to refer the case to the Sessions Court, **5 S. L. R. 87 = 12 Cr. L. J. 410.**

CHAPTER IX.*

UNLAWFUL ASSEMBLIES

"The rules for calling out and employing the military in aid of the civil power were first enacted in the Code of 1872, and embody (according to SIR J STEPHEN) the principles laid down in the charge of TINDAL, C.J to the grand jury of Bristol in 1832, as to the duty of soldiers in dispersing rioters *The rules carry the law somewhat further than it has yet been carried in England*, as they expressly indemnify all persons acting in good faith in compliance with requisition under ss. 128 and 130 and forbid prosecutions of Magistrates, soldiers and Police-officers except with the sanction of the Governor General in Council"—*Stokes' Anglo-Indian Codes, Vol II Introduction, p* 11

Assembly to disperse on command of Magistrate or Police officer

127. (1) Any Magistrate or officer in charge of a Police-station may command any unlawful assembly or any assembly of five or more person likely to cause a disturbance of the public peace, to disperse, and it shall thereupon be the duty of the members of such assembly to disperse accordingly

(2) This section applies also to the Police in the town [ ] of Calcutta [ ]*

Notes.—1 Definition of the term "unlawful assembly."—An assembly of five or more persons is designated an 'unlawful assembly," if the common object of the persons composing that assembly is—

first—to overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant, or

second—to resist the execution of any law, or of any legal process, or

third—to commit any mischief or criminal trespass, or other offence,

fourth—by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right, or

fifth—by means of criminal force or show of criminal force, to compel any person to do what he is not legally bound to do or to omit to do what he is legally entitled to do

Explanation.—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly—S 142, I P C

2. Punishment—Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both—S 145, I P C

* The whole of this Chapter, so far as it applies to the City of Bombay is repealed by *the City of Bombay Police Act* IV of 1902. *See* s 2 (1) and Schedule

2. Use of fire-arms in the suppression of riots.—When a Magistrate or an officer in charge of a Police-station engaged in dispersing an unlawful assembly is compelled, in the last resort to direct the Police acting under him to use their fire-arms, he shall give the rioters the fullest warning of his intention, warning them beforehand that the fire will be effective, that the ball or buckshot will be used at the first round, and that blank cartridges will not be used. Firing shall cease the instant it is no longer necessary. Care should be taken not to fire upon persons separated from the crowd, nor to fire over the heads of the crowds, as thereby innocent persons may be injured. Blank cartridges should never be served out to Police employed to suppress a riot.—*Bom. Pol. Man.*, *p.* 70.

3. Madras Rules.—The following are the rules to be observed by the Police when compelled to use fire-arms to disperse riotous assemblies:—

(1) When the Police party is under twenty files, it will be told off into four sections. If there should be more than twenty files, the party will be told off into more sections than four.

(2) All commands to the Police are to be given by the officer in command of the party. The Police are not, on any account, to fire excepting by word of command of their officer, who is to exercise a humane discretion respecting the extent of the line of fire.

(3) In order to guard against all misunderstandings, officers commanding Police parties are, on every occasion when employed in the suppression of riots or enforcement of the law, to ensure that the *fullest warning* is given to the mob before any order is given to fire and to take the *most effectual means* to explain beforehand to the people opposed to them that, in the event of the Police party being ordered to fire, their fire will be *effective*.

(4) If the officer in command should be of opinion that a slight effort would suffice to attain the object, he is to give the word of command to one or two specified files to fire. If a greater effort should be required he is to give the word of command to one of the sections, told off as above order to fire—the fire of the other sections being kept in reserve till necessary, and, when required, the fire of each of them being given by the regular word of command of the officer in command.

(5) The firing is to cease the instant it is no longer necessary. Care is to be taken not to fire upon persons separated from the crowd. It is to be observed that to fire over the heads of a crowd engaged in an illegal pursuit would have the effect of favouring the most daring and the guilty, and might have the effect of sacrificing the less daring and even the innocent.

(6) If firing should unfortunately be necessary, all Police-officers and constables must feel that they have a serious duty to perform, and they must perform it with coolness and steadiness and in such a manner as to be able to discontinue their fire the instant it shall be found no longer necessary.

(7) As a *warning* to rioters before firing commences:—

I. A single shot will be discharged in the air. If this is ineffective.

II. The first round fired into a body of rioters will invariably consist of buckshot instead of ball.

Note.—It should be clearly understood that *blank cartridge* is *never* to be served out to Police employed to suppress a riot.

4. Special Police-officers.—*See* ss. 15 and 17 of Act V of 1861 (Police Act).

Use of military force.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

Duty of officer commanding troops required by Magistrate to disperse assembly.

130. (1) When a Magistrate determines to diperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in His Majesty's Army or of any volunteers enrolled under the Indian Volunteers' Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

Notes.—1. Procedure to be adopted in dispersing unlawful assemblies.—

The following procedure will be adopted, according to circumstances, in dispersing unlawful assemblies showing a disposition to disobey orders to disperse —

(*a*) In ordinary cases —

(i) As many Police as may be considered sufficient, or as may be available, will be marched to the scene, and if the dispersal cannot be effected by simply marching the party of Police (informations appropriate to the circumstance) up and down the street or across the place to be cleared, a detachment will be drawn up in double ranks, and orders given to "draw batons and advance ' and on arriving within 50 yards of the crowd the front rank will be ordered to ' charge and use batons, ' the rear ranks continuing to advance in support, and if necessary, charging as well.

(ii) It must be remembered that the closer a crowd is pressed, the less are the members of it capable of offering resistance by the use of *lathis*, stones etc., and that the baton is pre-eminently a weapon for use in close grapple with an adversary, so that in large open spaces flank attack, with the object of closing up the mob and preventing their deriving advantage from superiority in numbers, will sometimes be found expedient

(*b*) In more serious cases where danger to life or property is apprehended —

(i) On being requisitioned a squad of Police, properly armed and accoutred, and carrying ten rounds of buckshot ammunition per man in command of a responsible officer, will proceed with all despatch to the scene

(ii) The officer in charge of the squad will halt at 80 yards distance from the scene and giving orders to fix bayonets, will report himself to the Magistrate, or Police-officer superior in rank to himself who may be present, and will thereafter act under the orders of such Magistrate or superior officer

(iii) The Magistrate or superior Police-officer, or other subordinate officer, as circumstances may permit, supported by a file (who will duly come to the charge on being halted) will proceed to within speaking distance of the mob, and command it to disperse, and distinctly warn it that the fire will be effective and that blank cartridge will not be used

(iv) If the mob shows itself aggressive and determined not to disperse the officer and file aforesaid will fall back, and the squad will, on due command to that effect, load, after which another warning to the rioters to disperse will be given, and if not obeyed within a reasonable time, fire will be opened on distinct word of command by the officer in charge of the squad either by specified number of files or by ranks of sub-sections or sections, or he may order a volley, according to the requirements of the situation He must bear in mind the general rule that, if possible half the men should have their arms loaded

(v) The fire should be so directed as to inflict as little bodily harm as possible, aim in the first instance, being taken at the feet of the nearest rioters, and due care being observed to avoid firing on persons separated from the rioters

(vi) Firing must cease the instant it is no longer necessary, *i e*, on the mob showing the slightest indication of retiring or dispersing

(vii) When a Magistrate or superior Police officer is present, the Police-officer in charge of the squad will act entirely under the orders of such Magistrate or officer, but when he is alone and acting on his own responsbility, he must distinctly understand that no firing can be commenced until some overt act of violence is committed by the rioters

(viii) If compelled to open fire, it is to be remembered the utmost humanity shall be used consistent with securing the public safety

(ix) After the order "cease fire," and should no further apprehension exist, the wounded will be sent to the nearest hospital and the senior Police-officer, will take account of the ammunition used, and if no Magistrate is present, to draw up an accurate report of all that transpired.

(x) District Superintendents should occasionally practise their men in this imaginary riot-drill, generally by sections, sometimes by all the Police he can find available —*See Pol Man I, p* 16

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped; or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree is necessary; or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the erection of, or to remove, repair or support, such building, tent or structure; or

to remove or support such tree; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be; or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do;

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A 'public place' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

Notes.—For offences affecting the public health, safety, convenience, decency and morals, *see* Chapter XIV, ss. 268—294, I.P.C.

1. **For Form** of the order for the removal of nuisances, *see* Sch. V, No. 16. *See* Form 19 for orders under s. 142, in cases where immediate action is urgently called for.

2. **'Person.'**—This includes a company or association.—*See* s. 11, I.P.C., and *General Clauses Act*, 1897, s. 3 (39).

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons

Note.—This section leaves it entirely to the discretion of the officer in command as to how he will disperse the assembly or arrest and confine the persons forming part of it.

Power of commissioned military officers to disperse assembly

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of His Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly, or that they may be punished according to law, but if while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action

Note.—This section empowers commissioned officers only

Protection against prosecution for acts done under this Chapter

132. No prosecution against *any person* for any act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the Governor-General in Council, and—

(*a*) no Magistrate or Police-officer acting under this Chapter in good faith,

(*b*) no officer acting under section 131 in good faith,

(*c*) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and

(*d*) no inferior officer or soldier, or volunteer doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence

Notes.—1. Good faith.—Nothing is said to be done in good faith which is done without due care and attention *See* ss 52 and 76, I P C, and s 3 (20) of *the General Clauses Act* X of 1897

2. The sanction required by this section is that of the Governor General in Council and want of such sanction cannot be cured by s 537, as is the case also where sanction is required under ss. 196 and 197, **31 M. 80** where **29 M. 149** *is followed* and **22 C. 176** *dissented from*

A Police officer in charge of a patrol boat has no authority to act under Chapter 9 of the Code and no sanction under s 132 is necessary for his prosecution for firing on an unlawful assembly in order to disperse it, **50 C. 318.**

3 **Inferior officer, or soldier, or volunteer.**—The words *in good faith* are omitted in clause (*d*) so that now obedience to order is sufficient justification in the case of these persons so long as the order is one which they were bound to obey As to the definition of these classes of persons, *see* Act V of 1869 (*Indian Articles of War*) as amended by Act XII of 1894 and *the Indian Volunteers Act* XX of 1869.

CHAPTER X

PUBLIC NUISANCES

Conditional order for removal of nuisance

*" **133.** Whenever a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class considers, on receiving a Police report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

* This section was substituted for the original section by Act XVIII of 1923 s 24

forms of nuisance. In *Madras*, s. 29 of the old Municipal Act VII of 1884, extended the provisions of ss. 133-144 of the Code to the City of Madras; but the whole of this Act has been repealed by *the Madras City Municipal Act* III of 1904, which contains no provision corresponding to s. 29 of the repealed Act.

12. **Powers of Magistrates of second class under this Chapter.**—When an order is made under the last paragraph of cl. (I) of this section, the second-class Magistrate may hold an enquiry under s. 137 and may confirm the preliminary order or stay further proceedings, **9 M. 201; 25 C. 278.**¶ But proceedings under this section cannot be handed over to a third-class Magistrate, **A. I. R. 1929 Cal. 813.**

13. **Magistrate other than the Magistrate issuing the rule under s. 133 may proceed under ss. 136, 137.**—In the case of an application for the appointment of a Jury there is no ambiguity as the application has to be made to '*the Magistrate by whom the order was made.*' In case of showing cause against the conditional rule issued under s. 133 there is some room for ambiguity as to who is to pass the final order, whether it is the Magistrate who issued the rule or the Magistrate before whom the party has been ordered to appear under the last paragraph of cl. (1) of s. 133. From the wording, however, of s. 137 it is clear that the Magistrate to whom the case is referred and who hears the evidence may pass the final order without reference to the Magistrate issuing the rule, even though he be a second-class Magistrate, but the Madras High Court considered it undesirable, as a rule, for a first-class Magistrate to call on the officer, who reports on a nuisance in his *administrative capacity*, to decide *judicially* whether it is a nuisance or not, **9 M. 201; 25 C. 278.** *See* also **17 C. 562 at p. 565** and **Weir II, 61.** *See* also **37 H. L. J. 313.**

But in a Bombay case where a Magistrate passed a conditional order under s. 133 of the Code, and when the party appeared to show cause, the Magistrate with the consent of the parties, sent the case to another Magistrate for inquiry and report, and on receipt of the report so submitted, made the final order:—*Held*, that the procedure followed was irregular so as to vitiate the proceedings, as there was a complete disregard of the imperative provisions of s. 137. **47 B. 89.**

14. **Jury under s. 138 may be appointed only by the Magistrate issuing the rule.**—*See* ss. 135 (*b*), 138, 139 and 141.

15. **Proceedings of Magistrates not empowered void.**—If a Magistrate, not empowered makes an order under this section, his proceedings are void.—S. 530 (*g*).

16. **No offence to disobey order of Magistrate not empowered.**—If the Magistrate is not lawfully empowered to promulgate the order, no conviction under s. 188, I.P.C., can stand, **8 C. L. R. 231; 1904 A. W. N. 233; 1 A. L. J. 615.** *See* also **14 B. 165; 20 A. 501; 8 P. R. 1873; 1 U. B. R. 178.**

III.—CIRCUMSTANCES WHICH GIVE JURISDICTION TO PROCEED UNDER THIS SECTION.

17. **Proof of imminent danger or urgency necessary to give jurisdiction to a Magistrate.**—This Chapter is not intended to enable a complainant to obtain by summary criminal process what he has failed to get in a Civil Court, or regarding which his civil suit has not yet been decided. When, therefore, there is no proof or urgency or imminent danger to the public interests, it is improper for a Magistrate to make use of the exceptional powers given by this Chapter as a Criminal Court, in regard to a matter which is already the subject of a civil suit, **4 P. R. 1897.** *See* **Ratanlal 81.**

18. **Nuisance must be to the public at large and not merely to private individuals.**—The words in this section which deal with an obstruction in a way, river or channel which is, or may be lawfully used by the public, seem to imply not only that the way, river or channel must be one of public use, but that the obstruction must be of that public use, **22 B. 988.** The scope of this section is plainly limited to injuries arising or likely to arise to members of the general unascertained mass of the public. The persons who under the clause require protection are "persons living or carrying on business in the neighbourhood or passing by." It would be straining the meaning of the words to hold that the clause applies to persons living actually in the alleged dangerous building or in the servants' houses in the compound belonging to it. Therefore this section does not empower a Magistrate to order the owner of a house standing apart from any public road in its own compound to repair such house, **20 A. 501** *which distinguishes* **12 M. 475** and **13 A. 577.** *By persons living or carrying on business in the neighbourhood* (injury to whom, the power to pass order under this section is intended to prevent) are meant, not the persons who in the exercise of their private right may use a building supposed to be in a dangerous condition, but unascertained members of the public whose ordinary avocations may take them to the neighbourhood of such building, **20 A. 501; 9 W. R. 70.** *See* Notes 29 and 37.

I.—APPLICATION OF CHAPTER.

3. Criminal Courts are bound by order of Civil Court restraining the complainant by an injunction not to interfere with alleged nuisance **34 P. W. R. 1917 (Cr.)**

4 **Chapter not to be worked so as to interfere with the free enjoyment of private property.**—The provisions of this Chapter should be worked so as not to become themselves a nuisance to the community at large Although every man is bound to so use his own property that it may not work *legal* damage or harm to his neighbour yet, on the other hand, no one has a right to interfere with a full and free enjoyment by another of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm, and therefore a lawful and necessary trade, such as tanning should not be meddled with, unless it is proved that it is injurious to the health or physical comfort of the community —*Per* TREMLET, J **17 P. R. 1883; 20 P. W. R. 1911; 117 P. L. R. 1911 = 12 Cr. L. J. 146; 36 A. 209.** Considerations of justice and equity should form the rule of a Magistrate s conduct in dealing with a nuisance, **2 B. H. C. R. Cr. Ca 334.**

S 133 of the Code is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which as been in existence for 15 years, **24 A. L. J. 112.**

5. **When proceeding to be instituted under this section and when under s. 143 or s. 144**—Public nuisances *specifically* provided for in this section are taken out of the *general* provision in s 144, **Weir II, 58; Ratanlal 50.** But where a nuisance is not specified in this section, *e g*, prevention of burial on sanitary grounds in certain places, it must be dealt with under the general s 143 or s 144, **Weir II, 64.** A Magistrate having once commenced proceedings under this section must proceed under this and the following sections of the Chapter and cannot take up the matter summarily under s 143, **8 W. R. 37, 11 B. 378; 2 M. I. A. 428 at p. 435.**

6. **S 133 does not oust the jurisdiction of a Magistrate to proceed under s. 147.**—' We are not prepared to follow **4 M. 121** if it was intended to decide therein that the fact that s 133 expressly provides for an order by the Magistrate directing the removal of obstruction to pathways, necessarily implies that a similar order cannot be passed in proceedings under s 147 The same remark applies to the similar *obiter dictum* in **Weir I, 143", 26 M. L. J. 233 = 15 M. L. T. 230 = 15 Cr. L. J. 362.**

7. **Orders under s. 147 cannot be passed when proceedings instituted under s. 133.**—When proceedings are taken under this section no order can be passed under s 147 Proceedings under this section are under an entirely different Chapter of the Code and are made for entirely different purposes and have nothing whatever to do with proceedings under Chapter XII **15 C. W. N. 667 = 12 Cr. L. J. 43.**

8. **Distinction between this section and s. 33 of Bom. Act VII of 1867.**—*Held per* CHANDAVARKAR, J, that in s. 33 of Act VII of 1867, the Legislature intended to deal with structures of a *temporary character*, *i e*, with a case where a person without intending to appropriate a public thoroughfare permanently to his own purpose, builds a temporary structure, such as a *booth* for a temporary purpose But where a person appropriates a public thoroughfare to his own purpose, such as by building a *pucca* wall, the appropriation must be treated as having been intended to be permanent and the act would fall more appropriately under this section, **8 Bom. L. R. 358,** where a conditional order was

II.—COMPETENCY OF MAGISTRATES.

9. **In the United Provinces powers to institute proceedings may be conferred on Municipal Boards.**—The powers of a District Magistrate under this section may be conferred upon Municipal Boards in the North-Western Provinces and Oudh and on Municipal Committees in the Central Provinces, and thereupon the provisions of ss. 133 to 142, both inclusive, with a modification in s 133 will apply to all proceedings taken in exercise of the powers so conferred *See* s 57 *of the North Western Provinces and Oudh Municipalities' Act* XV of 1883 and *the Central Provinces Municipal Act* XVIII of 1889, s 86, respectively.

10 **First-class Magistrates if empowered by Local Government.**—In *Madras* all Magistrates of the first class have been empowered to act under this section (*Fort St George Gazette*, 1873, *p* 717). So, too, in *Bombay*, except where the Magistrate is an Honorary Magistrate, when a special order is necessary in each case (*Bombay Gazette*, 1872, *p* 1325, *ibid*, 1873, 16). In *Punjab* also, all first-class Magistrates are similarly empowered, subject however to the control of the District Magistrate (*Punjab Gazette*, 1878, *Pt I*, *p* 361, *ibid*, 1873, *p* 75).

11. **Presidency Magistrates.**—In Presidency towns, the Presidency Magistrates are not empowered to act under this section. Their power is under the Penal Code, the Police Acts and the Presidency Municipal Acts and other Local Acts like the *Fire Brigade Act*, the *Smoke Nuisances Act*, etc., which deal with special

acting *bona fide* when he denies that there is a right of way over the land. Where there is no question as to the *bona fides* of the applicant's allegation, the Magistrate has no jurisdiction to go into the main issue between the parties as to whether the road was a public or a private one, **1 Bur. L. R. 530.**

Jurisdiction of a Magistrate to take action under s. 133 of the Code is not ousted because one of the parties to the dispute may have set up a *bona fide* claim of right to the subject thereof (**28 A. 98** *overruled*), 45-A. 646. But *see* **24 A. L. J. 361** and s. 139-A newly added.

22. **Even when claim not substantiated, Magistrate must determine whether claim bona fide or not.**—*See* **15 C. 564; 25 C. 278; 11 C. 8; 12 C. 696; 17 C. 562; 2 C. W. N. 554; 3 C. W. N. 345; 7 C. W. N. 117; 8 C. W. N. 143; 1900 A. W. N. 204; 28 A. 98; 22 B. 988; 4 Bom. L. R. 687; 10 Bom. L. R. 563 = 8 Cr. L. J. 33.**

23. **But Magistrate cannot decide title.**—Where a *bona fide* question of title is raised, the trying Magistrate should not go further and decide whether the title set up does or does not exist. He should proceed no further under this Chapter, but leave the matter to be decided by the Civil Court, **28 A. 98.** *See* **10 C. W. N. 845 = 4 Cr. L. J. 42; 11 C. W. N. 26; 15 Bom. L. R. 57 = 2 Bom. Cr. Ca. 13 = 14 Cr. L. J. 74.** In **35 C. 283,** the Magistrate came to the conclusion that the claim of the petitioner, if any, had been barred by limitation. He, however, stayed the passing of the final order for one month in order to allow the petitioner an opportunity of establishing his right by a civil suit, and subsequently, more than two months after the expiration of that period, made his order absolute; *held*, that the order of the Magistrate was bad in law, as he should have refrained from exercising jurisdiction when a *bona fide* claim to the land was raised and as he was not competent to decide whether the claim was barred by limitation. Also *see* **12 C. 137;** *ibid.*, **696; 4 P. R. 1897; 6 P. R. 1837, p. 9; 2 P. R. 1903; 36 C. 233; 10 Bom. L. R. 563 = 8 Cr. L. J. 33; 18 C. W. N. 1143 = 19 C. L. J. 631.**

24. **Claim to be set up at or before first hearing.**—In proceedings with reference to obstructions to public ways, it is open to the Magistrate to inquire into the *bona fides* of the claim; and where he decides against its *bona fides,* he must state reasons for his decision, which will be subject to revision by the High Court. Such a claim must be set up or before the hearing and not afterwards, **15 C. 564; 23 C. 499; 1 C. L. J. 434 = 2 Cr. L. J. 349; 7 C. W. N. 117.**

25. **Where there is a bona fide dispute between a private individual and Government.**—As to the right to a ground on which an encroachment is alleged to have been made by the private individual by building a wall, a Magistrate should not proceed under this section until that dispute is settled in a Civil Court, **Ratanlal 378.** *See* **2 Bom. L. R. 818; 24 A. L. J. 112.**

26. **No ouster of jurisdiction, when encroachment is upon way admittedly public.**—When the encroachment complained of is upon a way admittedly *public*, the jurisdiction of the Magistrate is not ousted by any claim of the person encroaching, however *bona fides*, **6 C. W. N. 886; 36 A. 209.** The decisions in **15 C. 564; 17 C. 562** and **25 C. 278,** were distinguished on the ground that in these cases the question was whether the way obstructed was or was not *a public way.*

V.—WHAT WOULD AMOUNT TO PUBLIC NUISANCE.

27. **Obstruction to public water-courses.**—Where the inhabitants of one village have placed an unlawful obstruction to prevent the flow of water along its natural channel and the resultant injury affects a large area of cultivated land and a considerable body of persons, the case is one of a public nuisance. A common nuisance cannot be excused on the ground that it causes some convenience or advantage to one party, **34 A. 345;** a dispute between two villages in respect of the right of one to dig and clear a water-course for irrigation purposes denied by the other is a dispute within the meaning of this section, **25 P. W. R. 1912 = 13 Cr. L. J. 594.** *See* also **36 A. 209** in Note 37.

28. **Cremation on private land may become a nuisance.**—Though a burning ghât or cremation ground may not itself be a nuisance within the meaning of cl. 2 of this section, still a Magistrate will have jurisdiction under that clause, if it is shown that such a ghât or ground is in such an offensive state, or that cremation is carried on upon it in such an offensive manner as to be a source of injury, danger or annoyance to persons living in the vicinity, **25 C. 425.**

29. **Privies on private property.**—Where a privy is allowed in such a condition as to be a nuisance to passers by, lawfully using a public place or way, proceedings to cause the nuisance to be abated may be instituted under this Chapter. This section, however, does not empower a Magistrate to order a privy to be removed merely because it is only *recently* made in any locality, **4 Bom. L. R. 882 = 26 A. L. J. 86; 29 Cr. L. J. 233.**

30. **Unlawful obstruction to river.**—Where the public used, for more than 20 years, to cross a river at a place where it was fordable all through the year, except for a few days during the freshes, and the petitioner

19. Magistrate has jurisdiction only if locus in quo is a thoroughfare or may be lawfully used by the public.—The provisions of this section are only applicable in such cases when there is no doubt that the place where the alleged obstruction exists in a public thoroughfare, **25 W. R. 4** The fact that the residents of a particular village had a right to take cattle across a field was *held* not sufficient to constitute a public right of way, **1906 A. W. N. 190 = 4 Cr. L. J. 65.** It is not necessary that the way should be one which is generally used by the public All that the section requires is that the way should be one which is or may be lawfully used by the public, **10 Cr. L. J. 210 (C.)** A Magistrate has jurisdiction to take action under s. 133 only if he is satisfied that the unlawful obstruction was of a channel which is or may be lawfully used by the public, **36 A. 209.** The fact of a Magistrate taking action under this section is *prima facie* evidence that he considers the *locus in quo* to be a thoroughfare or public place, and if no objection is taken that it is not such, and the jury find that the order under that section is reasonable and proper, the High Court will not interfere, **8 C L. R. 399.** In **12 A. L. J. 1024 = 15 Cr. L. J. 724,** it is, however, laid down that there must be a finding that the obstruction is on a way that may be lawfully used by the public or in a public place Before a Magistrate can make an order under this section to remove an obstruction from a path alleged to be a public thoroughfare, he must first have come to the conclusion that the path is open to the use of the public, **5 C. 875 = 6 C. L. R. 379**, also **9 B. L R 417, 18 W R. 41** In a case of a complaint for the removal of an obstruction from a road, etc., a Magistrate should first inquire if the road is a public one or not If he finds in the affirmative, he has jurisdiction to proceed If in the nagative, he should withhold his hand and abstain from carrying out the order for the removal of the obstruction **15 W R. 67.** *See* **21 W. R. 64** and **25 W. R. 4**

IV.—JURISDICTION OF MAGISTRATE OUSTED WHEN BONA FIDE CLAIM SET UP.

20. Bona fide claim will oust Magistrate's jurisdiction.—The powers embodied in ss 133—137 with regard to the obstruction of public ways, are not intended to be exercised where there is a *bona fide* dispute as to the existence of the public right, **4 Bom. L. R. 687 ; 15 Bom. L. R. 57 = 2 Bom. Cr. Ca. 13 = 14 Cr. L. J. 74 ; 28 A. 98 ; 22 B 988** Where there is such a dispute the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal, **11 C. 8 ; Weir II, 61 ; 4 C. W. N 596 , 12 C. 187** and **696 ; 17 C. 862 ; 18 C. W. N. 1158 = 19 C. L. J. 631 = 15 Cr. L. J. 515.** Though length of enjoyment cannot legalise a nuisance yet long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing it the character of a *bona fide* dispute as to title, such as might have the effect of ousting the jurisdiction of the Magistrate under this section At any rate he must be allowed an opportunity to have the question determined by a Civil Court, **25 C. 278.** Where the opposite party raises the objection that the way alleged to be obstructed was not one which is or may be lawfully used by the public, the Magistrate is bound to find whether the objection is a *bona fide* one and if he finds in the affirmative he should abstain from further action until the public right of way is determined by a competent Court, **3 C. W. N. 345, 26 C. 869 ; 8 C. W. N 143, 15 C 564 at p 573 ; 42 C. 158** If there is no finding that the claim is not made and put forward in good faith the order will be set aside **21 C L. J. 116 = 16 Cr L J. 160.** In **49 C 682 (F.B)**, all the previous cases were considered and it was *held* that in a proceeding under section 133 for the purpose of compelling removal of an obstruction from a public way, the Magistrate's jurisdiction is not ousted because of a *bona fide* claim of title being raised But of course in view of the latest amendment by the insertion of section 139-A, a Magistrate is bound to stay proceedings if he finds that there is reliable evidence in support of the denial of the public right until the matter of such right has been decided by a competent Civil Court **4 P. 783** *See* s. 139 A, which is newly added

21. Mere assertion of claim will not oust the jurisdiction of the Magistrate.—It is not open to any person illegally causing obstruction to public property, to set up a *bogus* question of title for the purpose of ousting the jurisdiction of the Magistrate, and notwithstanding the raising of such a question the Magistrate is entitled to hear a case sufficiently to enable him to make up his mind whether or not a *bona fide* question of title is raised **15 C. 564 ; 17 C. 862 ; 25 C. 278 , 31 C. 979 ; 28 A. 98 ; 42 C. 158** The mere assertion of a claim of title made without reasonable ground or honest belief in it, or honest intention to support it, will not oust a Criminal Court of its jurisdiction under ss 133 — 137, **15 C. 564, 17 C 862 ; 3 C. W. N. 345 ; 2 C W. N. 554 ; 7 C. W. N. 117 ; 31 C. 979 ; 10 Bom. L R. 563 = 8 Cr. L. J ,33 ; 23 C. 499** and **25 C 278.** Where the effect of the Magistrate's finding was that the petitioner's claim was not a *bona fide* assertion of title, but was an attempt to cause annoyance and inconvenience to a person with whom he was an enmity and that his act amounted to obstruction to the entrance to a public *ghat*, *held*, that the order under this section and the *order absolute* under s. 137, were not improper, **1 C. L. J 434 = 2 Cr. L. J. 349.** It does not follow, that because the land over which a right of way is claimed, belongs to a particular person, that person must necessarily be

physical comfort of the community and a Magistrate is not justified in passing an order under this section, closing the new market. Even the fact that people in the old market are forcibly dragged from it to the new one will not justify an order under the section, **Weir II, 62 = 14 M. L. J. 207.**

38. **Profession of a prostitute.**—This section does not warrant a Magistrate's interference with a prostitute for the purpose of removing her from her dwelling-house simply on the ground of the bad character of her profession, so long as she behaves herself orderly and quietly, creates no open scandal by riotous living, and causes no actual discomfort amounting to positive nuisance to the neighbourhood, **24, W. R. 68; 5 C. W. N. 566.** The existence of the houses of prostitutes newly by the road-side and the fact that they ply their trade in those houses cannot affect *the phycical comfort* of the passers-by, **5 C. W. N. 566.** But where prostitutes are seen on the public road soliciting passers-by and actually having their *charpoys* with them; *held*, that their occupation was clearly injurious to the health of the community, **2 P. R. 1900 = 24 P. L. R. 1900.** But it does not come under nuisance as defined in s. 250, I.P.C., **22 A. 113.**

39. **Slaughtering cattle.**—Where a Magistrate had treated the slaughtering of cattle as a "*nuisance*" and ordered its discontinuance within a *private enclosure* belonging to some Muhammadans: *held* that though the act complained of might be shocking to the prejudices of a community, it could not properly be regarded as a nuisance, **25 W. R. 72.** But obstruction upon a public road is a nuisance, whether in point of fact it causes practical inconvenience or not, **23 A. 159.** *See* also **1901 A. W. N. 25.**

40. **Occupation injurious to the health or physical comfort of the community.**—The interference with the public comfort must be considerable and the circumstances must show that a considerable section of the public must be affected injuriously and general equitable principles must not be lost sight of, **20 P. W. R. 1911 = 117 P. L. R. 1911 = 12 Cr. L. J. 146.** The working of rice husking machines near a residential quarter may become a nuisance, **9 P. R. 1904.** The word *physical* was introduced into the Code of 1882 as the result of **2 B. 457.**

41. **Trades or occupations must in themselves be injurious.**—In making an order under cl. 3 of this section, a Magistrate should be careful not to confound the occupation with the way in which it is conducted. The section deals only with occupation or trades which are *in themselves* injurious to health, etc., and has nothing whatever to do with trades which in themselves are innocuous, but in the course of which the manager or plier of them commits a public nuisance. Keeping a house of public entertainment is certainly not in itself an unhealthy trade, **47 P. R. 1888; 14 M. 364.** A lawful and necessary occupation, such as *tanning* ought not to be interfered with unless it is proved that it is injurious to the health or physical comfort of the community, **17 P. R. 1886.** The proprietor of a cremation ground cannot be said to be carrying on any trade or occupation within the meaning of this section, **25 C. 425.**

(*i*) *Practice of inoculation against small-pox, is no trade or occupation.*—Parents inoculating themselves and their children upon an outbreak of small-pox cannot be said to be carrying on a trade or to be engaged in an occupation. An order under this section to stop this practice is not legal, **(1913) U. B. R. 3rd Qr. 180 = 15 Cr. L. J. 253.**

(*ii*) *Cultivation is not an injurious occupation.*—The cultivation of maize, jower and bajree in certain land within a short distance from a town is not an injurious occupation within the meaning of this section though their mode of cultivation may be in some respects objectionable, **39 P. R. 1889.**

VII.—PROCEDURE TO BE ADOPTED BY MAGISTRATE.

42. **Rules laid down in this Chapter to be strictly followed.**—Where a Magistrate commences proceedings under this section, he is not at liberty to proceed otherwise than in conformity with the rules laid down in Chapter X of this Code, **8 W. R. 37; 11 B. 375.** 'Cases have come before the Judicial Commissioner in which proceedings under Chapter X have been instituted on a vernacular order merely initialled by the Magistrate. In proceeding thus laxly instituted other irregularities have naturally followed. The accused has not received proper notice of what he was required to do, and has not (as required by this section) been given an opportunity of appearing to show cause against the conditional order made by the Magistrate. The Judicial Commissioner would impress upon every Magistrate exercising powers under Chapter X the necessity of recording in each case a formal order in his own hand, stating the information he has received, and the order he proposes to issue and of seeing that a proper notice is issued to the accused giving him full information of what he is required to do, and an opportunity of appearing to show cause against the order, if he wishes to do so.'—*C. P. Cr., Part II, No.* 8. A Magistrate has no power to refer a dispute under this section to arbitration even if the parties agree on such a course being adopted, **22 Cr. L. J. 327.**

erected a *bund*, as of right, lower down the river, the effect of which was to make the river unfordable by raising the height of the water, and the Magistrate made an order under this section directing the removal of the *bund*, *held*, that the order was not illegal The right to erect a bund across the river could only have been an easement and the petitioner had by long desuetude lost the right, while the public had acquired a prescribed right of way. If it be conceded that the petitioner had a subsisting right to dam the river by putting up a bund, such right is subject to the maxim, "*Sic utero tuo, ut alienum non laedas*" and here the petitioner s action had caused obstruction to the public, **32 C. 930.**

31. Building likely to fall, etc.—To justify an action under this section, there must be proof that the property is *in presenti* in a dangerous state That it might become so by another man altering the adjoining premises or undermining the building in question, is not a ground for interference under the section, **5 P. R. 1890** at **p. 11.** Under the 1872 Code, the Magistrate could only direct the *removal* Now he may direct also its *repair or support*

32. Carrying on trade injurious to the physical comfort of the community.—A Magistrate has jurisdiction to take proceedings under this section if the trade in question is injurious to the physical comfort of the community, but the interference with the public comfort must be considerable and a considerable section of the public must be affected injuriously, **20 P. W. R. 1911 = 117 P. L.R. 1911 = 12 Cr. L. J. 146** *See* also **34 C. 73**

33. The motive with which the unlawful obstruction is caused is absolutely irrelevant.—The building of a cattle trough on Government waste land abutting on a public road is an obstruction and a nuisance under this section The motive with which a public highway is obstructed is absolutely irrelevant and it does not matter whether in point of fact, the structure causes practical inconvenience or not, because the land on which it is built though not at the time necessary for the continuous use of the public, may be required for such use when there is increased traffic or for any other similar reason, **23 A. 159.** But an order that a man should remove his house based on his—not his house—being a public nuisance is *ultra vires*, **10 Bur. L. R. 130.**

34. No length of enjoyment can legalise a public nuisance.—A previous sanction to the establishment of a trade such as a slaughter house does not entitle the proprietors to continue the business after it has become a public nuisance to the neighbourhood No one has a right to corrupt the air of a particular locality by the exercise of a noxious trade, simply because at the commencement of the nuisance no person was in a position to be injured by it, no prescriptive right can be acquired to maintain and no length of enjoyment can legalise, a public nuisance involving actual danger to the health of the community, **16 W. R. 6, 7 B. L. R. 499, Weir II, 89; 4 Bom. L. R. 882.** Yet the long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bona fide* dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under ss 133 and 137 and making the question a proper one for the Civil Court, **25 C. 278.**

VI.—NUISANCES WHICH DO NOT JUSTIFY INTERFERENCE UNDER THIS SECTION.

35. Obstruction or nuisance to individuals not within the scope of this section—This section does not apply to an alleged user by one man of his own property so as to cause injury to the property of another, **Ratanlal 516, Ratanlal 50.** *See* Notes 18 and 19

(*i*) *Private channels*—A Magistrate has jurisdiction to take action under this section only if he is satisfied that the unlawful obstruction was of a channel which is, or may be, lawfully used by the public Where, therefore, the owner of the field at a level lower than the surrounding lands, and through which the surplus water had flowed into a tank, erected a *bund* and raised the level of his field to such an extent that the flood water, instead of flowing into the tank as it used to do, was now held back and caused injury to the neighbouring fields *Held*, that the case did not affect any public rights and did not come within the purview of this section, **36 A. 209.**

(*ii*) *Private drains*—The obstruction of a drain into which sewage of certain premises fell does not fall under this section In such cases the parties must be referred to civil suit **5 W. R. 58; 1 W. R. 324 (Cir.)**

(*iii*) *Private path*—The obstruction of a private path is not a nuisance under this section, **2 W. R. 35.** But a privy may be, even if situated on private land, **4 Bom. L. R. 882.**

36. Future obstructions cannot be dealt with.—A Magistrate can only deal with existing obstructions He has no power to direct what is to be done in case of any future obstruction, **21 W. R. 10.**

37. Putting up a new market.—A person who opens a new market close to an old one cannot, by the mere fact of opening such a market be said to carry on a trade or occupation *that is injurious to the health or*

interfere with private or public persons which cannot be derived from a lawful origin, *viz*, the Acts of Parliament, **17 A. 485 (F.B)** A Magistrate's powers under this section are confined to the instances specially mentioned therein which does not confer general power upon a Magistrate to pass any order he may consider necessary for the protection of the public health It is only from a thoroughfare or public place that a Magistrate is at liberty to direct a nuisance to be removed, **22 W. R. 19.** He cannot act when merely a private right is infringed **25 W. R. 4.** (*i*) *Declaratory order*—An application to have it declared that a certain place was one which could be used for cremation purposes would not come under any of the clauses of this section, **24 W. R. 6.**

(*ii*) *Custody of children*—This section does not empower a Magistrate to pass to an order regarding the custody and guardianship of children **Weir II, 66**

(*iii*) *Over prohibition of objectionable accompaniments to religious ceremonies*—This section applies only to an existing physical obstruction or nuisance which is capable of being removed It cannot be made use of to put a stop to and prohibit certain objectionable accompaniments to ceremonies practised by a religious sect to the discomfort and annoyance of the majority of their townsmen, **1901 A. W. N. 126.**

(*iv*) *Prohibiting persons from drinking the water of a well*—A Magistrate has no power to order a person not to drink the water of a certain well and prevent others from drinking it, **1893 A. W. N. 145.**

(*v*) *Order to close a graveyard*—*See* **12 C. W. N. 70.**

(*vi*) *No power to direct new drain being put up*—This section gives no power to a Magistrate to order the construction of a new drain, **1900 A. W. N. 138.**

57. Order must conform to the provisions of s. 133.—(*i*) *Verbal order is illegal*—**16 Cr. L. J. 24 (C.).**

(*ii*) *Proper order as to excavations is to fence them and not to fill*—A District Magistrate passed an order under this section requiring the petitioner to fill up the excavations made by him in taking out earth for bricks that were being manufactured by him within the limits of *G* and to bring them up to the level of the ad jacent lands to make the land one whole level and to take such steps as would not leave the possibility of any accident happening, *held* that the order was illegal, as assuming the excavations to be adjacent to a way, etc, which was or might be lawfully used by the public or to any public place the Magistrate could only order them to be fenced round and not filled up, **22 B. 714.** *See* also **31 M. 280.**

But where an excavation is a nuisance it may be filled up—The order of a Magistrate should be confined to a direction to remove the nuisance complained of Where a tank is used as a reservoir for water a Magistrate's power extends only to having it *fenced* in order to prevent accidents, but where it is proved to be injurious to the health and comfort of the community, he may treat it has a public nuisance and cause it to be filled up, **10 W. R. 27, 2 W. R. 36.** But it would be manifestly straining the meaning of the word "remove" in para. (2) s 133 to hold that the removal of the trade or occupation includes ordering the person carrying on the trade to restore the status quo **31 All. 439.** The proprietor ought to have the discretion allowed him as to the mode in which he will remove the nuisance caused by the tank. If the Magistrate is compelled to direct the excavation of the tank, the actual cost of excavation can alone be charged against the proprietor, at whose disposition the soil taken out in the course of excavation must be placed, **10 W. R. 51.**

(*iii*) *Form of order when burning ground is a nuisance*—If a Magistrate finds a burning ghât to be a nuisance, he cannot order its removal though he can order the removal of the nuisance, *i e*, to take such steps as would result in the cremation of corpses at the burning ghât ceasing to be a nuisance to the public, **25 C 425.** *See* also **12 C. W. N. 70.**

(*iv*) *Form of order when forge is a nuisance*—Where a Magistrate purporting to act under this section ordered a forge set up by *L* to be removed on the ground, that the sparks from it might set fire to cotton stored in an adjoining building belonging to a third person. *Held* that the Magistrate was not justified in ordering the summary removal of the forge, but he should have only directed *L* to alter its construction so that sparks shall not issue out of it into the open air when it is worked, **Ratanlal 872.**

IX—FURTHER INQUIRY.

58. Further inquiry.—Where a Magistrate has dropped proceedings under this section, a District Magistrate or Sessions Judge has no power to order further inquiry, s. 437 not being applicable, **24 C. 395.** The proper course is to refer the matter to the High Court, **25 C. 425.** *See* also **21 W. R. 86, 14 C. W. N. LV.**

59. Revival of proceedings previously dropped.—*P* applied to the Sub-divisional Magistrate to take proceedings under this section in respect of a nuisance caused by *I* In the course of the inquiry, owing to a representation of *P*'s Mukhar, the proceedings were dropped Subsequently *P* obtained from the District

43. Chapter lays down procedure both for ascertainment of right and removal of obstruction.—The procedure prescribed by this and the following sections provides for the ascertainment of right as well as for the actual removal of the obstruction, **9 Bom. L. R. 30 = 5 Cr. L. J. 97.**

44. Procedure under this Chapter.—A Magistrate duly empowered, after satisfying himself upon information of the necessity of instituting proceedings under section 133 may issue a conditional order requiring the person causing such obstruction, etc., within a time to be fixed by the order to remove the obstruction, etc., or to appear before the same or other Magistrate at a time and place, all to be specifically fixed by the order The order must be duly served on the parties, *see* s. 134 If the matter is urgent the Magistrate may issue a temporary order under s 142 If the party neither removes the obstruction, etc., nor appears to show cause, the Magistrate may make the order absolute under s 136 and proceed to have the nuisance removed under s 140 (2) If the party appears he may either show cause by giving evidence or require the Magistrate to appoint a jury to consider the propriety of the order, s 135 If a claim is put forward that the way is not open to the public, the Magistrate must take evidence and satisfy himself of *bona fides* of the claim and he must record a finding If he is satisfied that the claim is *bona fide*, further proceedings must be dropped If otherwise, the Magistrate must take evidence and inquire into the reasonableness and propriety of the order under s 137, and if the Magistrate decides that the order is reasonable and proper he makes the order absolute and proceeds to enforce it under s 140

If the party requires a jury, the Magistrate shall under s 138 forthwith appoint a jury and fix a time for the return of the verdict No procedure is prescribed for conducting proceedings before the jury, but evidence must be adduced before them to enable them to come to a decision. If the jury decides that the order is reasonable or proper, the Magistrate may make the order absolute and enforce it under s. 140

If the jury modifies the order, the Magistrate may or may not accept the modification If either the jury propose a modification which the Magistrate does not accept, or the verdict of the jury is adverse, the Magistrate must drop all further proceedings

If owing to the default of the party proceeded against the jury is not appointed or if the jury do not return any verdict, the Magistrate is at liberty to proceed and pass such order as he may think fit under s. 140

45. Proceedings under section 133 are ex-parte.—The proceedings under this section are entirely *ex parte* The report or other information which the Magistrate has received before making the conditional order is not evidence against the opposite party, **24 C. 395.** But under s 137 he is bound to take evidence before making the order absolute *See* also **20 C. W. N. 1171.** *See* also **47 A. 341.**

46. Party affected by order should have an opportunity to show cause.—A Magistrate cannot pass an order for the removal of a nuisance without calling on the party to show cause why the order should not be passed against him, and without hearing the objections even if they are filed after the time fixed for their presentation, but before he takes up the case When that party appears to show cause, the Magistrate is bound to take evidence under s 137, **8 C L R. 431; 26 W. R. 7; 11 B. 375; 13 C. W. N. CCLXXXIII.** He is also bound, when required by a party, to compel the attendance of his witnesses, who, being summoned, do not appear, **6 C. W N. 548.** An order by a Magistrate under this section for the removal of a nuisance does not become absolute until an opportunity is given to the person affected by it to show cause why the order should not be carried into effect, **21 W. R 86.** *See* also **20 C. W. N. 1171.**

47. When party fails to comply with conditional order, it becomes absolute.—When a Magistrate accepts the information, and bases a conditional order upon it, and when the party against whom the order is made neither does the act command, nor takes action to vacate the order, the *ex parte* information becomes conclusive evidence and the omission becomes penal and subjects the party concerned to the penalty prescribed by s. 188, I P C. **12 M. 475 at p. 478; 13 A. 577.** Similarly, where the time fixed in the order has been allowed to pass without protest or compliance, liability to punishment attaches at once without a necessity for further notice provided for in s **140, 31 M. 280.** But *see* **20 A. 501.**

48. Question of jurisdiction must be raised before reference to Jury.—Whether the proceedings instituted under this section do or do not come within its purview, must be decided at the trial on point raised and *before* any reference to the jury, **8 C. W. N. 173.** *See*, however, **18 C. W. N. 1148 = 19 C. L. J. 631.**

49. Procedure when a bona fide claim is set up.—If the party proceeded against raises a question that the pathway is not a public property within the meaning of section 133, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim on the objection is not substantiated find whether the claim is *bona fide* or is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim

Consequence of his, failing to do so

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by s 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute

Notes.—1. Punishment for disobedience of order —" Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both, and if such disobedience causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or an affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

Explanation —It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm It is sufficient that he knows of the order which he disobeys and that his disobedience produces, or is likely to produce harm" S 188, I P C Proceedings under s 188, I P C., can be taken only subject to the provisions of ss 195 and 487 of this Code.

2. Provisions of section are stringent.—The provisions of this section are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorised to pass under Chapter X in order to prevent danger to the public becoming final without needless delay and thereby promptly to ensure public safety, **12 M. 475 at p. 478.**

3. The validity of an order after it becomes absolute cannot be questioned.—Though s 188 refers to the offender as a person directed to abstain from a certain act, or to take certain order with certain property in *his possession or under his management*, yet it is not competent to the accused to re-open the question of possession, etc, by reason of this section which conclusively presumes that the conditional order was correctly made. The words '*in that behalf*' mean for his failure to comply with the requirements of s 135, **12 M. 475 at p. 478.** When once an order has been made absolute it is not competent for the party affected by it to go behind it and question its validity in any way, **13 A. 577.** Or re open the question of its validity in any other proceeding, **3 P. R. 1900 = 24 P. L. R. 1900.**

4. But order made without jurisdiction may be questioned.—In distinguishing the case from **12 M. 475** the Court in **20 A. 501** observed " that the subject matter of the order therein being a tank or well in a public street, fell within the jurisdiction of the Magistrate and within the powers conferred by s 133 and the succeeding sections *The ground of contention upon which the conviction was impeached in that* case was, not that the order made was one of such a nature that the Magistrate was not empowered by the Code to make it, but the person upon whom the order was served was not the person who was responsible for the existing state of things, or who ought to have been made the subject of such order, while in this case what we have to consider is whether the public servant making the order in question is lawfully empowered to promulgate that order, as the subject matter of it being in a compound is without his jurisdiction"

5. No further notice under s 140 necessary before prosecution.—A person who allows the time fixed by an order under s 133 to pass by without compliance or protest may be proceeded against under s 188, I P C, without a necessity for a further notice under s 140, **31 M. 280.** *See* also **31 A. 577; 12 M. 475.**

6. Magistrate cannot proceed under this section if party appears and shows cause.—If, upon the appearance of the accused, the Magistrate, without taking his evidence or asking him to produce any proof of his statement that the land on which the dam was, had been sold by him to another person a year before, at once sanctions his prosecution under this section, the conviction will not be sustained, as the Magistrate was bound to take evidence and make some inquiry under s 137, **1 Bom. L. R. 783.**

Procedure where he appears to show cause.

137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summon case.

(2) If the Magistrate, is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

or other Court is exercising jurisdiction, **2 C. L. J. 149 = 9 C. W. N. 983.** *See*, however, **18 B. 661; 21 A. 107** and **23 C. 493.** In **(1915) M. W. N. 240 = 16 Cr. L. J. 349;** it was laid down that the fact that in such proceedings the person proceeded against is a competent witness on his behalf does not make the proceedings any the less a criminal trial and therefore it was *held* that no Letters Patent appeal lays againt the order of a single Judge

XIII.—ORDERS UNDER THIS CHAPTER AND CIVIL PROCEEDINGS.

69. Civil suit to set aside the order does not lie.—It is not competent to a Civil Court to set aside the order of a Magistrate made under this section, on the ground that such order was made without jurisdiction, because the land with reference to which the order was made is private property and not a thoroughfare or public place. But it is competent to a Civil Court irrespective of any order made under this section, to try the question whether the land which formed the subject is private property and not a thoroughfare or public place, as between the parties to such suit and those who claim under them, **6 C. 291 = 7 C. L. R. 433.** Sub-sec.(2) is in accordance with **3 B. L R Appx. 43 = 11 W. R. 434 (Civ.)** Civil suits will not lie to set aside an order duly made by a Magistrate under this Chapter, or to restrain him from carrying out such order into effect, **4 B. L R. 24 (F B.)** and **12 M. 475** *See* **14 C. 60.**

70. The opposite party may institute a suit for declaration of his right—A suit may lie for a declaration under s 42 of *the Specific Relief Act* 1877, against anyone of the public who claims to use the lands, as a public road To such a suit it is unnecessary to make the Secretary of State a party and it is not barred by an order under s 137, **15 C. 460 (F.B)** *overruling* **14 C 60.** *See* **17 B. 293, 8 H. P. C. R. A. C 94, 6 B. 670** and **672; 19 W. R. 426 (Civ), 6 C. 291; 7 Bur. L. T. 23 = 15 Cr. L. J. 259.** In **6 B. 670** it was *held*, where a Magistrate declares certain land to be a public thoroughfare, or part of a public thoroughfare, the party dissatisfied with the Magistrate s order cannot sue the Magistrate, but must sue *the Secretary of State for India*

71. When party instituting proceeding can be sued for damages.—The party aggrieved by an order under this section cannot sue the parties who instituted the proceedings before the Magistrate for damages unless he can show that, in taking such proceedings, they were actuated by malicious motives against him, or intended wrongfully to injure him, **2 B L. R. S N XV, 2 B 457.**

72. Magistrate's order is not a conclusive determination of title.—A Magistrate s order under this section is not a conclusive determination of the question of title, therefore a person aggrieved by the order can bring a suit for declaration of title against Government, and since public roads were vested in the Government of Bombay, they were interested to deny plaintiff s title to the land, **17 B. 293**

The 2nd paragraph of this section prevents the Civil Courts from questioning the order duly made under this section, which empowers the Magistrate to pass a conditional order There is no such bar to the absolute order of a Magistrate being questioned in a Civil Court The procedure adopted under this section is more or less summary and the decison of the Magistrate goes so far as to fix upon the party who must go to the Civil Court to get a civil dispute decided **A. I. R. 1929 All 833.**

73 Claim for jury does not operate as an estoppel—A person who, on receipt of an order of a Magistrate under this section declaring the existence of a right of way over such person s land, demands the appointment of a jury to try whether such order was reasonable, is not thereby stopped from afterwards suing to establish his right to the exclusive enjoyment of such land *Per* FIELD, J, **6 C. 291 = 7 C. L. R. 433.**

Service or notification of order

134. (1) The order shall, if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person

Notes —1. Orders must be served on individuals personally.—The provisions of Chapter X contemplate orders to be directed and served on persons individually and not addressed generally to the public at large by a proclamation, **8 A. 99; 12 C. L. R. 231.**

2 Absence of personal service does not make order illegal. It is sufficient if order is somehow brought to notice of those concerned—The mere non-service personally of a notice to remove sance is not a sufficient ground to set aside the Magistrate's order, when it appears th es ke the

Magistrate to compel the attendance of certain witnesses who had been summoned, but did not appear, and the Magistrate merely ordered the application to be filed and made an order against the defendants *Held* that the defendant had a right to call upon the Court to compel the attendance of witnesses, **6 C. W. N. 548.**

8. Non-appearance of objector on adjourned day—Power of Magistrate to make the order absolute.—When a person appears on the day fixed in obedience to notice issued under s 133, and showed cause, his subsequent failure to appear and produce evidence on the adjourned hearing does not justify the Magistrate to pass the final *order absolute* until he satisfies himself from evidence recorded before him that there was unlawful obstruction, though the absence of the defendant might be some ground for despensing with *any but very formal evidence*, **2 Bom. L. R. 818.**

8-A. A conditional order made absolute after a lapse of years owing to non-appearance of objector.—Where a conditional order passed in 1916 was made absolute in 1920, the High Court treated the final order as resting on no conditional order and reversed it, **23 Bom. L. R. 854.**

9. Illegal order cannot be made absolute.—All that a Magistrate can do under this section is to make absolute the conditional order passed under s 133 Where, therefore, the conditional order is one which the Magistrate had no jurisdiction to make under s. 133, the subsequent order under this section is also illegal **Ratanlal 516; 16 Cr. L. J. 24 (C.)**

10. Second-class Magistrate other than the Magistrate issuing the rule may make the order absolute.—*See* Note 12 to s. 133

11. Finality of order.—Reference to a jury is entirely optional with the person against whom the order has been made, but if he applies for a jury, he is bound by their verdict. If he does not apply for a jury, but prefers *to show cause against the Magistrate's order, the finality of that order after termination of the* proceedings would be none the less binding **14 C. 60.** *See* Notes 3 and 4 to s 136

12. Where a claim of right raised in answer to order under s. 133 was found to be *bona fide* and it was ordered that, unless the party sought to establish his right in a Civil Court within a limited time his *bona fides* would be again questioned in a Criminal Court, *held*, that the Magistrate should not have made the *order without taking evidence adduced by one side or the other*, **23. C. W. N. 774.**

Procedure where he claims jury

138. (1) On receiving an application under section 135 to appoint a jury, the Magistrate shall—

(*a*) forthwith appoint a jury cosisting of an uneven number of persons not less than five of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant,

(*b*) summon such foreman and members to attend at such place and time as the Magistrate thinks fit, and

(*c*) *fix a time within which they are to return their verdict*

(2) The time so fixed may for good cause shown, be extended by the Magistrate.

Notes.—1. For Form of the Magistrate's order constituting a jury, *see* Sch. V, No 17

2. Punishment for not attending as a juror.—Intentionally not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority is punishable with simple imprisonment for one month, or fine of 500 rupees, or both. In case such disobedience be made to an order requiring personal attendance, etc., in a Court of Justice, it is punishable with simple imprisonment for six months, or fine *of 1,000 rupees, or both—S. 174, I P C If the summons does not mention the place or time of* the day at which the juror is required to attend, he cannot be convicted for non-attendance, **5 A. 7.** The Magistrate should also give instructions as to what the jury is to do, **2 B. H. C. R. Cr. Ca. 384.**

APPOINTMENT OF JURY.

3. Appointment is imperative.—This section leaves no discretion to a Magistrate. He must appoint a jury if the petitioner applies for it, **Weir II, 63; 13 C. W. N. 387 = 10 Cr. L. J. 494.** His refusal to do so will be wholly without jurisdiction, **19 P. R. 1887.** He cannot decide the matter by *a local inquiry*, **2 C. L. R.**

Notes.—1. Magistrates bound to take evidence.—Where a person to whom an order has been issued under s. 133 appears to show cause against such order, the Magistrate is bound to take the evidence, even if the accused appears after the time fixed, but before the case is taken up, **8 C. L. R. 431; Ratanlal 320; 1 Bom. L. R. 783; 11 B. 375; 26 W. R. 7.** Both ss. 137 and 138 are imperative in their terms. The Magistrate has no discretion in the matter, **13 C. W. N. 367; 42 C. 702.** A Magistrate cannot act on his own opinion, but is bound to take evidence as a basis for the order he has to make. Otherwise the order will be *ultra vires* and illegal, **11 B. 375; Weir II, 62.** *See* also **32 P. R. 1917 (Cr.); 23 C. W. N. 1054; 20 A. L. J. 657.**

1-A. In an inquiry under this Chapter the Magistrate should proceed to take evidence in support of the order before the person asked to show cause against it is called upon to produce his evidence, **18 Cr. L. J. 848.**

2. Magistrate cannot act on personal local investigation without taking evidence. Waiver by party cannot confer jurisdiction.—The language of s. 137 is imperative and if the party appears to show cause the only course open to the Magistrate is to take evidence. The law does not contemplate that he should act as an arbitrator as public rights are involved. Even if the parties agree to abide by the decision of the Magistrate, based not upon evidence legally received, but upon information gathered upon local inquiry, the order of the Magistrate cannot be supported. No waiver on the part of the parties could confer upon the Magistrate's authority to act in a manner not prescribed by the Legislature, **10 C. L. J. 482 = 11 Cr. L. J. 1.** Where a Magistrate made an order under this section for the removal of a fence without recording any evidence or drawing up any formal proceedings, but acting merely on a local inspection, it was *held* that the procedure was altogether bad, **13 C. W. N. CCLXXXIII.** A Magistrate cannot without calling upon the respondent to adduce evidence, make the order absolute relying on his own inspection, **17 M. L. T. 142 = 16 Cr. L. J. 207.** *See* also **20 C. W. N. 1171; 23 C. W. N. 1054.** Where a Magistrate passed a conditional order under section 133 and the party appeared to show cause the Magistrate with the consent of the parties sent the case to another Magistrate for inquiry and report, and on receipt of the report so submitted *held*—that the procedure followed was irregular so as to vitiate the proceedings, **47 B. 89.** *See* also **49 All. 453; 49 All. 270.**

3. Magistrate cannot drop proceedings without taking evidence when opposite party shows cause.—Where in a proceeding under s. 133 in respect of an alleged obstruction of a public way, the Magistrate made a conditional order, but dropped the proceeding on the opposite party showing cause without following the procedure laid down by s. 137; *held*, that as the Legislature has directed in the event that had happened that the Magistrate should take evidence in the matter as in a summons-case, and in so far as he had failed to do that, he had not performed the duty cast on him by law. It would be open to the Magistrate to consider when that evidence was taken, whether there was a complete answer against the opposite party or whether it was not a proper case where the parties should be referred to a Civil Court, **42 C. 702.**

4. Parties cannot compromise nor Magistrate act as arbitrator.—As in a proceeding under s. 133 public rights are involved, the matter must be determined upon legal evidence and not made the subject of compromise by the disputing parties. The law does not contemplate that the Magistrate should act as arbitrator, **10 C. L. J. 482 = 11 Cr. L. J. 1.** This section is imperative and mandatory. A Magistrate cannot act as an arbitrator even if parties agree to it, but he should record evidence as if it was a summons-case and then dispose of the case, **25 C. L. J. 349 = 21 C. W. N. 926.**

5. Magistrate must take evidence on the matter of complaint as also the evidence of the opposite party.—"Shall take evidence in matter the" means shall take evidence upon the matter of the complaint, and not simply the evidence which the opposite party might offer. The report or other information which the Magistrate had received before making the conditional order is not evidence against the opposite party, the proceeding under s. 133 being entirely *ex parte*, **24 C. 395; 5 C. 875; 21 W. R. 64; 11 C. 271; 28 Cr. L. J. 60; 31 C. W. N. 963.**

6. As in a summons-case, the complainant must begin.—The complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence if so advised. When this has been done and not before, the Magistrate can make the conditional order absolute, if he finds sufficient reason for doing so, **31 A. 453** *following* **24 C. 395.** The opposite party is not bound to produce any evidence until the party who has set the law in motion has produced his evidence, **11 A. L. J. 931 = 15 Cr. L. J. 23; 20 A. L. J. 692.**

7. Duty of Magistrate to compel the attendance of witnesses.—When in a proceeding under s. 133 the defendant applied for the summoning of certain witnesses and also applied on the day of hearing to the

their verdict must be fixed Where this is not done, the Magistrate cannot carry out his original order, if there is any delay in the submission of the verdict by the jurors, **14 W. R. 69.**

9. Appointment of a second jury.—Where a jury had fully entertained and considered the matter submitted to it, and the individual members of the jury had given in their opinion to the foreman to report to the Magistrate, and the only delay was in the foreman's making the report, it was *held*, that the Magistrate could not appoint a second jury to consider the matter afresh, but ought to have acted on the report of the first jury which had been given in before he made his final order in the matter, **21 W. R. 54.** The Magistrate is competent to appoint a fresh jury only in the event of the jury duly appointed under this section being for some good cause unable to decide the matter submitted to it, *e.g.*, death of one of its members before final decision or perverse refusal of its members to hear and decide **44 A. 575 = 20 A. L. J. 472.**

DUTIES OF JURY.

10. Adjudication by some only of the jurors appointed bad.—The majority contemplated is a majority arrived at after the deliberation among the jurors appointed, **13 C. 275.** The law requires a juryman to exercise his own understanding on the case submitted to him, and to decide on evidence He should not blindly follow the opinion of his fellows Where out of five jurors only two saw the place and the third never visited it, but based his opinion solely on what had been told him by the other two, *held*, that the finding of the so-called majority was not that of a legal majority, **25 W. R. 4.** Where though five jurors were appointed, only four dealt with the case and submitted a report, the other being ill and unable to attend and the report was acted upon the Magistrate, *held* the order of the Magistrate was illegal and must be set aside Notwithstanding that the jury as a body can act by a majority, that act must be by a majority out of a jury of five people who investigated the case To hold otherwise would be in effect to say that a jury of three persons would be sufficient because that would be a majority out of a jury of five persons, **11 Cr. L. J. 402 (Cal.)** Where a minority of the jury do not attend the meetings, the Magistrate cannot proceed upon a report submitted by the majority, but it is competent for him to proceed under s. 141 and pass orders as he thinks fit, **13 C. 275.** *See* Note 7

11. Chapter does not lay down any rules of procedure.—There is no special procedure laid down by the Code to be adopted by a jury appointed under this section in coming to a finding on the questions submitted to them, **30 A. 364.**

12. Jury cannot decide on mere local inspection without taking evidence.—A jury cannot decide a matter referred to them merely on inspection of the locality without taking evidence, **26 C. 869; 6 C. W. N. 886; 13 C. W. N. 367.** *See* **30 A. 364.**

13. The only function of the jury is to decide whether the order is reasonable and proper.—The only function which a jury can exercise is to consider whether the order made by the Magistrate is reasonable and proper, *it being no part of their duty to determine the rights of the parties to the property*, **5 C. 875 = 6 C. L. R. 379; 31 C. 979, 21 W. R. 10; 3 C. W. N. 345; 10 C. W. N. 845.**

14. Jury cannot decide whether a road is public or not.—It is not competent to the jury to decide whether the way obstructed was or was not a public way, **19 C. L. J. 631 = 18 C. W. N. 1148 = 15 Cr. L. J. 515; 10 C. W. N. 843 = 4 Cr. L. J. 42; 14 C. W. N. 544 = 11 Cr. L. J. 305 (C.) = 11 Cr. L. J. 402; 7 Bur. L. T. 23 = 15 Cr. L. J. 289.** The Magistrate should himself determine prior to the appointment of a jury whether the road is a public one and not leave the question to the jury, **3 C. L. J. 360 = 3 Cr. L. J. 331.**

15. Whether jury can decide that claim is bona fide?—It has been *held* in **26 C. 869** and other cases (Note 52 at page 211) that it is for the Magistrate to determine whether the objection of a claimant that the way is not public is *bona fide*, and he cannot in spite of the objection, unless he determines that the matter is not *bona fide*, refer the matter to the jury In **30 A. 364** it was however *held* that where the contention was that the shed over a shop front was not situate in that portion which is admittedly portion of a way lawfully used by the public, but fell within a certain portion of that ground which had been by some Magistrate remitted for use by the persons who had erected shops in that public place, the question was one which the jury was competent to decide In **18 C. W. N. 1143,** the Magistrate submitted the case to the jury without deciding whether the claim was *bona fide*, the jury finding after collecting the evidence that there was *bona fide* claim, declined to proceed further to *decide the question* and referred the case to the Magistrate who declined to issue any order under s. 133, the High Court refused to interfere **4 Lah. 224.**

4. Principles to be borne in mind in appointing jurors.—'The Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency of using this section as a substitute for litigation in the Civil Courts in order to the settlement of a private dispute. In the present case, the question before the Magistrate was whether there had been an obstruction to a public way, to the injury or inconvenience of members of the public to use the same. The informant had no *locus standi* in the matter once he had performed what was perhaps his duty as a good citizen in calling the attention of the Magistrate to the existence of the nuisance. It is expedient that Magistrates should be on their guard against allowing a proceeding of this sort to assume the character of a private litigation and allowing it to be treated as a dispute to which two private individuals representing opposite interests are the parties. I still more emphatically approve of the principle laid down in the Punjab case that it would be highly improper on the part of a Magistrate to appoint to serve on a jury of this sort, the friends or supporters of the person at whose instance the proceedings under this Chapter are taken. At the same time it must be remembered that it is often not an easy matter to secure the services of a foreman and two jurymen to undertake in the public interests an inquiry of this sort, it may be in some village distant from headquarters......... The criterion, therefore which I would apply to a case of this sort, is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of the aforesaid person.' *Per* PIGOTT, J., **37 A. 26.**

(*a*) *Complainant and his witnesses ought not to be appointed as jurors.*—It is not competent to any one to exercise the authority of a public Court of Justice as Judge in his own case, and it is plainly against the most elementary principles of right and equity that an applicant for justice to a Criminal Court, or indeed to any other Court, should be compelled to submit his case to the arbitration of his adversary. Accordingly where a Magistrate appointed the complainant and his two witnesses as jurors, the High Court set aside the Magistrate's proceedings, as the jury so constituted was not a proper tribunal, **22 W. R. 47.**

(*b*) *Friends and supporters of complainant not to be appointed.*—It would be highly improper on the part of a Magistrate to appoint to serve on the jury the friends or supporters of the person at whose instance the proceedings are instituted, **4. P. R. 1897; 37 A. 26.**

(*c*) *Nominees of complainant not to be appointed.*—A Magistrate should exercise his own independent discretion in selecting the members of the jury, and the persons so selected by him should not be nominees of the party interested in upholding the Magistrate's order, **21 W. R. 43; 23 C. 499; 26 C. 869.** *See* also **31 Bom. L. R. 79,** where it was held that as the Magistrate adopted the nominations of the complainant, the procedure was illegal and the trial vitiated. But there is nothing illegal in a Magistrate ascertaining from the complainant the names of suitable persons to serve on the jury, **37 A. 26.**

(*d*) *Magistrate cannot veto appointment of juror by applicant.*—A Magistrate has no power to veto the appointment of a person nominated by the applicant, nor should he appoint the friends or supporters of the person at whose instance proceedings under Chapter X are being taken, **4. P. R. 1897.**

5. Appointment must be made in presence of both parties.—Jurors should be appointed or such appointment cancelled in the presence of the parties and not behind their back, even if any of them be a nominee of the Magistrate, **5. C. 875 = 6 C. L. R. 379.**

6. Power of appointment cannot be delegated.—(*a*) *To another Magistrate.*—The Magistrate, to whom an application is made to appoint a jury, cannot delegate that duty to another Magistrate, **Ratanlal 460.**

(*b*) *To the foreman.*—*See* **10 C. L. R. 193.**

7. Jury must be legally constituted.—If out of five jurors one is absent, a Magistrate cannot go on with the inquiry unless he appoints another juror in his place; where one out of five jurors declined to act and the remainder being equally divided, the Magistrate declined to pass any order under s. 139 and the case was therefore struck off, *held*, that the course taken by the Magistrate was irregular and that a fresh jury should be summoned and the case inquired into anew, **11 C. 84.** The foreman cannot substitute a juror in the place of an absent one, and the verdict of such an irregularity constituted jury is not legal; and disobedience of the order based upon such verdict is not punishable under s. 188, I.P.C., **10 C. L. R. 193.** A jury appointed under this section is not legally constituted when only the foreman is appointed by the Magistrate, and the rest of the members by the parties, **16 W. R. 23 = 7 B. L. R. Appx. 57.** *See* Note 9.

8. When constitution is changed, fresh time for verdict must be given.—Whenever from any cause the constitution of the jurors is changed and fresh juror is appointed, the time within which the new jury is to return

*" **139-A.** (1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river channel or place, and, if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter

Procedure where existence of public right is denied.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court, and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may require

(3) A person who has on being questioned by the Magistrate under sub-section (1) failed to deny the existence of a public right of the nature therein referred to, or who having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138"

Notes.—1. By the insertion of the new section 139 A the Legislature has accepted the view laid down in **52 C. 158.** Under this section the Magistrate is competent only to inquire into a claim relating to title and if on such inquiry he finds the claim to be *bona fide* he is bound to stay the proceedings until the existence of such right has been decided by a competent Civil Court *See* **23 A. L. J 187** where there was a denial of the existence of public right. *See* also **29 C. W. N. 649, 30 C. W N 648; A. I R 1929 All. 709.**

2. S 139 A requires only evidence and not proof and the only condition requisite to enable the Magistrate to stay the proceedings is that on the materials before him he shall have no reason to think the evidence false *The intent of s. 139-A (2) is that the Magistrate should neither encroach upon the jurisdiction of* the civil courts which alone can determine the existence of a public right. The criterion is that he should find evidence supporting the denial which he can pronounce as reliable. That is necessary and sufficient to oust his jurisdiction, **4 Pat. 783.** *See* also **24 A. L. J. 361.**

140. (1) When an order has been made absolute under section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

Procedure on order being made absolute

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without the local limits of such Magistrate's jurisdiction If such other property is without such limits, the order shall authorise its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found

Consequences of disobedience to order

(3) No suit shall lie in respect of anything done in good faith under this section.

Note.—An order for removing certain nuisance was made absolute under section 137 The order was not obeyed, and the petitioner applied to the succeeding Magistrate to enforce that order That application was refused on the ground that the order passed under section 137 was an illegal order *Held* that the Magistrate was not justified in going behind the order of his predecessor The discretion of the Magistrate under

* This section was inserted by the Cr P C Amendment Act, XVIII of 1923

16. Collective opinion of jury to be delivered through foreman.—The jurors are not to give their individual and separate opinions to the Magistrate, but they are to consult together and then express their collective opinion through their foreman with a view to its being acted upon by the Magistrate; if they required evidence to come to some conclusion, it should be produced before them by the Magistrate, **18 A. 158.**

EXTENSION OF TIME FOR DELIVERY OF VERDICT.

17. Extension of time.—Sub-clause (2) which is new, sets at rest the conflict between **2 B. H. C. R. Cr. Ca. 384** on the one hand, and **7 B. L. R. Appx. 57 = 16 W. R. 23** and **14 W. R. 69** on the other, as to whether a Magistrate could receive and enforce the award of a jury delivered after the day fixed for the purpose. The Calcutta High Court *held* that the jury was *functus officio* after the date so fixed. But the power now conferred by sub-sec. (2) can be exercised only by the Magistrate himself. He cannot delegate that power to the Chairman of the jury, **23 A. 159 at p. 161.**

EFFECT OF VERDICT.

18. Question of bona fide right cannot be raised after verdict.—A person who has applied for a jury is bound by their verdict and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bona fide* claim of right, **1900 A. W. N. 30; 30 A. 364.**

19. Grounds of objection to the verdict must be reasonable and specific.—Where a party objects to the verdict of a jury he ought to give the Magistrate reasonable *prima facie* ground for the opinion that either the jury did not in fact apply a judicial discretion to the case, or that the verdict was such as the jury could not have arrived at by a proper exercise of their discretion upon the materials before them, **23 W. R. 15.** The objection must be as specific as possible and not vague and indefinite.

20. When verdict is that order is reasonable, Magistrate bound by it.—Where a jury is appointed to try the reasonableness of the Magistrate's order, the Magistrate is bound to be guided by the decision of the jury. If their report is not clearly expressed, they may be called upon to state definitely, whether the order of the Magistrate is a reasonable and proper one, **12 W. R. 28.** Where the order of a Magistrate is referred to the consideration of a jury, and the jury, considered the order so referred to be reasonable and proper; *held*, that the only order the Magistrate was empowered to make was one founded upon the report of the jury by whose decision he must be guided, **22 W. R. 86; 10 Cr. L. J. 210 (C.).**

21. When order modified, Magistrate must either accept verdict or drop proceedings.—If the Magistrate does not accept the modification of the jury, he should stop further proceedings. But if he accepts the modification and if the report is not otherwise open to any objection, he is bound to accept the decision of the jury and be guided by it, **12 W. R. 28; 22 W. R. 86.** In a Calcutta case (*Revision No.* 1146 *of* 1905) relating to the removal of an obstruction from a public road, the jury was of opinion that the orders of the Magistrate ought to be *modified.* But the Magistrate called upon the parties to produce their evidence instead of proceeding under this section; *held*, that the procedure adopted by the Magistrate was bad and further the order could not stand, as it did not definitely state what the encroachments were and as it was alleged to have taken place seven or eight years before, and had been acquiesced in for a long time, it was not a public nuisance under s. 140.

22. Magistrate cannot refer verdict to High Court.—Where the majority of the jury come to a finding which the District Magistrate considers to be illegal, he cannot refer it to the High Court under s. 435, because the decision of the jury is not a proceeding in a Criminal Court which the District Magistrate can call for and examine and refer to the High Court. Nor can he take further proceedings in the matter under the Code, **Ratanlal 336; 30 A. 364.**

Procedure where jury finds Magistrate's order to be reasonable.

139. (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any)

(2) In other cases, no further proceedings shall be taken under this Chapter.

Note.—Report of the jury containing directions, which has been adopted by Magistrate can be enforced as provided for in section 140 (2). **18 Cr. L. J. 306.**

An order of the Magistrate rescinding a former order made by him is perfectly valid. *Ibid.*

2. Considerations of justice and equity must guide the Magistrate's discretion.—The Magistrate of a district issued an order calling upon the petitioner to remove a building, on the ground that it was an unlawful obstruction upon a high road. A jury of five persons was appointed to report within 15 days, whether the order was reasonable and proper. The jurors, being without instructions took different views as to the performance of their duties, but four of them visited the premises and were unanimous in finding that the building complained of was not on a high road at all. Five days after receiving reports to this effect, the Magistrate issued another order to the petitioner, requiring him to pull down his house within 15 days as the jurors had made no report within the time described. The petitioner showed cause, but without effect. The order was repeated, and he was punished under s. 188 I P C, for its disobedience, and his house was also pulled down. *held*, that the petitioner had shown sufficient cause to satisfy the Magistrate, and the order to pull down the house was not reasonable and proper, *held*, also that the conviction was bad. SAUSSE C J, remarked —' If the letter of the law had not been departed from, it seems that its spirit has not been complied with. The framers of the Code evidently contemplated that considerations of justice and equity should form the rule of the Magistrate's conduct in dealing with alleged nuisances or unlawful obstructions. The exercise of these summary powers requires both experience and discretion in a Magistrate and careful consideration of the rights of property, **2 B. H. C R Cr. Ca. 384.** Where, in a proceeding under s. 133, the jury appointed under s. 138 failed to return the verdict on account of certain causes, the petitioner appeared before the Magistrate and prayed for the appointment of a fresh jury, but the Magistrate refused the prayer and proceeding under s. 141, made the original order absolute, *held* that the Magistrate, in so doing, did not exercise a proper discretion. He ought to have, in the exercise of his discretion, appointed a fresh jury in compliance with the prayer of the petitioner, **12 C. W. N. 1047 = 8 Cr. L. J. 233**

3. If jury fails to return verdict, Magistrate may proceed under s. 137.—In **13 C. W. N. 367 = 10 Cr. L. J. 494,** *the petitioners against whom a conditional order under s. 133 was made, applied to the Magistrate for* showing cause against the order and also for the appointment of jury, but in the end elected to proceed with the application for the appointment of a jury, but the jury failing to submit their verdict within the ample time granted them by the Magistrate the Magistrate proceeded under s. 141 to make the order absolute. *held*, the Magistrate was justified in making the order absolute without taking evidence under s. 137, the petitioners not having taken any action, after the jury had failed to perform their duty, to move the Magistrate for taking evidence in their behalf. *Semble*.—The petitioners might have been allowed, after the jury had failed to perform their duty, to revert to their application for showing cause and to adduce evidence, if they had removed the Magistrate for that purpose. *See* **24 A. L. J. 165.**

Injunction pending inquiry

142. (1) If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

Notes.—1. For Form of injunction.—Pending inquiry by jury, *see* Sch. V, No. 19.

2. No jurisdiction when danger has passed away.—This section, does not authorise a Magistrate to take proceedings when the danger has passed away, **1 W. R. 8.**

3. Danger must be imminent.—No order can be made under this section, unless there is imminent danger or fear or injury of a serious kind to the public involved in the case, and where a Magistrate, who had made an order under s. 133, subsequently directed further inquiry to be made, it was *held*, that he must be considered to have abandoned his proceedings under this section, and that he should have proceeded under ss. 136 and 137 instead of finding the party charged under s. 188, I P C., **21. W. R. 86.**

section 140, sub-section 2 must be a judicial discretion and no Magistrate has judicial discretion to sit as a Court of Appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not, **27 C. W. N. 459.**

Notes.—1. For Form of Magistrate's notice, etc., after the finding by a jury, *see* Sch. V, No. 18. The notice must be served personally and not by advertisements, **1 Ind. Jur. 59.**

2. Good faith.—*See* Note 1 to s. 132.

3. No further notice necessary when party does not appear.—Whenever the time fixed by an order under s. 133 has been allowed, by the person, against whom the order was made, to pass by without compliance or protest, he may be proceeded against at once under s. 188, I.P.C., without further notice under this section, **2 M. 475; 13 A. 577; 31 M. 280.**

4. Final order should be passed by the same Magistrate who made the order absolute.—A Subdivisional Magistrate having made a conditional order, under s. 133, against a person to abate nuisance or appear and show cause before a second-class Magistrate why the order should not be enforced, the said person appeared as directed and the order was made absolute under s. 137. The second-class Magistrate then issued a notice and order under this section, requiring the nuisance to be abated within a certain date. The District Magistrate having referred the case on the ground that the second-class Magistrate had no jurisdiction to pass final orders in such cases, *held* that the order was not illegal, as presumably the Magistrate who issued notice under this section is the same Magistrate indicated in s. 137, where no special mention of his class is mentioned as is done in s. 135; but, as a general rule, it is undesirable for first-class Magistrates to call on the officer who reports on a nuisance in his administrative capacity to decide judicially whether it is a nuisance or not, **9 M. 201** *followed in* **25 C. 278.** In **Weir II, 61,** however, where a Deputy Magistrate having made a conditional order under s. 133 required the petitioner to appear and show cause before a Taluk Magistrate why the order should not be enforced; *held*, the Deputy Magistrate having ceased to have jurisdiction in the matter, the Taluk Magistrate alone ought to have proceeded to dispose of the reference made to him, in accordance with law, and the Deputy Magistrate had no jurisdiction to make the order absolute under s. 137 (3). *See* **47 B. 89.**

5. Liability of accused is for wilful disobedience of lawful order, and not for any relation to property.—It is no answer to a charge preferred under s. 188, I.P.C., that the accused had no control over the property (in regard to which the order is made) either as owner or possessor or otherwise, and that the order was made on an erroneous view of his relation to the property in question. The imputability consists, not in the actual existence of any rural relation between the accused and the property concerning which the order is made, but in wilful disobedience of the order lawfully made by a competent Magistrate under s. 133, **12 M. 475 at p. 477.**

6. Accused cannot go behind the order.—In case of prosecution for disobedience of the order made under this section, the accused is not entitled to go behind the order and show that it was one which ought not to have been made, **12 M. 475.** But a Magistrate is not warranted in convicting a person for disobedience of an order to abate local nuisances, when the legality of such order is under the consideration of an Appellate Court, **2 B. H. C. R. Cr. Ca. 384.** *See* Notes 3 and 4 to s. 136.

7. Practice.—Magistrates convicting under s. 188, I.P.C., should invariably quote the order which was disobeyed, and not the law under which that order was promulgated—*C. P. Cr. Cir.* No. 6. As to *quantum of punishment, see* **10 C. L. R. 193.**

Procedure on failure to appoint jury or omission to return verdict.

141. If the applicant by neglect or otherwise prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by s. 140.

Notes.—1. May pass such order as he thinks fit.—An order imposing on a person a certain fine for a nuisance and an additional fine for every day he continues the nuisance after conviction is bad, **1 B. L. R. Cr. 41 at p. 44,** where NORMAN, J., remarked that "a conviction must either be wholly good or wholly bad; part of it being bad, it is bad altogether and must be set aside."

III.—CIRCUMSTANCES WHICH JUSTIFY PROCEEDINGS.

10. Existence of emergency is a condition precedent to passing order.—The circumstances calling for an [illegible]
is with [illegible]
Cr. L. [illegible]
the Magistrate having power to proceed, **1 C. L. R. 58,** *e g*, where there is a probability of a disturbance of public tranquillity or a riot, or an affray, **23 W. R. 34**, and there must be information or evidence to that effect, **24 W. R. 30**, and the facts must be set forth in the order fully and in detail, **1 B. L. R. A. C. 20 = 10 W. R. 53**, **2 C. W. N. 747**; *see* also **10 B. L. R. 434 = 18 W. R. 47**, **1897 A. W. N. 59**, **4 A W. R. 12** Where a Magistrate directed the

[illegible]

order, **2 C. W. N. 747.** *If no immediate danger is apprehended* the Magistrate should proceed under s. 133 and not under this section Where a Magistrate dropped a proceeding instituted under s 145 and on the very next day initiated proceedings and issued an order under s 144, *held* the order was made without jurisdiction, as in the *interim* after the dropping of proceedings under s 145, no information that it was necessary for the imme diate prevention or as a speedy remedy in respect of an impending breach of the peace to pass such an order has been received, **13 C. W. N. CXIX**, *see* also **14 C. W. N. 234 = 11 Cr. L. J. 49.**

11. Order under this section is justifiable only if the direction is likely to prevent (1) obstruction, annoyance or injury to any person lawfully, employed, (2) danger to human life, health or safety, (3) a disturbance of the public tranquillity, or a riot, or an affray.—(*a*) *Cannot make order merely for protection of property*—A Magistrate has no jurisdiction to make an order under this section merely for the protection of property, **9 C. 103,** *see* **21 W. R 26**, **8 C. W. N. 373**, **13 C W N. 188**, **18 W. R. 47 (F.B.)**, (*b*) *Order cannot be made merely for preventing loss to another*—An order cannot be passed under this section which is meant to pre[illegible]
on the ground that [illegible]
11 C. W. N. CVII. A [illegible]
the apprehenions that the house of the opposite party would go down into the bed of the tank when there was no reasonable apprehension of a breach of the peace, **38 C. 876**, (*c*) *Preventing of reaping of crops till payment of rent.*—Where a Magistrate made certain orders under this section with the object of preventing certain ryots who had grown the crops from reaping the same, so that the rent might be promptly paid, on the information that the ryots were bent upon harvesting the crops without paying the landlord s share, and the landlord, in preventing their doing so, might cause a breach of the peace, *held* that the orders were made without jurisdic tion, as this section, notwithstanding its comprehensive languge was never intended to cover such a case. If that was the kind of injury for the prevention of which this section was enacted, it would have to be applied in favour of every landlord whose tenants attempt to cut crops without paying the rent due **8 C. W. N. 373.**

IV.—ORDER.

12. For Form of the order to prevent obstruction, riot, etc., *see* Sch V, No 21 In Bengal and Assam a fee of one rupee is chargeable for the written order under this section—*Calcutta Gazette*, 1879, *p* 30 (*a*), *Assam Gazette*, 1879, *p* 596

13. Contents.—(*a*) *Order must show necessity for speedy remedy by stating material facts*—Before a Magistrate can take action under this section, he must be of opinion that immediate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in the order Where it did not appear from the proceedings that the Magistrate was of opinion that immediate preven tion or speedy remedy was necessary and the order did not state the material facts, it was set aside, **32 C. 935**, **2 C. W. N. 747**; **1913 M. W. N. 1003 = 14 Cr. L. J. 653**; *see* also **38 M. 439** The order must be based on real apprehension properly arrived at, **38 C. 876.** But in **30 M. 548**, it was *held, following* **16 M. L. J. 148**, that where an order under this section omitted to state the grounds on which the Magistrate came to the conclusion that there was a dispute likely to cause a breach of the peace, the omission was not a ground for holding that the proceedings were void, that it would, at the most, be only an irregularity and the High Court would not inter fere in revision unless either of the parties had been prejudiced by such omission. (*b*) *Desirable that the order should state the time during which it is to be in force*—But the absence of time-limit does not [illegible] the order, **34 C. 897** *overruling* **7 C. W. N. 140**; **11 C. W. N. 223.**

4. **Magistrate not competent to revive order without fresh proceedings.**—Where a Magistrate set aside his order and struck the case off the file; *held*, that he had no power to revive it without a fresh proceeding, **8 C. 580.**

5. **Magistrate not competent to make orders after rule issued by High Court.**—When the High Court has issued a rule in any case, it takes full seisin of the case; and it is the High Court alone that can pass *ad interim* orders in the case. The Magistrate against whose order the rule is issued has no such jurisdiction, **11 C. W. N. 79 = 4 Cr. L. J. 433.**

6. **Magistrate making inquiry under this section competent to take action under s. 476.**—Having regard to the definition in s. 4 (*m*), a Magistrate making an inquiry before issuing an order under this section is acting in a stage of a judicial proceeding, and has therefore jurisdiction to take action under s. 476, if he is of opinion that the evidence given before him is false, **19 M. 18.**

6-A. Magistrate whose order under this section was disobeyed, is not competent to try the case of disobedience under s. 188, I.P.C., **29 C. L. J. 382.**

II.—ACTION UNDER S. 144 OR S. 145 OR CHAP. X OR CHAP. VIII.

7. **Magistrate has discretion to proceed under s. 107 or s. 145 or s. 144.**—Where a party has been found by a Magistrate to be in possession of land about which a dispute occurs, the Magistrate is not bound to act under ss. 144 and 145, but has a discretion to proceed either under s. 107 or under ss. 144 and 145, **32 C. 966** where **26 M. 471** and **7 C. W. N. 746** were followed and **7 C. W. N. 142** was not followed.

8. **In disputes about possession of land, whether proceedings should be instituted under s. 144 or s. 145.**—(*a*) **Madras view.**—*Proceedings may be instituted under s.* 144 *if there is apprehension of imminent breach of the peace.*—When one of the rival parties is found to be in actual possession of the lands in dispute, a Magistrate can proceed either under this section or s. 107 or s. 145, **26 M. 471,** where **25 C. 559** is doubted and distinguished. Where disputes relating to possession of lands cause apprehension of an imminent breach of the peace, a Magistrate may act under this section instead of under Chapter XII, and an order under this section may extend in terms to the prohibition of several acts, **3 M. 354.** If the dispute is as to possession of immovable property, an *ex-parte* order under this section would be invalid in the absence of any emergency to deal with the matter, **19 M. L. J. Sh. N. 25**; (*b*) **Calcutta view.**—*When possession in dispute, proceeding must be taken under s.* 145.—In a dispute regarding land when the question of possession is *disputed* between the parties, the proper course is to proceed under s. 145 deciding the question of possession on evidence and not pass order under this section. Where in a proceeding under this section, the Sub-divisional Magistrate holding that the first party was in possession directed the second party to refrain from interfering with that possession but the District Magistrate in revision holding that the second party was entitled to possession directed them to continue in possession and prohibited the first party from interfering with their possession; *held*, that both orders were bad in law, **11 C. W. N. 271 = 5 Cr. L. J. 76.** *See* also **3 Pat. L. J. 243** and **3 Pat. L. J. 287.** A Magistrate being satisfied that a dispute respecting a colliery existed between two parties and a breach of the peace was likely to ensue, passed an *ex-parte* order under this section by which both the parties were prevented from exercising any right of possession and before the expiry of the two months during which the said order remained in force, proceedings under s. 145 (1) were initiated, *held*, that under the above circumstances, the proper procedure for the Magistrate to have adopted was not to exercise the powers conferred upon him by this section and s. 145, either simultaneously or successively, but to act at once under s. 145, and if the matter be one of emergency make use of the second proviso to sub-sec. (4) of s. 145, rather than have resort to this section. By adopting such a course, he puts himself in a position to settle the dispute between the parties. Otherwise the cause of dispute might still exist at the end of the two months, **27 C. 785**; *see* **12 W. R. 66.** When, however, no claim is made to the possession of the immovable property except to a right in the nature of an easement and there is emergency, s. 144 ought to be resorted to, **17 C. W. N. 205 = 17 C. L. J. 397 = 13 Cr. L. J. 789.** But *see* **32 C. 966.** *See* also **2 p. 94.**

9. **Whether Magistrate should proceed under Chapter X or this Chapter.**—An order under this section cannot be passed in a matter dealt with under s. 133, **8 W. R. 87; Weir II, 58; Ratanlal 50.** *See*, however, Note 5 to s. 133.

Government that possessed a State religion might be unreasonable now that the Government professes impartiality to all creeds. The Magistrate should endeavour to abstain from the appearance of showing favour to one sect at the expense of another, though, where a sufficient emergency arises, private rights must necessarily yield to public security," **Mad. H. C. Pro., 13th May, 1885.** In **2 M. 140** the plaintiffs sought to set aside an order passed by the District Magistrate prohibiting all music while any procession is passing or re-passing the defendant's *musjid*. In declaring the order of the Magistrate to be *ultra vires*, the High Court observed as follows :—" In the proper governance of a country of which different sections of the inhabitants hold widely divergent creeds, it is, of course, necessary that regulation should be established securing the members of each sect in the legitimate performance of their devotional exercises from improper interference on the part of members of other sects, and such regulations find a place in the law of British India (*I.P.C., Chap. XV*)." " But at times, the right of the several sects to the undisturbed exercise of their religious observances may come into conflict without any criminal intention. In such cases, mutual toleration is, and must be, the only and the proper rule. It has then to be determined how far the conflicting rights interefere with and necessarily modify each other." It is, on the one hand, a right recognised by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed. It is, on the other hand, a right recognised by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music, so that they do not obstruct the use of it by other persons. If persons passing in procession attended by music pass a place in which others are assembled and engaged in public worship which the music would tend to disturb, it is the duty of the persons composing the procession to refrain from such disturbance; but assemblies for purpose of worship are held scarcely in any place at all hours and generally at appointed hours, and, therefore, it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognised place of worship it attended by music. If, indeed, the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognised place of worship, whether persons are or are not at the time there assembled and engaged in religious worship, the members of a numerous set might close every highway to the processions of a sect to which they are opposed by erecting in the neighbourhood of each highway a place of worship. The law in the restrictions it imposes on processions of whatever character does not go beyond the necessity, and a Magistrate has no *general* authority to declare the law on the subject and anticipate a breach of it by a prohibitory order. For the preservation of the public peace he has a special authority, and authority limited to certain occasions. " The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority." The Hindus of a particular locality had established their right to hold a procession with music before a Muhammadan mosque. The District Magistrate passed an order under this section prohibiting the exercise of the right, it was held that the procedure adopted was valid. It is not the duty of the authorities to enforce a decree in all circumstances and at all costs. Where there is a conflict between public interest and private right the former must prevail, **51 Madras 1006 (F.B.).**

As to the further exposition of the law relating to processions, *see* **6 M. 203 ; 5 M. 304; Weir II, 74 ; 26 M. 554 (F.B.). Ibid., 579** and **586, 88 M. 489 ; Ratanlal 708 ; 18 B. 693.** No person has a right to obstruct others when making lawful use of a public street and customs to the contrary founded on religious intolerance cannot be recognised ; **Weir II, 89** ; *see* also **26 M. 554 (F.B.).** If the members of any sect desire to prevent the use of the street in the neighbourhood of their houses by the members of another sect their proper course is to erect their houses on streets which are private property. *See* also **10 Bom. L. R. 1047 = 8 Cr. L. J. 431.** The fact that a procession is a luxury is not a sufficient ground for passing an order under this section, **15 Cr. L. J. 30 (M.).** *See* also **101 I. C. 893 = 28 Cr. L. J. 509.**

25. Holding of *hauts* or markets—Jurisdiction of Magistrates to regulate.—If the conditions required by the section are present, a Magistrate has undoubtedly power to direct a person to abstain from holding a *haut*, **10 B. L. R. 434 (F.B.), 18 W. R. 47**; but such power must be exercised in the light of the following observations. The holding a *haut* on one's own property is not in itself a wrongful act and therefore, any ulterior consequence which arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace, unless the ulterior consequences are made the basis of these proceedings. An order directing a man not to use his property in a lawful manner, *e.g.*, not to establish a *haut* on his own land does not come within the purview of this section, **13 Cr. L. J. 511**

circumstances and determine whether as a matter of fact the act prohibited is likely to lead to a breach of the peace, etc., is within or in excess of the legal rights of the person forbidden to do it. If it is found that a man is doing that which he is legally entitled to do, and that his neighbour chooses to take offence thereat, and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first the exercise of his legal right, but to restrain the second from illegally interfering with that exercise, **5 C 132.** His first duty is to secure to every person the enjoyment of his rights under the law, and by measures of precaution to deter those who seek to invade the rights of others, but if he apprehends that the lawful exercise of a right may lead to a civil tumult, and he doubts whether he has available a sufficient force to repress such tumult or to render it innocuous regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorised to interdict its exercise, **2 M. 140.** The Code declares the authority of the Magistrate to suspend the exercise of rights recognised by law, when such exercise may conflict with other rights of the public or tend to endanger the public peace But this authority is limited by the special ends it was designed to secure, and is not destructive of the suspended rights, **6 M. 203.** If a Magistrate apprehends a breach of the peace he can restrain temporarily the exercise by any private person of his lawful rights to prevent that result, **5 C. W. N. 329,** which follows the principle enunciated in **10 B L R 434 = 18 W. R. 47 (F.B)** where the order being of a permanent character was held to be bad, **26 C. W. N. 363; 904**

22. Magistrate is bound to make inquiry and protect legal rights of party found entitled to its exercise.—The object of this section is to enable a Magistrate in cases of emergency, to make an immediate order for the purpose of preventing an imminent breach of the peace, etc., but it is not intended to relieve him of the duty of making a proper inquiry into the circumstances which make it likely that such breach of the peace etc, will occur It is, therefore, incumbent on him to limit the operation of the order to such reasonable time as may be necessary to enable him to hold a sufficient enquiry and, if necessary, to deal with the case under this section A first class Magistrate issued an order under this section forbidding the *Kazi* and *Mulla* to go to the *Idga* outside the city of *D* on the *Bakri Id* and directing them not to allow others to do so *held*, that as it appeared that there was some dispute between the *Kazi* and the *Mulla* each of whom claimed to have the right to read the *Kudba* first on the *Bakri Id* at the *Idga*, the Magistrate should have held an inquiry, and determined which party had the legal right, and then have protected the party he found entitled, in the exercise of that right, **5 C. 132**, and that in any case there was nothing to justify the *ex-parte* issue of the order and the general prohibition to go to the *Idga* and the injunction against allowing others to go there *See* also **Ratanlal 967.**

22-A. When a breach of the peace is anticipated action is to be taken against the potential law breakers and not against peaceful citizens whom it is expected the law breakers will molest, **100 I. C. 825 = 28 Cr. L J 345.**

23. Scope and duration of the order must be co-extensive with the emergency.—The duration of the authority in the Magistrate to interfere with the private rights of parties is co-extensive with the emergency that justified the exercise of that authority He cannot issue orders intending to have effect for all time, **2 M. 140**; *see* also **31 C 990** where the order of the Magistrate was held to be wider than necessary A *Gossain*, had gone to pay a visit accompanied by a body of retainers and also by persons carrying horns which horns were blown for the glorification of the petitioner and to the annoyance of the party The Magistrate under this section issued a general order that neither party should use any musical instrument in the neighbourhood to each other's houses, *held* that the Magistrate cannot pass such a general order, though he may forbid the use of musical instruments for the purpose of giving *mutual offence* **6 W. R. 40.** An order of a Magistrate directing that all music shall cease when a procession is passing a certain place of worship is *ultra vires*, **2 M. 140; 22 Bom L. R. 157.**

24. Power to regulate the conduct of religious processions.—A Magistrate has jurisdiction to pass a temporary order under this section prohibiting a procession on the ground that it cannot be allowed without grave danger of a breach of the peace, with the force at the Magistrate's disposal, **15 Cr. L J. 30 (M.)** but in regulating the conduct of processions of Hindus and Muhammadans Magistrates would do well to bear in mind the observations of the Madras High Court which are as follows —' Primarily he (the Magistrate) must consult the public safety and the responsibility thrown on him is great seeing that the Legislature has prohibited all interference with his order by a superior Court. At the same time it is incumbent on the Magistrate to interfere as little as possible with private rights, and a custom which might be recognised as not • a

29. Magistrate has no business to adjudicate on rights and has no jurisdiction to decide questions of title or possession.—A Magistrate purporting to act under this section has no business to adjudicate upon rights and has no jurisdiction to decide upon any question of title or possession. His only duty is to make an order with the object of preventing a breach of the peace, if he considered a breach of the peace imminent, **11 M. L. J. 122 = Weir II, 93.** When one person presented a petition under this section alleging that he had the right, based upon long usage and custom of compelling another person to bring certain idols, admittedly in the possession and custody of such other, to his place, for the celebration of a festival and the Magistrate directed the person applied against to take the idols to the desired place; *held*, that there is no provision of law which vests in a Criminal Court the power, first, to decide the question of right and then to proceed to base its order under this section upon it; and that, therefore, the Magistrate's order is wholly unwarranted by law and without jurisdiction, **8 C. W. N. 376.**

30. Magistrate ought not to usurp the functions of a Civil Court.—A Magistrate has no jurisdiction to direct that certain disputed articles should be placed in the custody of the Court and should remain there for two months or until the decision of a pending civil suit, **12 C. W. N. 1044 = 8 Cr. L. J. 230.** After dropping proceedings under s. 145, a Magistrate has no jurisdiction to attach the immovable property and to pass a prohibitory order under this section, enjoining the parties not to interfere in any way with the attachment, **13 C. W. N. CXIX.** Where an application was made for the renewal of worship in a temple in which the worship had been stopped owing to disputes, the Magistrate has no jurisdiction under the section to direct the re-opening of the temple or the removal of the image and renewal of the worship without innovations, **Madras, Cr. Rev. Case 285 of 1904.**

VII.—PARTICULAR ORDERS HELD TO BE WITHIN THE SCOPE OF THIS SECTION.

31. Widening of temple gates.—Where a Magistrate directed the hereditary priests of a public temple which is visited at certain periods of the year by large concourse of pilgrims to widen and heighten the doorway, with a view to prevent the dangers arising from overcrowding and to improve the ventilation; *held*, that such order was legal, and the case would have been the same had the temple been a private propery, as it is open to all the Hindu public, **6 B. H. Cr. Ca. 36.**

32. Regulating worship in temple.—Where a District Magistrate being of opinion that there was such a risk or danger as is contemplated in this section, made an order directing certain specified persons, the *Pujaries* and *Shevdaries* and the public generally to abstain from interfering with the *Badves* in the performance of the daily pujah of the god *Vithoba* at *Pandarpur* and further directed the *Badves* alone to perform the said pujah; *held*, that the District Magistrate had jurisdiction to pass such an order and the High Court could not consistently with s. 435 (3), *infra* interfere with his discretion in revision, **4 Bom. L. R. 582.** An order forbidding the celebration of a religious ceremony at a certain place and the removal of idols from that place is good; but if it is coupled with a limitation that the act should not be carried out "*without the consent of certain persons*" then the order is bad, unless the limitation is removed, **8 C. W. N. 376.** As to the power to fix hours of worship, *see* **6 M. 203** and for power to regulate religious processions, *see* Note 240.

33. Management of temple.—"A Magistrate has jurisdiction to make an order directing a person *not to interfere with the management*" of a temple, as such an order is within the meaning of the words *abstain from a certain act*, **24 M. 45; 3 M. 354; 18 M. 402.**

34. Regulating entry into a Mosque.—Where, apprehending a breach of the peace, a Magistrate directed members of the *Hanafi* sect to enter a mosque at certain stated hours only, and the members of the *Shafi* sect at certain other stated hours only, *held*, the Magistrate had jurisdiction to make the order. Though *in form* it may be said that the order was not one to abstain from a certain act, *in substance and effect* it was an order directing certain persons to abstain from certain acts, **24 M. 262.**

35. Prohibition of burial.—Under this section an order may properly be made, on sanitary grounds, prohibiting burials in certain places, **Weir II, 64.**

36. Magistrate may forbid slaughter of cattle.—*See* **16 Cr. L. J. 190 (Oudh)**, Note 44 and **1885 A. W. N. 258.**

VIII.—ORDERS HELD TO BE NOT WITHIN THE PURVIEW OF THE SECTION.

37.—The only orders that may be made under this section are to direct any person (1) to abstain from a certain act or (2) to take certain order with certain property in his possession, etc.

(*a*) *Magistrate cannot take custody of property.*—An order made with the consent of parties that the Magistrate should take over the custody of certain safes and keys was held to be wholly illegal, **12 C. W. N. 1044.**

(Cal.); 4 C. W. N. 226. The Magistrate or Collector of a district has no power as an executive officer to stop the holding of a market within his district on a particular day when circumstances have not arisen such as would justify his taking action under this section, and even when such circumstances have arisen, the prohibition cannot be made for an indefinite period, **1897 A. W. N. 59.** Where an order enjoined the petitioner not to establish a rival market within a quarter of a mile of a certain market place, *held,* that it was not a proper order under this section as it did not mention any limit of time and there was nothing in the order to indicate whether the petitioner would be entitled to hold any market at any time within a quarter of a mile The object of this section is not that the order should be made prescribing the holding of *hauts* indefinitely within a certain area for two months. This procedure under s 107 would be the more appropriate remedy, **11 C. W. N. 223 = 5 Cr. L. J. 43; 11 C. W. N. 79 = 4 Cr. L. J. 433.** Where the only ground mentioned for the issue of an order under s. 144 restraining the holding of a rival *haut* was, that the Magistrate was satisfied from the report of the Police that by opening a new *haut* within half a mile from the old and long-established *haut,* the petitioners were about to disturb the public tranquillity, *held,* that an injunction could not be issued not to do a lawful act upon a man's own property and that the order in the form in which it was issued was without jurisdiction The holding of a *haut* on a man's own property is not in itself a wrongful act and therefore any ulterior consequence which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace, unless these ulterior consequences are made the basis of the proceedings The law as regards the preservation of public peace is based on an apprehension that either a certain person or certain persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace, **19 C. W. N. 248.** Where two rival Zemindars were holding their *hauts,* simultaneously every Friday and Wednesday, and the Magistrate made an order under this section directing one of them to hold his *hauts* on Saturdays and Tuesdays, *held,* that though the section empowers a Magistrate to make an order prohibiting a person from holding a *haut* on certain specified days of the week, the law does not empower him to direct that the *hauts* shall be held on certain days leaving the party no option to hold his *haut* upon days other than those his rival holds his *haut* on Disobedience of such an order is not punishable under s 188, I P C, **31 C. 990;** *see* **5 C. 7; 4 W R. 12; 4 C. L. R. 410; 21 W. R 26,** but *see* **16 C. 9, 18 W. R. 23; 21 W. R. 53; 14 W. R. 46; 11 W. R. 5.** *See* also **29 C. W. N. 411.** An order under this section could be passed if it appears that the public is molested by being forcibly conducted into the new market with the object of making them buy there, **55 Cal. 1077.**

An order prohibiting a Zemindar from holding a market on his estate is illegal —5, *Revenue, Judicial and Police Journal, Calcutta, p* 1155

26. Section does not empower Magistrates to make bye-laws—No Magistrate is empowered to make a general order, such as one directing persons not to allow their cattle or horses to run at large on the public roads, or warning them to take proper care of their cattle and that in case of disobedience they would be punished The order contemplated by the section is one in the nature of an injunction or command and not orders of the nature of regulations or bye laws, **12 W. R. 36; 3 B L. R. A. Cr. 45; 9 B. L R. Appx. 36.**

27. Order irrevocable in its effect should not be passed.—A Magistrate has no power to issue any order which is by its very nature irrevocable All that he has power to compel the owner of property *is* that he should take certain order with it. Such power does not extend to an order to cut down large quantities of trees, **13 W. R. 72; 32 C. 154.**

28. Magistrate ought not to interfere with execution of Civil Court decree.—A Magistrate has no jurisdiction to make any order under this section which would have the effect of interfering with the execution of a decree of a Civil Court **17 A. 485; 2 C. W. N. 572.** A landlord obtained a decree in a Civil Court against the tenant for possession and obtained delivery of the lands in execution, but the Magistrate at the instance of the tenant passed an order forbidding the landlord from interfering with the possession of the tenant as the landlord was unable to point out the exact lands of which he obtained possession, *held,* that the order made contrary to the decree of the Civil Court was wrong and the Magistrate was bound to maintain the possession of the landlord *See* **6 C. W. N. 466.** *R* purchased some properties in execution of a mortgage decree and was put in possession of the same The Magistrate of *D* purporting to act under this section ordered *R* or any of his subordinates to refrain from entering upon the lands and properties, and directed him to show cause why the order should not be made absolute or rescinded, *held,* that looking to the nature of the case and to the language of this section, it was clear that the section does not apply to a case like the present and the order purporting to be made under it is bad, **2 C. W. N. 572; 28 C. W. N. 732.**

(5) should not be interfered with in revision under s. 435, 16 Cr. L. J. 272 (M.). Sub-sec. (4) of this section allows an application to the District Magistrate against an order made by a Subordinate Magistrate. The High Court cannot interfere in revision, **Ratanlal 516.** *See*, however, **20 C. W. N. 758; 20 C. W. N. 981; 23 C. W. N. 145; 42 M. L. J. 352; 47 M. L. J. 439.**

55. Executive orders cannot be revised.—An order prohibiting the opening of *hauts* in a certain place is not a judicial order and therefore is not subject to revision, **21 W. R. 22**; nor an order to remove a prostitute, **26 P. R. 1860**; nor an order to burn a quantity of grain, **2 P. R. 1880.** *See* also **33 P. R. 1878.**

XII.—PROSECUTION FOR DISOBEDIENCE OF ORDER.

56. Practice.—Magistrate convicting under s. 188, I.P.C., should invariably quote the order which was disobeyed, and not the law under which that order was promulgated—*C. P. Cr. Cir., No.* 6. This section and s. 188, I.P.C., should be read together, **1 Agra 23.**

57. Sanction necessary.—Sanction is necessary before prosecution. *See* s. 195.

58. Legality of order can be questioned on conviction for its disobedience.—On conviction under s. 188, I.P.C., for disobedience to the order of a Magistrate directing the pruning of hedges; *held*, that as the circumstances showed that there was no necessity for a speedy remedy the Magistrate had no power to issue the order disobeyed, **Ratanlal 50 and 81.** Although orders made under this section are not appealable, still if a person be convicted for their disobedience under s. 188, I.P.C., he might appeal on the ground of their illegality, and the validity of the proceedings would then be inquired into, **8 W. R. 37.** *See* **23 C. W. N. 141.** Where an executive officer makes an order or issues a notification under the Code of Criminal Procedure, it is not within the province of judicial authority to question the propriety or legality of such order or notification until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notifiction. It then becomes the duty of the judicial authority to consider whether the order is properly made or not, **6 C. 88; 2 W. R. 32.** *See* **20 C. W. N. 981.** *See* **35 M. L. J. 454.**

59. Knowledge of the order must be proved.—The conviction would be illegal, unless it is proved that the accused knowing that an order has been promulgated by the proper authorities disobeyed that order, **1 Bom. L. R. 524; 16 C. 9.** *See* Note 64 and also **31 C. W. N. 340.**

60. Conviction for disobedience or order will not stand unless there be evidence as to the likely result of such disobedience.—A conviction under s. 188, I.P.C., for disobedience of an order made under this section in the absence of evidence as to the likely result of disobedience of such order is bad in law, **4 M. H. C. R. Appx. 5; 3 B. L. R. Appx. 149; 10 B. H. C. R. 424; 1886 A. W. N. 251.** Although the establishment of rival *haut* at a place near to an old *haut* and held on the same day may lead to a breach of the peace, it would not be safe or proper that that alone should form sufficient ground for conviction under s. 188, I.P.C., **4 C. W. N. 226.** To secure a conviction, there must be definite evidence on record to show that disobedience was likely to lead to a breach of the peace or other harmful result contemplated by the section, **32 C. 793.** But if the act of disobedience has tended to cause annoyance, it is sufficient for conviction under s. 188, I.P.C. Objectionable language such as "If you drink you will be drinking the blood of your children" speaks for itself and no further evidence is necessary, **10 Bom. L. R. 1047 = 8 Cr. L. J. 431.**

61. The order disobeyed must be in writing and duly promulgated.—Where the accused, servants of a contractor, quarried stones from a hill and some coolies were killed owing to an accident, and in consequence the District Magistrate issued an order through some *Munshi* to stop work; *held*, the order should have been in *writing* as required by this section and duly served or promulgated to the public as required by law, **36 P. R. 1905; 17 W. R. 57.** As to proof of service of order in order to secure a conviction under s. 188, I.P.C. *See* **13 A. 577; 14 B. 165; 16 C. 9** and **12 M. 475** and **18 C. 176.**

62. Magistrate issuing order cannot punish for its disobedience.—A second-class Magistrate, who issues an order under this section, has no jurisdiction to punish an offender for its disobedience, **10 B. H. C. R. 424; 24 M. 262; Ratanlal 50; 4 C. W. N. 226; 31 C. 990.**

63. When no offence to disobey orders.—If the person issuing order is not lawfully empowered to promulgate the order no conviction can stand, **3 A. 201; Ratanlal 50 and 81; 1904 A. W. N. 233.** If the order is both in substance and in its manner of publication illegal, as being beyond the powers conferred by law, the conviction will not stand, **14 B. 165 and 180; 20 A. 501.**

= 8 **Cr. L. J. 230**; nor can he make any order as to custody of money in respect of which a breach of the peace may take place, **12 W. R. 38** nor order a village munsiff to be in possession of the property, **3 L. W. 498.**

(*b*) *Nor can he pass any order regarding custody of children*.—This section does not empower a Magistrate to pass order regarding the custody and guardianship of children **Weir II, 66.**

(*c*) *He cannot direct division of crops between rival claimants*.—This section does not authorise a Magistrate to make an order for the division of crops between two rival Zemindars, because the Magistrate has no jurisdiction to pass an order of this nature, **32 C. 154.**

(*d*) *Regulating boat traffic*.—An order regulating the boat traffic at a certain landing place on the ground that the overcrowding of the boats was dangerous to the health of the residents of the town, purporting to be passed under this section is bad, not being really within the purview of the section, **25 C. 852**

(*e*) *Cannot attach immovable property*.—*See* **13 C. W. N. CXIX.**

(*f*) *Cannot direct erection of building*.—These words are undoubtedly very wide and equally vague, but it must be assumed that the Legislature in using those words in the section did not intend to give a Magistrate such extraordinary powers as would enable him to order, under this section, a building which has fallen down on private grounds to be rebuilt by the owner of the grounds, **17 A. 485.**

(*g*) *Cannot regulate holding of hauts*.—**31 C. 990.** *See* Note 25

38. Removal of embankment, bund, etc.—This section does not authorise a Magistrate to issue an order directing the removal of an embankment whereby adjacent lands are in danger of being flooded **5 M. H. C. R. Appx. XIX = Weir II, 66; 11 C. W. N. CVII**; nor to remove a dam which obstructs the flow of water through an irrigation channel, though the erection of such a dam may be prevented *for the purpose of preventing a riot or an affray*, **9 C. 103.** A Magistrate has no authority summarily to direct the owner of a tank in the dry bed of a river to destroy the banks on the ground that they are an obstruction to the public in the lawful enjoyment of the river and that the stopping of the water interfered with the health of the public, **10 W. R. 36; 1 B. L. R. (S N.) XXVII.** Nor to direct a person to remove a wall erected on land alleged to belong to another person, in the absence of the evidence showing that a riot or affray was likely to occur, **13 W. R. 19, 2 C. W. N. 732.**

39. Removal of prostitutes.—A Magistrate ordered certain prostitutes and their Zemindars under whom they *held* the land to remove the houses of the former from a particular site within 24 hours and to take up their quarters on the opposite side of a railway line, on the ground that the visitors to the prostitutes had to cross the railway line and thereby their lives might be endangered, *held*, that the orders were *ultra vires* and not covered by the words "*such Magistrate may direct any person to abstain from a certain act or to take certain order with certain property in his possession*," **2 C. W. N. 70.**

40. Disputes as to rents.—The Chapter is for temporary orders in urgent cases of nuisance, and has no application to the collection of market dues which does not come under that category **23 W. R. 57.** In a case of dispute between rival parties as to the payment of rents by tenants, a Magistrate has no power to make an order that no rent should be collected until such time as the right and title of the parties should have been established by order of a competent Court, and a conviction under s. 186, I P C, for disobedience of such an order cannot be sustained, **8 C. L. R. 231; 19 C. 127; 9 C. W. N. 392; 27 C. 918; 16 C. 80; 3 M. 354.** In **1914 M. W. N. 169 = 15 Cr. L. J. 145**, it was *held* that an order retaining a certain body of people from exercising the rights of Melvaramdar in relation to certain lands is valid.

41. Disputes about easements.—A right to flow of water and a right to use a pathway across the land of another are rights of use of land and water within the meaning of s 147 and cannot be adjudicated upon under this section by a Magistrate with subordinate powers, **3 M. H. C. R Appx. XXIII = Weir II, 65; 19 W. R. 6.**

42. Is the scope of this Chapter limited to orders in respect of immovable property?—Chapter XI refers to interference or dealing of some kind with the land itself or with something erected or standing upon it, and is directed to the prevention or direction by prompt order of some definite act on the part of an individual, so that injury or nuisance may not be caused **19 C. 127.** There seems to be nothing in this section to justify this opinion.

IX.—SCOPE OF CL. (3)—VALIDITY OF ORDERS ADDRESSED TO THE PUBLIC.

43. Must the order be addressed to the public 'generally'?—In **8 A. 99**, it was *held* that a proclamation by a Magistrate forbidding, in general terms, any person spreading nightsoil on his fields so as to cause disease or annoyance was *ultra vires* and not within the scope of Chapter XI An order may, under s 144, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act,

(6) If the Magistrate decides that one of the parties was "* or should under the first proviso to sub-section (4) be treated as being" in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, "* and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed."

Party in possession to retain possession until legally evicted.

†(7) "When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto;

‡ "(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute, in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale proceeds thereof, as he thinks fit.

‡ "(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

‡ "(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107."

Note.—The report of the Select Committee says: "In view of the objections of the Bengal Government, we do not think sections 145, 147 and 148 should apply to the Presidency towns. We have therefore omitted the first amendment made by clause 27 and the references to Presidency Magistrates and Chief Presidency Magistrate respectively in clauses 29 and 30. In order to meet several difficulties which have arisen in connection with the words "receive the evidence produced by them" in section 145, cl. (4), we have made an amendment adopting the phraseology of section 244, cl. (1). By sub-clause (7) as newly amended the Magistrate is empowered to inquire who the legal representative of a deceased person is, with a view to bring him on record. Under sub-clause (8), which is newly added, a Magistrate can make orders about the disposal of any crop or produce of land, subject to speedy and natural decay by sale or otherwise. The powers of the Magistrate to proceed under section 107 are expressly reserved under sub-clause (10) which is newly added.

Notes.—1. Suggestion.—The chief object of this section is apparently to prevent a breach of the peace, but from decided cases it seems that the parties who resort to a Criminal Court have some ulterior and different object in view, *viz.*, to shift the burden of proof in a subsequent civil suit on the opposite party. *See* **29 C. 187 (P.C.)**. Decided cases show that the proceedings before a Magistrate under this section are of a *quasi*-civil nature, and the Magistrate not being accustomed to civil work must often find it a very difficult task to pronounce an opinion in favour of one or other of the party. In order to defeat this collateral object of the complainant, it would be well if it were enacted that instead of deciding the question of actual possession, the Magistrate were only to bind the parties to keep the peace in case there be any imminent danger of its breach, and then make a reference to the Civil Court regarding the question of actual possession. The Civil Court should decide this question as if it were a suit under s 9 of *Specific Relief Act* and communicate its decision to the Magistrate in question, who will pass final orders in accordance with that decision. This would avoid great deal of trouble to the Magistrate as well as to the parties.

* Words in the inverted commas were added by Act XVIII of 1923.
† Sub-section (7) was substituted by Act XVIII of 1923.
‡ Sub-sections (8), (9), (10) were added by Act XVIII of 1923.

64 **Sanction for disobedience of order when bad** —No sanction for prosecution for disobedience of order ought to be given unless such disobedience causes or tends to cause annoyance injury, etc **14 C W N 234 = 11 Cr L. J 49.**

XIII —CIVIL PROCEEDING TO VACATE MAGISTRATE'S ORDER.

65 **Civil suit lies to vacate the order.**—There is nothing in the provisions of this section which shows that the Legislature intended to deprive a private individual of the redress which the law affords him (when special injury is caused to him) by means of a civil suit **3 C. 20 (F B.).**

66 **Magisterial order is a sufficient cause of action to found a suit.**—A magisterial order prohibiting people from going in procession in public streets is without special damage a cause of action for the sustainability of suits by a member of the public for a declaration and injunction with regard to their right to go in procession **19 M L J 617, 20 M L J. 119,** and *see* also **50 M 15, 18 B 693; 2 B 457**

67. **Limitation for suit for damages** —A suit for an alleged damage caused by an order of a Magistrate purporting to be under s 144 falls within Art. 2 of *the Limitation Act* and must be brought within 90 days **18 In. Ca 84 (Cal).** *See* also **16 O. C. 211 = 21 In. Ca. 426.**

CHAPTER XII

DISPUTES AS TO IMMOVABLE PROPERTY

Procedure where dispute concerning land etc, is likely to cause breach of peace

145. (1) Whenever a District Magistrate, Sub-divisonal Magistrate or Magistrate of the first class is satisfied from a Police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute

(2) For the purposes of this section the expression "land or water" includes buildings, markets fisheries crops or other produce of land, and the rents or profits of any such property

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute

Inquiry as to possession.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute peruse the statements so put in, hear the parties, receive "all such evidence as may be" produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at such date

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed, and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be

I.—NATURE OF PROCEEDINGS UNDER THIS CHAPTER.

2. **Are proceedings 'civil' or 'criminal'?**—The proceeding under s. 145 is, in reality, a civil one, **33 C. 68 (F.B.)**; it is *quasi*-civil, **23 P. R. 1902.** The proceeding is a *quasi*-executive action, **25 B. 179.**

3. *Under s.* 526.—In **26 M. 188; 11 O. C. 61 = 7 Cr. L. J. 423; 34 A. 533**, it is *held* that the proceeding under this Chapter is a '*criminal case*' within the meaning of s. 526 while it is *held* in **25 B. 179; 8 S. L. R. 215; 5 P. R. 1914**, that it is not a '*criminal case*' as it does not deal or arise out of a crime already committed. *See* Note 167.

4. *Under s.* 15 *of the Letters Patent.*—Though the Court dealing with a dispute under this section is a Criminal Court, yet an order under this section is not one made in a '*criminal trial*' within the meaning of s. 15 of the Letters Patent and therefore an appeal lies from the order of a single Judge of a Chartered High Court, **17 M. L. J. 158 = 5 Cr. L. J. 343 (F.B.).**

5. **Is the proceeding 'a case' within the meaning of ss. 192 and 528?**—A proceeding is a case within the meaning of s. 192 (1), **22 C. 898; 2 C. L. J. 614 = 3 Cr. L. J. 83; 10 C. W. N. 1095**, but not under s. 192 (2), **4 C. W. N. 821; 36 C. 370.** *See* Note 163.

6. **Proceeding is an inquiry—s. 4** (k).—A proceeding is an inquiry within the meaning of s. 350, **13 C. W. N. 420 = 9 Cr. L. J. 278; 37 C. 812.** *See* also **22 C. 898; 28 C. 709.**

7. **Section 185 does not apply to proceedings under Chapter XII.**—Section 185 deals with offences only and has no application to proceedings under s. 145, **12 A. L. J. 390 = 15 Cr. L. J. 520.**

8. **Proceedings under this section are 'judicial' proceedings.**—*See* **s. 4.** (1) *But order paying over proceeds of the attached property is not an order in the exercise of a judicial power.*—In the course of proceedings under this section the Magistrate ordered that the crops growing on the attached land should be cut and sold and the proceeds deposited in Court. One of the parties brought a suit against the other and obtained an adjudication in his favour so far as his title to the money in Court was concerned, but the suit was dismissed as he had no cause of action against the other party. The Magistrate, when applied to, paid over the money to the party who had obtained the declaration in his favour; *held*, that the Magistrate in paying the money to the proper claimant, was not exercising any judicial power and the High Court therefore could not interfere, **6 C. W. N. 882.**

8-A. Proceedings under s. 145 of this Code are now included under proceedings within the meaning of s. 435. *See* Notes to that section.

II.—COMPETENCY OF MAGISTRATES.

(A)—Personal.

9. **Presidency Magistrates.**—The Code does not expressly authorise Presidency Magistrates to act under this section. In Madras, under s. 7 of Mad. Act III of 1888, the Commissioner of Police who is an *ex-officio* Magistrate can exercise the powers under this Chapter. In Calcutta and Bombay, such Commissioners, although they are not *ordinarily* Magistrates, can still be invested with the powers necessary for the preservation of the peace and prevention of crime. *See* Act XIII of 1856 and Bombay Acts IV of 1882 and IV of 1902; also Bengal Act IV of 1886.

10. **Bench of Magistrates.**—Under this Code, by virtue of section 15 (2) Benches have power to take proceedings under this section, **3 C. 754 = 2 C. L. R. 263** decided under the Code of 1872 is not applicable.

11. **Sessions Judge or High Court or District Magistrate cannot direct initiation of proceedings.**—A Session Judge is not competent to order a Magistrate to take action, **20 C. 520**; nor the High Court, **23 W. R. 58; 30 C. 112**; nor a District Magistrate, **24 C. 391.** *See* Notes 156 and 157 below.

12. **Proceedings of Magistrates not empowered void.**—If a Magistrate not empowered by law in that behalf, passes an order under this section, his proceedings are void. *See* s. 530 (*j*).

(B)—Local.

13. **Property must be within the jurisdiction of the Magistrate.**—Where a Magistrate drew up proceedings under this section in respect of a *Julkar*, lying partly within and partly without his jurisdiction; *held*, the order in regard to the part outside the jurisdiction was *ultra vires* and the whole proceedings were set

Syllabus of Notes

(*i*) *Suggestion of the breach of the peace must not be merely colourable.*—The suggested apprehension of a breach of the peace must not be merely colourable, but made to induce the Magistrate to deal with matters properly cognisable by the Civil Court, **10 C. 78 = 13 C. L. R. 410**; also **5 A. 607**; **27 C. 918**; **20 C. 513**; **7 C. L. R. 352**; **23 C. 557**; **20 W. R. 57**; **27 C. 981**; **22 W. R. 79.**

(*ii*) *No overt acts necessary.*—The section does not primarily contemplate cases in which there have already been acts of violence. All the disputants may be persons of peaceable disposition, but if the dispute is in its nature of such a kind that it is likely having regard to the known conditions of society, to lead to a breach of the peace, that is enough to warrant the Magistrate's intervention, **30 C. 155 (F.B.).**

28. Magistrate must satisfy himself that such a dispute exists.—To satisfy the requirements of this section; Magistrate must himself inquire into the likelihood of a breach of the peace happening and must come to a judicial decision upon it, and in conducting the subsequent investigation, he must examine the witnesses whom the parties have tendered. It is not enough if he merely states that he has been directed by the Judge to proceed under this section, nor could he deal summarily with the case after a mere inspection of the locality, **4 C. W. N. 779.** He must examine the witnesses tendered by the parties and come to a judicial conclusion, **9 W. R. 64**; **4 C. W. N. 779.** And where a Magistrate merely ordered on the complainant's petition that the accused should be summoned to answer the complaint, and on the accused appearing and denying that there was any risk of a breach of the peace, the Magistrate, without determining whether any breach of the peace was likely to occur, or enquiring whether the accused had any evidence, proceeded to take the complainant's evidence, and finding that the accused had wrongfully taken possession, ordered the complainant's possession to be restored, *held*, that the Magistrate had no jurisdiction, as he failed to find facts that were necesssary to constitute the foundation of his jurisdiction. His order, therefore, was set aside, **6 P. R. 1883.**

Use of printed forms condemned.—Where the statement that the Magistrate was satisfied as to the likelihood of a breach of the peace was in *print* and not recorded by the Magistrate himself, the use of such forms was condemned, as it is likely in many cases to prevent the Magistrate from applying his mind to a consideration of the materials before him in order satisfy himself as to whether not such a dispute as is contemplated by this section exists, **9 C. W. N. 51.**

28-A. 'Dispute' in sub-section (1) means actual disagreement existing between the parties at the time of the proceedings although the question has already been decided by a Civil Court. **32 C. W. N. 1173 (F.B.).**

29. Proceedings ought not to be instituted when one party is in possession and acting in exercise of his rights.—In investigating a case of dispute as to land between two parties, a Magistrate found that one party was in possession, but there being a charge against both parties of rioting under s. 147, I.P.C., he punished both parties; *held* that the party in possession was protected by s. 104, I.P.C., in maintaining his possession, and the punishment inflicted on him was accordingly remitted, **10 W. R. 64.** Where a Magistrate found that the persons who attempted to do *Basti Pujah*, which is said to have provoked the petitioners, were not entitled to perform this pujah; *held* that if the petitioners acted properly within their rights there was no eason to suppose that any breach of the peace was likely to be committed by them, **3 C. W. N. 463.**

(*i*) *Proceedings under this section unnecessary when claim to possession not bona fide.*—Where certain persons, wrongfully and without any *bona fide* claim to possession, sought to eject another by force and a breach of the peace was imminent; *held*, the Magistrate was not bound to act under this section, but might proceed under s. 107, **28 A. 406.** *See* also the observations in this connection in **3 Pat. L. J. 243.**

(*ii*) *When a party by instituting suit for possession admits the other party is in possession, Magistrate ought not to institute proceedings.*—Under this section, a Magistrate has power to intervene and pass a temporary order in regard to the possession of land under dispute, only until one or other of the parties applies for and obtains a determination of his right in a Civil Court. Where, therefore, one of the parties by bringing a civil suit for possession, has admitted the other party to be in possession, it was *held* the Magistrate has no jurisdiction to proceed under this section, but might invoke other sections of the Code, if he thought it necessary to take any steps to preserve the peace, **7 C. W. N. 558.** But the pendency of a suit under s. 9 of *the Specific Relief Act* does not take away the jurisdiction of the Magistrate, **36 C. 370.** *See* also **(1911) 2 M. W. N. 96 (Jour.)**; **5 C. 835.**

30. Jurisdiction to initiate proceedings does not depend upon date of dispossession.—The jurisdiction of a Magistrate to initiate proceedings is not determined by the date of dispossession of one of the parties claiming the land, but is determined on the apprehension based on reliable information that a dispute likely to

aside, as they were taken with regard to the *Julkar* as a whole and the Magistrate was allowed the option if he saw fit to do so, to initiate fresh proceedings as to the part of the *Julkar* within the limits of his jurisdiction, **1 C. L. J. 329 = 2 Cr. L. J. 406.** This section is not applicable to disputes as to *Ijmalee* property, nor does it authorise a Magistrate to adjudicate on any question concerning lands beyond the limits of his jurisdiction, **17 W. R. 33.**

14 Jurisdiction of Magistrate where situation of property doubtful.—In **12 O. C. 400 = 11 Cr. L. J. 69,** however, it was *held* applying the analogy of s 182 that where it is uncertain in which of several local areas the land in dispute is situate, inquiry can be made by a Magistrate having jurisdiction over any of such local areas. Even if there is any defect, it is cured by s 531 The deep stream of the River Ghogra, as it exists at any given point forms the boundary line between the Fyzabad District in Oudh and the Basti District in Agra A dispute arose between a piece of land between the two channels of the river and it was found that the channel which was towards the Fyzabad side was the deep stream of the river and it was held that the Magistrate of Basti has jurisdiction to proceed under s 145 **16 Cr. L. J. 527 (A.).**

15. Magistrate of one district may act on report of Police-officer of another district.—Where a Police-officer of District *F* made a report to the effect that a breach of the peace was likely to take place in consequence of a dispute concerning a piece of water lying partly within District *F* and partly within District *D*, *held*, that the Magistrate of *D* had jurisdiction to take proceedings under this section in respect of the water lying within his jurisdiction, **29 C. 885.** In such a case it is essential that an order in writing under sub sec. (1) is under all circumstances made Otherwise subsequent proceedings would be *ultra vires* and therefore liable to be set aside as made without jurisdiction, **A. 2 L. J. 272.**

III.—OBJECT OF SECTION.

16. Purpose of section is to preserve public peace—The object of s 145 is to bring to an end by a summary process disputes relating to land, etc, which are in their nature likely, if not suppressed, to end in breaches of the peace The maintenance of the public peace was the object before the mind of the Legislature, **30 C. 155 (F.B.)** The procedure prescribed by this section is intended solely for the purposes of preventing breach of the peace The institution of proceedings is entirely within the discretion of the Magistrate A party to a proceeding under this section is not in the position of a *plaintiff* in a civil suit who has set the Court in motion and has a right to require a decision upon the questions raised by him If a Magistrate either refuses to make an order under sub-sec (1) or, having made such an order, subsequently cancels it, on the ground that a dispute likely to cause a breach of the peace does not exist, no private person has any status to contest the propriety of his refusal to make any inquiry into the question of possession, **30 C. 112, 30 A. 41.**

17. Object of section is to deal with actual possession and not with right to possession.—(*i*) The Magistrate should not deal with the proceedings under this section as if it were a civil suit The only question the Magistrate has to decide is, who is in actual possession of the land and if he does not do so his order is without jurisdiction, **35 C 795; 7 C. L. J. 369 = 7 Cr. L. J. 336; 27 C 918; 17 C. W. N. 944 = 14 Cr. L. J. 269.** (*b*) He cannot call on the parties to furnish a statement of their title. He is not at liberty to enter into the merits of their respective claims as regards *the right to possess*, except in so far as it might assist him in determining the question of *actual possession*, **25 B. 179; 6 C. L. J. 182 = 6 Cr. L. J. 192; 7 C. L. J. 369 = 7 Cr. L. J 336.** *See* also **30 C. 155 (F.B.); 40 C. 982; 15 Cr. L. J. 470 (O.).** *See* Notes under Heading XI, **28 Bom. L. R. 448.**

18. Order under this section is intended to be only temporary.—The order of a Magistrate under s 145 is meant to be only a temporary or tentative order and is to be operative so long only as the rights of the parties are not determined by Civil Court, **29 C. 208; 26 C. 625.**

19 Magistrate not bound to come to some conclusion.—In cases coming under this section, the tribunal trying the case is not under the necessity which a Court trying a civil case or ordinary criminal case is under, of coming to a conclusion at all The Legislature contemplates circumstances in which it may be desirable for a tribunal, presumably unacquainted with the conduct of civil proceedings, and strictly a criminal tribunal to say that the facts of the case do not enable it to come to a conclusion, **14 C. 361 at p. 364.** He may under such circumstances, proceed under s 146, **5 C. W. N. 900.**

were the Police report states in the vaguest term, that each of the parties claim a certain right and that as both are men of substance, there might be a breach of the peace, **11 C. W. N. 198 = 5 Cr. L. J. 32.**

35-A. Order of superior Magistrate not enough.—A Sub-divisional Magistrate cannot institute proceedings merely on the order of a District Magistrate stating that in his opinion it was the duty of the Sub-divisional Magistrate to institute proceedings under s. 145, **24 C. 391.**

VIII.—EFFECT OF PRIOR ADJUDICATION BY COMPETENT COURT ON JURISDICTION OF MAGISTRATE TO INSTITUTE PROCEEDING.

36. During pendency of suit for possession whether Magistrate may institute proceedings?—*See* Note 29 (*ii*) at page 273.

37. Decree of competent Court negative existence of dispute.—When the rights of the parties have been determined by Civil Court, there is no longer a "dispute" within the meaning of this section; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace is to take action under s. 107 of the Code and require from such person security to keep the peace. *Per* FIELD, J., **6 C. 835 = 8 C. L. R. 217 ; Ratanlal 462.** When a Civil Court decree is passed, the right between the litigants is decided, and there is no more place for a summary order which proceeds not upon title, but on mere possession, **16 W. R. 24; 24 W. R. 17.** "When the rights of the parties have been determined by a competent Court the dispute is at an end, and it is the duty of the Magistrate to maintain the rights of the successful party. In other words, the defeated party will not be allowed to go to the Criminal Court, and, alleging the existence of a dispute, invoke the aid of the Magistrate and the Police to neutralise the effect of the decree of a competent Civil Court," **6 C. 835 at p. 841 = 8 C. L. R. 217 at p. 222.** The object of this section is to enable a Magistrate to intervene and pass a temporary order in regard to the possession of the property in dispute, to have effect until the actual right of one of the parties has been determined by any competent Court. It is consequently his duty when that right has been declared, within a time not remote from his taking proceedings under this section, to maintain any order which has been passed by any competent Court, and, therefore, to take proceedings which must necessarily have the effect of modifying or cancelling such orders, is to assume a jurisdiction which the law does not contemplate. On a breach of the peace being certified to him, the Magistrate ought to content himself with declaring that the order of the Civil Court should be maintained, and with that view he should assist the possession of any person whose title is found by that Court.—*Per* PRINSEP, J., **26 C. 625 at p. 628.** The duty of a Criminal Court when proceeding under s. 145, where there is a decree of a Civil Court for possession in respect of the disputed land, is to find which party held such Civil Court decree and then to maintain that party in possession, **5 C. W. N. 563.** Where in execution of a decree a Civil Court had given symbolical possession of the lands in dispute to the first party on the 9th September and proceedings under s. 145 were instituted between the parties to the decree in the following December and the Magistrate found and maintained possession for the second party, *held*, that the Magistrate was bound to give effect to the decree of the Civil Court, **29 C. 208.** Where eight days prior to the institution of proceedings under this section one of the parties was put in possession of one of several plots in dispute, in execution of a Civil Court's decree establishing his right; *held*, that it was the duty of the Magistrate to have found possession in accordance with the decree of the Civil Court and that an order made by the Magistrate attaching all the plots was made without jurisdiction, so far as the plot included in the decree was concerned, **32 C. 796 ;** *see* also **6 C. W. N. 38,** where the interval was three months and the **6 C. W. N. 161,** where it was *held* that the disputed boundaries of a *Julkar* having been settled by a Civil Court decree, the Magistrate ought to have simply maintained it, **5 Pat. L. J. 104; 17 A. L. J. 434.**

38. Magistrate disregarding decree of Civil Court acts without jurisdiction.—A Magistrate is not justified in disregarding the decree of a Civil Court. It is his duty to uphold, and carry out that decree, so far as lies in him to do so, **2 A. L. J. 274 = 2 Cr. L. J. 236** which follows **26 C. 625;** *see* also **2 C. L. J. 147 = 2 Cr. L. J. 572.** If a Magistrate fails to decide the effect of a Civil Court decree between the parties, on the question of possession, he fails to decide an important issue and thereby declines to exercise jurisdiction, **11 Cr. L. J. 184 (C.).**

Magistrate should maintain the decree of the Civil Court.—A Magistrate ought not to interfere with the execution of a decree of the Civil Court. If called upon to interfere at all, because he apprehends a breach of the peace, he should maintain in possession the person who has been actually put in possession by the Civil Court, **6 W. R. 10.** Where in execution of a Civil Court decree in a suit in which only one of the members of *a Mitakshara Joint Hindu Family* was party, the whole of the family property was delivered over to the purchaser;

cause a breach of the peace exists between two parties Therefore a Magistrate does not act without jurisdiction if he takes action even when the petitioner alleges that dispossession had taken place more than two months prior to the initiation of proceedings, **11 A. L. J. 305 = 14 Cr. L. J. 223.**

31. Recent decree or order of competent Court may negative absence of dispute.—*See* Notes under Heading VIII

VII —NATURE OF INFORMATION OR REPORT ON WHICH MAGISTRATE MAY ACT.

32. The information must indicate likelihood of a breach of the peace —Where proceedings instituted on a Police report under this section were dropped because it did not specify the boundaries of the disputed land, *though it contained all the necessary facts to give the Magistrate jurisdiction and a fresh Police report* was sent in stating the boundaries, but nothing was stated therein as to any apprehension of a breach of the peace and the Magistrate drew up proceedings referring to both reports, *held* that the proceedings were without jurisdiction, as the later report on which he must have acted, contained no reference to a breach of the peace, **6 C. W. N. 340; 23 C. 557.**

33. No hard-and-fast rule as to the materials or sufficiency of the information.—A Magistrate is not in any way limited as to the materials he might make use of to ground his finding No complaint is necessary, nor is he confined to evidence recorded on oath, **19 W. R. 10.** But a mere telegram is not information, **22 B. 949** at **p. 956.** It is absolutely essential that the fact of his being so satisfied and the grounds thereof should appear in his first order directing the issue of notice, **6 C. P. Cr. 21, 2 Bom. L. R. 84; 28 C. 416; 4 M. L. T. 213,** but *see* **33 C. 352 (F B.)** Mere reference to a petition made by a private person complaining of the commission of various offences none of which necessarily involved a breach of the peace, is not sufficient to found jurisdiction, **4 C. W. N. 57.** He must record a distinct finding that the dispute is such, as is likely to cause a breach of the peace **Weir II, 117; Ratanlal 39.** It is not sufficient to justify the initiation of proceedings under this section that in the course of a trial, it appears from the statement of a witness that a breach of the peace is likely to ensue **20 C. 520.** A mere petition by an officer in the employ of one of the interested party, is not however such information on which a Magistrate can act without receiving further evidence **29 M. 561.** The mere statement on oath of one party is not sufficient to justify a Magistrate instituting proceedings, **10 C. 78.**

34. Grounds when stated by Magistrate must satisfy Revision Court —The Magistrate is bound to satisfy himself on grounds which are reasonable that a breach of the peace is imminent and the grounds stated by the Magistrate must be such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned, **20 C. 513.**

35. Value of Police report—To act or not on it, left to the discretion of the Magistrate —Whether [illegible] his discretion, and he is in [illegible] [illegible]. No doubt the Police report [illegible] ent of the facts from which the Magistrate may be satisfied as to the likelihood of a breach of the peace, but, there is no inflexible rule that the Police report should show that the disputing parties are actually assembling men or doing other specific overt acts No rule can be laid down so as to specify the sufficiency of the materials upon which he takes action But he must form his own judgment and not proceed upon a mere expression of the opinion of the Police, **33 C. 33,** where **25 W. R. 2** and **22 W. R. 79** are *dissented from* and if there is nothing in the Police report or elsewhere to justify the initiation of proceedings under this section, *i.e.*, if it does not appear from such report that there is a likelihood of a breach of the peace, no proceedings can be instituted, and if already instituted they are void and the defect is not cured by s 537, **20 C. 513; C. W. N. 198 = 5 Cr. L. J. 32; 11 C. W. N. 835 = 6 Cr. L. J. 36.** It is not sufficient that the Magistrate should have before him a Police report and that he should have given orders thereon but it is his duty to draw up an order satisfying the requirements of the law, **27 C. 981; 6 M. L. T. 91** A Police report *in itself* is not evidence that a dispute likely to induce a breach of the peace exists although it may be sufficient to justify a Magistrate in initiating proceedings, **7 B. L. R. 329.** When the Police report showed that the two parties were disputing about the possession of a tank and that they were big Zemindars and though there was nothing to show there was a likelihood of a breach of the peace, yet a breach of the peace was not impossible, *held*, this report ought not to be made the foundation of a proceeding under this section, and the mere opinion of the Police-officer without sufficient materials should not be acted upon, **11 C W. N. 835 = 6 Cr. L J. 36** So also

put in possession under the decree, the Magistrate has jurisdiction to disregard the decree and proceed under this section, **3 Bur. L. T. 74 = 11 Cr. L. J. 655**; *see* also **5 C. 584**; **25 W. R. 74**; **4 C. 378**; **13 Cr. L. J. 583 (C.)**. A Magistrate taking action under this section cannot base his finding on the question of possession and decide the case in favour of one party on the mere fact that possession was given to that party under a decree in a partition suit to which the second party were not parties, there being no evidence that the fresh party ever obtained possession as against the petitioners, **17 C. W. N. 56.** In **6 C. L. R. 206**, symbolical possession under decree against the former owner of the land in dispute had been given to the complainant in execution of those decrees, and he was obstructed from obtaining actual possession by the defendants who were no parties to the suit in which the decrees were passed, and the Magistrate passed an order confirming the complainant in possession, without any evidence that he was in actual possession either before or at the date of inquiry, his order was set aside. The Court remarked :—"The Criminal Court may properly inquire into and punish riot or an unlawful assembly if it be proved. But it altogether oversteps its province when it interferes in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought." *See* s. 332 of the Code of Civil Procedure, 1882. After a redemption decree had been passed by the Civil Court, the mortgagee claimed to be in cultivatory possession and the Magistrate made an order under this section upholding the possession of the mortgagee tenant, *held*, that the order was properly made as the tenant was in cultivatory possession of the land in dispute and was never disturbed in his possession by the Civil Court decree, **2 A. L. J. 274 = 2 Cr. L. J. 236.** It was, however, *held* in **5 C. W. N. 563**; **7 C. W. N. 118** that it is not necessary that the Civil Court decree should be between the parties to proceedings under this section. The Magistrate is bound to maintain a party in possession in accordance with the Civil Court decree, even when one of the parties to the proceedings before him was not a party to the decree and *see* Note 38 (*i*).

40. Mere issue of certificate without delivery of possession not protected.—Where the petitioner bought the lands belonging to the counter-petitioner's family in execution-sale, and the sale was only confirmed and the sale certificate issued; *held*, there being no delivery of possession whatever, actual or symbolical to the petitioners their rights were not protected by proceedings under s. 145, **31 M. 416.** An order for delivery of symbolical possession under **O. XXI. R. 96, Civ. P. C.** has no bearing on the Magisterial enquiry, **16 Cr. L. J. 736 (M.)**.

41. Co-parcenary property cannot be disturbed till there is actual division.—Even after a Civil Court decree for partition has been passed, the properties must be treated as joint, until the jointness is disturbed by actual division by metes and bounds. No order can be passed under this section in regard to such properties, whilst the suit is still pending or before actual division, **8 C. W. N. 485**; **23 P. R. 1902.**

42. When Magistrate can pass prohibitory order though Civil Court has refused an injunction.—Where the District Court has refused to grant an injunction to restrain the defendant from building on the land on the ground that he was in possession of it, it would still be competent for a Magistrate to issue a prohibitory order if he comes to the conclusion that the issue of such order was expedient for the preservation of the peace, and this was a consideration to which he would be entitled to have regard to, notwithstanding that the Civil Court had on other grounds refused an injunction, **7 M. 460.**

43. Is the existence of a decree or order more than 'mere presumptive proof of possession.'—Does it affect the jurisdiction of the Magistrate? It was contended upon the authority of **6 C. 835**; **5 C. W. N. 563**, that the Magistrate was bound to treat a previous order and decree as conclusive upon the question of possession and should on that basis, have maintained the petitioner in possession. 'In our opinion these cases are clearly distinguishable, and we may add that, if they purport to lay down as an invariable rule, that a Criminal Court in determining the question of possession under s. 145 is concluded by every decree of a Civil Court and every previous order of a Criminal Court relating to the same property, no matter when and under what circumstances such orders were made we are unable to accept this as a correct statement of the law. The Court which initiates proceedings under s. 145 must determine the question of actual possession with reference to a particular point of time, namely, the date of the initial order or, in the case of forcible dispossession a date within two months next before such date. In the investigation of this section any previous order of a Civil or Criminal Court relating to the property in dispute may throw light upon the matter, but the evidentiary value to be attached to any such piece of evidence must obviously depend upon the particular circumstances of each case......... **6 C. 335** *distinguished.* Again in **26 C. 625**, it was laid down that the duty of a Magistrate when the right to possession has been declared within a time *not remote* from his taking proceedings under s. 145, is to maintain any order which has been passed by a competent Court. This statement however appropriate it may be in connection with the facts of the particular case before the Court, is obviously not

and subsequently, when the purchaser tried to take possession, the other members, not parties to the suit objected to proceedings being instituted under this section, the Magistrate declared that the purchaser should be put in possession of a fractional share only, *held*, that the order was made without jurisdiction as the writ of possession showed that the whole of the property had been delivered to the purchaser and it was not open to a Criminal Court to go behind it, **6 C. W. N. 841.** When a decree has been passed regarding the whole of any portion of a disputed land, it is the Magistrate's duty to maintain the decree, and he cannot again institute proceedings under this section regarding the land covered by it, **16 W. R. 24; 24 W. R. 17; 24 B. 527; 7 C. L. R. 516; 9 C. W. N. 392.** Where symbolical possession of immovable property of a judgment debtor has, whether rightly or wrongly been duly given by the proper officer of the Civil Court to the purchaser thereof at an execution sale, and such possession has not been subsequently abandoned by the purchaser, a Magistrate is bound to maintain such possession and he has no power to direct that the judgment-debtor being in actual possession, shall be so maintained until ousted by a Civil Court, **5 C. L. R. 200; 14 C. 169.**

It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree holder who has actually been given possession against him by a Civil Court and in a criminal proceeding to assert that possession and by force of the order of the Magistrate drive the decree-holder and auction purchaser back to the Civil Court for a further declaration of his right **20 C. W. N. 796 = 17 Cr. L. J. 162 = 33 In. Ca. 822; 27 C. W. N. 267.** *See*, however, **16 Cr. L. J. 736 (M.).**

39. **But every decree is not conclusive.**—The question of possession in a proceeding under this section has to be determined with reference to a specified point of time, upon this question every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive, the evidentiary value to be attached to such document must depend on the circumstances of each particular case, **33 C. 33.**

(i) *Decree must be clear and unambiguous*—The observations in **26 C. 625** apply where there is no doubt whatever as to what the Civil Court has done, *i e*, where it cannot be disputed that a certain party has been declared owner and put in possession by a Civil Court Where, however, one of the parties contended that he purchased the land itself in execution of a decree and the opposite party contended that what was sold under the decree was not the land, but the right to levy assessment and the decree was *ambiguous held*, that the Magistrate was within his jurisdiction in deciding that the *actual* possession was with the opposite party, **6 Bom. L. R. 246.** A Magistrate cannot act upon his interpretation of a decision of a Civil Court, **1 C. L. R. 273;** he is bound to enquire into possession and *that* alone, **3 C. L. R. 94,** and the order of a Civil Court deciding title, must be executed by that Court and not by the Magistrate, **2 B. L. R. A. C. 27;** *see* **1. W. R. 25.**

(ii) *Decree must be recent*—Where a Magistrate, on the strength of a decree 23 years old, made an order declaring one of the parties to be in possession and refused to receive oral evidence tendered by the opposite party in proof of present possession, *held*, that the order was bad. Though the decree is presumptive proof of possession, it is not absolutely impossible that the party who obtained the decree 23 years ago should have been subsequently dispossessed, **8 C. W. N. 719.** In **33 C. 33**, the existence of a decree 17 years old was *held* not to affect the Magistrate's jurisdiction Where the Civil Court decree was four years old it was *held*, the Magistrate was justified in proceeding under this section without giving effect to the decree **11 C. W. N. 210.** In a case like this, it would be most unsafe to act on documentary evidence alone, **5 W. R. 79.**

(iii) *Question of possession must have been directly in issue in the previous suit*—Where the suit in which the decree is passed is neither for declaration of title nor for possession of the disputed lands, but merely one for damages in which the determination of title is incidentally necessary, there is no order of a Civil Court which could be said to be modified or cancelled by a possession under s 145 *see* **16 M. L. T. 52 = 15 Cr. L. J. 559.** When the question of possession as between the parties to the criminal proceedings was not fought out between them in the previous civil proceedings and if there is any finding about possession in those proceedings, the Magistrate may take it into consideration in arriving at a decision, but he ought to arrive at his own finding as to which of the parties was in possession, **15 Cr. L. J. 663 (M.).**

(iv) *Where the decree is not between the same parties, Magistrate may proceed under this section*—In **4 C. L. J. 562 = 4 Cr. L. J. 503,** it was *held* that the actual possession of a person, not party to the Civil Court decree in execution of which another person was put in possession, could not be disturbed by a proceeding under this section, and possession given to the decree-holder. Symbolical possession in execution of a foreclosure decree is not effective against a lessee who was not a party to the mortgage suit. When the parties to the proceeding are not parties to the decree and the petitioners were not in possession nor were the respondents

But an order of attachment of a temple does not necessarily mean that the temple must be closed altogether, **Weir II, 110, 112** and **99.** *See* also **17 Cr. L. J. 235 = 34 In. Ca. 651 (M.).**

48. Collection of rents.—A right to collect rent over the whole property in dispute comes under this section, **11 C. 413; 16 C. 513; 15 C. 527; 12 M. 88; 19 C. W. N. 959.** Where there is no dispute as to the actual shares of co-parceners, but there is dispute as to the right to go in and collect the rents and break up the arrangement by which the rents were collected on behalf of all the co-parceners; *held*, that there was no want of jurisdiction in a Magistrate to take proceedings under this section, **27 C. 259; 31 M. 318.** But where there is no dispute as to the extent of the respective shares of two parties, or as to the fact of their possession in a village, and the dispute is only as to who is entitled to collect the rents from the tenants, such a dispute cannot be dealt with under this section, **10 O. C. 69 = 5 Cr. L. J. 394; 36 C. 986; 10 C. W. N. 1088; 36 A. 143.** This section does not refer to a dispute as to right to collect rents of a joint undivided estate in a certain proportion, **18 W. R. 36; 9 C. W. N. 392.**

49. Disputes about crops or other produce of land.—"Chapter XII is headed *disputes as to immovable property*" and it is clear that by these words in sub-sec. (2) are meant crops or other produce of land attached to the land and not severed from it, **30 C. 110; 28 A. 266.** A Magistrate has therefore no jurisdiction to adjudicate upon rival claims to crops cut and stored on the thrashing floor, **29 Cr. L. J. 857.** But he has jurisdiction to pass an order dealing with the crops on the land at the date of the order and harvested since the beginning of the disturbance, **13 Cr. L. J. 295 (M.)** and the mere fact that the crops have been removed does not oust the jurisdiction of the Magistrate, **Weir II, 108;** *see* also **6 C. W. N. 105; 19 C. W. N. 959; 8 C. L. J. 242; 15 A. 394; 6 C. W. N. 882** and Note 153. Claims to collection of rent can be made the subject of inquiry under s. 145 and in such enquiries the question must always be who was actually collecting rent at the date of the preliminary order, **1915 M. W. N. 267 = 17 M. L. T. 225 = 16 Cr. L. J. 284.** Trees may come within the definition of 'land' in section 145 as being "produce of land," but lac which is not a part of the tree itself but is a parasitic growth on the tree is not crop or a produce of land. Proceedings held under section 145 in respect of lac are therefore without jurisdiction. **24. C. W. N. 1039.**

50. What are not 'profits' within the scope of the section.—(*a*) *Collection of offerings in a temple not within this section*—Offerings given by worshippers for the worship of any deity are not profits arising out of a building. They arise out of the deity irrespective of the building or the land upon which he may happen to dwell. To hold otherwise would be to allow the Criminal Courts to interfere with the customary laws of this country, **37 C. 578,** *followed.* Where the dispute relates to the right to the offerings only, it is clear that the dispute is about movable property and a declaration under this section, that one of the parties is in possession of such offerings, is an order made without jurisdiction, **38 C. 387; 5 Pat. L. J. 246.**

(*b*) *Dispute as to right to collect fees from sellers in a 'market' does not come within this section.*—A market in the town of *K*, belonged to one *D*. The Police reported to the Sub-divisional Magistrate of *K* that a breach of the peace was likely to take place between some of the servants of *D* and one *R*, who was appointed *chaudhry* of the market for the collection of certain dues, by the *Banias* and other persons who came to sell their goods. The Magistrate instituted proceedings under s. 107, and after examining the Sub-Inspector, came to the conclusion that the case 'could not appropriately be proceeded with under s. 107,' cancelled the order under s. 107, proceeded under s. 145, after observing the formalities required by that section, and passed an order in favour of *R*. In revision, it was contended, that the order was one made without jurisdiction; *held*, setting aside the order, that the dispute in this case did not really concern any tangible immovable property. There was no dispute about the 'market' or 'the rents or profits of any such property,' which admittedly belonged to *D*. The subject-matter in dispute was the remuneration allowed to *R* for his services in regulating the business of the market on behalf of the *Banias* and others whose *chaudhry* he was; and this payment was purely voluntary on their part and was in no way connected with the ordinary rents and profits of the market and was not a perquisite of the Zemindar, but was a personal matter between the *Banias* and the *chaudhry*, and therefore, that the dispute in this case did not relate to the 'profits' of a market within the meaning of this section and the order was one made without jurisdiction. S. 107 is the appropriate section to be applied, **36 A. 143; 20 A. L. J. 694.**

(*c*) *Collection of fees from pilgrims not within this section.*—This section does not empower a Magistrate to institute proceedings in respect of a dispute between two parties relating to a distribution of fees paid by pilgrims at *Gaya* for performing *Sradh* ceremony, although there may be likelihood of a breach of the peace in consequence of such a dispute. Such fees can in no sense be said to be profits which issue out of land, **3 C. L. J. 137 = 3 Cr. L. J. 214.**

justified by the provision of the statute and regarded as a general proposition is not sufficiently precise to be applicable to all cases, **5 C. W. N. 563; 20 C. 520; 32 C. 796** *referred to* Upon a review of these authorities it appears to be clear to us that there is no inflexible rule of law that a Magistrate in deciding the question of possession is concluded by every previous order of a Civil or Criminal Court relating to the subject of dispute and that the weight to be attached to any such previous order must depend upon the facts and circumstances of the particular case, **33 C. 33.** I fail to understand how the jurisdiction of the Magistrate to take proceedings under s 145 was affected by the decree (referring to **32 C. 796**), provided he is satisfied that the dispute is likely to cause a breach of the peace and chooses to give himself jurisdiction by recording an order under s 145 (1), it is difficult to see looking to the words of the section that his proceedings are *ultra vires,* **16 M. L. T. 52 = 15 Cr. L. J. 559.** In **36 A. 233,** the High Court declined to set aside the order of a Magistrate who in spite of the symbolical possession given in June in execution of a decree of a Civil Court to one of the parties found in the following November possession in favour of the other party

44 Effect of a previous order of a Criminal Court.—(*i*) *Infructuous order under s 522 no bar to proceedings under this section* —Where an order under s 522 is passed, but possession under that section was never as a fact delivered to the petitioners and the order was thus infructuous, it is no bar to the jurisdiction of a Criminal Court to proceed under this section, as the Court has to deal with the breaches of the peace regarding actual possession of immovable property, **18 C. W. N. 1088 = 15 Cr. L. J. 700.**

(*ii*) *Fresh proceedings should not be instituted when previous order under s. 145 (6) is still in force* — Where an order under cl. (6) has been passed the section forbids all disturbance of such possession until evicted in due course of law and a Magistrate should not institute fresh proceedings when such an order is still in force But where the previous order was merely that the parties had compromised and that according to the terms thereof both sides should be in possession, such an order is one falling under cl (5) showing that no dispute existed and not an order cl (6), *held,* that the Magistrate was competent to issue fresh proceedings, **15 C. W. N. 568 = 12 Cr. L. J. 32.** But an order under s 145 made a long time ago does not bar fresh proceedings *See* **38 C. 33.**

(*iii*) *Fresh proceedings should not be instituted during pendency of rule issued by High Court* — During the pendency of a rule issued by the High Court to show cause why the order of a District Magistrate under this section should not be set aside, a Magistrate subordinate to the District Magistrate instituted a fresh proceeding in respect of the same subject matter *Held,* that the fresh proceedings were highly irregular and improper, **4 C. L. J. 418.**

IX.—THE 'PROPERTY' WITHIN THE SCOPE OF THE SECTION.

45. Right to ferry comes within the purview of this section.—The right to a ferry, *i e*, the right to carry passengers and their goods to and fro in a boat across a river cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them Therefore where the subject matter of dispute is a ferry including the land and water upon which the right to ferry is exercised the case came properly within this section, **26 C. 188.** But the right *to use a ferry* would come under s 147 **3 C. W. N. 148.**

46 When fishery rights may be dealt with under this section.—Where there is a *bona fide* dispute relating to a *fishery right,* proceedings under this section may be instituted, **33 C. 117.** The decisions in **12 C. 539** and **13 C. 179** which *held* that a "*fishery right*" not being a dispute concerning any 'tangible immovable property' did not fall within the scope of this section are now superseded by the change in the wording of this section But the possession of a fishery cannot be dealt with under this section where the parties have joint rights and are not seeking actual possession, as this section has always been held to be confined to exclusive possession, **11 C. W. N. 512** *referred to* *Semble*, a Magistrate might have jurisdiction under s 145 (2) if what was in dispute was not a share in the fishery but a share in its profits which are either the fish caught or their price when sold "It may be that a co-owner fishing *Julkar* holds a part of the profits he derives from his fishing on behalf of his co-owner and from the necessity of the case is his agent to do so This would take the case out of the principle laid laid down in **10 C. W. N. 1033** and **36 C. 985**; but is not certain that it would bring it within the principle laid down in **27 C. 259**;" **11 C. L. J. 412 = 11 Cr. L. J. 370.** *Cf* **24 C. 449** and **19 C. 544.**

46-A. Mining rights fall within the definition of the term land in this section, **4 Pat. L. J. 134.**

47. Possession of temple.—A dispute regarding the possession of a temple is a dispute regarding tangible immovable property and a Magistrate would be justified in attaching such property under s 146

parties to the proceedings would either operate mischievously to an absent party or from the fact that such order has been passed behind the back of such party it would be inoperative, and therefore it would inevitably tend not to a termination of the dispute, but to a renewal of it in different directions and between other parties. That was not clearly the object of the law, **4 C. W. N. 753 at p. 755.** If parties are absent, they may be declared, *ex-parte* after due proof of service of notice upon them. For a person to be concerned in a dispute relating to land it is not necessary for him to be present near the land or to have notice of that proceeding when started, **20 C. W. N. 978.**

56. **Parties concerned must be definite and named specifically.**—One *D* belonging to a class of *Sevaites* complained to the District Magistrate that while performing *Alankar Pujah* for one of his *Yajamans* in the temple of *Shri Pandurang* at *Pandharpur*, *B* belonging to another sect of *Sevaites* wrongfully obstructed him, etc. The District Magistrate, being satisfied on the report of a Sub-Magistrate as to the existence of a dispute likely to cause a breach of the peace, passed an order that the sect of *Sevaites* to which complainant belonged were alone entitled to perform the *pujah* and that the other sects of *Sevaites* had no right to perform the same; *held*, that the Magistrate's procedure was defective inasmuch as the original complaint was against one class of *Sevaites* generally without any particulars being specified, whereas the order of the Magistrate was addressed to all classes of *Sevaites*, and though this section required that the parties concerned should be named specifically, for they are to be served with notices to attend the Court and state their case, no such notices were issued and the parties concerned had no opportunity to put in their respective claims. Therefore the order was set aside, **24 B. 527.**

57. **When tenants are necessary parties in a dispute between rival Zemindars.**—Where two rival sets of tenants claim to hold under two rival sets of *Zemindars* and are disputing about the actual occupation or possession of a plot of land, and in a proceeding under this section the *Zemindars* are made parties, but the tenants are not; *held*, that the presence of the tenants is essentially necessary for the proper and effectual decision of the case, and that the omission by the Magistrate to join them as parties is illegal and without jurisdiction, **27 C. 892; 26 C. 456.** But where in a dispute concerning land between the rival tenants of two *Zemindars*, the *Zemindars* themselves never moved in the matter and were not made parties; *held*, on the application of the unsuccessful set of tenants, that though it was desirable that the landlords should be made parties, the order was not bad for want of jurisdiction, as the objection was not *bona fide*, being taken by the unsuccessful party only before the Revision Court, **6 C. W. N. 206;** *see* also **38 C. 889.** When the dispute is between the *Lakhirajdar* and the *Putnidar* as to the right to collect rent the tenant need not be a party, but if it appears that there is a dispute as to the tenants actually in possession, the tenants must be made parties, **19 C. W. N. 959 = 16 Cr. L. J. 590.**

58. **Dispute between landlord and tenant.**—The rule that the possession of the tenant is the possession of the landlord does not apply to cases in which there is a dispute between the tenant and the landlord as to the fact of possession, **Weir II, 107.**

59. **Dispute between principal and agent, master and servant.**—Possession that can be pleaded in a proceeding under this section, must be possession based on a claim of right of possession. The possession of an agent or servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master, **10 C. W. N. 1088 = 4 Cr. L. J. 215; 36 C. 986,** *see* also **15 Cr. L. J. 708; 24 A. 443; 23 P. R. 1902; 1914 M. W. N. 795 = 15 Cr. L. J. 669** and Note 71.

60. **Representation of principal or master by agent, manager or servant.**—(*a*) *When master is absent.*—A Magistrate has jurisdiction under this section to make an order in favour of a person who claims to be in possession of the disputed land as agent to or manager for the proprietors, when the actual proprietors are not resident in the province, **31 C. 48 (F.B.),** which renders absolute, **21 C. 915 and 916** (Note); **24 B. 527; 25 C. 423; 7 C. W. N. 208; 2 C. W. N. 670.** The Full Bench *held* that in sub-sec. (1) '*such possession*' must mean actual possession and that the possession of an agent or manager, where the proprietors are absent is within the section. *See* **8 C. L. R. 94** where a wife was declared to be in possession on behalf of her lunatic husband. (*b*) *When master is present.*—Where proceedings are taken in consequence of a breach of the peace being imminent owing to the acts of a person acting as a servant of another who claims to be in possession, no order should be passed unless such latter person is made a party to the proceedings, **6 C. L. R. 193; 21 C. 915.** But there is no reason why the Full Bench ruling in **31 C. 48** should not also apply to a case, where the landlord is within the jurisdiction of the Magistrate. In **32 C. 287,** it was *held* that making the manager a party to the proceedings under this section, instead of the Zemindar resident within the jurisdiction of the Magistrate is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction.

51. Dispute as to succession to muth not within the purview of the section.—A Magistrate cannot proceed under this section in a case of dispute arising out of a right of succession to *muth* and its appurtenances, but should apply to the Judge under the provisions of Act XIX of 1841 to appoint a curator, or make a curator, or make some order with regard to property, till the right of succession is determined **11 W. R 23 = 2 B. L. R. A. C. 27.** The grant of a certificate under Act XXVII of 1860, was not proof of possession nor did it entitle the holder to be put in possession of the property of a deceased person, **25 W. R. 16.** *See* also **34 C. 840.**

52. Jurisdiction over movables in immovable property.—This section does not confer upon a Magistrate the same powers of attachment over movables (*e g*, salt in salt pans) as over immovable property, **Ratanlal 891.** It has also been *held* that a Magistrate has no jurisdiction to attach under s 146 a crop of *Mohua*, no longer growing on the trees **28 A. 266, 30 C. 110.** A Magistrate has no jurisdiction to pass any order in respect of the possession of goods and business of a shop in dispute, **23 P. R. 1902.** An elephant by itself cannot be attached If however, a forest with elephants in it is attached, proceedings may be taken under this section, **(1912) M W. N 540 = 13 Cr. L. J. 222**; *see* Note 46 above as to profits of a fishery and *see* also **4 Bom. L. R. 438,** where it was *held* that the right to sandal paste upon an idol could not form the subject matter of proceeding under this section, nor the offerings to the idol, **38 C. 387 ; 20 A. L. J. 906.**

X.—PARTIES CONCERNED.

(A)—DUTY OF MAGISTRATES

53. Duty of the Magistrate to ascertain and join parties.—A Magistrate ought before entering on his inquiry under sub-sec (4) though not as a preliminary to the initiation of proceedings (for which latter purpose) all that is requisite is that he should issue the order under sub-sec. (1) to the parties named in the information, to satisfy himself to the best of his ability on the information before him as to who are the persons claiming to be in present possession of the subject of a dispute, but that he is not concerned to ascertain what persons have or claim to have mere rights to possession An order of a Magistrate cannot be vitiated by any error of jurisdiction merely because such inquiry has not been made or carried far enough, **30 C. 155 (F.B.)** *see* also **24 C. 55 ; 21 C. 915, 24 B. 527 ; 6 C. W. N. 101 ; 3 C. W. N. 329.** *See* Note 65

54. All persons claiming to be in actual possession and concerned in the dispute should be made parties.—Having regard to the object to which the proceeding is directed *i e*, the ascertainment of the person actually in possession at the time of the preliminary order under sub-sec (1) all persons claiming to be in actual possession ought to be made parties and not merely the actual disputants But it is not necessary that all persons interested in or claiming a mere *right to possession* of the property in dispute should be made parties, **30 C. 155 (F.B.)**, *see* also **21 C. 29.** This section contemplates one proceeding against all the parties known to be concerned in the dispute so as to conclude the matter definitely and finally so far as the Criminal Courts are concerned, **27 C. 892 ; 11 Bom. L. R. 377.** The publication of a copy of the order at or near the subject matter of dispute is to some extent a general notice to all persons concerned in the dispute and will enable persons not mentioned in the order or personally served to intervene and it may have the effect of bringing in other persons interested to show under sub-sec (5) that no dispute exists or existed

(B)—WHO ARE PARTIES CONCERNED

55. Who are parties concerned in dispute?—The section concerns owners as well as occupiers of land. When a *Zemindar* has let his lands in farm he, his farmers, and their occupying ryots are all in their degree, concerned in the dispute as to possession, and they ought to be maintained in the possession of the interests which they severally enjoy, **5 C. L. R. 287 at p. 289 ; 25 W. R. 18.** Where petitioners alleged that the landlords have fraudulently attempted to dispute their possession by setting up false tenants as cultivators of the lands in dispute, the landlords are the real parties, **4 C. W. N. 743.** *Parties concerned in such dispute* are not limited to the parties actually concerned in the dispute, but include parties concerned in the subject matter of the dispute who would be affected by the Magistrate's order declaring possession, **4 C. W. N. 613 ; 21 C. 29 ; 26 C. 188.** The words "parties concerned" do not necessarily mean only the parties who are disputing, but include also persons who are interested in or claim a right to the property in dispute. **27 C. 892** and **32 C. 889.** The object of this section is to obtain a settlement of disputes regarding possession of land as are likely to cause a breach of the peace, and if it were possible to decide such a matter in the absence of a person who was really interested in the subject matter of the dispute and, therefore, in the terms of the final order which would be passed the result would be that an order declaring the possession of one of the

(D)—Who may show Non-existence of Dispute?

66. **Strangers interested in land should be allowed to show that there is no dispute.**—Where a person applies to be made a party on the ground that he is interested in the land in dispute as a tenant of a part of the property in dispute and there is nothing to show that that is not the case, he should be allowed to show there is no dispute under sub-sec. (5), s. 145, **37 C. 285.** Sub-sec. (5) does not enable a Magistrate to add parties to the proceedings. It enables a stranger to come in and show that no such dispute likely to cause a breach of the peace concerning any land, etc., exists or has existed. He cannot become nor can he be made a party to the dispute which he seeks to show has never existed, **3 C. W. N. 329; 30 C. 155;** (F.B.); **4 C. 650; 5 C. W. N. 900;** *see contra* **20 C. 520.**

67. **Order against or in favour of persons not parties.**—Where certain of the parties to a proceeding under this section disclaimed all interest, but the Magistrate nevertheless passed an order that they with certain others were in joint possession of the disputed land, *held*, that the order was bad for want of jurisdiction, **6 C. W. N. 104.** *See* Notes 145 and 146.

XI.—THE 'POSSESSION' WITHIN THE SCOPE OF THE SECTION.

(A)—What constitutes Possession.

68. **Section concerned solely with actual physical possession.**—Section 145 is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others. Therefore, in proceedings under that section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant, **4 C. W. N. 426.** Questions as to the rights of parties raised by their written statements under s. 145, are quite irrelevant; as such, proceedings are initiated by the Magistrate in the interests of public order and tranquillity, and it is his preliminary order that settles the actual issue between the parties and forms his jurisdiction, **16 Cr. L. J. 525 (M.).** The possession in regard to which the Magistrate's jurisdiction should be exercised must be of a real and tangible character, **23 W. R. 45.** Immediate receipt of rent is actual possession, **16 C. 513,** but the constructive possession through intermediate holders (*ticcadars*) to whom the ryots pay rent is not actual possession, **3 C. 320.** *See* also **16 Cr. L. J. 736 (M.); 49 C. 177.** Actual possession in sub-section (1) means actual physical possession even though wrongful including that of a recent trespasser, **32 C. W. N. 1173 (F.B.).**

69. **The possession to be determined is the absolute continuing possession of either party—right of public to be in possession for one day in the year.**—Where one of the parties to a proceeding under this section representing the public claimed only the right to worship on the disputed land on one day in the year, and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding *pujah*; *held*, that the right of such party to be in possession for one day in the year or to take such steps as are necessary to prepare for the *pujah* is in the nature of an easement and not in the nature of possession. Proceedings under s. 145 are entirely without jurisdiction, unless they are directed to the decision of the absolute continuing possession of either party until they they are ousted by the order of the Civil Court, **17 C. W. N. 205 = 17 C. L. J. 897 = 13 Cr. L. J. 739; 49 C. 871.**

70. **Nature of possession when large area in dispute.**—When *C* had the right under a *pottah* to dig for coal and erect the necessary buildings in a certain area and was exercising his right in one portion of the area, and *N* under a subsequent *pottah* commenced digging for coal in another portion of the same area, *held*, that the possession in regard to which the Magistrate's jurisdiction should be exercised must be of a real and tangible character. When a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged rights in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, is not of itself a sufficient possession on which the Magistrate's order may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession, though at variance with the right, **23 W. R. 45.** *See* also Note 139.

(*a*) *Evidence of possession when the subject-matter of dispute is forest land.*—Where the property in dispute is forest land, the right to possession of which is exercised by cutting and removing timber from time to time, it was *held* that in cases like these, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession *at the date of the Magistrate's order*, it is necessary to inquire which party was in undisturbed possession of the land

61. Receiver cannot be made a party.—When a receiver is appointed by a competent Court, his possession is the possession of the Court. Such an officer cannot be correctly described as '*a party interested in a dispute*'. But even if he could be so described, the Magistrate has no jurisdiction to make an order on him under this section without the sanction of the Court that appointed him, **30 C. 593.** So also in a dispute between old and new tenants of an estate, the receiver who granted new leases to the new tenants and who himself is not in actual possession is not a proper party to the proceedings, **9 M. L. T. 502 = 12 Cr. L J. 185**; *see* also **10 C. 1015; 30 C. 721; 26 M. L J. 208 = 15 Cr. L. J. 509.**

62. Public cannot be a party.—*See* **17 C. W. N. 205 = 17 C. L. J. 397 = 13 Cr. L. J. 789**; Note 1

63. Reversioner not a necessary party.—The words 'the parties concerned in such dispute' must have been intended to extend to persons other than the actual disputants, there may be a dispute between *A* and *B* which is likely to cause a breach of the peace, to which *C* is not strictly a party, but in which he is nevertheless concerned as claiming to be in possession, **30 C. 155**. A person whose claim is that he is *the next reversioner*, is not a necessary party, because he has no possible right to present possession, **24 A. 443** which *distinguishes* **27 C. 892** and **28 C. 446.**

(C)—Mis-Joinder and Non Joinder of Parties

64. Mis-joinder or non-joinder of parties does not ordinarily affect jurisdiction.—It was laid down by the Full Bench in **30 C. 155** that questions of mis-joinder or non-joinder of parties do not ordinarily affect *jurisdiction*. Such questions as whether *A* ought to have been added as being a person likely to be affected by the proceeding or *B* omitted as not being concerned in it or whether *C* was added at too late a stage and such like, are questions of procedure by which the jurisdiction of the Magistrate is not affected. There are proceedings under this section which are not without jurisdiction, merely because the Magistrate on information before him has made parties thereto only those actually in dispute and likely to cause a breach of the peace, although it is brought to his notice that another party is interested in the subject matter of the dispute, and neither are they bad because some person claiming possession in some way to the lands in dispute or some portion thereof has not been made a party, he not being one of the parties to the dispute likely to cause a breach of the peace so far as it appeared from the information on which the Magistrate acted, *see* also **5 C. W. N. 544; 6 C. W. N. 206.** This Full Bench view follows **9 B. L. R. Appx. 39 = 18 W. R. 54,** which laid down that the only persons entitled to notice are those concerned in the dispute and the following cases, **21 C. 29, 27 C. 892; 4 C. W. N. 753; 28 C. 446; 5 C. W. N. 57** and **900** and **6 C. W. N. 101** must be read subject to the above observations

65. Competency of Magistrate to alter or add parties during the course of the proceedings.—Up to the time the Magistrate enters upon the inquiry, the Magistrate has very wide powers, with respect to the persons whom he will bring into the proceedings. He may alter or add to the array of parties either of his own motion or on the application of anyone, claiming to be concerned in the dispute in the sense that he claims to be in possession. The initial order is no doubt intended to fix a time within which claimants are to come in, but it would not be very material even if, after the date so fixed but before the opening of the actual inquiry, parties are added. If a party is added after the initiation of proceedings, there is no necessity for fresh proceedings provided the party added was originally concerned in the dispute which is the foundation of the proceedings, **30 C. 155 (F.B.)** at **pp. 198-199.** Where the Magistrate added parties and issued fresh copies of the original proceedings, *held*, that he was within jurisdiction **10 C. W. N. 1095 = 4 Cr. L. J. 223.** If a Magistrate declines to add a party, on the ground that he has no power to join him, he declines jurisdiction, and the final order may be set aside as without jurisdiction under s 435 and s. 15 of *the Charter Act*—BANERJEE J, in **30 C. 155 (F.B.)** But, subject to the provisions of sub-sec (7) the section contains no provision for the addition of parties after the commencement of the inquiry under sub sec (4). The *person interested* in sub-sec. (5) does not come in for the purpose of joining in the proceedings, but for bringing it to an end. If a Magistrate for sufficient reasons thought proper after the commencement of the inquiry under sub-sec. (4) to bring in an additional party, that would only be an *irregularity* and it would not be necessary in consequence to initiate a fresh proceeding, but evidence previously taken ought, if the parties added so require it to be again taken in their presence, **30 C. 155 (F.B.)** at **pp. 199** and **201; 24 C. 55** and **21 C. 404,** which laid down that the addition of new parties would put an end to the proceedings is evidently no longer law, having regard to the objects of sub-sec. (3) and the above Full Bench case, which renders obsolete, rulings to the like effect in **3 C. W. N. 329; 4 C. W. N. 748** and **83** (Note), **5 C. W. N. 67** and **900; 27 C. 892; 4 C. 650 = 3 C. L. R. 551; 24 C. 55.** *See* also **20 C. W. N. 978.**

(i) *Record of rights.*—Whatever presumption may be raised by a recently published record of rights it does not of itself establish the factum of possession, **19 C. W. N. 123 = 16 Cr. L. J. 315** and the High Court cannot interfere in revision merely because the Magistrate fails to give effect to the order.

(ii) *Census records not evidence.*—Census records are inadmissible as evidence of possession. *See* s. 12 of Act X of 1900.

(iii) *Succession certificate.*—A certificate under Act XXVII of 1860 to collect debts due to the estate of a deceased person, will not authorise a Magistrate in awarding possession, **18 W. R. 34**; nor is such a certificate sufficient proof of possession, **25 W. R. 16.**

79. How far evidence of title may be used in evidence to prove possession.—(*i*) *Magistrate may consider evidence of title only as a guide upon question of possession.*—"If a Magistrate uses evidence of title merely in order to guide and assist his mind in coming to a decision upon the question of possession, he would not be transgressing the provisions of this section by using the evidence of title for this limited purpose; but if instead of proceeding to decide as to the actual possession, he virtually puts aside the consideration of this question and determines the question of title alone, he is clearly doing that which the law has forbidden him to do." *Per* FIELD, J., **7 C. 46 at p. 50 = 8 C. L. R. 245.** *Approved* by PETHERAM, C.J., in **14 C. 169**; *see* also **14 C. 361; 35 C. 795; 6 C. L. J. 182 = 6 Cr. L. J. 192; 34 M. 138; 16 Cr. L. J. 470** (O.); **8 W. R. 61; 3 C. L. R. 94; 13 C. 175; 25 B. 179.**

(*ii*) *But proof of title is not proof of possession.*—The Magistrate may, if necessary, take and consider evidence of title to enable him to decide the question of actual possession, but proof of title is not proof of actual possession, **34 M. 138.** Where evidence of possession is available, a Magistrate acts clearly without jurisdiction in deciding the claim of the parties on documentary evidence long anterior to the date of the proceedings, as they are not sufficient proof of the continuance of possession up to the date of the proceedings and the case on record is left absolutely unproved, **18 C. W. N. 700 = 19 C. L. J. 356 = 15 Cr. L. J. 202.** In this case the Magistrate declared possession as evidenced by documents relating to a period ten years prior to the proceeding without taking further evidence as to fact of present possession, his order was set aside as made without jurisdiction being contrary to clause (4). No sufficient evidence of possession was produced before the Magistrate, but evidence as to the title of the person in whose favour the Magistrate found was given, and the Magistrate based his decision upon the latter evidence, and determined the case with reference to the merits of the claims of the parties to the *right* of possession; *held*, that although the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession, he was wrong in basing his decision on the evidence of title, **7 C. 46 = 8 C. L. R. 245.**

(C)—JOINT POSSESSION.

80. Where possession is found to be joint, Magistrate has no jurisdiction.—'Neither s. 145 nor s. 146 applies to cases of joint possession. The object aimed at by the Legislature is the prevention of the breach of the peace. This can be secured by asking one of the parties to keep away from the property. But where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another, it will not be in the interest of the preventive remedy that both should be maintained in possession. It may establish their rights to remain in *statusquo.* It will certainly not help the Magistrate to maintain order and peace. That I take it is the reason of the rule why Courts have declined to declare the joint possession of the contesting parties.' *Per* SESHAGIRI AYYAR, J., in **27 M. L. J. 169 = 15 Cr. L. J. 572.** Where the contending parties are admitted in joint possession of disputed lands, the Magistrate has no jurisdiction to determine, whether one of them would make use of the land in such a manner as to cause annoyance to the other, **2 C. L. R. 62.** The section contemplates a dispute between two parties, each of which asserts a right to hold actual possession of a property as against the other and not a dispute between a party claiming to hold joint possession and another contesting such rights. Such a dispute nearly always arises out of a claim to hold a specific share in the property, and this obviously is a matter which no Criminal Court can properly deal with. Therefore where two parties are in joint possession of the property in dispute, and one of them tries to evict the other so as to endanger the public peace, this section does not apply, and the order allowing one of the parties to be in possession till evicted by law is bad, **4 C. W. N. 426; 7 C. W. N. 118.** No order can be made under this section where the dispute is about an undivided share in land or the rent issuing from an undivided share because the subject-matter in dispute is uncertain and the boundaries of the land are

in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one on which the dispute arose, and whichever party be found to have been in possession on the occasion should be presumed to have possession at the time when the proceedings were commenced **16 C. 281.** Where it was found that certain jungle lands were in the *khas* possession of the Zemindar and the other party, without claiming any easement or claim of right, cut a few trees and encroached upon a small portion of the jungle, such act would not oust the Zemindar s possession **32 C. 287**, *see* also **16 B. 338 at p. 341 and L. R. 13 A. C. 793 at p. 799.**

71. Actual possession may also include possession through others.—There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him. The proper construction of the section is, that by actual possession is meant the possession of the master by his servant the possession of the landlord by his immediate tenant, the person who pays rent to him, the possession of the person who has the property on the hand by the usufructuary, **18 W. R. 11 = 9 B. L. R. 229;** immediate receipt of rent is actual possession, **16 C. 513.** The mere fact that tenants might have attorned to a stranger, unknown to their landlord, to pay rent to him, has been *held* not to terminate their previous tenancy so as to affect the possession of their landlord and to deprive him of his right to have recourse to this section in case of a likelihood of a breach of the peace and have his possession of the right to collect rents maintained, **15 C. 527; 27 C. 259 and 892; 19 P. R. 1884; 33 C. W. N. 574.** *But possession through an intermediate holder is not actual possession*—The constructive possession through intermediate holders (*ticcadars*) to whom the rents were paid is not such possession as is contemplated by this section **3 C. 320.**

72. How the party came into actual possession is not the matter for inquiry.—A Magistrate has no concern, provided the possession dates more than two months prior to the date of preliminary order as to how the party in actual possession obtained possession but has only to pass an order retaining him in possession, **11 C 365; 6 B H. C. R. Cr. Ca. 30; 12 C. 521.** Under this section the point for inquiry is not whether any of the claimants has taken possession of the subject of dispute by force, but whether the struggle for it has ceased leaving it in the hands of one of them. If the struggle has ceased, the party in whose hands it remains is in actual possession which the Magistrate is bound to recognise according to the section and authorities If the struggle is still going on or if neither party can show its complete control over the subject *at the date of the order*, neither party is to be regarded as in possession, and the Magistrate is to take action under s 146—*Per* CHATTERJI, J **5 P. R. 1897; 22 C 297; 27 Bom. C R 1353**

In **3 Pat. 809** where the petitioners were wrongfully but peaceably dispossessed and applied to the Magistrate to take proceedings under s 145 the High Court, in revision rejected the petition and *held* that even if the petitioners were wrongfully dispossessed, they were not forcibly dispossessed and therefore sub-sec (4) of 145 did not apply

73. Magistrate not concerned with rightful possession.—A Magistrate has no authority to restore to possession a person alleged to have been illegally dispossessed, **W. R. 1864, Cr. 5.** His duty is to determine actual possession and not rightful possession **7 Bom. L R. 18.**

74. Magistrate not competent to deal with right to possession.—The Magistrate exceeds his jurisdiction when he looks into the right to possession on the merits of the respective titles of the contending parties, **6 C. L. J. 182 = 6 Cr. L. J. 192, 25 B. 179; 35 C. 795;** but *see* **12 O. C. 400 = 11 Cr. L. J. 69** where **31 M. 416** and **6 C. L J. 182** are dissented from *See* Note 17

75. Possession of master and servant, principal and agent.—The possession of an agent or servant is not a fit subject for a proceeding under this section as against his principal, **10 C. W. N 1088 = 4 Cr. L. J. 218; 36 C. 985.** *See* Note 59 *see* also **2 L. W. 107 = 16 Cr. L. J. 52.**

76. Possession given by Amin in butwara proceedings.—The possession given by an *Amin* in a *butwara* proceeding is simply one of ownership and not of occupancy Such possession cannot, therefore, in proceedings under this section be held to oust tenants occupying lands previous to such delivery of possession, **4 C. 378; 3 C. L. R. 94.**

(B)—EVIDENCE AS TO POSSESSION

77. Admission of parties—*See* Note 114

78. Documentary evidence.—Documentary evidence would at the best be a most unsafe guide Oral evidence always has been and must be the principal matter, on which Magistrates must proceed, **25 W. R. 79.**

possession of one set of tenants, **3 Bur. L. T. 74 = 11 Cr. L. J. 655.** So also where the case is one of exclusive possession claimed by each set of landlords through their respective tenants, the Magistrate has jurisdiction to pass an order in favour of one tenant against the other persons setting up their tenancy, **38 C. 699.** The mere fact that there may be a joint title to the land would not prevent the application of s. 145 if the Magistrate has found that the possession was with one party, **20 C. W. N. 518** where **40 C. 982** was referred to. *See* also **17 M. L. T. 225 = 16 Cr. L. J. 264; 2 Lah. 372.**

(D)—Point of Time at which Possession becomes Material.

82. The date of the preliminary order is the critical date for determining possession.—The law on this subject is now made clear. The date of the order under sub-sec. (1) is taken as the critical date for the purpose of determining actual possession This supersedes the decision in the cases reported in **11 C. 365; 12 C. 539; 21 C. 521; 18 M. 41; 20 W. R. 51; 15 B. 152; 13 A. 362,** *see* **32 C. 1093.** The question of possession under this section is to be determined with reference to a specified point of time. Upon this question every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive. The evidentiary value to be attached to such document must depend upon the circumstances of each particular case, **6 C. 835 = 8 C. L. R. 217; 5 C. W. N. 563; 26 C. 625; 8 C. W. N. 719; 32 C. 796,** and **33 C. 33.**

83. Possession prior to date of the preliminary order can only be used as a guide.—A Magistrate should find as to who was in possession on the date of his order, not on any date anterior to that, although previous possession may be a guide to his finding as to peaceful and actual possession on the date of his order, **16 Cr. L. J. 239 (M.).** In this case the Magistrate found possession was with one party on 4th February, but failed to give any finding as to who was in possession on the 20th February. The section requires the Magistrate to ascertain who, at the time of his preliminary order, is in actual possession. This inquiry is to be made without reference to the merits of any party to a right to possess, **Weir II, 98** and **99** which overrule **6 M. H. C. R. Appx. XIII.** He is bound to maintain the party in such possession, subject however to the first proviso to sub-sec. (4) even when such possession has been obtained by fraud or trickery, **Ratanlal 27.** "It is impossible to lay down any hard-and-fast rule which may be applicable to all cases: as to the exact point of time to which an inquiry under this section must be directed, and the time at which possession must be found in one party or the other must be governed by the facts of each particular case. To hold that the Magistrate is precluded from inquiring into anything before the date when he actually commenced his own proceeding might in some cases lead a person who has been acting in an unwarrantable manner, to misuse the process of the law so as to enable him to carry out a high-handed and improper scheme which could never have been the intention of the Legislature." **22 C. 297.** *See extract from Sel. Com. Rep.* at p. 239. Section 522 is the only provision which would enable a Magistrate to restore the possession of a dispossessed party, and this power can only be exercised in cases in which there has been a conviction of an offence attended by criminal force and dispossession has been affected by means of such criminal force, **Weir II, 98** and **99.** Where in respect of land under water the Magistrate finding that there could not be any act of possession by either party within the two months preceding, based his decision in favour of one party upon the fact of possession in the previous years, *held* the order was bad, **20 C. W. N. 1014.**

84. Scope of proviso to cl. (4).—The proviso merely recites a circumstance under which the presumption of possession may be made in favour of one of the disputants. It does not debar the Magistrate from deciding the question of actual possession on other grounds also. In any case a Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to in the proviso, *i.e.*, if he takes action under the section even when the petitioner alleges that dispossession has taken place more than two months prior to the initiation of proceedings, **11 A. L. J. 305 = 14 Cr. L. J. 223.**

85. Possession how determined when injunction issued under s. 144.—With a view to prevent a breach of the peace in a dispute concerning the possession of a colliery, a Magistrate issued an injunction under s. 144 forbidding both the parties to exercise any act of possession. His successor afterwards initiated proceedings under this section, *held*, that as no evidence could be offered to show the possession of either party by reason of the injunction, the Magistrate may ascertain the possession immediately before the order of injunction and regard his intervention under s. 144 as an attachment suspending the previous possession. For the former possession continued, although the lawful exercise of its right had been forbidden for a time. Also, that under such circumstances a Magistrate should at once proceed under this section and when necessary, attach the land under sub-sec. (4), instead of issuing a prohibitory order under s. 144, **27 C. 785.** The operation of s. 146 is limited

undefined, **4 C. W. N. 426; 7 C. W. N. 181**; a dispute between co-owners as to separate and permissive possession of joint property is not within the scope of this section, **12 C. W. N. 199.** S 145 is not intended to regulate mode of management and when the parties are jointly entitled an order under s **145** should not be made, **23 C. 60.** S **145** clearly refers to exclusive possession and is not capable of being construed to authorise a Magistrate to take cognisance and dispose of disputes regarding joint possession, **23 P. R. 1902 = 135 P. L. R. 902; 29 Cr. L J. 775.** Where it has been declared that the property is joint and partition has been declared that the property is joint and partition has been ordered, no proceeding under s 145 ought to be *held* until partition has been effected **8 C. W. N. 485.** Where the parties are jointly entitled to collect rents and are in joint possession, s 145 is excluded, **10 C. W. N. 1088 = 4 Cr. L. J. 215.** Proceedings under this section cannot be instituted with respect to a dispute between parties having joint rights to the land in dispute, each claiming exclusive possession thereof **11 C. W. N. 512 = 5 Cr. L. J. 296; 40 C. 982; 32 C. 249; 11 A. L. J. 696.** *See* also **11 A. L. J. 696; 32 C. 249, 36 C 988; 5 A. 607; 19 C. W. N. 959; 17 Cr. L. J. 76.**

(*i*) *Possession of parties over partnership party*—No proceeding can be taken under this section to determine the question which partner is in exclusive possession as *Manager*, **32 C. 249.**

(*ii*) *Possession of trustees over debutter property*—Debutter property being by nature impartible and inalienable, the possession of co-shebaits must necessarily be always joint and as such beyond the scope of this section. The possession of one of several co-shebaits who for convenience has been entrusted with the sole management of the debutter property is the possession of an agent or servant as against the other co-shebaits and is not a fit subject of a proceeding under this section when the other co-shebaits claim joint possession, **10 C. W. N. 188 = 4 Cr. L. J. 215** *distinguishing* **27 C. 259**; so also as to burial ground, **25 W. R. 24.** Where the second party admitted that they were in possession of a temple on behalf of the *Hukhdars* which consisted of members both of the first and second parties and the Magistrate found that the party in possession did not claim exclusive possession, *held* the ruling in **4 C. W. N. 426** directly applied and the Magistrate had no jurisdiction to pass any order under s 145, as the possession of the second party was on their own allegations not exclusive possession or superior possession but possession on behalf of all the *Hukhdars* In **Weir II, 99**, the successful party was in inclusive possession and in **31 M. 318** the possession of the manager of a Hindu family, which possession was in quality superior to that of the junior members was protected **16 Cr. L. J. 52 (M.)**

(*iii*) *Public property*—If the public are declared under s 145 to be in possession of any piece of land, then both parties to the dispute are included in that term, and the possession therefore, is joint possession and the jurisdiction of the Court under this section is ousted **17 C. W. N. 203 = 17 C L J. 397 = 13 Cr. L. J. 789.**

81. Magistrate has jurisdiction over joint property possession.—(*a*) *Where by express or tacit arrangement possession is with one party, Magistrate may proceed under s* 145—Where it is found that one co-sharer is in actual possession and the other is not the Magistrate may act under this section Co-sharers in an estate may, by express or tacit arrangement be each separately in actual possession of specified and demarcated portions and in that case there is nothing to prevent proceeding under this section **40 C. 982; 27 C. 259.**

(*b*) *Where one party has superior right, his possession may be upheld—e g, manager of joint Hindu family*—The manager of a Hindu co-parcenery under the Mitakshara law in which the managing member has a recognised position of superiority with defined rights of management and possession independent of the consent of the other members of the family can be protected under s **145, 31 M. 318; 27 C. 259.**

(*c*) *Where there is no dispute as to title, but only as to the locality of the property, this section is applicable*—But where there is no dispute as to the title, and the only question is whether the disputed plot lies within the boundaries of an estate exclusively owned by one of the parties or within the boundaries of another estate which was the joint property of both the parties, an order could properly be made under this section **7 C. W. N. 462;** *see* **5 C. W. N. 105**, where it was admitted by both the contending parties that they were the joint proprietors of *Mouzah G* and the question was whether certain alluvial lands belonged to that *Mouzah* or to another *Mouzah* to which one of them had exclusive right, *held*, that the Magistrate had jurisdiction to proceed under this section and attach under s. 146 as the land was not in the joint possession of the parties. The subject matter of the dispute must be clearly determined, *see* also **11 C. W. N. 198 = 5 Cr. L. J. 32.**

(*d*) *Where property though joint, possession with one party, section applies*—Where there is a dispute between two rival sets of tenants claiming under joint owners, the Magistrate has jurisdiction to protect the

but should form the subject of separate proceedings. Where, therefore, an order was made that one of the prosecution witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction and there was no evidence that the witness was dispossessed by the criminal force proved in the case, the order was set aside, **Weir II, 100** and **674.**

(B)—Contents of the Preliminary Order.

93. The order need not be self-contained—Reference to Police report.—Where an initiatory order under sub-sec. (1) was drawn up in these terms :—" Whereas it appears from the Police report, dated 2nd January 1905, that there exists a dispute which is likely to cause a breach of the peace between the abovenamed parties for the possession of 2 *bighas* 18 *cotiahs* in three plots of land, it is ordered that the said parties do attend, etc., and the Police report set out sufficient grounds for the apprehension of a likelihood of a breach of the peace; *held* by *the Full Bench*, that the order was not detective, because it was not self-contained and did not state in express terms the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed, when such grounds appeared in the Police report on which the order was founded and to which it made reference in express terms, **33 C. 352 (F.B.)** *following* **13 C. 175** and **20 C. 513.** But it is the duty of the Magistrate to record distinctly that which the law requires to be recorded and he performs his duty in a perfunctory and unsatisfactory manner if without stating the grounds he merely refers to a Police report, **7 C. 46** *distinguishing* **6 C. 835.** It is not sufficient to have before him a Police report and that he should have given orders thereon that a written order be drawn up within the terms of this section, **27 C. 981.** *See* also **7 C. 46 = 8 C. L. R. 245 ; 16 M. L. J. 148 = 3 Cr. L. J. 437 ; 23 M. L. J. 499 = 13 Cr. L. J. 753,** and *cf.* **30 M. 548.** But *see* **4 M. L. T. 213 ; 9 C. W. N. 263** is now *overruled.*

94. Order must state that a dispute likely to cause a breach of the peace exists.—A Magistrate should specify the nature of the information received by him, and state the principal facts which by the exercise of a judicial discretion he derives therefrom, and which in his judgment constitute grounds for believing that a dispute concerning a certain land exists, which is likely to induce a breach of the peace, if he does not take measures to prevent it. Unless he is in a position in this way to present clear and rational grounds, capable of being estimated according to their merits on the mere statements of them, he has no legal foundation on which to base his investigation *inter partes* relative to possession. When a Magistrate does not state in his order that a dispute exists which is likely to cause a breach of the peace he has no jurisdiction to take any action under this section, **11 A. L. J. 696 ; (1907) A. W. N. 49 ; 28 C. 416 ; 6 C. P. Cr. 21; 2 Bom. L. R. 84; Weir II, 117.** The proceeding recorded by a Deputy Magistrate did not set forth in express language that a dispute likely to cause a breach of the peace existed in respect of the land in question between *A* on the one side and *B* and *C* on the other, nor did it set forth the grounds upon which he was so satisfied that such dispute existed, *held*, that the proceedings were defective, and that although the report of the Police might be taken to be incorporated by reference, yet that was not sufficient to justify the order, as it did not show that a breach of the peace was imminent. Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further, **6 C. 835 = 8 C. L. R. 217 ; 4 C. 650 = 3 C. L. R. 551 ; 4 C. W. N. 57 ; 5 C. W. N. 900.** Where owing to a dispute amongst several classes of temple servants attached to a Hindu temple, a member of one class complained to the District Magistrate that while performing the service, the members of another class obstructed him and prayed for removal of the obstruction; and the District Magistrate after calling for a report from a Subordinate Magistrate, made an *ex-parte* order prohibiting all other classes of temple servants, except the one to which the complainant belonged, from interfering in the said service, *held*, that the order must be construed as having been passed under this section as it did not fall under s. 144, and the order if under this section must be set aside as it (i) did not specify the grounds on which the Magistrate was satisfied that there was a dispute likely to cause a breach of the peace ; (ii) did not specify the parties against whom the order was made ; (iii) as no notice was issued to all the parties concerned, and (iv) as the order interfered with a decree passed by the High Court, **24 B. 527.** *See* also **20 C. 520 ; 6 W. R. 50; 5 W. R. 14 = 1 Wym. Cr. R. Rul. 17 ; 27 C. 981; 28 C. 416** and **6 C. W. N. 923 ; 9 P. W. R. 1915 = 92 P. L. R. 1915 = 16 Cr. L. J. 206 ;** but *see* **18 A. L. J. 1140** (*contra*).

95. Local inquiry conducted by the Magistrate himself does not absolve the Magistrate of his duty to state the grounds.—The grounds on which the Magistrate is satisfied there is a likelihood of a breach of the peace, must be stated, even though the Magistrate acts upon a *local inquiry* held by himself, **9 C. W. N. 621.** The object of drawing up a proceeding under sub-sec. (1) is to inform the parties of the grounds or source of information which satisfied the Magistrate that a dispute existed, but where the Magistrate bases his order, on

to cases in which on the evidence before him the Magistrate is unable to find possession with either of the parties Where, by virtue of an order under s 144, the possession of a party has been interfered with and subsequently proceedings are taken under this section the power conferred by s 146 cannot be used to the prejudice of the party who had been in possession up to the date of the order under s. 144, **27 C. 785.** Under the 1872 Code, it was *held*, that it was in possession at the time when proceedings were instituted and not at the time the Magistrate came to his final decision that was material **20 W. R. 51** and **24 W. R. 73.**

86. **Subsequent proceedings cannot be treated as continuation of an earlier one.**—In determining the point of time at which the *factum* of possession is material, a Magistrate cannot treat a subsequent proceeding as a continuation of an earlier one and cannot refer back to the possession held by one or other of the parties upon the date of the earlier proceeding in deciding which of them should be declared to be in possession on the date of the subsequent proceeding **5 C. W. N. 900 at p 903.**

XII.—PRELIMINARY ORDER.

(A)—Essential to give Jurisdiction

87 **Object of the preliminary order**—One object of this is to prevent the Magistrate from rashly interfering with questions of possession which should ordinarily be decided by the Civil Courts **4 C. 650** *referring to* **3 B. L. R. 76.** The intention of the law seems to be not only that Magistrates should have sufficient grounds for proceeding under this section, but that they should inform the parties concerned of the grounds on which they are proceeding, **20 C. 520; 24 B. 527; 32 C. 771.**

88. **Omission to record an order in writing invalidates all further proceedings**—It is absolutely necessary for a Magistrate to draw up or to have drawn up an order under sub-sec. (1) which in all respects satisfies the requirements of the law It is not sufficient to have before him the Police report and that he should have given orders thereon that a written order be drawn up within the terms of this section, **27 C. 981;** also **Ratanlal 39** and **51** *See contra* **Weir II, 98.** Omission to draw up such an order is a question of jurisdiction which renders all the proceedings invalid, **1 C. L. J. 432.** *See* also **4 C. 650; 30 C. 443; 6 C. W. N. 923; 16 Cr. L. J. 628 (Pun.), 30 C. 155 (F.B.); 1907 A. W. N. 49; 34 C. 840, 32 C. 552; 25 A 537; 16 M. L. T. 52 = 1914 M. W. N. 798 = 15 Cr. L. J. 559, 15 Cr. L. J 424 (A.), 169 P. L. R. 1915; 13 Cr. L. J. 296 (A.)**, and Note 25 In **4 W. R. 26** it was *held* that the omission to record proceedings under s. 318 of the Code of 1861 is not a mere informality in procedure, which if no substantial injustice were done, the High Court might overlook But as one of the parties alleged that he was precluded from adducing evidence by this very omission, the proceedings were quashed, *see* **25 W. R. 74,** *contra* **23 W. R. 81; 1884 A. W. N. 317; Oudh Cr. 173 of 1904** and **2 Wy. Cr 1.** Though strictly speaking the Magistrate has no jurisdiction to summon the parties without passing the essentially preliminary order, *see* **25 W. R. 74** But when once they were before him the Magistrate recorded an order complying with cl (1) and the parties quite understood the nature of the proceedings *held*, the further proceedings were not wholly without jurisdiction and the Chief Court refused to interfere **15 P. W R. 1914 = 68 P. L. R. 1914 = 15 Cr. L. J. 279.** *See* Note 25, **1 R. 53.**

89 **Notice under s 107 not substantial compliance with this rule**—Where proceedings were instituted against both parties under s. 107, but after their appearance, the Magistrate being of opinion that he ought to proceed under this section, directed the parties to produce their evidence as to the fact of possession, without making any preliminary order under sub-sec. (1), *held*, that the making of a formal order under sub-sec. (1) is absolutely necessary to the initiation of proceedings under this Chapter and that the omission is a defect affecting the Magistrate's jurisdiction **32 C. 552.** *See* also **7 C. W. N. 174** It would appear that **24 W. R. 16 6 W. R. 61** and **8 W. R. 83** are now obsolete Where a Magistrate, having made an order under s 118, added that a particular person be put in possession, *held*, that the latter order was made without jurisdiction, **25 A. 537.**

90. **Notice under s. 147 is not enough.**—A Magistrate gave notice under s 147 Objection was taken that the cases did not fall under s. 147 The Magistrate, without deciding that the case fell under s 145 and without giving notice to the parties of his intention to proceed under s. 145 eventually passed an order purporting to be under s. 145, *held* that the Magistrate acted without jurisdiction in passing an order under s. 145, without first making an order under the first paragraph of that section, **19 M. L. J. 18 = 5 M. L. T. 103.**

91. **Notice under s. 144 not enough.**—*See* **16 M. L. T. 52 = 15 Cr. L. J. 559.**

92. **Order under this section cannot be made as part of proceedings of a trial of an offence.**—Orders under this section should not form part of a judgment on a conviction for an offence attended by criminal force,

on the point, 8 C. W. N. 719. But if no party has been prejudiced, want of service does not affect the validity of the proceeding, 33 C. 68 (F.B.); 30 A. 41; 30 M. 548.

And in 3 R. 169 it is *held* that the failure to serve the copy of the preliminary order, under s. 145 (1) on the respondent and the failure to post the order on the land are irregularities cured by s. 537, but Magistrates should nevertheless see that these irregularities do not occur.

101. Service of notice must be on known persons.—Although no particular mode of giving notice calling upon parties under this section to appear before the Magistrate has been provided, yet the language of the section indicates that the notice shall be addressed to known individuals, and not be in the form of a public proclamation or citation, 4 C. 650.

102. Service must be effective.—The mere service of a notice upon a *mofussil Naib* who takes no steps whatever to consult his employer or act under his directions is not such a notice as is contemplated by this section, 17 W. R. 9.

103. Issue of warrant to enforce attendance of absent party is illegal.—In a case under this section, on the date fixed for the filing of written statement, the party in whose favour the order was passed was absent. The Magistrate thereupon issued a warrant for his attendance: *held*, that the matter in issue not being the commission of an offence, but the settlement of a dispute between the contending parties as to the possession of land, it was entirely optional with the parties or anyone of them to attend or not. Therefore, the issue of a warrant was illegal, 5 C. W. N. 71. If the party is absent, the Magistrate may proceed *ex-parte*, 8 C. W. N. 642; *see* also 14 C. W. N. 98.

104. Is publication essential or not?—The provision as to publication of the order mentioned in sub-sec. (3), is directory and is a matter of procedure only and omission to comply with it does not destroy the jurisdiction of the Court which arises as soon as the provision of sub-sec. (1) have been complied with. The object of publishing a notice on the subject of dispute is to reach all persons interested therein and unless it be shown that someone interested has been materially prejudiced by the omission to serve the notice the High Court will not interfere. The omission to publish a notice under sub-sec. (3) at some conspicuous place is not an illegality which deprives the Magistrate of his jurisdiction (8 C. W. N. 590 and 9 C. W. N. 909 *overruled*); 33 C. 63 (F.B.); 30 A. 41; 30 M. 548; 12 O. C. 400 = 11 Cr. L. J. 69; 15 P. W. R. 1914 = 68 P. L. R. 1914 = 15 Cr. L. J. 279, but if the irregularity has seriously prejudiced any of the parties, the High Court will interfere, 35 C. 774; 7 P. R. 1907 = 6 Cr. L. J. 113; 22 P. R. 1916 (Cr.).

(D)—Cancellation of the Preliminary Order.

105. Jurisdiction to cancel.—If a Magistrate is satisfied before inquiry commences under sub-sec. (4), no matter where his information comes from, that there is no likelihood of a breach of the peace he may stay or cancel all proceedings, 28 C. 416 and 446; 6 C. W. N. 417; and take no further proceedings. The moment it is found that there is no likelihood of a breach of the peace the jurisdiction to proceed ceases, 29 Cr. L. J. 456. It is not necessary that the information must be confined to what the parties give under sub-sec. (5), 30 C. 112. *See* also 17 Cr. L. J. 138. But an order saying that, as the Court sees that one party is in possession, it is not necessary to continue the proceedings, is not an order declaring the possession of that party, 4 C. W. N. 417. But when proceedings under this section are cancelled on the ground that there is no likelihood of a breach of the peace, the Magistrate has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other, 3 C. L. J. 573 = 3 Cr. L. J. 466; 46 M. L. J. 563 = 47 M. 713; 49 M. 232.

106. Cancellation must be in accordance with law.—But proceedings under this section should terminate in one or other of the ways contemplated by law. It is improper for the Magistrate to stop the proceedings by recording an order "*Parties absent—case filed,*" 6 C. W. N. 923; A. I. R. 1929 Mad. 847. In 43 M. L. J., p. 716, a Magistrate initiated proceedings under section 145, cl. (1), attached property but subsequently omitted to proceed with the inquiry, on the ground that an order under section 144 had been passed against one of the parties by another Magistrate and the order had been confirmed by himself. He also directed delivery of the attached properties to one of the parties. *Held*—that the order of the Magistrate was justified neither by section 145 nor by section 146 and that the High Court could set aside the order in revision.

107. Jurisdiction to cancel order made by predecessor in office.—A Magistrate has jurisdiction to cancel the preliminary order under sub-sec. (1) made by his predecessor and to order the restoration of property attached and placed in the hands of a receiver, Weir II, 108.

a previous local inquiry held by himself and there is no record of the inquiry, there is nothing to which reference can be made to find out the materials upon which the Magistrate acted, **32 C. 771.** It was *held* in **7 C. W. N. 599**, that where a Magistrate held the local inquiry in the presence of all the parties and satisfied himself by that inquiry that there was a likelihood of a breach of the peace and on that finding directed further proceedings under this section, it cannot be said that the proceedings were invalid merely because he failed to state the source of information in his order, as the source was the inquiry itself **6 C. W. N. 923** and **27 C. 981** were here *referred to* and *distinguished*

96. Knowledge of the parties may cure defect—Where there is a dispute likely to cause a breach of the peace and the parties are aware of it the Magistrate is not ousted of his jurisdiction under s. 145 merely *because it is not stated in the notice that a dispute likely to cause a breach of the peace exists*, **16 Cr. L. J. 224 (A.)** Where the parties are fully aware of the matter in dispute, the High Court declined to interfere merely because the initial order did not set forth the grounds of the Magistrate being satisfied of the existence of a dispute being likely, **32 A. 132.**

97. Mere non-statement of the grounds where there has been substantial compliance with the section will not vitiate the proceeding—The High Court declined to interfere with the order of a Magistrate, on the ground that though the preliminary order did not set forth as explicitly as it might have set forth the reasons which satisfied the Magistrate that there was a likelihood of a breach of the peace, there was otherwise a substantial compliance with the requirements of this section, **1905 A. W. N. 260 = 3 Cr. L. J. 43 ; 1907 A W. N. 50 = 4 A. L. J. 91 = 5 Cr. L J. 117 ; 17 M. L. J. 449 ; 16 M. L. J. 148 = 3 Cr. L. J. 437 ; 7 C. W. N. 599.** Once the Magistrate is satisfied that a dispute exists likely to cause a breach of the peace, he has jurisdiction and his subsequent action must be considered in relation to procedure and not to jurisdiction The irregularity, if any would be cured by s. 537, **36 M. 275**, *see* also **30 M. 543 ; 32 A. 152 ;** the referring judgment in **33 C. 352 (F.B.)** and **12 O. C. 400 = 11 Cr. L. J. 69 ; 5 L. W. 165 = 36. In 5 Ca. 855.**

98. Subject-matter of dispute should be specified.—An order made under sub sec (1) which gives no information as to the subject matter of the dispute and which leaves the persons to whom notice is ordered to be issued quite in the dark as to the property in regard to which they have to set forth their respective claims is in order made without jurisdiction and therefore liable to be set aside in revision, **27 A. 296 ; 27 C. 981** and **30 C. 443** *followed See* also **11 C. W. N. 193 = 5 Cr. L J. 32** Though it is the rule that the lands in dispute must be thoroughly well ascertained by the specification of boundaries, yet where the parties were not at issue on his matter and neither the Court nor anybody concerned in the dispute was under any misapprehension as to what the disputed lands were and the only point was which party held a Civil Court decree, *held*, that the non specification of boundaries of the disputed land did not vitiate the proceedings of the Magistrate, **5 C. W. N. 563**

99. The order should specify the place of inquiry.—Where one of the parties was unable to produce his witnesses owing to his not being informed of the place of trial the Magistrate being on tour, and the Magistrate, in the absence of this party made an order in favour of the other, party *held*, that the order must be *set aside as the party had no notice of the place of trial in sufficient time to procure the attendance of his* witnesses, **7 C. W. N. 705.**

(C)—SERVICE OF THE PRELIMINARY ORDER AND ITS PUBLICATION.

100. Effect of notice not being served on some of the parties.—Where proceedings under this section were taken in the absence of some of the parties concerned, who had no notice of the same, then the proceedings were in law bad so far as they were concerned and the Magistrate had no jurisdiction *to pass any order*, so far as it affected those persons—*Cal H C Cr Rev No* 1208 *of* 1905, *see* also **35 C. 774 ; 30 C. 155 (F.B.); 7 P. R. 1907 = 24 P. W. R. 1907 = 6 Cr. L. J. 113 ; 14 C. W. N. 93 , 19 C. W. N. 959** Where on the day fixed for the inquiry under sub sec. (4) the first party presented a petition stating he had no notice of the date fixed for trial and that a copy of the order under sub-sec. (1) had not been served on him but the Magistrate without making any investigation whatsoever as to the truth of the allegation, proceeded to determine the question of possession and made an order in favour of the second party, *held*, that the Magistrate was bound to satisfy himself that the notice of the proceeding and a copy of the preliminary order were duly served upon the first party and that his failure to do so vitiated all subsequent proceedings, **8 C. W. N. 76.** When objection is taken that the preliminary order has not been served, the Magistrate ought not to be satisfied by the mere written return of the process-server, but should examine the serving peon and allow him to be

on the point, **8 C. W. N. 719.** But if no party has been prejudiced, want of service does not affect the validity of the proceeding, **33 C. 68 (F.B.); 30 A. 41; 30 M. 548.**

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102. Service must be effective.—The mere service of a notice upon a *mofussil Naib* who takes no steps whatever to consult his employer or act under his directions is not such a notice as is contemplated by this section, **17 W. R. 9.**

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104. Is publication essential or not?—The provision as to publication of the order mentioned in sub-sec. (3), is directory and is a matter of procedure only and omission to comply with it does not destroy the jurisdiction of the Court which arises as soon as the provision of sub-sec. (1) have been complied with. The object of publishing a notice on the subject of dispute is to reach all persons interested therein and unless it be shown that someone interested has been materially prejudiced by the omission to serve the notice the High Court will not interfere. The omission to publish a notice under sub-sec. (3) at some conspicuous place is not an illegality which deprives the Magistrate of his jurisdiction (**8 C. W. N. 590** and **9 C. W. N. 909** *overruled*); **33 C. 63 (F.B.); 30 A. 41; 30 M. 548; 12 O. C. 400 = 11 Cr. L. J. 69; 15 P. W. R. 1914 = 68 P. L. R. 1914 = 15 Cr. L. J. 279,** but if the irregularity has seriously prejudiced any of the parties, the High Court will interfere, **35 C. 774; 7 P. R. 1907 = 6 Cr. L. J. 113; 22 P. R. 1916 (Cr.).**

(D)—Cancellation of the Preliminary Order.

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107. Jurisdiction to cancel order made by predecessor in office.—A Magistrate has jurisdiction to cancel the preliminary order under sub-sec. (1) made by his predecessor and to order the restoration of property attached and placed in the hands of a receiver, **Weir II, 108.**

108. Power of Magistrate to quash proceeding upon transfer.—Where a proceeding under this section drawn up by a Deputy Magistrate was transferred by the District Magistrate to his own file and then summarily quashed, *held*, that the District Magistrate could only quash the proceeding in accordance with the provisions of sub-sec (5) on facts being brought to his notice which were sufficient to satisfy him that no dispute likely to cause a breach of the peace existed. *Semble*—If the District Magistrate after transferring to his own file a proceeding under s. 145 drawn up by a Subordinate Magistrate, quashed the proceeding on a full consideration of the facts and after hearing the objections, if any, of the parties, the High Court would not interfere with the order quashing the proceeding, **13 C. W. N. 125.**

XIII.—INQUIRY.

(A)—PROCEDURE

109. Procedure to be followed.—In **11 C. 762** it was broadly laid down that a proceeding under s. 145 should be regarded on all points of procedure as in summons-case and this ruling was followed in **21 C. 29.** In **30 C 508**, it was, however, laid down after referring to these cases that it cannot be stated as a rule of law that proceedings under Chapter XII should be regarded, as to procedure, as summons-cases and that the previous cases did not intend to do more than lay down a rule of convenience in a case where special provision was not made by the law In **32 C. 1093** after referring to the provisions of the Code and the previous decisions stated, it was observed as follows —"When, however, we turn to s **145**, which finds a place in the Chapter on disputes as to immovable property, we find that the Code does not specify that the procedure to be followed is either that prescribed for summons-cases or warrant cases. On the other hand, cl. (4) provides that the Magistrate shall receive the evidence produced by the disputing parties, consider the effect of such evidence, and take such further evidence, if any, as he thinks necessary The conclusion seems to us to be irresistible that, although the Legislature, in cases for the taking of securities for keeping the peace and for good behaviour as also in cases of public nuisances, has expressly provided that in some specified instances the procedure prescribed for summons-cases and in others the procedure prescribed for warrant-cases shall be followed and has thus entitled the parties to claim the assistance of the Court, within the limits defined in other parts of the Code, in summoning witnesses and in producing evidence, yet the Legislature has deliberately omitted to extend the procedure prescribed for summons-cases or warrant-cases to proceedings under s. 145 S 145 was intended to provide a speedy remedy for the prevention of breaches of the peace, arising out of disputes relating to immovable property . The Legislature could hardly have contemplated an elaborate and protracted investigation the result of which might in many instances be to defeat the very object in view, namely, an effective prevention of a breach of the peace" The Magistrate may adopt a procedure which will best carry out the object of the Legislature *Cf* the remarks of SADASIVA AYYAR, J, in **27 M. L. J. 613 = 15 Cr. L. J. 676.**

110 If party absent or fails to file written statement, Magistrate may proceed *ex parte*.—(*a*) If one party fails to put in his appearance, the Magistrate may proceed *ex-parte*, **6 C. W. N. 923**, but he must take evidence **8 C. W. N. 719**; *see* also **5 C. W. N. 71.** (*b*) Where the parties fail to put in written statements Magistrate may issue an order under s 146, **14 C. W. N. 80**; but not if parties had not sufficient time, **12 C. W. N. 896 = 8 Cr. L. J. 202.** A Magistrate has discretion to refuse further time to file the written statement **8 C. W. N. 642; 14 Cr. L. J. 302 (C.).**

111. Duty of Magistrate to complete inquiry on the date fixed—What sub-sec (4) contemplates is that on the date originally fixed, the Magistrate should take all the evidence that is produced before him and unless he considers it necessary for good reason to require further evidence, should decide then and there if he can, which of the parties is in actual possession. G L. No 3 of 1909 at page 10 of Vol I of the Calcutta General Rules referred to, **17 C. W. N. 144 = 17 C. L. J. 610 = 14 Cr. L. J. 40.** If the Magistrate should grant adjournment he is not bound to exhaust the processes of the Court in order to enforce the attendance of witnesses that do not appear

(B)—BOUND TO RECEIVE EVIDENCE.

112. Magistrate 'shall' receive evidence.—The Magistrate must examine the parties and take evidence, **17 Bom. L. R. 382 = 3 Bom Cr. Ca. 45 = 16 Cr. L. J 434.** Though a Magistrate is justified in passing an order under this section in favour of a party who was present at the hearing and against a party not present, he is not entitled to make an order declaring a party to be in possession, without taking evidence, **6 C. W. N. 923; 12 C. W. N. 771 = 3 Cr L J. 27; 11 A. L. J. 536 = 14 Cr. L. J. 277.** It is not sufficient that there is a mere *scintilla* of evidence as to the existence of a dispute, but there must be some evidence from which the Magistrate may

reasonably draw the necessary conclusion of fact, **5 M. H. C. R. Appx. XLIX; 7 B. L. R. 322 and 329.** A Magistrate cannot pass an order declaring one party to be in possession upon the mere fact that the Police report showed that the other party had admitted possession in the first party, without himself instituting proceedings, **6 M. L. T. 91 = 10 Cr. L. J. 6.** A Magistrate has no jurisdiction to make an order under this section based solely on the written statement of one of the parties, without any evidence whatever, though the other party is *ex-parte*, **8 C. W. N. 642; 12 C. W. N. 771; 14 C. W. N. 212**; or one made on local enquiry discarding evidence, **10 C. W. N. 181**; or on the petition of an officer in the employ of one of the parties, **29 M. 561.**

113. Failure to receive evidence vitiates proceeding.—The Magistrate is bound to receive and record all the evidence the parties want to produce, **11 A. L. J. 586 = 14 Cr. L. J. 277.** The Court must examine the witnesses tendered, **9 W. R. 64; 6 M. H. C. R. Appx. IV.** It is not open to the Magistrate to refuse to receive the evidence tendered to him. Since the section enables a party to show that no dispute likely to cause a breach of the peace exists, such a refusal on the Magistrate's part is *ultra vires*, and his proceedings therefore are liable to be set aside by the High Court in revision, **29 M. 561; 33 C. 840; 23 P. R. 1902.** In **11 C. 762** it was stated that the Magistrate was bound to examine all witnesses produced in Court, no matter what their number was. As to the power to recall and re-examine witnesses in proceedings under the section, *see* s. 540 and **18 W. R. 64.** Persons who, though not actually involved in the dispute, are made parties to proceedings because they claim to be in possession of the lands which are the subject-matter of such proceedings, should not be shut out from giving evidence in support of their claims. To do so would undoubtedly occasion very serious prejudice and interference with any possession which they might be able to establish, **20 C. 520.** Where in a proceeding under this section the Magistrate refused to examine certain witnesses who were present, on behalf of one of the parties, giving as his reason that sufficient evidence had already been recorded; *held following* **30 C. 508** (*footnote*) that the Magistrate had acted in contravention of the express terms of sub-sec. (4) and the High Court had power to interfere in revision, **31 C. 685.** But in **3 C. L. J. 478 = 3 Cr. L. J. 423**, it was said that it was not intended in **31 C. 685** to lay down the broad rule that a Magistrate had no discretion, but was bound under all circumstances to examine every witness and that if he omitted to do so, he acted without jurisdiction. In **16 C. 513** the High Court refused to interfere when the Magistrate declined to hear more than a limited number of witnesses. *See* also **32 C. 1093.** Where a Magistrate examined ten of the witnesses produced on behalf of one of the parties, but refused to examine any of the witnesses mentioned in a supplemental list, on the ground that the evidence sought to be adduced was worthless, it was *held*, that the Magistrate could not be said to have acted without jurisdiction, **24 A. 315.** The High Court would have interfered if there was an absolute refusal to hear the witnesses on one side. *See* also **28 M. L. J. 134 = 16 Cr. L. J. 156**, where the High Court refused to interfere, with the remark that Magistrates should always be chary of taking upon themselves the duty of deciding on behalf of the parties which witnesses should be examined. An order made without giving an opportunity to the parties to adduce evidence is bad, **4 P. R. 1916 = 17 Cr. L. J. 129 = 32 In. Ca. 305.** If a Magistrate fails to take evidence or refuses to examine except on the ground of vexation or delay, the witnesses tendered by the parties, the order is bad, **17 Cr. L. J. 217 = 34 In. Ca. 329 (M.); 2 L. W. 1208; 38 M. L. J. 73; 5 Pat. L. J. 246.**

114. Decision may be based on mere admission.—Although it is necessary ordinarily to record evidence before passing final orders, it cannot be said that it is indispensable to do so when the case is completely given up by the opposite party. An admission made by a *Mukhtar* that his client had no actual possession is sufficient in a *quasi*-civil proceedings of this nature. The fact that the Magistrate passed his final order, without recording this admission, would not invalidate the order, **7 C. W. N. 381.** If one of the parties admits that the other is in possession, the Judge is not bound to take any evidence, **9 M. L. T. 91 = 10 Cr. L. J. 47.** *See* **(1914) M. W. N. 795 = 15 Cr. L. J. 669.** But the mere fact that the Police report showed that one party had admitted possession in the other is not enough, **6 W. L. T. 91 = 10 Cr. L. J. 6.**

114-A. Neglect to file written statements not sufficient cause to stop proceedings.—Where a Magistrate has taken any evidence in a case, he is not justified in refusing to proceed with it because the parties neglected to file written statements on the day fixed for filing the statements. The Magistrate was wrong in saying that he had nothing before him on which to decide, **11 W. R. 9.** When any party applies for time to file his written statement, it is within the discretion of the Magistrate to grant it or not, **8 C. W. N. 642; 12 C. W. N. 896 = 8 Cr. L. J. 202; 14 Cr. L. J. 302 (C.).**

108 **Power of Magistrate to quash proceeding upon transfer.**—Where a proceeding under this section drawn up by a Deputy Magistrate was transferred by the District Magistrate to his own file and then summarily quashed, *held*, that the District Magistrate could only quash the proceeding in accordance with the provisions of sub-sec (5) on facts being brought to his notice which were sufficient to satisfy him that no dispute likely to cause a breach of the peace existed. *Semble*—If the District Magistrate after transferring to his own file a proceeding under s. 145 drawn up by a Subordinate Magistrate, quashed the proceeding on a full consideration of the facts and after hearing the objections, if any, of the parties, the High Court would not interfere with the order quashing the proceeding **13 C. W. N. 125.**

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(A)—PROCEDURE

109. **Procedure to be followed.**—In **11 C. 762** it was broadly laid down that a proceeding under s. 145 should be regarded on all points of procedure as in summons-case and this ruling was followed in **21 C. 29.** In **30 C 503,** it was, however, laid down after referring to these cases that it cannot be stated as a rule of law that proceedings under Chapter XII should be regarded, as to procedure, as summons-cases and that the previous cases did not intend to do more than lay down a rule of convenience in a case where special provision was not made by the law In **32 C. 1093** after referring to the provisions of the Code and the previous decisions stated, it was observed as follows —"When, however, we turn to s. 145, which finds a place in the Chapter on disputes as to immovable property, we find that the Code does not specify that the procedure to be followed is either that prescribed for summons-cases or warrant cases. On the other hand, cl. (4) provides that the Magistrate shall receive the evidence produced by the disputing parties, consider the effect of such evidence, and take such further evidence, if any, as he thinks necessary The conclusion seems to us to be irresistible that, although the Legislature, in cases for the taking of securities for keeping the peace and for good behaviour as also in cases of public nuisances has expressly provided that in some specified instances the procedure prescribed for summons-cases and in others the procedure prescribed for warrant-cases shall be followed, and has thus entitled the parties to claim the assistance of the Court within the limits defined in other parts of the Code in summoning witnesses and in producing evidence, yet the Legislature has deliberately omitted to extend the procedure prescribed for summons-cases, or warrant-cases to proceedings under s. 145 S 145 was intended to provide a speedy remedy for the prevention of breaches of the peace, arising out of disputes relating to immovable property The Legislature could hardly have contemplated an elaborate and protracted investigation, the result of which might in many instances, be to defeat the very object in view namely, an effective prevention of a breach of the peace' The Magistrate may adopt a procedure which will best carry out the object of the Legislature *Cf* the remarks of SADASIVA AYYAR, J, in **27 M. L. J. 613 = 15 Cr. L. J. 676.**

110. **If party absent or fails to file written statement, Magistrate may proceed** ***ex-parte***—(*a*) If one party fails to put in his appearance, the Magistrate may proceed *ex parte*, **6 C. W. N. 923**, but he must take evidence, **8 C. W. N. 719**; *see* also **8 C. W. N. 71.** (*b*) Where the parties fail to put in written statements Magistrate may issue an order under s. 146, **14 C W. N. 80**; but not if parties had not sufficient time, **12 C. W. N. 896 = 8 Cr. L. J. 202.** A Magistrate has discretion to refuse further time to file the written statement **8 C. W. N. 642; 14 Cr. L. J. 302 (C.)**

111. **Duty of Magistrate to complete inquiry on the date fixed.**—What sub-sec (4) contemplates is that on the date originally fixed, the Magistrate should take all the evidence that is produced before him and unless he considers it necessary for good reason to require further evidence, should decide then and there if he can, which of the parties is in actual possession. G L. No 3 of 1909 at page 10 of Vol. I of the Calcutta General Rules referred to **17 C. W. N. 144 = 17 C. L. J. 610 = 14 Cr. L. J. 40.** If the Magistrate should grant adjournment he is not bound to exhaust the processes of the Court in order to enforce the attendance of witnesses that do not appear

(B)—BOUND TO RECEIVE EVIDENCE.

112. **Magistrate 'shall' receive evidence.**—The Magistrate must examine the parties and take evidence, **17 Bom. L R. 382 = 3 Bom Cr. Ca. 45 = 16 Cr. L. J 434.** Though a Magistrate is justified in passing an order under this section in favour of a party who was present at the hearing and against a party not present, he is not entitled to make an order declaring a party to be in possession, without taking evidence, **6 C. W. N. 923; 12 C. W. N. 771 = 3 Cr L. J. 27, 11 A. L. J. 536 = 14 Cr. L. J. 277.** It is not sufficient that there is a mere *scintilla* of evidence as to the existence of a dispute, but there must be some evidence from which the Magistrate may

(D)—DEPUTING A MAGISTRATE TO MAKE ENQUIRY.

[*See sec.* 148 (1) *and Notes* 1—6 *thereto.*]

117. How far a Subordinate Magistrate may be deputed to conduct the Investigation.—Though s. 148 enables a Magistrate acting under this section, to depute a Subordinate Magistrate, to make a local investigation, he ought not to depute to such Subordinate Magistrate, the whole investigation under this section; but, on receipt of the report of such Magistrate should himself take written statements from the parties and receive the evidence produced by them and conclude the investigation under this section, **Weir II, 118.** A Magistrate cannot refer under s. 148 the only issues raised to the Subordinate Magistrate, **10 A. L. J. 465 = 13 Cr. L. J. 777.**

118. Decision based entirely on report of deputed Magistrate, if good.—Where on the day fixed for an enquiry under this section, both parties failed to file their written statements, the Sub-divisional Magistrate deeming a local enquiry necessary for the decision, directed a Deputy Magistrate, under s. 148, to make the enquiry. On receipt of the report, the Sub-divisional Magistrate passed an order declaring the first party to be entitled to possession. The second party moved the High Court to quash the proceedings on the ground that the Sub-divisional Magistrate had no jurisdiction to make the order in the absence of any evidence on record and also on the ground that he had no jurisdiction to make the order merely on the report of the local investigation; *held*, that the Magistrate had jurisdiction to decide a case on the report of the Deputy Magistrate made after local inspection. The parties neither asked to be heard nor tendered any evidence which the Magistrate refused. If he had refused he would have been wrong, **17 C. W. N. 131 = 14 Cr. L. J. 302.**

119. Magistrate should not base his decision on evidence recorded by the deputed Magistrate.—Where a Magistrate omitted to take evidence as required by sub-sec. (4), but based his decision on evidence recorded by a Subordinate Magistrate at the local inquiry, it was *held* his order was one made without jurisdiction and the order was set aside, **31 M. 82** *followed by* MILLER, J., in Cr. R. No. 3 of 1908 (Madras High Court). *See* **3 C. L. R. 134; Weir II, 97** and **118; 10 A. L. J. 465 = 13 Cr. L. J. 777.** *See* s. 148 (2). *But see* **37 M. L. J. 589** in which **31 M. 82** *is not followed.*

(E)—MODE OF RECORDING EVIDENCE.

120. Memorandum of evidence not sufficient.—*See* s. 356. When in a proceeding under s. 145, the Magistrate only made a memorandum of the evidence purporting to act under sub-sec. (3) of s. 356; *held*, setting aside the final order of the Magistrate that the provisions of sub-sec. (1) of s. 356 are imperative. Sub-sec. (3) applies only to cases in which the evidence recorded under sub-sec. (1) is not recorded in the Magistrate's own handwriting, **42 C 381.**

121. Magistrate may act on evidence taken before his predecessor.—It was formerly *held* that where a Magistrate decided the question of possession upon evidence not taken before him but taken before his predecessor, his proceedings were liable to be set aside by the High Court, **23 W. R. 62; 4 M. H. C. R. Appx. XX; Weir II, 97.** But now s. 350 would govern such a case, as a proceeding under this Chapter is an inquiry within the maning of s. 4 (*k*), **22 C. 898.** *See* also **10 C. W. N. 1095 = 4 Cr. L. J. 223; 13 C. W. N. 420 = 9 Cr. L. J. 278** and Note 164.

(F)—DEATH OF PARTIES.

122. Proceedings shall not abate by death.—Even under the old section proceedings under this section did not abate by reason only of the death of any of the parties thereto. But there was no express provision to bring on record the legal representatives of a deceased party. But now under the amendment by Act XVIII of 1923, sub-clauee (7) to section 145 specially provides for bringing on the record the legal representatives of a deceased party. So under the new amendment, **21 C. 404** is no longer law.

(G)—REFERENCE TO ARBITRATION.

123. Reference to arbitration not proper.—The procedure laid down by this section does not contemplate that the question as to who is in actual possession should be delegated, even by consent of parties to arbitrators. The section directs the Magistrate himself to receive the evidence produced by the parties and on a consideration thereof to come to a decision, **32 C. 552.** But where parties themselves applied that the matter might be referred to arbitrators and the Magistrate made an order in terms of the award, the High Court refused to interfere on the ground that the party was not entitled to object to the course pursued at his request, **6 C. W. N. 109.** *See* also **15 C. W. N. 271; 25 C. W. N. 719.**

115. Decision not based on legal evidence bad—(a) *Written statements*—The statement made by a

[illegible]

examine the parties and take evidence, **17 Bom. L. R. 382 = 3 Bom. Cr. Ca. 45 = 16 Cr. L. J. 434.** *See* also **18 W. R. 11; 30 C 918; 7 C W. N. 510; 14 C W. N 216; 13 Cr L J. 293 (A.), 6 P L R 1913 = 2 P. W. R. 1913 = 14 Cr L J. 138.** (b) *Mere local inquiry and unsworn testimony*—Mere local inquiry and statements of parties not on oath are not sufficient data on which a Magistrate can decide what party is in possession of land with regard to which a breach of the peace is apprehended **16 W. R. 13.** Where in a proceeding under this section the Magistrate discarded the evidence on record as unreliable, and decided the case upon what he saw heard and inferred at a local investigation held by himself, it was *held* that the Magistrate erred materially in his jurisdiction and the final order was set aside, **10 C. W. N. 131 = 3 Cr. L. J. 193** A Magistrate must decide the question of possession on evidence taken by himself and not according to the result of a local enquiry ordered with the consent of the parties unless they consent to be bound thereby **3 C. L. R. 134,** *see* also **4 C W N. 779,** where it was *held* that a Magistrate cannot summarily deal with the matter after mere inspection of the locality *See* also **23 C W. N. 750** (c) *On evidence not adduced by either party*—An order for possession under this section made on the evidence of a person, who was not a witness of any of the parties such as the Court is bound to examine under sub-sec (4), is bad, **8 C. W. N. 719** *See* also **4 P. R 1916 = 17 Cr. L J 129** (d) *Evidence recorded by the deputed Magistrate,* **46 C. 1056, 37 M. L J. 589; 31 M 82,** was not followed

(C)—Duty of Magistrate to assist Parties to adduce Evidence

116. Is it obligatory on the Magistrate to enforce the attendance of witnesses, at the instance of the parties?—(a) *Must usually issue summons*—When anyone of the parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance **11 C. 762, 21 C. 29.** A Magistrate who refuses to assist one of the parties to a proceeding under this section in procuring the attendance of his witnesses, thereby deprives that party of a hearing on the only question for the determination of the Court. Such a refusal amounts to a denial of justice and the Magistrate in refusing process acts without jurisdiction, **30 C. 508.** Even where the application of the process is somewhat late, the proper order for the Magistrate is not to refuse process on the ground that there was not sufficient time but to allow the petitioner s application on the distinct understanding that the witnesses must be served within sufficient time to enable them to appear, **30 C 508** (*footnote*) Where one of the parties to the proceedings under this section applied for summons against a Sub-Inspector and the Magistrate ordered the Sub-Inspector to come with his diaries, but on the date of hearing the Sub-Inspector did not appear and the Magistrate rejected the application of the petitioner asking for summons on the ground that it was vexatious, and passed the final order, *held*, that the order was without jurisdiction, as the petitioner was not given an opportunity of examining the Sub-Inspector, **18 C. W. N 94 = 15 Cr. L. J. 79.** *See* also **18 W. R. 64.**

(b) *It is entirely left to the discretion of the Magistrate to issue summons or not*—After a review of the previous cases it was laid down in **32 C. 1093,** as follows — It appears to us to be clear from the provisions of the Code that it is not obligatory upon the Magistrate to assist the parties to a proceeding under s. 145 to produce their witnesses, and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence. In this case one of the parties who had obtained summonses on his witnesses applied on failure of some of them to appear, for fresh summonses against them which the Magistrate refused, and it was *held* that the Magistrate acted within his powers and in the absence of any prejudice the High Court refused to interefere Section 145 neither contemplates the summoning of witnesses at the instance of the parties nor renders it obligatory on the Magistrate to compel attendance of any witnesses unless in his discretion he thought it necessary to take the evidence of those witnesses, **38 C. 24** where **32 C. 1093** is *followed.* A Magistrate is not bound to exhaust the processes of the Court in order to enforce the attendance of witnesses that do not appear In this case it was *held* that having regard to the conduct of the party concerned and also to the fact that the witnesses mentioned could not be found the Magistrate acted rightly in refusing to issue process, **17 C W. N. 144 = 17 C. L. J. 610 = 14 Cr. L. J. 40.** It is certainly discretionary to the Magistrate to allow witnesses to be re-summoned on a petition presented towards the end of the enquiry, **17 M. L. T. 225 = 16 Cr. L. J. 234.**

131. When property in dispute is divisible into several plots, Magistrate may declare possession in respect of each plot.—*See* Notes 139 and 140.

132. One dispute as to several plots may be dealt within one proceeding.—A dispute having arisen as to the possession of 109 plots of land to which a claim to possession was made by the ryots of village *A* on the one hand and by the ryots of village *B* on the other, the Magistrate instituted proceedings in respect of all the 109 plots, but, having taken evidence dealt in his order with 12 only, directing that the ryots of village *B* should be kept in possession, *held* that, it appearing that all the 109 plots were covered by the same state of circumstances, the Magistrate exercised a sound discretion in dealing with the case as he did. **10 C. L. R. 523.** When the dispute is one, the fact that it embraces several distinct parcels of lands is not sufficient to necessitate an independent proceeding in respect of each, **30 C. 155 (F.B.).**

133. One proceeding with respect to large number of distinct villages is illegal.—When the dispute is alleged to exist in 230 villages, each village stands on its own footing and the Magistrate will be acting *ultra vires*, if he clubbed together 230 subjects of dispute and treated them as one. The Legislature does not contemplate wholesale proceedings of this sort The Magistrate should decide which party, at the date of his order, was in actual possession of this or that village and confirm that possession, instead of arbitrarily finding that one party was in possession of all the villages, **29 M. 561.** *See*, however, **16 C. 513.**

134. Joint trial of separate cases is illegal.—Where a Magistrate tried cases against different persons under this section jointly and justified his action as having been taken by consent of the parties; *held*, that however convenient this course may be, the parties in all cases not being the same, the procedure was not legal Therefore the trial of each case should be separate, **4 C. W. N. 743.** Similarly, where two investigations were before a Magistrate who, after deciding one of the cases remarked in the other, that because the lands adjoined he had taken the evidence in the two cases together and found it unnecessary to continue the inquiry further, it was *held* that the parties kept out of possession were entitled to a full enquiry, **8 W. R. 63.**

135. Objection as to joint trial may be waived.—Where at the instance of the petitioner, a Magistrate tried a number of cases under s 145 in one proceeding; *held*, that though the proceeding was irregular, it did not lie in the mouth of the petitioner to object to the illegality because he was one of the persons who petitioned the Magistrate to adopt that course, **14 C. W. N. CCXXIII.**

136. Proceedings under this section must be separate from trials for offences.—**Weir II, 674.** *See* Note 92

XV.—FINAL ORDER.

(A)—Form and Contents.

Note.—Whether sections 366 and 371 do or do not apply to an order under section 145, the Magistrate must give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub-section (4) and directed his mind to the consideration of the evidence and whether he has acted with jurisdiction in making his final order. A final order merely stating that a certain number of witnesses were examined, pleaders heard and the oral and documentary evidence considered in light of the arguments, is not a proper one Re-trial ordered, **49 C. 187.**

137. Form of final order made under sub-sec. (6).—Form No 22, Sch. V, shows how a formal order declaring possession and forbidding disturbance is to be drawn up, **14 C. W. N. 78 = 11 Cr. L. J. 26.** The form ought to be borne in mind by a Magistrate taking steps under the Chapter.

(*i*) *Magistrate to sign his name in full to an order under this section*—A Magistrate should sign his name in full to a judicial order under this section and should also note his official position, **12 C. W. N. 771 = 8 Cr. L. J. 27.**

138. What the order should contain.—(1) Where an order is made in favour of a party holding that he is in possession of a part of the disputed property, the boundaries of the plot must be given so as to specify it, **14 C. W. N. XCVIII.** If it covers land not included in the initiatory order it is bad, **11 C. W. N. XLIII; 7 C. W. N. 462** and **558.** (2) The order should embody a clear finding as to which of the parties was in possession of the disputed land at the date of the order under s 145 (1) and it is not enough to find who was in possession a year before the date of proceedings, **9 Cr. L. J. 505.** The Magistrate must give a finding as is required by law regarding possession of either or both the contending parties on the date of his order, and if he fails to do so, he fails to exercise his jurisdiction He has to find as to who was in possession on the date of his order, not on any date anterior to that, **16 Cr. L. J. 239 (M.).** (3) It should not contain any directions as to delivery of possession, **14 C. W. N. 78 = 11 C. L. J. 26.** The Magistrate must find that the dispute between the parties is likely to cause a breach of the peace, **9 P. W. R. 1915 = 92 P. L. R. 1915 = 16 Cr. L. J. 206.**

But in **3 P. 288, 32 C. 552** was cited with approval and it was *held* that the scheme of an inquiry under s. 145 of the Code being retrospective, and not prospective an award made on a reference to arbitration by the parties, awarding possession of plots in dispute to one of the parties or dividing the plots between the parties cannot be the basis of an order under s 145 *Per* FOSTER, J, there might conceivably be certain instances in which the parties have agreed that the Court should refer the matter in dispute to arbitration for the purpose of deciding the question as to who is in actual possession at the time of the proceedings

124 Where matter has been referred, Magistrate should take the finding of the arbitrator into consideration.—In **7 C. W. N. 461,** the parties agreed that the question of possession should be decided by an arbitrator and pending the award the property was attached under s 146 After delivery of the award, the Magistrate refused to raise the attachment, *held,* that the Magistrate was bound to bring the proceedings under this section to their proper and legal termination by finding which party was in actual possession and for that purpose was bound to take the finding of fact by the arbitrator into consideration *See* also **3 Pat. L. J. 248.**

(H)—ATTACHMENT—PROVISO TO CLAUSE (4)

125. Duration of attachment under cl. (4)—An order for attachment under the proviso to cl (4) should only authorise attachment pending the Magistrate's decision under s 145 and not until a decree or order of Civil Court is obtained **8 S. L. R. 207 = 16 Cr L. J. 235.**

126 Attachment and postponement of proceedings *sine die*—A Magistrate has no jurisdiction to pass an order postponing *sine die* a proceeding under s 145 at the same time retaining under attachment the property covered by these proceedings, on reasons extraneous to the proceedings, **13 C. W. N. 104 = 8 C. L J. 564 = 9 Cr. L. J. 35.** But *see* **13 C. W N 601.**

127. When attachment under s 146 can be made.—*See* Notes under Heading II to s. 146

(I)—RECEIVER

128. Appointment of receiver under proviso to cl. (4) illegal—The appointment of a receiver under this section even before the commencement of the inquiry is illegal The only section authorising such a step is cl. (2) of s 146 and that section authorises attachment in certain cases only after the conclusion of the inquiry, **8 M. L. T. 314 = (1910) M W. N. 821 = 11 Cr. L. J 536.** In **13 Cr. L J. 293 (M)** however, it was *held* that a Magistrate may appoint a receiver to be in possession of the property but such a person will only be the agent or servant of the Magistrate acting under his order It is an administrative order passed for the management of the property which he has attached The right to attach carries with it the right to take the necessary steps for its custody and management.

XIV.—JOINT INQUIRY INTO SEVERAL CASES.

129. Joint hearing of the cases of several claimants—Where one set of persons asks the Magistrate to be maintained in possession against another set of persons and the latter asserts that they hold the land in different and independent parcels severally, the Magistrate should not pass an order declaring the former set in possession against the latt r set, but should distinctly specify which is entitled as against which, and to which portion of the land in question. Otherwise, it would render it necessary for the party out of possession to make all persons defendants in any civil suit brought to recover possession of the land **15 C. 31; 16 C. 513.** But it was *held* in the Full Bench Case of **30 C. 155** that where in the same proceedings some of the parties are concerned only with several portions of the land in dispute, the Magistrate is not without jurisdiction to deal with the case and that it is not necessary there should be separate and distinct proceedings in respect of each person. Such irregularities anyhow do not affect the jurisdiction of the Magistrate. In **8 L. R. 25 = 9 Cr. L. J. 265,** it was *held* that when several accused persons were found to be in possession of different and separate pieces of land alleged to be the property of the complainant, the accused could not be tried jointly

130. One proceeding with respect to several plots of land with several persons not bad.—Where a Magistrate drew up one proceeding with respect to several plots of land claimed to be in the possession of different persons, *held,* that the procedure adopted by the Magistrate was not bad as it was not shown that any of the parties had been precluded from giving any evidence and no party was prejudiced by the Magistrate not taking separate proceedings **5 C. W. N 544.** Similarly in **6 C. W. N. 206** where it was objected that inasmuch

142. Alteration of preliminary order.—Where a Magistrate recorded a preliminary order under this section and his successor, on the same materials, revised those proceedings altering their entire character, converting the dispute regarding the actual possession of land into a dispute regarding the collection of rent; *held*, it was an abuse of jurisdiction on the part of the Magistrate so to alter the proceedings—an abuse which would justify the intervention of the High Court in revision, **27 C. 892.**

143. Effect of the final order.—Although the section does not expressly authorise the Court to put the successful party into possession, the effect of it is to entitle him to take possession, **7 C. L. J. 547 = 12 C. W. N. 696.** The principle enunciated in **L. R. 8 I. A. 123** and **L. R. 11 I. A. 37**, that an order though erroneously made is nevertheless valid until reversal upon appeal, applies to an order under this section; such an order is final and binding upon the parties and those claiming under them. Although the order confers no title, the fact of possession remains and the persons in possession can only be evicted by a person who can prove a better right to the possession himself, **4 Bom. L. R. 167.** A Magistrate's finding as to the fact of actual possession is conclusive, but not so of the *Mamlatdar* under Bombay Act III of 1876, **5 B. 387.** *See* also **26 B. 353; 15 B. 238; 4 Bom. L. R. 167.**

(B)—PERSONS BOUND BY THE FINAL ORDER.

144. Witnesses not bound by order.—The mere fact of a person being examined as a witness in such a case does not make him a '*party*' bound by order, **18 M. 51.**

145. Order only binding on actual parties to proceedings.—Where an order was made between *A* on the one side, and *B* and the three tenants of *B* on the other, declaring that *A* was in possession of the property in dispute; *held*, that this order was only binding on the actual parties to the case before the Magistrate, and that subsequent tenants of *B* could not be criminally punished for disobeying the order in question, **3 B. L. R. Ap. Cr. 13;** *followed in* **18 M. 51; 3 C. W. N. 329.** A person cannot be convicted under s. 188, I.P.C., of disobedience of an order made under this section, unless it be shown, that the order was in fact addressed to him, **7 C. L. R. 291.** A person cannot be punished when the order has been passed on no proper inquiry, **16 P. W. R. 1913 = 92 P. L. R. 1913 = 14 Cr. L. J. 63.**

Contra—on all persons who have notice.—In **21 C. 404**, RAMPINI, J., expressed a different view, and it has been decided in **11 Bom. L. R. 377** that "the provisions of s. 145 make it clear that the parties whom the Magistrate has to deal with are not merely the actual parties to, but all persons who may be concerned in the dispute, the object being to prevent a breach of the peace. Therefore, it is not the actual parties but all parties who may have notice of the proceedings that are bound by the order." *See* also **33 C. W. N. 1002.** A person purchasing from one against whom an order was made and with knowledge of such order, is liable to be punished also, **13 C. 175.**

XVI.—CERTAIN ORDERS IN EXCESS OF THE MAGISTRATE'S JURISDICTION.

146. Order on persons not parties to the proceedings.—An order under this section or s. 146 directing persons who are not parties to the proceedings under this section, to do a thing with respect to the property in dispute or warning them that any rights to property they might have, must be settled in a Civil Court is *ultra vires*, **Weir II, 106.** So is an order under sub-sec. (6) made in favour of four persons, two of whom claimed no interest in the property in dispute, **6 C. W. N. 104.** *See* Notes 67 and 145 above.

147. Proceedings by way of execution of final order bad.—There is no specific provision in the Code authorising a Magistrate to take proceedings in the nature of execution (*e g*, directing the Police to give possession) after passing orders under s. 145. Disobedience to such orders can be dealt with under s. 188, I.P.C. It is doubtful whether they can be forced otherwise, **14 C. W. N. 78 = 11 Cr. L. J. 26.** Under s. 145 a Magistrate has no jurisdiction to oust one person and place another in possession of a property; such power is conferred by s. 522 and can be exercised only if there be conviction of an offence, **13 A. L. J. 932 = 16 Cr. L. J. 714.** A party in whose favour an order is made is entitled to take possession, **12 C. W. N. 696.** The effect of the order is to entitle the successful party to take possession, **7 C. L. J. 547.**

148. No power to direct how possession is to be exercised or the land has to be used.—Where a Magistrate found *firstly* that both parties were in possession of separate rooms in the same building, and *secondly* that they had both joint possession of certain rooms in which the family documents and other valuables were kept; and directed on the first finding that the separate possession should continue, and on the second finding that the rooms, except in the presence of certain public officer; *held* on the facts that the order as to continuance of separate possession was not improper, but that the order as to not opening the rooms, except in the presence of public officers was illegal, inasmuch as the Magistrate had not been unable to find which party was in

In proceedings under s 145 of the code where Magistrate issues an order under cl 6 without deciding which party was in possession on the date of the preliminary order, he acts without jurisdiction and the High Court can interfere in revision

139. Distinct and separate orders in respect of portions of the subject of dispute in the proceedings may be made.—In a proceeding under this section regarding certain plots of land the Magistrate found that one of the parties was in possession of four plots which were marked by distinct boundaries and were distinguishable from the rest and confirmed the party in possession thereof but as to two other plots he attached them under s 146 as they were not so distinguishable. In revision, it was contended that being unable to find either party in possession of the whole of the subject matter, it was the duty of the Magistrate to attach the whole of the lands in dispute, *held* that the words '*subject of dispute* in this and the following sections refer either to the whole or to any component part or parts thereof If the component parts are distinct and separable from the rest, it cannot rightly be held, that because the Magistrate is not able to find possession of one of the component parts of the subject matter in dispute with either party he is found to attach the whole although that component part is distinct and separable from the rest It on the other hand the subject matter in dispute is indivisible and must be dealt with as a whole, as was the case in **22 C. 297,** it must be dealt with in such a way as to make in regard to it one single order either under this section or the next **5 C. W. N 710,** and where a Magistrate finds that one party has been in possession of a portion of the land in dispute and the other party in possession of the rest and the possession of the one is not likely to interfere with the enjoyment of possession of the remaining portion by the other the Magistrate can maintain both the parties in possession of their respective portions **11 C. W. N. 743 = 5 Cr. L J 490,** where **22 C 297** is *referred to* and *distinguished* *See* also **14 C W. N LXXIX, 21 W R 53, 9 C W N. 887.** Where however the disputed land in respect of which proceedings under s 146 were instituted consisted of several plots, all held by tenants on a yearly rent of half the produce and the parties to the proceedings were the *lakhirajdar* and the *putnidar* the dispute between whom was as to the right to collect rent it appeared that as regards some of the plots there was a dispute as to what tenants were in possession *held* that as regards the plots about which there was a dispute as to the tenants in possession the Magistrate should not have passed any order in these proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings, **19 C. W. N. 959.**

140. Proper order when parties are in possession of portions of subject-matter which is indivisible —In a proceeding under s. 145, regarding dispute between two parties concerning certain collieries, it appeared that the first party were certainly in possession of the building which contained the office where the business of the collieries was transacted, and where all the cash books and the papers of the business were kept, and that the second party had during a period of about 14 days prior to the commencement of the proceedings succeeded in obtaining the possession of the pits wharves, tramways etc, of the colliery by what the Court considered to be an high handed and improper scheme and acting in an unwarrantable manner The Magistrate considering himself bound to find who was in actual possession at the date of the proceedings by himself, passed an order in favour of the second party, *held*, that such order was bad and that as the second party was not in possession of the whole of the property in dispute and the effect was to place them in possession of the portion that was in the possession of the first party, the proper order to make, under such circumstances was one under this section attaching the property, **22 C 297.** But if the component parts are distinct and separate the Magistrate may if necessary, deal with the different parts differently **5 C W. N. 710, 24 W. R. 73; 11 C. W. N. 193 = 5 Cr. L. J. 32** and *see* Note under Heading XI (*a*) above

141 Final order must not deal with plots not included in preliminary order —The Magistrate would be exceeding his jurisdiction if his final order covers plots not included in the preliminary order under sub sec (1) **11 C W. N. XLIII.** When in a proceeding under this section, a question is raised as to the identity of the land in dispute, the Magistrate is bound, before going further, to ascertain and identify the lands, so that neither party may be in doubt as to the specific lands in respect of which proceedings are taken. A Magistrate has no jurisdiction to decide a dispute as to lands in excess of those referred to in his preliminary order, **7 C. W. N. 462** and **558** *Query*—Whether an order made by a Magistrate giving a party to a proceeding under this section possession of a greater extent of land than is claimed by him may be questioned as one made without jurisdiction? **7 C. W. N. 462** Where in a proceeding under s 145 dealing with several plots of land a preceding Magistrate cancelled the proceedings in respect of some specified plots, his successor is not competent to pass a final order in respect of the plots excepted, **17 Cr. L. J. 286 = 34 In. Ca 1006 (Patna)**

153-B. Where it was found that one party was in possession on behalf of himself and another, both being members of the same family, *held* that the order of the Magistrate declaring the former to be in possession was without jurisdiction, **23 C. W. N. 1051.** A Magistrate has no power to pass a temporary order pending his decision of the question of possession under this section, **22 Cr. L. J. 48.**

XVII.—REVIEW AND REVIVAL OF PROCEEDINGS.

154. Magistrate may amend order.—When the order of a Magistrate under this section is not definite in regard to the description and boundaries of the property which is the subject of the order, such order can be amended and made more definite by the Magistrate on application by a party to the proceeding, **Weir II, 107.**

155. But not competent to review.—There is no authority for holding that a Magistrate can review a final order passed by himself under this section, **35 C. 350; 16 O. C. 192 = 14 Cr. L. J. 605; 24 A. L. J. 227.**

156. District Magistrate has no jurisdiction to revive an order once cancelled.—Where a case under this section has been dismissed or struck off the file by a Subordinate Magistrate on the ground that the Police report does not disclose any apprehension of a breach of the peace, a District Magistrate has no power to revive the old case and direct further inquiry, **20 C. 729.** But where a Subordinate Magistrate expressed an opinion that there was no ground to take proceedings under this section on a Police report, the District Magistrate can, on the same Police report, initiate proceedings under this section independently, **29 C. 242.**

157. High Court will not interfere with an order of cancellation.—The High Court has no power to interfere in revision with an order of a Magistrate, cancelling a preliminary order under sub-sec. (1) on the ground that there no longer existed a dispute likely to cause a breach of the peace, whatever might be the source of the information on which the Magistrate has acted, **30 C. 112; 13 C. W. N. 125.** *See* **28 C. 446, 2 Lah. 364.** But *see* s. 435 as amended and Notes thereon, now orders under Chap. XII are proceedings within the meaning of s. 435.

158. Further inquiry.—When a case under this section is dismissed or struck off the file, a District Magistrate or Sessions Judge has no power to order further inquiry under s. 437, **20 C. 729.** Nor has the High Court, **30 C. 112.**

159. New proceedings ought not to be instituted on old materials.—Under this section proceedings cannot be renewed after the dispute has been settled, and an order has been made that the case be struck off. Under such circumstances a new proceeding would not be justified only on the meterials upon which the proceeding stuck off was passed, **20 C. 867.** Nor can any further inquiry be ordered under s. 437. To enable the Magistrate to take fresh proceedings it would be necessary to set forth new materials, **6 C. W. N. 923.** It is competent to a Magistrate to institute fresh proceedings when in the previous proceeding the parties had compromised, **15 C. W. N. 568 = 12 Cr. L. J. 32.** *See* also **4 C. L. J. 418** and Note 44, **3 Lah. 401.**

160. Fresh proceedings should not be instituted during pendency of rule.—During the pendency of a rule issued by the High Court to show cause why the order of a District Magistrate under this section should not be set aside, a Magistrate subordinate to the District Magistrate instituted a fresh proceeding in respect of the same subject-matter. *Held*, that the fresh proceedings were highly irregular and improper, **4 C. L. J. 418.**

161. Fresh proceedings not to be instituted when previous order still in force.—Where an order under cl. (6) has been passed, the section forbids all disturbance of such possession until evicted in due course of law and a Magistrate should not institute fresh proceedings when such order is still in force. But where the previous order was merely that the parties had compromised and that according to the terms thereof both sides should be in possession, such an order is one falling under cl. (5), showing that no dispute existed and not an order under cl. (6). The Magistrate is competent to issue fresh proceedings, **15 C. W. N. 568 = 12 Cr. L. J. 32.**

162. District Magistrate cannot direct Subordinate Magistrate to institute proceedings.—A District Magistrate has no authority to direct a Sub-divisional Magistrate to take action under this section, **24 C. 391.**

XVIII.—TRANSFER.

163. Transfer of cases instituted under this section.—The general power conferred by ss. 192 and 528 of the Code upon a District or Sub-divisional Magistrate to transfer or withdraw any case for inquiry or trial by any Magistrate subordinate to him is not taken away or cut down by anything in this section, **22 C. 898** and **10 C. W. N. 1095.** But a Magistrate of the first class, who is empowered to transfer cases under s. 192 (2), is not competent to transfer cases under this section, **4 C. W. N. 821; 36 C. 370.** *See* also **24 A. 151** and **5 C. W. N. 686; 29**

possession and had not found that neither party was in possession, **Weir II, 108** Where in a proceeding under this section the Magistrate found that the disputed land was in possession of the second party, but directed that two pathways on the disputed and should remain intact and only the remainder of the land should remain in possession of the second party, *held*, the Magistrate was not competent to pass such an order, **17 C. W. N. 793 = 14 Cr. L. J. 391.** In a dispute concerning land the Magistrate, having found one party to be in possession, had no power to give the opposite party found not to be in possession permission to cultivate the disputed land pending the decision of any possessory suit he might bring **18 W. R. 27.** Nor, that one of several joint owners should not use the land in such a manner as to cause annoyance to another, **2 C L. R. 62** Nor can the Magistrate decide the method by which the possession is to be exercised of the agency by which the person in possession is to collect the profits **36 C. 986 ;** Note 147

But in a Bombay case it was *held* that there is no reason why a Magistrate, in proceedings initiated under s 145 of the Code, should not grant a right of way to one of the parties over the property in dispute, **48 B. 512 = 26 Bom. L R.**

149. No power to put party into possession or direct the erection of boundary marks.—Where a Magistrate made an order under this section declaring one of the parties to be entitled to possession until evicted in due course of law, and further ordered that boundary marks by pillars should be laid down, defining the limits of the possession of the respective parties, *held* that the section does not empower the Magistrate to put any party in possession or to lay down the boundary marks of the subject of dispute and a person removing such boundary marks cannot be held guilty under s 434, I P C, **27 A. 300 ;** Note 147

150. Removal of structure or award of damages.—Where *B* erected a *bundh* on land claimed both by him and *A* and in proceedings under this section between *A* and *B*, the Magistrate dealt with the matter as if he had to try *a question of title* and made an order (i) declaring that *A* was entitled to the land, (ii) directing *B* to remove the *bundh* and (iii) further directed that *B* should pay *A* certain amount as damages *Held* (*a*) that the Magistrate was bound to inquire as to which party was in possession and not treat the case as if the matter before him was one solely of title (*b*) that the Magistrate under this section had no power to direct the *bundh* to be removed, and (*c*) that the Magistrate was not competent to make an order as to damages. Even under s 148 the Magistrate has no power to make an order as to costs other than those incurred for witnesses or pleader's fee or both, **32 C. 602** *followed in* **6 P. L. R 1913 = 2 P. W. R. 1913 = 14 Cr. L. J. 138** where the order was as to the removal of platforms The Magistrate has no power to remove any superstructure on the disputed land.

151. Magistrate has no jurisdiction finally to settle the differences between the parties.—This section does not empower a Magistrate to make an order permanently settling the difference of the parties —*Mad H C Pro*, *23rd Jan*, 1883 It is a misconception of the aim and object of the law, to set at rest questions of title to possession of land, **17 W. R 3; 33 C 795.** Interference on the part of the Magistracy in a case of a purely civil nature is most mischievous **4 M. H. C R Appx. 49,** the primary object of the section being the preservation of the peace, **21 C. 29.**

152. Magistrate has no power to forbid payment or collection of rents.—It is not open to a Magistrate acting under s. 145 to forbid one party from collecting rents until he can prove his claim before a competent Court and to forbid another party to pay rent **4 C W. N. CCXXIII**

153. Orders regarding crops.—A Magistrate cannot order that a person shall be maintained in possession until he has reaped a crop and then that he shall give way to another, **1 C. L. R. 136** Nor has he jurisdiction to allow one of the parties to reap the crops to the exclusion of the other when the Magistrate cancels proceedings **3 C. L. J. 573 = 3 Cr. L. J 466.** Nor has he jurisdiction to direct a division of the crops grown on the land the subject matter of proceedings **8 C. L. J. 242.** Nor to order the proceeds of crops on the land attached *Minus* expenses to be handed over to one of the parties **7 C. L. J. 369 = 7 Cr. L. J. 336.** Nor has he any power to direct the produce to be delivered to one of the parties when he releases the attachment, **16 Cr. L J 104 (M.)** Although an order to the Police under this section, directing them to take charge of the crops in dispute may not be strictly legal yet when in the execution of such order the Police were merely guarding such crops, the owner cannot exercise any right of private defence by way of seizing and carrying off into confinement several of the Policemen, **9 C. W. N. 125.**

153-A. A Magistrate should not make a supplementary order without hearing the other party, **22 C. W. N. 552.**

justice to reach and remedy all forms of judicial high-handedness, though the Code contains no provision analogous to section 151 of the Code of Civil Procedure But now it should be noted that section 561 (a) expressly provides for such inherent powers of the High Court to make such orders as are necessary in the ends of justice.

170. Order as to costs in revision.—The High Court, in dealing as a Court of Revision with an application under this section, cannot make any order as to the costs of such application. **Oudh (S.C.) 227;** but the Madras High Court, in **L. P. Appeal No. 88 of 1908** *held* that costs may be awarded by the High Court. *See* Notes to s. 148. *See* also **45 M. 913.** But *see* **48 M. L. J. 106** which holds that costs cannot be granted by the High Court in revising a proceeding under section 145 of the Code, **48 M. 262.**

Contrary to this the Bombay High Court has *held* that it is competent to the High Court, in its criminal revisional jurisdiction, to award costs of a revision proceeding before it under s. 145 of the Code, **27 Bom. L. R. 1353.**

171. Magistrate cannot go behind the order of the High Court.—Where the High Court decided that a case fell under this Chapter and directed the District Magistrate to take the case on his file, and the District Magistrate transferred the case to another Magistrate. *Held*, that the latter Magistrate was bound to inquire into the matter, and it was not open to him to go behind the order of the High Court, **3 Bom. L. R. 416.** But, where an order made by a Magistrate having been set aside by the High Court, the successful party went to the Magistrate to have the High Court's order executed, the Magistrate then drew up a fresh preliminary order under sub-sec. (1) and after due inquiry made a final order under sub-sec (6), substantially similar to the order, that was set aside by the High Court. *Held*, that the question whether a Magistrate had sufficient materials before him to justify his action was not a question of jurisdiction and could not be gone into by the High Court, **All. Cr. Rev. 709 of 1905.**

172. During the pendency of a rule issued by the High Court, the Subordinate Courts ought not to issue fresh proceedings.—The District Magistrate made a final order on the 5th September, 1905. On the 21st December, 1905, the High Court issued a rule on the District Magistrate to show cause why the order should not be set aside and this rule was made absolute on the 2nd February, 1906. In the meantime, a Deputy Magistrate, subordinate to the District Magistrate, instituted fresh proceedings on the old materials on the 12th January, 1906. Held, that during the pendency of the rule in the High Court, proceedings in the Lower Court in the same matter must be considered to have been stayed and it was not only irregular, but highly improper ... proceedings ought not to be instituted ... after the dispute had been settled, ... a rule is issued on a District Magistrate staying ... Under such circumstances a ... same ... would be bound to obey the orders of the High Court, and no proceeding ... an any further proceedings with reference to the property in the Magistrate to ... would be necessary ... of the District Magistrate is still in force, there is competent to ... compromise to institute such proceedings where ... proceedings ... breach of the peace, **4 C. L. J. 418 = 4 Cr. L. J. 397.** All Subordinate Magistrates are ... *See* also **4 C. L.** ... proceedings ... would be justified in carrying ... Subordinate Magistrate would be justified ... Also when the order ... the subject-matter of the rule ... any apprehension of a b... no reason to suppose that there was ...

173. Letters Patent Appeal from the order of a single Judge.—Although the authority invested with ... to decide a dispute under this section is not a Court of civil jurisdiction, but a Criminal Court, an order passed in revision by a single Judge of the High Court, under this section, is not one made in a "criminal trial." So an appeal lies under s. 15 of the Letters Patent to a Bench ... **16 Cr. L. J. 239 (M.)** ... the order merely dismisses the revision petition, ... **17 M. L. J. 168 = 5 Cr. L. J. 343,** even when ... were highly ... *Cf.* **29 C. 286; 12 M. L. J. 408** and **14 M. L. J. 394.**

XXI.—EFFECT OF ORDER UNDER THIS CHAPTER ON CIVIL PROCEEDINGS.

174. Admissibility of orders under s. 145 as evidence in civil cases.—In **29 C. 187 (P.C.)** the Privy Council pointed out that orders under this section are admissible in evidence on general principles and under s. 13 of *the Indian Evidence Act* to show the fact that such orders were made, as to who the parties were, what the land in dispute was and as to who was declared entitled to retain possession. But they decide no question of title.

175. Suit to recover property comprised in the order under s. 145 by party bound by the order or any-one claiming under him, must be brought within three years from the date of the final order.—All persons bound by or parties to an order under this section by ss. 192 ... *the Limitation Act*, 1908. All persons bound by or parties to an order under this section ... persons claiming the property through any such person under a title *derived subsequent* to the ... now IX of ... *the Limitation Act*, ... within three years from the date of the order, under Art. 47 of *the Limitation Act* ... s. 192 (2) ... passed against benamidar may not bind the real owner ... **11 C. 562; 11 C. L. R.** ... **W. R. 128 (Civ.)**

C. 392. It was *held* in 2 C. L. J. 614 = 3 Cr. L. J. 83 that proceedings under this section are criminal cases and a Magistrate has power to transfer them under ss 192 and 528 There is therefore no illegality in a Magistrate transferring a case under this section to a Subordinate Magistrate and even if there were any, it would be cured by s 529 (*f*) In 36 C. 370 It was *held* that a Subordinate Magistrate cannot be empowered under s 192 (2) to transfer proceedings under this section But a transfer of such proceedings made by a Subordinate Magistrate empowered under s 192 (2) is a legal defect curable by s 529 *See* also 22 C. 898; 26 M. 188; 5 C. W. N. 686; 31 C. 350; 28 C. 709. But *see* 25 B. 179. But see also 55 M. L. J. 693 wherein 22 Cal. 898 and 26 Mad. 188 are distinguished In 28 C. 709 it was *held* that an investigation of a case under this section is an '*inquiry*' and the Court taking cognisance of it '*a Criminal Court*' within the meaning of the *Code*

164 Transfer may be made pending final order.—The jurisdiction to make a final order under this section is not personal to the Magistrate who initiates the proceedings and a District Magistrate may of his own motion, transfer a case under this Chapter to a Magistrate of the first class subordinate to him, 10 C. W. N. 1095 = 4 Cr. L J. 223; 22 C. 898.

165. Magistrate trying on transfer, need not have local jurisdiction.—Where the District Magistrate transferred a case under this section to a Deputy Magistrate to try it himself or to make it over to another Magistrate, and the Deputy Magistrate transferred the case to another Magistrate not having local jurisdiction over the subject matter of the proceedings and such Magistrate tried the case and passed the final order, it was contended (i) that the order authorising the Deputy Magistrate to transfer to another Magistrate was bad under s 192 (2) and (ii) that the final order by the trying Magistrate was bad as he had no local jurisdiction, *held*, that the irregularity, if any, under s. 192 (2) was cured by s 529 (*f*) and that the trying Magistrate had jurisdiction, 5 C. W. N. 686. The trying Magistrate may on transfer, add parties and issue fresh copies of original proceedings, 30 C. 155, 10 C. W. N. 1095 = 4 Cr. L. J. 223.

166. Successor can continue proceedings.—When in the course of a proceeding one Magistrate is transferred and another comes in his place, the latter if of competent jurisdiction can deal with the proceeding under s. 350, 13 C. W. N. 420 = 9 Cr. L. J. 278; 37 C. 812 *See* Note 121

167. High Court's power to transfer.—(*a*) *Under* s 526—In 26 M. 188; 34 A. 533; 11 O. C 61 = 7 Cr. L. J. 423, it was *held* that the High Court has power to transfer as the case was one over which a Criminal Court exercises jurisdiction So also GHOSE J, in 28 C 709. In 25 B. 179; 18 C. W. N. 393 = 15 Cr. L. J. 359; 8 S. L. R. 215 = 16 Cr. L. J. 249; 5 P. R. 1914 = 15 Cr. L. J. 363, it was *held* that s 526 had no application to cases under Chapter XII which are not criminal cases So also TAYLOR, J, in 28 C 709. It is proposed to amend s 526 by omitting the word 'Criminal' in 'criminal cases'

(*b*) *Under s 15 of the High Court's Act and s 29 of the Letters Patent*—*See* 28 C 709 and Note 4

XIX.—REFERENCE.

168 Reference—Power of Sessions Judge with proceedings under this section—Under the old Code the Sessions Judge had no power even to call for the record, under s 435, of proceedings under s 145 But under the new amendment of s 435, by the omission of sub-sec (3), a Sessions Judge has power to refer under s 438 because he is now authorised to call for the record of proceedings under s. 145, under s. 435 So it will be seen now that the decisions in 20 C. 520, 23 P. R. (1902) have lost their importance

XX.—REVISION, AND POWERS OF THE HIGH COURT.

169. Law before the new amendment of section 435 of the Code—Before the omission of sub-clause (3) of s. 435 declaring proceedings under ss 143, 144 and proceedings under Chap XII and s. 176, to be not within the meaning of s 435 it was *held* by all the High Courts that although they could not interfere under ss. 435 and 439 with proceedings under this Chapter, still it was invariably *held* that the High Courts could interfere under their general powers of interference by virtue of the Letters Patent and the High Court's Act It was also *held* that the High Court had power under section 107 of the Government of India Act (5 and 6 Geo. V. c. 61) to set aside proceedings under section 145 (43 C. 522; but *see* 41 A. 302 *contra*) But now since the omission of sub sec. (3) of section 435 of the Code it is clear that the Legislature wishes to confer powers of revision over orders under sections 143, 144, 176 and Chap XII

It is also interesting to note that 43 C. 522 while holding, under the old section 435 that the High Court has power to interfere under section 107 of the Government of India Act has also *held* that under section 107 the Court has power to make such consequential and incidental orders as may be necessary in the interest of

181. **No suit lies for damages for getting wrongful attachment.**—No suit lies to recover damages suffered by plaintiff by reason of his land having been kept under attachment for a year under an erroneous order under s. 146, Cr. P. C. from the defendant upon whose complaint the enquiry leading up to the order was instituted, **14 C. W. N. 96 = 10 C. L. J. 226.**

182. **Unsuccessful party not liable for damages property during attachment.**—A party to the proceedings under this Chapter sued the other for damages in respect of the property consequent upon an order of attachment under s. 146; *held*, that the damages for the loss of profits were not the probable result of the defendants act, being the consequence of the Magistrate's order and that the defendant was not liable in damages as no action will lie against any person for procuring an erroneous decision of a Court of Justice, **9 In. Ca. 133 C.; 6 M. 426; 12 Cr. L. J. 14 (C. 20 A. L. J. 205.**

183. **Civil suit for costs.**—A civil suit brought by a witness to recover costs incurred in appearing to give evidence in proceedings under this section is maintainable, **8 C. W. N. 179**; but a suit to enforce the order of Magistrate granting costs will not lie, **11 C. W. N. CCLXII.**

184. **Possessory proceeding is not notice to quit.**—Proceedings under this section are not a sufficient demand of possession for the purpose of maintaining an ejectment suit, **4 C. 339.**

185. **Mamlatdar's power to make a possessory order not ousted by order under this section.**—The jurisdiction of the *Mamlatdar* under s. 10 of Bom. Act III of 1876 to entertain a possessory suit is not taken away by the fact that a Magistrate had made an order under this section, because while the Magistrate finds possession on a particular date, the *Mamlatdar* determines who was in possession before that date, **26 B. 353.** *See* also **5 B. 387.**

186. **Order of Magistrate maintaining possession is no bar to appointment of a receiver by Civil Court.** - The Code of Civil Procedure and the powers of Civil Courts under that Code are in no way fettered by any order that may be passed by a Magistrate under this section The Magistrate's order is only intended to control any period up to the time when the Civil Court takes seizin of the matter and passes such orders as may be necessary for the protection of the property. It decides no question of title, **39 C. 187.** Therefore the existence of an order under this section in respect of any immovable property would not prevent a Civil Court from appointing a receiver in respect of the same property under s. 505 of the *Civil Procedure Code of* 1882, **22 A. 214.** Any order passed under this section ceases to have effect when the party aggrieved by it obtains an order from the Civil Court, declaring his rights as against such order, **2 C. L. R. 62.**

187. **Has a Civil Court power to appoint receiver superseding receiver appointed by Magistrate?**—When a receiver is appointed by a Magistrate under s. 146 (2) the Civil Court has no power to appoint a receiver in supersession of the receiver appointed by the Magistrate and such an interlocutory order cannot have the effect of discharging the Magistrate's attachment or enable the Court to remove the Magistrate's receiver.

When, however, the Civil Court thinks that a receiver should be appointed, it should make an order appointing a receiver conditionally on the Magistrate withdrawing his attachment, and it would be a wise and proper exercise of discretion on the Magistrate's part to withdraw his attachment on being informed of the order of the Civil Court. In the absence of good reason to the contrary, the Civil Court should continue the receiver appointed by the Magistrate, **40 C. 862.** *See* also **27 C. 259** and **1900 A. W. N. 22,** for the effect of an order of a Civil Court appointing a receiver.

188. **Whether pleader engaged in proceeding under this Chapter, disqualified to act for the other side in subsequent civil suit?**—Where a pleader who has appeared for a party in proceedings under s. 145, seeks to appear for the opposite party in a subsequent civil suit flowing out of such proceedings, he ought to satisfy the Court that in acting in the subsequent proceedings he has not as a fact obtained from his previous client any knowledge useful to his present client or anything which is not now public property, **38 M. 650.** A professional gentleman should as far as possible stick to the side who first employed him. It might be a very good practice if when gentlmen were offered instructions in any connected case that they should at least in the first place inform their first clients, **16 Cr. L. J. 420 (F.B.).**

189. There is an inflexible rule of law that a Magistrate is concluded by every previous order of a Civil or Criminal Court relating to a property in dispute, **30 C. L. J. 123.**

(*ii*) *Starting point of limitation*—For a suit to recover property in respect of which an order under s 145 has been made, the period of limitation runs from the date of the order of the Magistrate and not from the date on which a rule issued by High Court under s 15 of the Charter Act against the Magistrate's order was finally disposed of **12 C. W. N. 840, 6 C 709** If limitation has once begun to run, the plaintiff cannot have a fresh starting point from the date of subsequent attachment by the Criminal Court, **28 C. 86.**

(*iii*) *To what orders the article applies*—Art 47 is applicable, even though the Magistrate acted illegally and with irregularity, in not making proper enquiries provided the plaintiff had notice of the proceedings though the notice is not served in due course of law, **38 M. 432** But if no order is made respecting the possession of immovable property Art 47 is inapplicable **16 I. C. 635 (C.), 3 W. R. 174 (Civ.), 11 W. R. 477 (Civ.), 20 W. R. 316 (Civ),** nor is the article applicable to an order of attachment under s 146, as the order is not an order respecting the possession of property, **1 M. 309; 26 M. 410, 20 A. 120,** but *see* **28 C. 86**

(*iv*) *To what suits the article applies*—This article applies only to suits by the unsuccessful party to recover possession and not to a suit by the successful party to recover possession, **6 C L. R. 93;** nor to a suit by the unsuccessful party for confirmation of possession, **10 W. R. 24 (Civ),** nor to a suit for partition *Cf* **5 B. 25, 15 B 299.**

(*v*) *Article 47 does not apply when attachment is under s 14*6—An order made under section 146 for the attachment of the property in dispute is not an order respecting the possession of such property Consequently a suit brought by one of the claimants against the other for possession is not governed by Art. 47, Sch II of *the Limitation Act*, **1897 A. W. N 214; 20 A. 120; 1 M 309, 4 N.-W. P. H. C. R. 1868, p. 63, 28 C. 86; 26 M. 410.**

176. Limitation when property attached under s 146—As attachment under section 146 operates in law for purposes of limitation, simply as detention or custody of the property by the Magistrate who pending the decision of a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled on the date of attachment whether he be one of the actual parties to the dispute before him or any other For purposes of limitation the seizin or legal possession will, during the attachment be in the true owner, and the attachment by the Magistrate will not amount either to dispossession of the owner or to his discontinuing possession Such title of the true owner cannot be extinguished by the operation of s 28 of *the Limitation Act*, 1877, however long such attachment may continue, **26 M. 410.** Thus in **32 C. 856,** it was *held* that the effect of attachment of lands in dispute between two sets of tenants is, that the Magistrate takes possession on behalf of such of the tenants as might eventually establish right to possession The fact that neither set of tenants brought any suit to establish their title to the lands or paid any rent for them to the landlord for nine years, cannot be said to constitute an abandonment of the land by the rightful tenants, *see* also **28 C. 86** But if limitation has already begun to run against a party, the attachment under this section cannot furnish a fresh starting point, **5 C. W. N. 160.**

177. Burden of proof in subsequent civil suit.—In a suit brought by the party defeated in the criminal proceedings the burden of proving his title to possession lies on the plaintiff, **4 C. W N. 597 (P.C), 6 C. W. N. 386 (P.C), 29 C. 187.**

178 Can the unsuccessful party institute suit under s 9 of the Specific Relief Act?—No—**20 W. R. 12 (Civ)** It was *held*, that although this section does not expressly authorise the Court to put the successful party into possession, the effect of it is to entitle him to take it and the unsuccessful party cannot be said to be dispossessed otherwise than in due course of law, so as to give rise to a cause of action for a suit under s 9 of *the Specific Relief Act* **7 C. L. J. 547.** But where there was forcible dispossession immediately prior to the institution of proceedings under s 145 and the wrongdoer's possession was maintained by the Criminal Court, a suit under s 9 will lie, **30 A. 331.**

179. Is the unsuccessful party bound to sue for possession?—The comprehensive proposition that whenever an order under s 145 has been made, the necessary consequence is the actual dispossession of the unsuccessful party so as to compel him to sue for possession cannot be maintained **16 In. Ca 898 (C.)** Where owing to his inability to decide which of the parties is in possession a Magistrate appoints a receiver under s 146, a party thereto is justified in instituting a suit for declaration only and is not bound to ask for recovery of possession of land, **15 C. W. N. 758**

180 Possession of receiver is possession of party rightfully entitled for all purposes—The possession of a receiver must be deemed to be possession of the party rightfully entitled to the property for all purposes and not merely for the purposes of limitation, **(1911) 2 M. W. N. J 109 = 13 Cr. L. J. 23.**

merits but only allows an order for attachment to be made when it is not possible to decide which party is in possession, Weir II, 110; 8 M. L. T. 447 = 11 Cr. L. J. 560; 40 C. 105. A Magistrate can attach property only on the ground that he cannot satisfy himself as to which of the parties is in possession and not on his inability to decide on the rights of the parties, 6 Bom. L. R. 723. But the Magistrate is neither called upon nor empowered to consider the question of rightful possession, 7 Bom. L. R. 18 = 2 Cr. L. J. 23. *See* also 27 C. 785.

But where certain Muhammadans complained against certain Hindus about the use of certain well and the Magistrate attached the well under s. 146. *Held*, that the real question of decision before the Magistrate was whether Muhammadans also had a right to use the well and therefore there was no jurisdiction for preventing the Hindus from using the same. 23 A. L. J. 41.

5. **Inability to adjudicate must be after inquiry.**—A Magistrate is empowered to appoint a receiver under cl. (2) only after the termination of the inquiry as to possession conducted under cl. (4) only of s. 145. A Magistrate acts *ultra vires* if he appoints a receiver before the completion of the inquiry, 13 Cr. L. J. 535 (M.). The doubt on which a Magistrate can act must arise from his inability to decide on evidence offered by the contending parties, as to their possession and not on a doubt entertained without such inquiry, 1 C. L. R. 273. Unless and until a Magistrate has made the inquiry contemplated by s. 145, that is to say, unless he has received and considered the evidence produced before him by the parties, the Magistrate has no jurisdiction to proceed under s. 145, 15 Cr. L. J. 470 (O.). *See* also 12 C. W. N. 896 = 8 Cr. L. J. 202; 40 C. 105.

6. **Magistrate bound to take evidence before attaching property.**—A Magistrate is bound before attaching the property in dispute, to take evidence for the purpose of ascertaining who was in actual possession of the subject of dispute, and to record his grounds for being satisfied that a breach of the peace was likely to occur, 18 W. R. 4. A Magistrate acts without jurisdiction in passing an order under this section without hearing witnesses who might have been called before him 14 C. W. N. XCI. Where a Magistrate after refusing to grant time to a party to produce evidence, heard the parties and being unable to satisfy himself as to which of them was in possession, attached the subject matter in dispute, *held*, that the Magistrate acted without jurisdiction and his order was illegal, 12 C. W. N. 896 = 8 Cr. L. J. 202. Where the order was on no evidence produced by either side and the land was attached under s. 146, *held* that the Magistrate acted without jurisdiction as he had taken no evidence, 40 C. 105; 32 C. W. N. 543. A Magistrate cannot without an inquiry attach the property pending the decision of a competent Civil Court, 1 S. L. R. 33 = 9 Cr. L. J. 272. But if the parties will not adduce evidence even if sufficient time was given to them, the Magistrate may proceed under this section, 14 C. W. N. 60 = 11 Cr. L. J. 27.

7. **Magistrate ordering attachment without considering the evidence acts without jurisdiction.**—A Magistrate has no jurisdiction to pass an order under this section without investigating the question in the light of evidence, 11 Cr. L. J. 90 (C.). In 14 C. W. N. XCI such an order was set aside, but the Magistrate was directed to continue the proceedings under s. 145 and make the necessary orders after hearing the witnesses, 23 C. W. N. 910.

8. **Section inapplicable when there is no doubt as to actual possession.**—In a dispute between the wife of a lunatic and the manager of his estate with regard to the possession of certain property, it was proved that the wife was in actual possession, but there was a doubt whether she was not in possession merely as agent for her husband. *Held*, that the Magistrate ought not to have attached the property on the ground that he was unable to decide who was in possession. 3 C. L. R. 94. A Magistrate has no jurisdiction to proceed under this section when he finds that possession is actually with one party (Mad. Cr. R. P. 11 of 1906).

(*a*) *Section inapplicable when contending parties are in possession by turns.*—When a Magistrate found that both the parties were in possession of a choultry by turns and passed an order of attachment. *Held*, that if the parties were in possession by turns, it was possible for the Magistrate to decide as to who was in possession at the date of the order and no order under this section could be made (Mad. Cr. R. P. 99 and 149 of 1904).

(*b*) *No jurisdiction when both parties are in possession.*—When both parties are in possession, no order can be passed under s. 146, 27 M. L. J. 169 = 15 Cr. L. J. 572. Where proceedings under this Chapter have been instituted in respect of two *Mouzahs* and the Magistrate made an order under sub-sec. (1) in respect of one of them and in regard to the other, he found that it was in the possession of one of the parties and made a separate order retaining that party in possession. *Held*, that this case had to *be decided upon the test of the collection of rents from the raiyats.* The Magistrate found that both the parties at the time of the order under sub-sec. (1) were collecting rents, from some of the *raiyats* of the village, and this amounted to a finding that both the

146. (1) If the Magistrate decides that none of the parties was then in such possession or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof

Power to attach subject of dispute.

* " Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute "

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, "† and if no receiver of the property the subject matter in dispute, has been appointed by any Civil Court," appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure

* Provided that in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate who shall thereupon be discharged

Note —Proviso to sub-sec (1) and sub-sec. (2) are new Section 146 is amended so as to enable the District Magistrate or the Magistrate attaching the subject of dispute to withdraw the attachment at any time after being satisfied that there is no likelihood of the breach of the peace The proviso to sub-clause (2) which is newly added makes express provision for the delivery of the subject of dispute into the hands of a receiver subsequently appointed by any Civil Court.

Notes.—1. Form.—For form of warrant of attachment, *see* Sch V, No 23, *infra*

Power of receiver.—See *Civil Procedure Code V of* 1908 Ord XL which corresponds to s 503 of the Code of 1882

I.—SCOPE OF SECTION.

2. Construction of section—Parties—The parties contemplated by this section are the parties concerned in the dispute relating to land or water as mentioned in s 145, **123 P. L R 1911 = 18 P. W. R. 1911 = 12 Cr. L J. 403.** The word '*then*' means the point of time at which possession becomes material *See* **33 C. 68, 27 C. 785** and Notes under Heading XI (*c*) to s 145

3 S. 146 is a corollary to s 145 —Magistrate must act after recording preliminary proceeding under s. 145 —S 146 is a sort of corollary to s 145 and the legality of an order under s 146 depends on its having been preceded by legal proceedings under s 145 If that proceedings under s 145 are void for want of jurisdiction an order under s 146 cannot stand **16 M. L. T 52 = 15 Cr L J. 559, 40 C. 105** referred to A Magistrate cannot summarily pass an order of attachment without regarding preliminary proceedings under the preceding section It is only when after regarding such a proceeding and taking evidence, he decides that neither party is in possession or that he cannot satisfy himself as to which party is in possession that he can attach the land in dispute **1 C. L R. 86.** *See* also **Weir II, 108.** He has no jurisdiction to attach unless there is a likelihood of a breach of the peace as a result of conflicting claims and proceedings under s 145 have been instituted, **2 A. L. J. 149; 9 C. W. N. LXXV** and *see* Notes to s 145 under Heading V

II.—WHEN ATTACHMENT MAY BE MADE.

4 Jurisdiction to attach arises only when neither party is in possession [illegible] is impossible.—
neither party [illegible]
that he can attach the land in dispute, **1 C L R. 85, Weir II, 103.** Unless the Magistrate records a finding that he is unable to find which party is in actual possession he cannot pass an order under s 146, **16 Cr L J 239 (M).** The section applies only when the Magistrate finds that neither of the parties is in possession, **9 C. W. N. 887 = 1 C. L J. 331 = 2 Cr. L J. 408; 5 C. W. N 105.** A Magistrate may pass an order under this section only when it is not possible on the evidence to decide as to the fact of possession. The special provisions of this section are not meant to relieve the Magistrate from the duty of deciding on the

* Added by Act XVIII of 1923

† The words in inverted commas " and if no receiver [illegible] Civil Court were inserted by Act XVIII of 1923

attached. After the attachment had taken place, a third person came in and represented that neither of the contending parties had any interest in the land, as the land was leased to a person who was dead, and his right not being transferable, he, as landlord, took possession. The Magistrate did not remove the attachment, observing that the landlord's possession was without colour of law. *Held*, that the Magistrate ought to have withdrawn his order when he found the property in dispute in possession of the landlord, **24 W. R. 40.**

16. Decision of Court determining rights of attachment.—A Magistrate ceases to have authority to retain the property after a competent Civil Court determines the rights of parties, **7 Bur. L. T. 293.** A person who after the attachment obtains the order of a Survey Court in his favour is entitled to have the attachment released because the order of the Collector under the *Bengal Survey Act*, 1875 (B.C.) is a determination by a competent Court of the right of the persons entitled to the possession of the land, **37 C. 331.** So also is the decision of a Civil Court, **14 C. W. N. XCI.** It is the duty of a Magistrate to withdraw the attachment as soon as it is brought to his notice that a competent Court has determined the right of parties or the person entitled to possession, **17 M. L. T. 392.** A Magistrate cannot keep going the attachment in spite of a decree of the Civil Court on the ground that the other party was going to appeal, **7 Bur. L. T. 293 = 15 Cr. L. J. 500.** *See* also **17 Cr. L. J. 331 (M.)** where **17 M. L. T. 392** was followed and it was *held* that the Magistrate should withdraw the attachment when there has been an adjudication in favour of some at least of the parties.

But in **30 C. W. N. 646** it was *held* that the entry in the Record of Rights could at best be treated as presumptive evidence of the relation of lanlord and tenant, but could not be regarded as constituting the final adjudication of a competent Court within the meaning of s. 146 (1), and therefore the attachment need not have been released. But *see* **46 A. 879** below. Note 17 below.

17. Jurisdiction where right is to be determined by Revenue Court.—This section does not give jurisdiction to pass an order of attachment in a dispute between parties whose right regarding such dispute would have to be determined by a Revenue Court, **15 A. 394.** But now the words '*Competent Court*' has been substituted for '*Civil Court*' in sub-sec. (1). The words "Competent Court" include a Revenue Court, **46 A. 879.** *See* **30 C. W. N. 646** above.

18. After release from attachment a fresh attachment may be ordered only after fresh proceedings.—Where a Magistrate being in doubt as to which of two parties was the rightful owner, attached it in order to prevent a breach of the peace, and later released it from attachment on the parties coming to an agreement, but subsequently re-attached it on the appearance of a third claimant from whose attempt to obtain possession a breach of the peace was apprehended. *Held*, that the Magistrate was only competent to order fresh attachment after taking the preliminary steps set forth in s. 145 and if, on completion of the inquiry he found himself in the position described in this section and if there was any dispute, he ought to have proceeded *de novo* under this Chapter or have recourse to proceedings under Chapter VIII, **25 W. R. 68.**

18-A. Parties not being able to give satisfactory proof of possession property was attached under this section and party referred to a Civil Court. The Civil Court held in favour of one party and that party applying to the Magistrate to raise the attachment that Magistrate reported to the District Magistrate who directed fresh proceedings under s. 145 to be taken. *Held*, these proceedings were absolutely without jurisdiction, **17 A. L. J. 434.**

VI.—PARTIES BOUND BY THE ATTACHMENT.

19. Order of attachment binds only persons who are parties to proceedings under s. 145.—A final order under this section cannot be made against persons who were not made parties to the proceeding under s. 145, or who were not in the case regarded by the Magistrate as such, though notices had been issued upon them to file written statements and they had only entered appearance, but had done nothing else. Magistrates should be aware that one of the first principles on which Courts proceed is that judicial proceedings cannot bind a person who is not a party to them, **3 C. W. N. 329.** Therefore in a dispute about alluvial land of which neither party was admittedly in possession, the Magistrate passed an order for attaching the land as well as the crops standing thereon, it was *held* that so far as the crops were concerned the order of attachment was bad and without jurisdiction. For, the crops belonged to the tenants who grew them and they were not parties to proceedings; there being no dispute between them, the effect of the order would be prejudicial to their interests, **5 C. W. N. 105.** *See* also **123 P. L. R. 1911 = 18 P. W. R. 1911 = 12 Cr. L. J. 403** and Notes to s. 145 under Heading XV (*b*).

20. Does not bind parties newly added.—Where a Magistrate added new parties in the course of proceedings under s. 145 and, being unable to find on the evidence which of the contending parties was in

parties were in possession and consequently sub-sec. (1) had no application to the special circumstances of the case. The section applies only when the Magistrate finds that neither of the parties is in possession. The intention of the Legislature is obviously to maintain the *status quo*, and consequently the order of attachment was set aside, **9 C. W. N. 887 = 1 C. L. J. 331 = 2 Cr. L. J. 403.** *See* also **Weir II, 108.**

9. **Where land in dispute is not in the possession of the rival contending parties, order of attachment is proper.**—In a matter under s 145 between two rival Zemindars claiming to hold certain alluvial lands of which they admitted to be joint proprietors, but neither of them was in joint possession, the Magistrate passed an order of attachment, under this section of the lands as well as the crops standing thereon *Held*, that as no question of jurisdiction arose, there was no ground for the exercise of revisional powers, **5 C. W. N. 105.**

III.—WHAT PROPERTY MAY BE ATTACHED.

10. **Attachment not desirable when dispute is about petty strips of land.**—Where the dispute is regarding a narrow strip of land at the base of a hedge forming the boundary between two contiguous estates the Magistrate, instead of attaching such land, should find for one party or the other on the evidence with reference to the points of possession, **4 W. R 26.** Attaching the land is not a satisfactory way of setting a petty dispute of this description

11. **Crops cut and stored cannot be attached.**—A Magistrate has no jurisdiction under this section to attach crops cut and stored, the word *crops* in s 145 (2) being limited to standing crops attached to the land **30 C. 110.** But the mere fact that the crops which are the subject of the dispute have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate, **Weir II, 108.** *See* also **13 Cr. L. J. 295 (M.).**

12. **Land recently delivered in accordance with Civil Court decree not to be attached.**—Where the petitioner was put in possession of certain lands in execution of a Civil Court decree and evidence of the decree and of the possession given thereunder was placed before the Magistrate, but in spite of this he made an order of attachment under this section *Held*, that the order directing the lands to be attached was made without jurisdiction and that it was the duty of the Magistrate to have found possession in accordance with the decree of the Civil Court, **32 C. 795 ; 24 A. L J. 399.**

13. Where the lower Courts found that there was likelihood of breach of peace and that neither party was in possession of the immovable and movable property in dispute of a certain muth, and passed an order of attachment under s 146 *Held* that the movable property being appurtenant to the *muth*, the order of attaching the same was valid, **24 A. L. J. 383.**

IV.—PROFITS OF ATTACHED PROPERTY.

13-A. **Powers of Magistrate to deal with profits of attached property.**—A Magistrate after passing orders under this section is entitled to refuse to hand over the value of the produce to any of the parties to the dispute, but he has no power to treat the profits claimed as 'derelict' and as the property of Government, **123 P. L. R. 1911 = 18 P. W. R. 1911 = 12 Cr. L J. 403.** Where a forest is attached, the Magistrate is entitled to take possession of the elephants therein **(1912) M. W. N 540 = 13 Cr. L. J. 222.** When once the Magistrate has cancelled his preliminary order and released the immovable property from attachment, he has no jurisdiction to direct the delivery of the collected produce to one of the contesting parties The proper course to take under the circumstances is to retain the produce until one or the other of the parties obtained an order of a Civil Court. If the property is perishable or difficult to keep in safe custody it might be sold and the proceeds kept in deposit, **16 Cr. L. J. 104 (M)** The Magistrate is not entitled after the final decision of the Civil Court, to retain in his hands, the profits derived from the attached property during the period of attachment, **1893 A. W. N. 100.** *See* also **17 Cr. L J. 331 (M),** where **17 M L. T. 392** was followed. **46 M. L. J. 565.**

Where the Magistrate made an order for attachment of land and arranged for the collection of produce in order to avoid future litigation about the actual amount of produce collected by the petitioner, *held*, that the Magistrate has acted in excess of his powers conferred by the statute and that the order is therefore void and must be set aside, **7 L. 131.**

14. **Rights of receiver to accretions.**—Where a receiver has been appointed under s 146 in respect of any property in dispute, he is entitled unless some special circumstance is established, not only to the subject matter of the proceedings but also to all accretions to the property and gives good title to a tenant under him, **14 C. W. N. 631 = 11 Cr. L. J. 288.**

V.—DURATION OF ATTACHMENT.

15. **Attachments should be withdrawn when party entitled to possession comes forward.**—A Magistrate finding himself unable to determine which party was in possession of the subject of dispute ordered it to be

I.—APPLICATION OF SECTION.

2. **Duty of Magistrate to protect rights.**—Where rights are threatened, the Magistrate has jurisdiction to protect persons lawfully exercising their rights by prohibiting the persons from interfering with the exercise of that right, **21 M. L. J. 487 = (1911) M. W. N. 44.** *See* also **6 M. L. J. 193** and **7 M. 49.** A Magistrate is bound to investigate a case in which the complainant alleged that his right of way is interfered with, and ought not to refer him to the Court, **14 W. R. 28**; but *see* **24 W. R. 20.**

3. **Where proceedings may involve a long and complicated inquiry, it is desirable that parties should be bound down to keep the peace.**—Where the settlement of a dispute involves issues of right which can only be properly determined by a Civil Court, and if a breach of the peace is likely to arise from such a dispute the proper course for the Magistrate to take is to bind down one, if not both of the parties, **4 C. W. N. 779; 23 C. 557; 36 C. 923; Ratanlal 462; 29 M. 97.** Magistrates should not institute proceedings under this section, unless they are satisfied that a real danger of the evil for the prevention of which the procedure was devised does in fact exist. Such inquiries may lead to injustice being done from defective procedure, and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated inquiry and the presence of a large number of people, when the remedy of binding down a few persons to keep the peace is ready to his hand, **21 C. 727; 23 C. 557.**

4. **Where dispute concerns the possession of land, etc., and not merely the user of it, this section inapplicable.**—A Magistrate cannot owing to the difficulty in attaching a property under s. 146, pass an order under this section. Section 147 is intended to appy only to cases where there might be disputes concerning the right of use of any land or water as distinct from disputes as to the title to possession of the land itself for which provision is made by ss. 145 and 146, **16 O. C. 192 = 14 Cr. L. J. 605.**

5. **Dispute likely to lead to a breach of the peace, must exist.**—In order to found the jurisdiction of a Magistrate it is necessary that a dispute exists between two persons concerning the right to the use of any land or water or any right of way; the jurisdiction is intended for the purpose of preserving the public peace. It does not convert the Magistrate into a Civil Court, which is to determine the rights between parties, or to consider and discuss any questions of proprietary damage done to individuals, **22 W. R. 48.** *See* **10 C. 76** and **11 B. 584.** If the materials upon which the proceedings are based do not disclose the fact that there is an imminent danger of a breach of the peace, the Magistrate should not take action under this section. Any evidence taken in the course of trial cannot give him jurisdiction which he does not otherwise possess, **23 C. 557; 20 C. 520; 25 W. R. 74; 4 C. L. R. 483; 7 C. L. R. 352; 7 C. 385; 20 C. 513; 2 C. W. N. 670; 6 M. L. J. 193; 5 C. 194.**

6. **No jurisdiction when the rights of parties have been judicially determined.**—If on entering on an inquiry a Magistrate finds that the rights of the parties have been judicially ascertained, he should not make any investigation into the matter, as he could not assume that a dispute would be continued on a question which has been set at rest by judicial decision on the rights of parties, **11 B. 584.** If he apprehends a breach of the peace he should proceed under Chapter VIII, **Ratanlal 462; 14 B. 25.**

II.—WHAT RIGHTS MAY BE MADE THE SUBJECT-MATTER OF PROCEEDINGS.

7. **No jurisdiction where matters in dispute are not adjudicable by a Civil Court.**—Where the matters in dispute are not adjudicable by a Civil Court, this section does not give a Magistrate jurisdiction to interdict the persons named in his order, *e.g.*, from taking part in certain ceremonies in the temples specified, **14 B. 25.** He should act under Chap. VIII, if he apprehends a breach of the peace.

8. **Is the section limited to rights to use land or water in the possession of others?**—The proviso read with the body of the section, clearly indicates that the Legislature in enacting this section intended to deal with rights to use of land or water, the property of others and as such in their possession, **4 C. W. N. 779.** The words *concerning the use of land* in this section cannot be qualified and the section construed, as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession (**7 M. 460** *followed*, while **4 C. W. N. 779** *not followed*), and that the alteration of the language of the Code seems to be with the object of enlarging rather than restricting the scope of the section. The section is wide enough to cover a case like this where the user is by the person in possession, **29 M. 97.**

9. **Does the section apply to rights, arising out of contract or is it limited to recurring rights in the nature of easements?**—*Landlord and tenant.*—A dispute between a landlord and his tenant regarding the right of the latter to re-construct a *gola* which has fallen down does not properly come under this section, as the settlement of such a dispute involves issues of right which can properly be determined only by a Civil Court, and

possesion of the disputed property attached it under this section, it was *held* that the order of attachment was bad so far as it affected the possession of the party newly added, 5 C. W. N. LXXXIII.

VII.—EFFECT OF ATTACHMENT AND RECEIVER'S APPOINTMENT.

21 **Trespass upon attached property is punishable criminally**—A person who trespasses upon and cultivates immovable property which has been attached by a Magistrate under this section commits the offence of criminal trespass, and is punishable under s 447 I P C 8 M L. J. 253.

22 **Disobedience of an order under this section**—Disobedience to an order under this section is not an offence falling under s 188 I P C, and is not punishable as such 8 M L. J 253 = Weir I, 143, and a Magistrate whose order attaching land has been disobeyed cannot himself try the accused for disobedience, 13 C. W N. CCXXIII. *Cf* Ratanlal 904

REVISION.

23 Under the newly amended ss 435 and 439 the Sessions Court and the District Magistrate and the High Court have power of revising proceedings and orders under Chapter XII as such proceedings and orders have become revisable because of the omission of clause (3) from s. 435 by the amending Act XVIII of 1923

24 **High Courts power of revision in the appointment of a receiver**—The High Court has no jurisdiction to entertain the petition for the appointment of a receiver pending the disposal of a criminal revision petition preferred against an order of the lower Court passed under s 145 of the Code, 49 M L J. 593.

147. *(1) Whenever any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a Police report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in section 145 sub-section (2) (whether such right be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in section 145, and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry

Disputes concerning rights of use of immovable property, etc.

(2) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution

(3) If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right

(4) An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction

Notes—1. Doubts have been expressed as to the procedure to be followed in cases under section 147. The recent amendments were introduced with a view to make it clear that the procedure laid down by section 145 is to be followed in cases of rights in, to or over land or easements covered by section 147 It is also made clear that under this section a Magistrate can make an order prohibiting any exercise of an alleged right or prohibiting any interference with such alleged right subject to any subsequent decision of a Civil Court of competent jurisdiction as provided in cl (4) of the present section (see *Sel Com. Rep*, clauses 27 to 30).

Form of the order—In passing an order under this section, the Court should adopt the Form No 24, Sch V 13 C W. N. 859 = 10 Cr. L. J. 292 and *see* Notes below

* Section 147 has been substituted in the place of the old s. 147 by Act XVIII of 1923

law, **7 M. 49; 6 M. L. J. 193.** It is doubtful whether this section applies to such cases at all. Anyhow a Magistrate has no jurisdiction to pass an order under this section, or s. 145, unless he finds that but for the order, there will be a breach of the peace, **Weir II, 117.**

(*b*) *Religious processions.*—A Magistrate is not authorised under this section to make an order prohibiting a religious procession, where the right to prevent the procession is not found to exist, **Ratanlal 548.** A Magistrate has jurisdiction under s. 147 to pass orders even against the right of passage through a public street, **16 Cr. L. J. 767 = 31 In. Ca. 367 (M.).** *See* also **105 I. C. 660 = 28 Cr. L. J. 948** in which it is held that an order allowing the Hindus to pass through the street with the procession and prohibiting the Muhammadans from interfering was legally competent under this section.

15. Obstruction to use of water for irrigation.—Where it was found that the first party had a right to the flow of water for purposes of irrigation from a certain channel passing through the village of the second party who obstructed such flow by erecting certain *bunds*. *Held*, that the Magistrate is competent under this section to direct that the obstruction be removed, **5 C. W. N. 67; 36 C. 923; Oudh S. C. No. 64** and **13 W. R. 51; Weir II, 65.**

16. Right to let off water.—The right which is claimed is a natural right of every landholder to the use and enjoyment of his own land and among the necessary incidents to such enjoyment is the right to let off water by the natural course in which it has always flowed and would always flow so as to prevent inundation of his own land. When the second party erected a *bund* on the boundary of the first party's village to prevent the flow of such water; *held*, that the erection of such *bund* was an infringement of that natural right, and the Magistrate had jurisdiction to direct the first party to remove the *bund* with the assistance of the Police, **15 C. L. J. 267 = 12 Cr. L. J. 319.** Section 147 is not confined to mere easements. *See* also **39 C. 560.**

17. A right to take water from a well.—Where Christians were prevented by Hindus from the lawful exercise of their right to take water from a well, *held*, that the Magistrate had jurisdiction under this section to pass an order forbidding the Hindus from interfering with the exercise of that right, **(1911) M. W. N. 44.**

18. Rights to fisheries and ferries.—It was *held* that the words "right to do anything in or upon tangible immovable property" included right of fishing, **23 C. 55; 23 C. 557,** and a Magistrate is competent to take action under this section in case of any dispute concerning the exercise of *Julkar* right. As to ferry right, *see* **26 C. 188; 3 C. W. N. 148** and Notes under Heading IX to s. 145.

19. Easements.—For definition, *see* s. 4 of Act V of 1882. This term includes profits *a prendre*, **23 C. 55.** This section is not confined to cases of easement acquired by uninterrupted enjoyment for twenty years as provided by s. 26 of *the Limitation Act* (XV of 1877), **13 C. W. N. 859 = 10 Cr. L. J. 292.**

20. Right to sandal paste over an idol.—On a complaint being made that the right to take sandal paste from the idol of *Shri Pandurang* belonged to the complainants and their right was unlawfully disputed and the dispute was likely to cause a breach of the peace, an order was made declaring the complainant's right to the paste and directing that the accused should remove the paste and hand it over to the complainants. *Held*, that the Magistrate had no jurisdiction. It was not a dispute concerning the right of use of any land or water or of any right of way or easement over the same. If the Magistrate was of opinion that a breach of the peace was likely, he ought to have proceeded under Chapter VIII, **4 Bom. L. R. 438.**

21. Rights which are not within the scope of this section.—(*a*) *Right of privacy.*—The right of privacy is not a right in the assertion of which a person can be justified in entering upon the premises of another and closing the windows and doors; nor is it a right to prevent the doing of anything in or upon any tangible immovable property, within the meaning of this section, **Ratanlal 357.**

(*b*) *Right to use privy.*—A privy is neither 'land' nor 'water' nor the use of it an easement over the same within the meaning of this section, and a Magistrate has no jurisdiction under this section to deal with the same, **15 Bom. L. R. 329 = 2 Bom. Cr. Ca. 72 = 14 Cr. L. J. 400.**

(*c*) *Obstruction to drain.*—The obstruction of a drain into which the sewage of the complainant's house falls, does not come under this section, **5 W. R. 58 = 1 Wym. Cr. Rul. 52.** In such a case, a civil suit and an injunction would be the proper remedy. *See* **5 W. R. 57 = 1 Wym. Cr. Rul. 50,** which relates to an obstructing wall.

(*d*) *Right of a tenant to put up a wall.*—*See* **4 C. W. N. 779** and **29 M. 97** in Note 10.

(*e*) *Right to worship.*—*See* **37 C. 578; 38 C. 387** and Note 12 above.

if a breach of the peace is likely to arise from such a dispute the proper course for the Magistrate to take is to bind down one if not both of the parties The right of use of land contemplated by s 147 is one of an entirely different description resembling a right of easement not one arising from the terms of a contract between land lord and tenant in this matter (*see* proviso) If this right in dispute is exercisable at all times of this year it must have been exercised within three months next before the institution of the inquiry under s 147 The right to erect or recreate a *gola* is not of this description **4 C W N 779** In **29 M 97**, it was *held* that the enclosing by a tenant of cultivable lands by a wall instead of a hedge is not *prima facie* an interference with the landlord s rights and ought not to be interfered with under this section by a Magistrate being a matter to be settled by a Civil Court In such a case if a breach of the peace is apprehended security must be taken from the party in possession *See* also **15 C L J 267**, **16 Bom L R 29**

10 The right must have been exercised within three months—An order as to the removal of an obstruction from a public way cannot be made unless the right has been exercised within three months prior to the institution of proceedings **105 P L R 1909**, **14 Cr L J 303 (C)** *See* also **21 C 727** Where however, a dispute existed concerning the right of use of certain water for irrigation and the Magistrate expressed his final order thus To summarise the evidence the Court is of opinion that the first party the *Thikadar* and *Zemindar* of *B* have proved an uninterrupted use of the water of this Calo for twenty years which they have enjoyed as an easement and as of right *Held* that the objection that the Magistrate has not found that the right in dispute had been exercised within either of the periods mentioned in this section is not sustainable as the finding in the order is sufficient for the case **5 C W N 67**

10 A Non exercise of the right must be within the control of the person claiming the right—Where the applicants claimed a right to take a religious car on a certain date every year but in the year 1924 they were unable to exercise that right owing to objections raised by the opponents. In 1925 they asked for an order to carry the car on that day but the Magistrate declined to make an order under s 147 of the Code on the ground that the applicants had not exercised that right in the preceding year On application to the High Court *held* that the order of the Magistrate prohibiting the applicants from exercising their rights was wrong The proviso to sub-sec (2) to s 147 of the Code contemplates a non exercise of the right for reasons within the control of the persons claiming the right **27 Bom L R 1058**

11 Does the section apply to the 'right to officiate' in a mosque or temple?—(*a*) *Yes* according to *Madras* and *Bombay* Where a dispute likely to cause a breach of the peace is shown to exist concerning the right to perform a religious ceremony in a mosque the Magistrate may exercise the powers conferred by this section **11 M 323** The right to perform religious worship in a temple comes under s 147 and not under s 145 **3 Bom L R 416** In **29 M 237**, the right to use a mosque by persons claiming to officiate as kazis was *held* to be within the scope of the section So also a dispute as to the right to enter the temple and officiate at the *kumbabhishekam* ceremony whenever it is necessary to perform it **27 M L J 587** = **16 M L T 427** = **15 Cr L J 671** AYLING J dissenting from **29 M 237** and **27 M L J 587** and approving **37 C 578** *held* that the words land or water are used in s 147 in their ordinary significance without the extended meaning assigned to them in s 145 and the words therefore will not cover the right to perform *puja* in a temple nor the right of the management of the temple itself **17 Cr L J 235** = **34 In Ca 651 (M)** **48 M L J 628**.

12 *Contra Calcutta*—In **37 C 578** it was however laid down *dissenting* from **29 M 237** and **11 M 323** that though s 147 is not in terms confined to easements but relates to any dispute concerning the right of use of land or water the section does not cover a dispute to perform the duties of a Pujari in a temple as the dispute is not about the use of land It is the worship which is disputed and not the use of the land In **38 C 387**, this ruling was approved but the dispute there was as regards the offerings made in a temple and it was *held* that the offerings given by the worshippers for the worship of any deity are not profits arising out of a building and the dispute is one about movable property **52 C 959**

13 Right to use of a pathway—A right to a flow of water and a right to use a pathway across the land of another are rights of use of land and water within the meaning of this section and cannot be adjudicated upon under s 144 by a Magistrate with subordinate powers **Weir II, 65** In a dispute as to a right of way, the Magistrate should decide whether the complainant had been in use and occupation of the road and if so for how long and if he finds him to be in possession should retain him in it leaving the owner of the land to refer the question of right to the easement to the Civil Court He should not decide against the complainant because he may have another right of way leading to the same place **2 W R 64**.

14 Right of using a highway—(*a*) The conveyance of a corpse along a highway is not an unlawful use of the highway except when danger to the public health is occasioned thereby Therefore an order preventing a Hindu funeral procession from passing along a highway to which the Muhammadans objected is bad in

28. **Summary disposal of case without evidence on inspection of locality.**—In a matter under this section as under s. 145, a Magistrate is bound to hear the evidence tendered by the parties; he cannot summarily deal with it after inspection of the locality, **4 C. W. N. 779; 9 W. R. 64** and **7 B. L. R. 329; 3 Bom. L. R. 416.** Where a Magistrate made an order under this section, declaring possession to be with a certain person, without making any inquiry as to the party in possession; it was *held* to be illegal and was set aside under s. 15 of the Charter Act, **29 M. 237,** and Notes 1, 3 and 6 to s. 148.

(C)—PARTIES.

29. **Parties to the inquiry—Owners not necessary.**—For the purpose of the enquiry contemplated by this section, it is sufficient it the persons who claim for themselves the right, though that right is derived from others, are made parties. The owners are no necessary parties, **23 C. 55.** *See* **2 C. W. N. 670.**

30. **Adding parties to the proceedings.**—A Magistrate is not competent to add parties to the proceedings under this section any more than he can to proceedings under s. 145, **5 C. W. N. 67.** But *see* Note 65 to s. 145 as the effect of the Full Bench Ruling in **30 C. 155.**

31. **Though order ineffectual as against persons not parties to proceedings, it is not bad as regards the other parties.**—Where a dispute existed concerning the right to use certain water for the purpose of irrigation and after declaring the existence of that right in favour of the first party, the Magistrate coupled with them other persons who were not parties to the proceedings; *held*, that the order is bad so far as regards persons who were not parties to the proceedings, but that does not make the whole order illegal so as to make it ineffectual; it is binding on those to whom it was properly directed, **5 C. W. N. 67.** And so also the order in favour of persons not parties is illegal, **7 M. 460.** *See* also Notes under Heading XV (*b*) to s. 145.

(D)—NATURE OF ORDER.

32. **No power to make a declaratory order.**—This section is not intended to provide a substitute for civil suit to declare the rights of parties, **6 W. R. 74,** but *see* **14 W. R. 28.** Nor does it enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruptions by any person of rights actually enjoyed, which have been exercised by the public or a person or a class of persons, **5 C. 194.** *See* also **24 W. R. 20.** An order which declares that as between the contending parties, certain land in dispute does not belong to the public is not one, the contravention of which can form the subject of an order under s. 188, I.P.C., **24 W. R. 20.**

33. **Competence of a Magistrate to direct removal of an obstruction—Language of the section inartistic.**—"It is obvious that this section has not been happily expressed and that if strictly construed, it is meaningless. A Magistrate empowered to enquire into a dispute likely to cause a breach of the peace concerning the right of use of land or water, including any right of way or other easement over the same, and it is clearly the object of the law that by his order he shall settle that dispute; and that his order is to be in force until the party against whom the order is passed shall have obtained the decision of a competent Court in his favour...............No provision is made for a cause in which the Magistrate's order may be modified, though from the nature of the matter in issue, this may constantly happen. But what does the section mean by stating that the Magistrate's order is to permit '*such thing to be done*' or to direct that '*such thing shall not be done?*' The word *such* must refer to something in the context, but the section is silent in this respect. An explanation is suggested that *such thing* means the matter in dispute connected with the right of use of land or water. This may be what was intended. It is to be regretted that the law should have been so imperfectly and inartistically expressed." *Per* PRINSEP, J., in **5 C. W. N. 67,** where it was *held* that the Magistrate was competent to direct the removal of an obstruction to a right of way caused by the erection of *hauts*, there being a likelihood of a breach of the peace in consequence of the obstruction and this was followed in **5 C. W. N. 335; 36 C. 923; 15 C. L. J. 267 = 12 Cr. L. J. 319; 39 C. 560.** But it was held *by the Madras High Court* in **4 M. 121** that a Magistrate has no jurisdiction under this section to direct the removal of any obstruction to a public way and *see* **Weir I, 143; Weir II, 118,** where it was *held* that an order directing a person to remove a fence, so as to allow of the use of an alleged right of way, cannot be passed by a Magistrate under this section and disobedience of such an order is not an offence under s. 188, I.P.C. This case was followed in **15 Cr. L. J. 291 (M.).** A Magistrate should proceed under Chapter X for the removal of an unlawful obstruction from a thoroughfare, **5 W. R. 5.** But in **26 M. L. J. 233 = 15 M. L. T. 230 = (1914) M. W. N. 394 = 15 Cr. L. J. 362,** it was *held* that the fact that s. 133 expressly provided for an order by a Magistrate directing removal of obstruction to a pathway did not necessarily imply that no similar order can be passed in proceedings under this section even where a

III.—INQUIRY.

(A)—PROCEDURE

22. Necessity of recording order before issue of process —This section does not require the Magistrate, as s 147 does, to formally record a proceeding stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists before he can institute proceedings under it though it requires the Magistrate to be satisfied upon proper materials before him that such a dispute does exist, **2 C. W. N. 670.** Possibly the reference to s 145 is only to sub-sec. (4) Failure to record a proceeding under this section does not render the order of the Magistrate bad, **27 M L. J. 587 = 16 M. L T. 427 = 15 Cr. L J. 671** It is to be noted that the words ' in the manner provided by s 145 ' were not in the Code of 1882 under which **2 C. W. N. 670** was decided Anyhow the inquiry contemplated does not necessarily include the preliminary order *See* **21 C. 727.**

23. Mode of proceeding must be as under s. 145 —A case under s 147 is to be decided by the same procedure and on the same principles as a case under s 145 **38 C 387.** An order under this section is without jurisdiction if it was passed on proceedings under s 133, without any action in accordance with s 145 Section 147 clearly says that the procedure under that section shall be as under s 145 which includes the filing of written statements, taking of evidence and, if necessary, local investigation, **15 C. W. N 667 = 12 Cr. L J. 43**

(B)—NOTICE TO PARTIES AND EVIDENCE

24. Mode of inquiry and taking evidence—Notice to principal parties necessary.—The inquiry contemplated by this section, is a judicial inquiry and the opinion formed by a Magistrate must be a judicial one, based on evidence legally recorded by him in the manner provided by s 356 and on due notice to the persons who respectively claim to deny the right, the subject of dispute Notice to servants of such person is not equivalent to notice to them and in such cases actual notice should be given to all persons claiming or denying the right and interested in the subject matter of the inquiry, **21 C. 737 ; 2 C. W N. 670.** Want of notice vitiates proceedings, **105 P. L. R. 1909.**

25. Ex-parte order illegal —Where a complaint was made to a Magistrate that an obstruction had been raised and existed on land reserved by Government and dedicated as a public road , *held* that an *ex parte* order directing the party in possession not to retain possession of the land until he should obtain the decision of a competent Civil Court adjudging him to be entitled to exclusive possession, with a further direction to remove the obstruction, was bad in law, **4 M. 121** The word ' may ' does not make inquiry optional with the Magistrate Unlike an order under s. 133, the inquiry under this section should precede any order *See* also **21 C 727.**

26. Burden of proof.—A Magistrate has a discretion whether he will interfere in a case of a dispute under this section The complainant must make out a sufficient case for the interference of the Magistrate, **11 W. R. 3.** Persons who claim a right of restraining other people from exercising ordinary proprietary rights over their own land must establish the same *i e* , the burden of proof lies on them, **11 C. 52.** In this case *A* objected to *B*, a neighbouring Zemindar cutting a bund situated in *B s* land.

27. Legal proof of user necessary —This section does not refer to stale cases, and no order can be passed thereunder without legal proof that the subject of dispute is open to the use of the public or any person or class of persons, **5 W. R. 57.** There must be a finding that the right was exercised within three months, **14 Cr. L. J. 303 (C).** An order under this section cannot be made without some evidence in proof of the allegation contained in the written statement, where the party who, in the ordinary course of things would oppose the order, does not expressly admit the allegations made by the other party An order therefore based solely on the written statement of one of the parties is illegal, even though the other party is *ex parte*, **30 C. 918.** But where the allegations of one party are admitted by the other, no evidence is necessary in addition to the written statement, **7 C. W. N. 351.** The jurisdiction given by this section to decide for a time the right to enjoyment of property should not be exercised, except on clear and satisfactory proof. Where the only evidence is that of user, it should be such as to show satisfactorily acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time, **4 M. H. C. R. App. XXVI.** But any intermittent encroachment on the part of a person who claims no easement or customary right would not affect the title or possession of the superior landlord, **31 C. 48 (L. R. 13 A. C. 793 at p. 799).** "The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment, to be effectual for any purpose It does not leave behind it any cloud on the title of the rightful owner," **32 C. 287.**

eminently necessary, **15 C. L. J. 267 = 12 Cr. L. J. 319.** Local inquiry may be ordered even after rejecting application for time for filing written statement, **16 Cr. L. J. 302 (C.).** *See* also Ord. XXVI, ss. 9 to 12 of the Code of Civil Procedure, which provide for the conduct of a local investigation by a duly appointed Commissioner.

2. **Local inquiry should not be directed to matters which may be proved by oral evidence.**—"The local inquiry referred to in the section should be restricted solely to some question relating to the features of the property about which the dispute has arisen, and should not be directed to any matter which can be proved before the Magistrate by oral evidence, such as the question of actual possession."—*Per* PRINSEP, J., **3 C. L. R. 134.** *See* also **Weir II, 118; 31 M. 82; 10 A. L. J. 465.** *See* Notes under Heading XIII (*d*) to s. 145. But *see* **37 M. L. J. 589** in which **31 M. 82** is not followed.

3. **Who ought to be deputed to make the local inquiry.**—The duty of making the local inquiry should be deputed to a Magistrate not to a *Canungoe*, **7 C. L. R. 352.** And it must be a personal inquiry by the person deputed, **5 C. W. N. 686.**

4. **Trying Magistrate may himself make local inquiry.**—The rule that in criminal cases, Courts are only justified in holding a local inspection in order to explain the facts appearing in evidence, does not apply to cases under s. 147. Though, as a rule, it is better to have the local investigation by some other person, there is nothing in law to prevent the presiding Magistrate from making the investigation himself, provided he records what he saw and does not act upon hearsay evidence, **15 C. L. J. 267 = 12 Cr. L. J. 319; 12 C. W. N. 896 = 8 Cr. L. J. 262.** The trying Magistrate may himself make the local inquiry, **5 C. W. N. 686.**

5. **Not necessary to examine deputed Magistrate as a witness.**—This is an enabling section authorising the District or Sub divisional Magistrate to depute any Subordinate Magistrate to make a local inquiry and in that case the Magistrate's report may be read as evidence without his being examined on oath, **12 Cr. L. J. 480 (C.).** But the Magistrate cannot refer the only issues raised in the case to a Subordinate Magistrate and decide the case without examining any witnesses merely on the report of the Subordinate Magistrate, **10 A. L. J. 465 = 13 Cr. L. J. 777.**

6. **Parties entitled to copy of report of local inquiry.**—When such inquiry has been made and the result reported, it becomes part of the proceedings in the case and the party affected by it is entitled to be acquainted with the results thereof, and to have an opportunity of rebutting the report of such inquiry, if he thinks it necessary, **21 W. R. 25.**

COSTS.

7. **Cost cannot be awarded where there is no decision.**—An order allowing the petitioners to withdraw a case initiated under s. 145 cannot be considered a decision and that being so, the Magistrate cannot while following the withdrawal direct him to pay the costs of the counter-petitioners, **9 M. L. T. 324 = 12 Cr. L. J. 49.**

8. **Assessment of costs within the discretion of the Magistrate.**—A wide discretion as to costs is given to the Magistrate by sub-section (3), but in assessing costs he should not fix an arbitrary sum (**Cal. H. C. Cr. Ref. 477 of 1902**) If the costs are such as fall within the scope of the section the High Court will not consider whether they are excessive or deficient, **15 C. W. N. 811 = 12 Cr. L. J. 376.** But the order must give particulars as to how the Magistrate arrived at the figure, else the order will be set aside, **14 C. W. N. 73.**

9. **What costs may be directed to be paid.**—The only costs which the Magistrate may under this section direct to be paid are costs which have been incurred as witnesses, or pleaders' fees, or both, **32 C. 602.** (*a*) *Damages.*—A Magistrate has no power under this section to direct that one party should pay another damages apart from such costs. He cannot include costs for cutting crops which have been attached, **32 C. 602.** (*b*) *Penalty for insufficient stamp duty.*—A Magistrate is not entitled to deal with penalties on documents not properly stamped by reason of s 44 (3) of the *Stamp Act.* S. 44 (3) of the Stamp Act cannot clothe the Magistrate with jurisdiction to deal with costs other than those provided for by s. 148 (3), **13 M. L. T. 224 = 18 Cr. L. J. 297; 14 Cr. L. J. 210 (M.).** (*c*) *Extra fee and travelling expenses.*—Nor should he include additional costs incurred for extra fees and for travelling and other expenses of a like nature incurred by bringing Pleaders or Counsel from a distance, **9 C. W. N. 887 = 1 C. L. J. 331 = 2 Cr. L. J. 408.**

10. **Costs to be awarded by Magistrate when passing decision—The order must be made within a reasonable time after the disposal of the main question.**—The law is that the order of costs must be made within a reasonable time and after notice to the other side. There is no decision of this Court which lays down

person had obstructed a pathway by a fence. A Magistrate has jurisdiction under this section to direct such a person 'not to obstruct' the pathway, **4 M. 121** and **Weir II, 143-144** were not followed. A suggestion was made that **4 M. 121** might be distinguished on the ground that that obstruction in that case was a permanent one while in this case the obstruction was flimsy

In **30 C. W. N. 238** it was held that the change in the wording of s 147 was made with a view to make it clear that the Magistrate has only the power to issue a prohibitory order restraining any person from doing any act interfering with the right of another when the Magistrate finds that it exists But the Magistrate has no jurisdiction to make an order *in the nature of a mandatory injunction*

34 **Can the Magistrate order the Police to remove obstruction?**—Where on a party failing to remove a bund in pursuance or an order under this section the Magistrate ordered the Police to remove the bund, *held*, that the order must be set aside There was no indication in the Code that the Legislature intended the Magistrate to carry out an order under this section through the agency of the Police The section clearly contemplates orders directed to the persons who are parties to the dispute, **36 C. 923**, *distinguishing* **5 C. W. N. 67** and **335** In **15 C. L J. 267 = 12 Cr. L J. 319**, however, it was *held following* **5 C. W. N. 67** and **335** and *distinguishing* **36 C 923** that Magistrate has jurisdiction to order the Police to assist a party in removing an obstruction This decison was *followed in* **39 C. 560.**

35 **Duration of the order must be fixed**—An order, made under this section is bad in form unless it specifies the time for which it is to operate Therefore, a first class Magistrate cannot forbid certain persons from taking part in any of the ceremonies in or appertaining to certain temples, **14 B 25** *Cf* **34 C. 897 (F.B)**

36 **Such rights**—For meaning of the expression, *see* **23 C. W. N. 956.**

IV.—REVISION.

37. **Revision.**—The High Court will not interfere with the discretion of the Magistrate, **7 M. 460, 29 M 97, 15 Cr L J. 359** But if the order is one made without jurisdiction or if the Magistrate has not followed the procedure laid down, the High Court will interfere, **105 P. L. R. 1909** *see* Notes under Heading XX to ss. 145 and 435 (3)

148. (1) Whenever a local inquiry is necessary for the purposes of this Chapter,* any District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid

Local inquiry

(2) The report of the person so deputed may be read as evidence in the case

(3) When any costs have been incurred by any party to a proceeding under this Chapter the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or any other party to the proceeding, and whether in whole, or in part or proportion Such costs may include any expenses incurred in respect of witnesses and of pleaders fees which the Court may consider reasonable

Order as to costs

Note.—The last sentence of sub-section (3) is now added by Act XVIII of 1923

LOCAL INQUIRY.

1. **Local investigation when to be ordered**—Local investigation should only be ordered in cases where they are absolutely required by the Courts, on subordinate points for a determination of the main issue in the case, for instance, in cases in which it is necessary to ascertain by measurement, disputed areas of land or to ascertain whether particular lands are identical with lands detailed in documents, and in such like cases When however, any fact can be elicited by evidence, that evidence *should be heard by the Court itself.—Cal H C Cr No 41 of 1866* In a case where levels and the fall of water are concerned, local inspection is

* The words "for witnesses, or pleaders fees, or both have been omitted by Act XVIII of 1923

16. **Power of High Court to order costs.**—The Madras High Court in **Letters Patent Appeal 88 of** 1908, *held* that costs may be awarded by the High Court; *contra see* **Oudh (S.C.) 277.** *See* also **48 M. 262; 27 Bom. C. R. 1353** and also Note 170 to section 145 above.

17. **Revision.**—When a Magistrate awards costs which are not mentioned in the section it is open to the High Court to interfere in revision, **13 M. L. T. 224 = 13 Cr. L. J. 297.** In **4 C. W. N. 83** it was *held* that the High Court is debarred by the terms to sub-sec. (3) of s. 435 from considering the matter as to costs passed under this section. *See* also **9 C. W. N. 887 = 1 C. L. J. 331 = 2 Cr. L. J. 408; 28 M. L. J. 134 = 16 Cr. L. J. 156.** In **17 Cr. L. J. 348,** Patna High Court *held* that an order for costs should not be revised.

18. **Suit to enforce order of Magistrate granting cost will not lie.**—*See* **11 C. W. N. 242** *distinguishing* **8 C. W. N. 178.**

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

Police to prevent cognisable offences.

149. Every Police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent the commission of any cognisable offence.

Notes.—1. Prevention of cognisable offences.—For definition, *see* s. 4 (*f*) and the *General Police Act* V of 1861 printed as Appendix XIV.

2. **Interposition of the Police for prevention.**—By s. 151, a Police-officer may arrest without warrant, if it appears to him that the commission of an offence cannot otherwise be prevented. Should he do so, his subsequent procedure must be regulated by s. 60. An officer in charge of a Police-station can proceed to inquire into such offences when they have been committed within the limits of such station. He should, however, when a complaint is made to him reduce such complaint into writing, and enter the substance thereof in the diary, whether the occurrence which is the subject of the complaint, took place within his jurisdiction or not.—*Beng. Pol. Man., 2nd Ed., p.* 374.

3. **Police-officers to secure the good will of the people, etc., for prevention and detection of crime.**—Police-officers shall themselves, and shall encourage their subordinates, to endeavour to secure the general good-will of the people and the assistance of the leaders of the different communities in the prevention and detection of crime, and generally in furtherance of the object of Government; and they shall become acquainted with the headman of all places within their jurisdiction, which may be important as the scene of offences, of large gathering or for any other reason. With a view to the repression of any tendency on the part of the Police to harass village officials, to oppress or to be corrupt, such officers shall, from time to time, make unexpected visits of inspection to the different stations and posts in their jurisdiction, and shall, at all times exhibit the utmost accessibility to the people, cultivate the friendship of well-disposed persons, and by visits to towns and villages, unattended by Police or other officials, ascertain the feelings of the people and facts enabling them to check the reports of their subordinates.—*Punj. Rul. and Chap. XXIV, p.* 282.

4. **Duty of Commissioner as to prevention and detection of crime.**—For the purpose of prevention and detection of crime, the Commissioner as Deputy Inspector-General is mainly responsible. The Commissioner will see the maintenance of cordial and intelligent co-operation between the Police in the different districts and between the Police and the Magistracy, the organisation of security proceedings under the Cr. P. C., the surveillance of bad characters, and the measures for the control of crime on the borders of British Territory and Native States. The Commissioner will satisfy himself that important cases are investigated on the spot by a suitable Agency, and that gazetted Police-officers take an adequate share in this work. He will give attention to special type of crime, such as the traffic in women, commonly known as *Barda Faroshi,* and the theft of arms.—*Punj. Pol Cir., p.* 214, *para.* 486.

5. **Co-operation of village servants.**—It is most important that the Police should secure the hearty co-operation of the landed proprietors, and especially of the village headmen or *Mukkadams.* These functionaries can do so much either to assist or to thwart the Police that it must always be an object to enlist them on the side of order. They must invariably be treated with the consideration due to their position, and care must be taken that they are not unnecessarily harassed. Amongst a well-disposed peaceable population

that an order for costs must necessarily be made at the time the judgment is delivered, **15 C. L. J. 267 = 12 Cr. L. J. 319; 15 C. W. N. 811 = 12 Cr. L. J. 376; Mad. Cr. R. P. No. 352 of 1905.** An order of costs should, as a rule, be made at the time of the passing of the main order when the facts are fresh in mind of the Magistrate, **13 O. C. 66 = 11 Cr. L. J. 335** The award of costs should be made by the Magistrate at the time of passing his decision under s 145, in the same manner as under s 218, Civ P C , the order for costs of any application should be made when the application is disposed of, **22 C. 387.** The words 'at the time' were explained in **15 C. W. N. 811 = 12 Cr. L. J. 376** to mean while the same Magistrate is still sitting and the parties are able to appear before him, **23 C. 37; 28 C. 302.** In **29 M. 373**, it was laid down that though the award of costs under this section should almost invariably be contemporaneous with the decision of main question and the order passed thereon under s 145 yet the fact that costs were awarded subsequently, would not render the award invalid, especially where the circumstances of the case require the postponement of the question of costs But no order in the matter should be passed, except within a reasonable time after the disposal of the main question and in the presence of both the parties It is in the discretion of the Magistrate to refuse to award costs, if there has been unnecessary delay in applying for costs, **47 Cal. 974.**

11. Delay in applying would be sufficient ground to refuse costs.—Order for costs and assessment of the same should not be made by the Magistrate, after a long interval, and without allowing all the parties affected an opportunity to appear and show cause, **24 C. 757; 10 C. W. N 1030 = 4 Cr. L. J. 171; 29 M. 373.**

12. Only trying Magistrate may order costs.—It is only the Magistrate who passes the order under ss 145, 146 or 147 that can decide by whom costs are to be paid in such a case, though the actual assessment may be made by his successor Section 148 cannot be interpreted as authorising the successor of the Magistrate who passed the order under s 145 to award costs to the successful party Where a final order declaring possession was made under s. 145 on 14th June, 1909, and no application for costs was put in until 6th October, 1909, when the Magistrate who made the final order had left the district and the Magistrate succeeding made an order granting costs, the order was set aside as without jurisdiction, (**21 C. 609; 22 C. 384** and **387; 23 C. 27; 24 C. 757** and **29 M. 373** considered), **13 O. C 66 = 11 Cr. L. J. 335;** *see* also **A. I. R. 1929 Pat. 93 = 114 I. C. 193.**

13. Assessment of costs may be made by Magistrate's successor.—Where a decision has been given in a case under s 145, and an order for costs has been made at the same time and by the same Magistrate, there is no objection to the amount of such costs being afterwards assessed by a different Magistrate, if an application for that purpose is made to him within a reasonable time, **22 C. 384; 23 C. 37; 28 C. 302, 10 C. W. N. 1030 = 4 Cr. L. J. 171; 15 C. W. N. 811 = 12 Cr. L. J. 376; 27 M. L. J. 613 = 16 M. L. T. 248 = 15 Cr. L. J. 876.** Once an order for costs has been made, there is no reason why the amount should not be subsequently assessed, as is done in civil cases, **14 M. L. T. 195 = (1913) M. W. N. 771 = 14 Cr. L. J. 570.** In this case, the Magistrate directed that a certain party should pay the costs without specifying the amount and fixed the amount subsequently having heard both the parties on the matter

14. ***Award of or assessment of costs must be made after notice to party affected.***—A Magistrate has no jurisdiction to pass an order under this section, making a party liable for a certain sum as costs without notice to him so that he might have an opportunity of contesting the same, **28 C. 302.** Proceedings under ss. 145 and 147 are *quasi*-civil in their nature An order for, and the assessment of costs under this section should be made at the time of passing decision under s 145 in the presence of parties or subsequently after notice, **24 C. 757; 29 M. 373; 14 C. W. N. 55; 13 C. W. N. 170; 15 C. W. N. 811 = 12 Cr. L. J. 376.** Previous order directing costs cannot be set aside without notice, **10 C. W. N. 1030 = 4 Cr. L. J. 171.**

15. Assessment of costs may be made in favour of legal representative of party.—At the time of passing the final order, the Magistrate directed payment of costs, but through some negligence in the Magistrate's office the costs were not included Nearly three years later, the successful party having died, his son applied to the successor in office of the Magistrate to ha[illegible]
by the son was su[illegible]
15 Cr. L. J. 676. C[illegible]
has got an order in his favour to obtain the fruits of that order Courts have power within reasonable limits to enact rules of procedure for this purpose, when the Legislature has not enacted such rules and there is no prohibition. Per *Sadasiva Ayyar, J*

PART V.

CHAPTER XIV.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

Note.—This Chapter, except s. 155, does not apply to the Police in the Presidency town of Calcutta, **15 C. 595** at **p. 606; 21 B. 495.** As to Bombay, *see* Note 2 to s. 155 and *see* Note 18 to s. 1. As to the powers of the officers of the Criminal Investigation Department, *see* **35 M. 247—359.**

Information in cognisable cases.

154. Every information relating to the commission of a cognisable offence, if given orally to an officer in charge of a Police-station, shall be reduceed to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

I.—FIRST INFORMATION.

Notes.—1. Section applies to offences committed outside the local limits of the station.—There is nothing in this section to prevent a Station House Officer receiving and recording the information of a cognisable offence committed outside his station limits, though he has no power under s. 157 to conduct an investigation. The Code is silent as to the correct procedure to be adopted by the Station House Officer in such cases, **1914 M. W. N. 382 = 15 Cr. L. J. 622.**

2. First information, its nature and importance.—The first information is the basis upon which an investigation under this Chapter commences. It is apparently thought that the information on which an investigation, is commenced, is not *the first information* of the offence and that when in the course of the investigation, something has been elicited which shows that an offence has been committed a first information can be recorded. This is certainly not what the law contemplates. In nearly every trial, it is important that it should be known to the judicial officer, what were the facts given out immediately after the occurrence and reported to the Police and the object of a first information is to render him so acquainted, **7 C. W. N. 345; 8 C. W. N. 218; (1911) 2 M. W. N. 14 = 12 Cr. L. J. 497; 16 C. W. N. 145 = 13 Cr. L. J. 65; 17 C. W. N. 1213.** *See* **(1911) 2 M. W. N. 373 = 12 Cr. L. J. 551,** where accused's name was not mentioned in the first report when it should have been mentioned. *See* also **14 P. W. R. 1909 = 11 Cr. L. J. 99; 23 P. W. R. 1914 = 15 Cr. L. J. 530; 26 P. W. R. 1915.** The first information is the basis of the case, and whether it be true or false, it at any rate usually represents what was intended by the informant to be the case set up by him at the time. All Criminal Courts should therefore bear in mind the importance of examining, when there appears to be any necessity to do so, the first information of an offence reduced to writing in accordance with this section. In view of the notorious tendency in this country to improve upon the original statement of facts, to strengthen the case as it proceeds, and sometimes to add to the persons originally named as the offenders, it is of great importance to know what was said at first. Th s is specially the case where the Court has to deal with evidence of recognition or where the facts of the crime are established, but the question whether all the persons charged with its commission actually participated in it appears to admit of doubt.—*C. P. Cr. Cir., Part II, No.* 9. In addition to the entry of the first information in the diary, if the Police-officer makes any memorandum of what the first informant said, that memorandum should also be produced, **7 C. W. N. 345; 27 C. 295** and **4 C. W. N. 49,** *see* also **47 A. 280 = 23 A. L. J. 14.**

3. The first information must be recorded at once—Statement recorded during investigation, not first information.—*A*, finding his brother *M* to be missing, gave information to the Police, but the Sub-Inspector did not record it as required by this section. Nevertheless he commenced investigation, and after four days when the matter had so developed that there was some reason to believe that *M* had been murdered, he for the first time recorded a statement from *A* as the first information; *held*, that such a practice was contrary to the provisions of this section and a statement recorded under such circumstances cannot be regarded as a first information. Any statement recorded as in this case, several days after the commencement of the investigation, and after there had been some development, is not only no first information, but has very little or no value at all as the original story has, because it can be made to fit into the case as then developed, **11 C. W. N. 554 = 6 Cr. L. J. 86; 16 C. W. N.**

nothing is more irritating to both the people and their landlords than the unnecessary intrusion and prying of the Police The Police will find in the village watchmen, when judiciously managed and kindly treated, their best allies in repressing and detecting crime, while if they oppress and tyrannize over them, they will soon discover that none can more effectually thwart and baffle their efforts —*C P Pol Man*, 56

Information of design to commit such offences

150. Every Police-officer receiving information of a design to commit any cognisable offence shall communicate such information to the Police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognisance of the commission of any such offence

Note —*See* ss 82—85 as to the powers and duties of a Police-officer The duties under this section must be performed without reference to local jurisdiction If he does not, he is liable under s 176, I P C *See* also s. 119, I P C

As to *suspicion* in respect of a cognisable offence, *see* s 157

Arrest to prevent such offences

151. A Police-officer knowing of a design to commit any cognisable offence may arrest without orders from a Magistrate and without a warrant, the person so designing if it appears to such officer that the commission of the offence cannot be otherwise prevented

Note.—Arrest without warrant made under this section must be reported to the District or Sub-divisional Magistrate *see* s 62 The provisions of ss 60 to 63 must be strictly followed in such cases

Prevention of injury to public property

152. A Police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable or the removal or injury of any public land mark or buoy or other mark used for navigation

Notes.—1. Every Forest officer and Police-officer shall prevent and may interfere for the purpose of preventing, the commission of any Forest offence—s 64, *Act VII of* 1878 (*Forests*).

2. Public property.—*I e*, public road building, lamp-post, land mark, mile-stone or a tree in a public avenue or Government forest. The offences in relation to these are set forth in ss 430 to 433 I P C But a Police-officer cannot arrest without a warrant in the case of an injury to a public land mark, s 434, I P C as it is not cognisable

3 Arrest without warrant—If a Police-officer is obstructed in the execution of his duty he may arrest him without warrant S 54, *cl* 5

Inspection of weights and measures

153. (1) Any officer in charge of a Police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction

Notes—1 [illegible]
powers in C [illegible]
As to Madr[illegible]
in his office standard weights and measures.

2. Power limited to Police-officer in charge of station.—The power under this section is confined to an officer in charge of a Police-station—*see* s 4 (*p*), to be exercised within the limits of his jurisdiction. *See* s. 551 as to powers of superior Police-officers.

3. False weights and measures—*See* Act XXXI of 1871 relating to weights and measures of capacity and the rules framed under s. 11 of that Act. *See* also Chapter XIII I P C., as to offences relating to weights and measures

given orally or presented in writing, be not complete in itself, the Police-officer should elicit by interrogation such further information as may be necessary. If a particular person be charged or suspected, the facts on which the suspicion is based should be clearly set forth. The informant should be required to distinguish what he professes to know personally from matters of which he has heard only second hand. Police-officers are strictly forbidden to make merely a note of the information and to defer drawing up the first information report until they have made further inquires into the complaint. The informant's statement, when complete, should be read over to him, and *he must sign it.* The report should show that this has been done. In "heinous cases" the statement should be read over to the informant in the presence of one or more respectable and uninterested witnesses, who should also be asked to sign it.—*Beng. Pol. Code, p.* 372. But a so-called information, that is, one recorded in the course of an investigation not being the first information, need not be signed, and would, if signed, be contrary to the provisions of s. 162.

8. **Information not a complaint—No Court-fee.**—Information to the Police is not a complaint in the strict technical sense of s. 4 (*h*) and it is not chargeable with any Court-fee under Act VII of 1870. *See* s 19, *cl. xvi of the Court Fees Act.*

9. **Punishment for making a false entry.**—Where a Station House Officer refused to enter in the Station Diary a report made to him concerning the commission of an offence and entered instead in the diary a totally different and false report as that which was made to him, he was found liable under s. 177, I.P.C., **20 A. 151.**

II.—FALSE INFORMATION.

10. **Prosecution for false information to Police.**—As to the liability for prosecution for giving false information to the Police, *see* **5 C. 281; 8 C. L. R. 255; 7 C. 87; 8 C. L. R. 387; 25 W. R. 10; 8 C. L. R. 289; 27 M. 127; 6 C. 496 = 7 C. L. R. 467; 6 C. 582.** *See contra* **7 M. 292.** Even if the statement made to the Police-officers is not reduced to writing as required by this section, the informant may be convicted of preferring a fa se charge under s. 211, I.P C., **27 M. 127.** But the mere despatch of a telegram falsely stating that a dacoity has been committed without mentioning any names does not constitute a false charge under s. 211, **1914 M. W. N. 382 = 15 Cr. L. J. 622.**

11. **Prosecution for false information to Village Magistrate who forwards complaint to Police.**—When a person gives information or makes his complaint to the Village Magistrate who in accordance with his duty under s. 45 submits the complaint to the Police, the complainant sets the criminal law in motion just as effectually as an information given under this section and is liable to be convicted under s. 211. **32 M. 258** (**31 M. 506** *dissented* from). *Contra* SANKARAN NAIR, J., *following* **31 M. 506** *held*, that such an information to the Village Munsiff cannot be regarded as one legally under s. 154, but was one really under s. 161. In **20 M. L. J. 132 = 11 Cr. L. J. 286,** it was *held* that if the law had already been set in motion against the complainant when the accused made the statement to the Police, the basis of the charge under s. 211, the proceedings could not be said to have been instituted by the statement of the accused and so **32 M. 258** did not apply. Such a statement was one under s. 162 and the accused could not be convicted under s 211, I.P.C., **31 M. 506** *followed.*

12. **No compensation when information given to Village Magistrate.**—It has been *held* in **(1911) 2 M. W. N. 558 = 10 M. L. T. 55J = 13 Cr. L. J. 29** *following* **25 M. 667** that compensation cannot be granted under s. 250 to an accused when the information was given to a Village Magistrate who forwarded it to the Police.

13. **Composition of offence no answer.**—The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211, I.P.C., **11 C. 79.**

14. **Sanction for prosecution for giving false information.**—No sanction is necessary for prosecution for giving false information to the Police, **24 W. R. 41; 5 C. 184; 3 A. 322; 7 M. 292.**

15. **Punishment for giving false information.**—Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person is punishable with imprisonment for six months, or fine of Rs. 1,000, or both.—S. 182, I.P.C. *See* also s. 203, I.P.C.

III.—COGNISABLE OFFENCES.

16. **Under the Indian Penal Code—**

(1) All offences under Chapter XII (*Coin and Government stamps*) are cognisable.

(2) All offences against the human body (Chapter XVI) are cognisable, excepting—

145 = 13 Cr L J 65 Where on the information given by a *Chowkidar* which was duly recorded in the *Station Diary* a Sub-Inspector went to the hospital and took down the statement of the dying man and filed it as *the first information held* that the statement could in no sense be regarded as the first information and the statement so regarded is not evidence except to refresh the memory of the person taking it down 6 C. W N 921

The word information in s 154 of the Code means something in the nature of a complaint or accusation The information referred to in s 154 may come from more than one source and more than one such information may be recorded at or about the same time but once the Police have taken active steps to investigate any written statements taken by them fall within s 162 and are inadmissible in evidence 2 Pat 517

4 **First information not by itself evidence—How it may be made use of at the trial**—Although a report of the commission of an offence made at a *thana* may be used in a criminal trial to corroborate or cross-examine a witness such reports are not evidence of the existence of the facts therein mentioned 1897 A W N 47 Where certain statements relating to the commission of an offence were made by *J* to *H* for the purpose of info ming the Police and *H* reported the statement to the officer in charge of a Police station who recorded it and the record was admitted in evidence and relied on as the first information *held* that the so called first information ought to not have been used as evidence because it was a reproduction by *H* of the statement said to have been made to him by *J* and although the evidence given by *J* could be contradicted by the evidence of *H* proving the statements made by *J* to *H* it could not under s 155 (3) of the *Indian Evidence Act* be contradicted by what the Police Sub Inspector recorded as the first information of *H* 8 C W N 218 The first information is a document of great importance and in the practice it is always and very rightly produced and proved in criminal trials But it is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it. *Per* CARNDUFF J in 17 C W N 1213 = 14 Cr L J 642 *See* also 15 C W N 198 = 11 Cr L J 557, 16 Cr L J 62 (Sindh)

5 **Actual words of complainant to be taken down in recording first information**—What the law requires is not a first information drawn up by a Police-officer and finally settled by an attorney but the statement of the person himself giving the first information 16 C. W N 145 = 13 Cr L J 65 It is of the utmost importance in recording the first information that the acual words of the complainant should be used and not an (Urdu) translation of them The recorder should take down the complaint as it is *made* and not merely his own impression of what the complaint meant to say Some Police-officers have been dismissed for falsely entering a report made at the station such falsification would have been impossible if the actual words of the complainant had been taken down read over to him and signed by him in token of their being correct.—*Reg and Ord N W P p* 268

6 **Desirable that the informant should be questioned and all information obtained**—If a Police-officer makes an investigation he is entitled to examine the person giving the information and the latter is bound to answer all questions other than those the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture 8 B 216 If the information be tendered in writing it will be endorsed with the date of presentation and the person tendering it will be required to sign it (if he has not already done so) If the written information relates to facts with which the person tendering it is acquainted and which he is able and willing to state orally the mere incident that a written report is presented does not make it unnecessary to take down the information from the reporter's own lips If the person who brings the written information knows nothing of the facts to which it refers he should be required to state the circumstances under which he brought it The written information will in any case be kept on record and acted on or not as may seem proper When the information relates to the theft of property the informant must be asked to give a detailed list of the articles stolen and should be closely questioned as to any noticeable mark or marks or other peculiarities of the articles which may afford hope of recognition. For instance an ornament may have been broken or repaired a brass vessel may have been dented or scratched by a blow or by a fall a shawl torn and mended Some individuality of construction is often to be found in the work of certain craftsmen. The complainant will be required too to state the value of each article and the weight and name of maker (if he can give them) of any gold or silver ornament stolen —*C P Pol. Man p* 147

7 **Special instructions for recording**—If the information be given orally, it must be recorded in plain and simple language as nearly as possible in the informant s own words. The use of technical or legal expressions, of high flown language or of lengthy and involved sentences is forbidden If the information whether

to above apply equally to all officers receiving information of the occurrence of heinous crime. In dacoities where the scene of occurrence is within reasonable distance of the line of rail, the officer, Sub-Inspector, Head Constable or Writer Constable, to whom the report is made at the station will ascertain and note in the Station Diary whether information was conveyed through the Station Master to the nearest Railway Police.

Cognisable cases.—Every cognisable complaint preferred before the Police, whether *prima facie* false or true, whether serious or petty, whether relative to an offence punishable under the Indian Penal Code or any Special or Local law, shall ordinarily be reported in the above form. Police-officers should not, when complaints of grievous hurt or other cognisable offence are made at Police-stations, await the result of the medical examination of the injured person or of any injury before recording a first information under this section. No general order to the contrary must be allowed to exist in any district. A first information report must be sent in immediately after intimation of a cognisable case is given, whether it be given by the complainant in person, by a person not personally interested in the case, by a Chowkidar, through the Magistrate on complaint, or by petitioner in any other way whatever. It is not optional with an officer in charge of a Police-station to defer the submission of the first information report till he has made a preliminary inquiry into the truth or otherwise of the complaint.

Vague rumours of crime.—The informant's statement as to such a rumour should find place in the Station Diary, and if on inquiry the rumour prove well founded, a first information report should be at once submitted.—*Beng. Pol. Code, p.* 368.

21. **Form and Contents of report.**—For the form (*memorandum of crimes and other occurrences*) prescribed by the Local Government of Madras, see *Mad. Pol. Man., Vol. II, Form No.* 44. The report should contain the following particulars:—(1) date and hour of receipt at Police-station of first information; (2) nature of information and parties concerned; (3) crime reported and value and details of property stolen, if any, (4) date of occurrence of the crime; (5) place of occurrence, direction and distance from Police-station, taken by officer in charge of station.

22. **The Code contemplates two distinct records.**—This section appears to provide for two distinct records, the former of which may be called for and made use of by the Magistrate or other judicial officer trying the case to which the record relates; whilst of the other, judicial cognisance can be taken only so far as the matter of inquiry affects the conduct of the Police-officer who prepared the record.

(*a*) *First record.*—The first record should simply contain the plain statement or deposition of the person making the complaint or giving information to the Police-officer, without any additional matter elicited by interrogation, or comment on the part of the officer receiving the complaint, and there is nothing in the law to prevent such complaint or statement being brought to the Police-station in written form. The law requires that before action is taken upon the complaint it shall be placed upon record either by the complainant himself or by the officer before whom the complaint is lodged. That judicial cognisance may be taken of this record in the trial of the case to which it refers is plainly to be inferred from the absence of any proviso to the contrary.

(*b*) *Second record or report.*—The second record provided by this section is purely for Police purposes, for the information of the superior officers of Police, and the future guidance of the officer in charge of the Police-station. This, as other subjects of record in Police Diary, is expressly declared to be excluded from judicial cognisance, except in so far as the subject of inquiry relates to the conduct of the Police-officer in connection with the case to which this record has reference. Ordinarily, it ought not to be sent to the Magistrate trying the case, but if, at the trial, the Magistrate requires the production of the diary, it must be produced. The Government cannot impose any limit upon the discretion of Magistrates in calling for evidence or in judging what is or is not evidence according to law. Although the diary kept by a Police-officer is not evidence of the facts stated therein, except against that officer, it may be evidence of other facts.—*Beng. Pol. Man.*, *2nd Ed*, *p.* 376.

VI.—GENERAL DIARY.

23. **"Book to be kept by such officer."**—This book is the *General Diary* also known as the *Station Diary* or *Station House Register*. The entries in this diary are *prima facie* proof that such complaints as are therein contained, were actually made and recorded, though of course, they prove nothing as to the truth or falsity of the information. Under s. 44 of Act V of 1861 (*Police*), the Station House Officer should record in this diary all complaints, and charges preferred, the names of the persons arrested, the names of the complainants, the offences charged, the weapons or property that may have been taken from their possession or

(*a*) Those relating to miscarriage and unborn children (ss 312 to 316). (*b*) Simple hurt, s. 323. (*c*) Simple assault, ss. 352, 355, 358 (*d*) Buying a person as slave, s. 370 (*e*) Keeping a person in confinement after writ of release has been issued s 345

(3) All offences against property (Chapter XVII) are cognisable, excepting—

(*a*) Extortion, ss 384 389 (*b*) Criminal misappropriation, ss 403 and 404 (*c*) Criminal breach of trust by a public servant or a banker, s 409 (*d*) Cheating ss 417 to 420 (*e*) Fraudulent deeds and disposition of property (*f*) Mischief generally, and mischief by removing a land mark, ss 426, 427 and 434

(4) The offences of rioting, and being a member of an unlawful assembly (ss. 143 to 148). Personating a public servant (ss 170 and 171). Resistance to apprehension, escape from custody (ss. 224 to 226) and harbouring offenders (ss 212 to 216)

17. Under the Railway Act IX of 1890—S 100—Railway servants drunk on duty S 101—Railway servants endangering the safety of persons S 119—Male persons entering carriage or other place reserved for females S 120—Intoxication or indecency on the part of any person, or interfering with the comfort of passengers or extinguishing a lamp S 121—Obstructing Railway servant in his duty S 126—Maliciously wrecking or attempting to wreck a train S 127—Maliciously hurting or attempting to hurt persons travelling by rail Ss 128 129—Endangering safety of persons travelling by Railway, by (*a*) wilful act or omission (*b*) rash or negligent act or omission S 130 (1)—Minors guilty of offences noted in ss 126 to 129

IV.—SHALL BE SIGNED.

18. First information must be proved only by the written record—Having record to the provisions of this section and s 91 of *the Evidence Act*, the only legal proof of the terms of a complaint of a cognisable offence to the Police is the written record of the same, excepting where secondary evidence of its contents is admissible It would be most unsafe if in cases under s 211 I P C, a Policeman s report of what a complaint contained could be accepted as sufficient proof of its contents without insisting on the production of the document itself if it were in any way procurable, **1 Bur S. R 572.**

19. Refusal to sign is punishable—Refusal to sign a statement made to a public servant, when required so to do, is punishable with simple imprisonment for three months, or fine of Rs. 500, or both—S 180, I P C

V.—FIRST INFORMATION REPORT.

19-A. Report of first information not part of a judicial record—Neither a Judge nor a Magistrate can direct that a complaint which the Police are required by this section to reduce to writing, shall be retained as part of the judicial record of the investigation before the Magistrate But the substance of the complaint is to be entered in the Police-officer s diary, and the Magistrate can call for and inspect the same. The record would be more conveniently retained in the custody of the Police-officer than filed in the Magistrate s office

20. First Information Report.—This report is drawn out and submitted under this section and s 157, whereby the officer in charge of a Police-station is ordered upon information received, to send a report to the Magistrate empowered to take cognisance of such offence upon a Police report. *See* s. 190 This section directs every complaint or information preferred to an officer in charge of a Police-station shall be reduced to writing and entered in a book. When in the absence of the Sub-Inspector or Head Constable a station or outpost is left in charge of a constable, he cannot accept any complaint or prepare and submit the first information report of any crime reported to him unless the Local Government shall have given powers to such officers under s 4 (*p*). He will, however, enter in the Station Diary an abstract of the complaint for the information of the District Superintendent, and will report the complaint to the officers in charge of the station or outpost, as the case may be, by sending the complainant or informant with a note of the same to him.

Heinous crime—Whenever a report is received of the occurrence of heinous crime during the absence of the Sub-Inspector or other officer above the rank of constable, the writer (or other) constable competent to make the entry in the Station Diary, will also arrange to send immediate information to the Sub-District Inspector, or if the facts of the case, as may occur in dacoity, murder, etc., require the immediate apprehension of the accused, he will make arrangements accordingly When the report of heinous crime relates to an occurrence outside the jurisdiction of the officer to whom the report is made, he will at once send information to the Police-station within whose jurisdiction the occurrence took place and if circumstances of the case warrant it, will effect the apprehension of the accused. The instructions regarding early apprehension in the cases alluded

2. Powers of Police and Magistrates in non-cognisable cases.—This section deals only with the powers of Police-officers It confers no power or authority on Magistrates to direct a local investigation by the Police, or call for a Police report, **12 B. 161.** But in **8 Bom. L. R 589 = 4 Cr. L. J. 183** it was *held* that a Magistrate was empowered under sub-sec (2) to refer cases of non-cognisable offences to the Police for investigation and report and under s. 156 (3) cases of cognisable offences. *See* also **4 L. B. R. 137 = 7 Cr. L. J. 414, 10 W. R. 49, 16 C. W. N. 1049 = 13 Cr. L. J. 691; 1914 U. B. R. 19 = 16 Cr. L. J. 87,** and Note 4 to s 156 Upon information given of the commission of a non cognisable offence, a Police-officer can instead of merely referring the informant to a Magistrate under s 155 (1) report the case to Magistrate under s 155 (2) who can under such circumstances order an investigation without first taking cognisance of the offence under s 190 Section 155 (2) read with s 529 (*b*) and Schedules III, II (*2*) leaves no doubt on the point, **6 M L T. 259 = 11 Cr. L. J. 156.** *See* also **16 C. W. N. 1049 = 13 Cr. L. J. 691, 1914 U. B. R. 19 = 16 Cr. L. J. 97.**

The object of the Legislature being to allow aggrieved parties direct access to justice, without the intervention of the Police, the Calcutta High Court in its circular, dated 20th July 1871, cautions Mag strates, especially in summons-cases and non-congnisable cases against the indiscriminate use of the Police agency for ascertaining facts regarding which the Magistrate is bound to form his own conclusion on evidence given before him.

3. What Magistrates empowered.—The powers contained herein are exercisable only by Magistrates of the second class and upwards —Sch III, cl. 2, and in addition they must have power to try the case or to commit it for trial If a Magistrate not empowered erroneously and in good faith orders a Police investigation in a non-cognisable case, his proceedings shall not be void *See* s 529 (*b*).

4 Delegation of duty to other Police-officer —It is questionable whether a Police Inspector ordered by a Magistrate to investige a non-cognisable offence, can legally delegate the duty of making the investigation to a Chief Constable, **Ratanlal 433.**

5. Police Report of non cognisable offence if a "comp'aint"?—The officer receiving information cannot submit a re,p rt If of his own motion, as where he has himse f seen the alleged offence committed he makes a formal report or complaint that will amount to a comp laint as defined in s 4 (*h*, **26 B. 150** The person who gives the information may himself be a Police-officer *See* Note 11 to s 4 and Notes to s 190

6. Consequence of entering false report in Station Diary.—A Police-officer at a Police station who, being as such officer bound to enter all reports brought to him of cognisable or non-cognisable offences in the Station Diary refused to enter a rep rt made to him concerning the commission of an offence and entered instead in the diary a totally different and false report as that which was made to him is guilty of the offence mentioned in s 177, I P C, **20 A. 151.**

7. Improper use of statement made to Police —In **10 C 256** it was *held* that statements of witnesses or confessions taken at a Police investigation, are not *as far as their subject matter is concerned* any more the property of the Police than the property of the prisoners and that a pleader was not guilty of misconduct in making use of copies of such documents for the benefit of his client, when delivered to him by the client, however improperly the client may have become possessed of them, provided the pleader was neither party nor privy to the obtaining of them.

8. Police procedure where investigation ordered.—If an order is given by a competent Magistrate for an investigation by the Police (under s. 202), into the truth or falsehood of a complaint of a non cognisable offence, a Police-officer may institute and carry through an investigation into the offence just as if it were a cognisable one—with this exception that he cannot arrest and *challan* the accused or any other person in the event of his investigation leading him to believe any particular individual to be guilty All that he can do is to ***report the result of his investigation*** If, however, the investigation reveals that the offence is really a cognisable one, it is the duty of the Police-officer at once to bring the offence on the Crime Register, to report to the Magistrate that he is dealing with the offence under s 157 and to act accordingly —*C P Pol. Man*, *p* 163 *See* Note 9 to s. 156

9. Duty of Police to send report to Magistrate after investigation—Police cannot independently institute proceedings under s. 211, I P C.—Information of the commission of a non-cognisable case was given to the Police who obtained the authority of a Magistrate under s. 155 to investigate the case without submitting any report to the Magistrate under s. 173, the Police after some investigation instituted proceedings against the informant under s. 211 and obtained a conviction, *held*, the conviction was illegal. The case had not

s 200, but merely considered the effect of such omission on orders subsequently passed by him as if under ss 203 and 476 In **8 Bom. L. R. 589 = 4 Cr. L. J. 183**, however, it was *held* that where one *L* appeared before the Police and was by the Police referred to the Magistrate with the intimation that he should make an application to the Magistrate and that they would then enquire and from the facts stated it was not known whether the offence was cognisable or non cognisable and then *L* made his representation to the Magistrate who then sent it to the Police to investigate and it was contended that the Magistrate could only proceed under Chap XVI and that he had no power to direct investigation *Held*, that the Magistrate had power to direct investigation by the Police If it was a cognisable offence he had power under s. 156 (3) and if it was non-cognisable he had this power because he had taken cognisance of the offence under cl (*c*), s 190 and not upon a complaint Chap XVI did not apply *See* also Note 3 to s 155 As to whether a Magistrate can refuse to take cognisance of a complaint which has been duly made to him on the ground that it relates to an offence cognisable by the Police, and should therefore have been made to the Police, it was *held* by the Punjab Chief Court, following **4 B. 489** and **7 C. 157**, that a Magistrate cannot refuse, when properly called on to do so, to exercise jurisdiction merely on the ground that the complainant might reasonably have had recourse to the Police instead of to the Magistrate The question remains as to whether a Magistrate, after having taken cognsiance, may not properly call on the Police to assist in investigating the case It seems to the Judges that a Magistrate who has taken cognisance, under s 190 of an offence cognisable by the Police may, after complying with the provisions of s 200 and issuing his process (if he sees no reasons for doubting the truth of the complaint and otherwise find sufficient ground for proceeding), give information of the case to the Police-officer having jurisdiction, with a view to his further investigating its facts and circumstances in the manner laid down in s. 157 In such a case, as is contemplated, the Police-officer would not have to take measures for the discovery and arrest of the offender, as the supposed offender would be known and a process would have been issued by the Magistrate to compel his appearance but in other respects it would rest with him to take steps to secure the case being properly brought before the Court, and he would be responsible that the witnesses named by the complainant to the Magistrate were supplemented by any others who might be necessary to complete the case for the prosecution

The above remarks proceed on the assumption that the complainant to the Magistrate knows, or thinks he knows, who has injured him In cases of complaint of a cognisable offence against an *unknown* offender, the Magistrate would have to record, under s 203, that there were in his judgment no sufficient grounds for proceeding It would also be open to him to communicate to the Police the information supplied to him or to leave it to the complainant either to apply to the Police or to take such other measure, as he thought proper for discovering the offender —*Punj. Cr*, *Vol II, p* 163, *et seq*

5. Sessions Judge cannot direct investigation by Police.—Section 156 only empowers Magistrates to direct investigation and a Court of Sessions therefore has no power to direct investigation **11 P. R 1910 = 16 P. W. R. 1910 = 11 Cr. L. J. 330.**

6. Scope of clause (3).—Cl. (3) enables a Magistrate to direct an investigation even when he has received no report or complaint.

7. Duty of Magistrate where there is delay in investigation.—Where there is great delay in the investigation by the Police, it is the duty of the committing Magistrate, and failing him, of the Sessions Judge to enquire fully into the circumstances of the delay, and to consider its bearing on the prosecution story, **3 Bom. L. R. 1902.**

8. Police inquiry need not be exhaustive, but it must be impartial —A Police-officer would not discharge his duty if he declined to listen to, or call for information tendered by the accused, which went directly to negative the charge against him. But if the evidence was of a nature which, if adduced and believed would still leave the accused under such a degree of suspicion as would justify his transmission before the Magistrate, then the Police are not bound to delay the inquiry with a view to such investigation.—*Mad Pol. Man., p.* 90.

come to an end, and could not come to an end without an order of the Magistrate. This being so, it is contrary to the method and the spirit, contrary indeed to the whole system of our criminal procedure, that the Police should be allowed to prosecute in the way they have done without even having the case disposed of by a Magistrate. The point is one not of technicality, but of very great importance. One need say little to show how absolutely contrary to our system things would be if the Police were allowed independently of the Magistrate to take proceedings, as they have done here, in cases which had never been disposed of by Magistrate,' **17 Bom. L. R. 69 = 16 Cr. L. J. 161.**

10. **Statements made to the Police under sections 154 and 155 cannot be used as evidence or made the foundation of a charge of defamation.**—Statements made to the Police as the result of action taken under section 154 or section 155 of the Code of Criminal Procedure are privileged statements, and, as such, cannot be used as evidence or made the foundation of a charge of defamation. Further, inasmuch as a statement, in order to be defamatory within the meaning of section 499, I.P.C., must be made with a certain intention, a statement made primarily with the object that the person making it should escape from a difficulty cannot be made the subject of a criminal charge merely because it contains matter which may be harmful to the reputation of other people or hurtful to their feelings, **41 A. 311.**

Investigation into cognisable cases.

156. (1) Any officer in charge of Police-station may, without the order of a Magistrate, investigate any cognisable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a Police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as abovementioned.

Notes.—1. Investigation not a judicial proceeding.—Having regard to s. 4 (*m*), the investigation by a Police-officer is not a stage of a judicial proceeding, because the Station House Officer has no power to record evidence on *oath* and though persons examined by him are bound to answer under sub-sec. (2) to s. 161, all questions put to them, they are no longer bound to answer *truly*. *See* definition of "judicial proceeding" and Notes thereunder.

2. **Powers of superior Police-officers to investigate.**—Under s. 551, Police-officers superior in rank to an officer in charge of a Police-station may exercise the same powers throughout the local area to which they are appointed, as may be exercised by such within the limits of his station. An Inspector of a Provincial Criminal Investigation Department has jurisdiction to investigate in any part of the Province, as a Presidency or Province may well be *held* to be the "local area" to which he is appointed. It was so *held* by the majority of the Judges in **35 M. 397.** The minority was of opinion that the Criminal Investigation Department was created to assist the ordinary Police force in the detection of certain crimes and an Inspector of that department was not entitled to exercise the same powers as the officer in charge of a Police-station under s. 156. *See* **(1919) M. W. N. 199.**

3. **Effect of application of Chap. XV.**—The effect of applying the provisions of Chap. XV, relating to the place of inquiry or trial, to Police investigations in cognisable cases, is to give the Station House Officer power to investigate cases over which more than one Court has jurisdiction, as *e.g.*, *murder in dacoit* under sub-section (1) of s. 181. In **1893 A. W. N. 124** it was pointed out that the reference to Chap. XV, in this section did not limit the application of s. 156 to offences only, but the investigation may extend to cases within the scope of s. 55. *See* also **15 A. 11.**

4. **Is a Magistrate competent under this section to order investigation by Police when complaint made to him.**—It is the duty of a Magistrate, on presentation of a complaint of any offence, to immediately proceed in the manner laid down in Chap. XVI, and the Magistrate has no option of referring it to the Police for investigation under sec. 156 (3). If an alternative procedure to that laid down in sec. 200 had been intended it would have found place in Chap. XVI and not in Chap. XIV which deals with the procedure and

Non-Cognisable Cases

1 After investigation ordered by Magistrate case found to be true.	Send Charge-sheet to the Magistrate by whom the case was referred
2 After investigation ordered by Magistrate case found to be false	Send Referred Charge-sheet to the Magistrate by whom the case was referred through Divisional Inspector
3 The accused arrested under s 57 name and residence not ascertained within 24 hours	Send the accused with Occurrence Report to the Magistrate having jurisdiction
4 The accused arrested under s 57, name and residence ascertained within 24 hours.	Release the accused and send bond with Occurrence Report to the Magistrate having jurisdiction

Notes—(1) Station House Officers should endeavour to ascertain the truth and real nature of the case from the complainant and get the charge put up in its true character

(2) A report will be made to the Magistrate under s 173, in all cases investigated by the Police irrespective of results

(3) An investigation is held to be completed—(*a*) When the Police have done all in their power to find the offender or offenders and have failed (*b*) When the Police arrest and charge an offender (*c*) When the Police refer as false a charge that they have investigated

(4) The results of Police investigation into cases connected with other Government departments or establishments should be communicated at once by the Police officer making the investigation to the local head of such department or establishment

Procedure where cognisable offence suspected

157. (1) If, from information received or otherwise, an officer in charge of a Police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognisance of such offence upon a Police report, and shall proceed in person or shall depute one of his subordinate officers "*not being below such rank as the Local Government may by general or special order prescribed in this behalf" and to proceed, to the spot to investigate the facts and circumstances of the case, "*and if necessary, to take measures" for the discovery and arrest of the offender

Provided as follows —

Where local investigation dispensed with

(*a*) When any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a Police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot,

Where Police-officer in charge sees no sufficient ground for investigation

(*b*) If it appear to the officer in charge of a Police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case

(2) In each of the cases mentioned in clauses (*a*) and (*b*) of the proviso to sub-sec. (1), the officer in charge of the Police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, "*and in the case mentioned in clause (*b*), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated"

Note—The addition made to sub section (2) makes it obligatory on the Police to inform the complainant if the complaint is not investigated

* The words in the inverted commas, *viz* "not being .. .. in this behalf" and .. .. measures and and in he case mentioned in clause (*b*) .. .. cause it to be investigated" were added by Act XVIII of 1923

9. Police procedure.—The following tabulated form (taken from the *Madras Police Manual* shows the proper procedure, under this Code, on receipt of a complaint or information of the commission of a cognisable offence, and on receipt of an order from a Magistrate to investigate a non-cognisable offence:—

Cognisable Cases.

CIRCUMSTANCES.	PROCEDURE.
1. The facts appear to constitute a cognisable offence. No person accused, or, if accused, not arrested. Station House Officer determines to enter on an investigation either at the scene of the alleged crime (sec. 157) or at the station house [s. 157, proviso (*a*)].	Send original information, whether it be the Village Magistrate's Report or the information written or dictated by complainant or informant, with Occurrence Report (Form No. 44, Vol. II) to the Magistrate having jurisdiction.
2. The facts do not appear to constitute an offence, or in cases of pretty nature there is no chance of procuring any evidence, so that the Police think that there is no necessity for entering on an investigation [s. 157, proviso (*b*)].	Send original information, whether it be the Village Magistrate's Report, or the information written or dictated by complainant or informant, with Occurrence Report to the Magistrate having jurisdiction explaining reasons for not investigating.
3. Accused arrested on sufficient grounds. Investigation cannot be completed within 24 hours.	Send accused at once to the nearest Magistrate with Crime Occurrence Memo: containing an exact copy of entries regarding the case in Station House Report.
	Note.—If the accused is forwarded to a Magistrate other than the Magistrate having jurisdiction, Occurrence Report as in Case I must be sent to the latter.
(*a*) On completion of the investigation, the case is found to be true.	Send Charge-sheet (Form No. 45, Vol. II) to the Magistrate having jurisdiction.
(*b*) On completion of the investigation, the case is found to be false.	Send Referred Charge-sheet (Form No. 46, Vol. II) to the Magistrate having jurisdiction through Divisional Inspector.
4. On completion of the Investigation the case is found to be true; the Police have done all in their power to find the offender or offenders and have failed.	Send Form No. 47, through the Inspector of the Division, to the Magistrate having jurisdiction.
5. The accused arrested. Inquiry likely to be completed within 24 hours.	Detain the accused. Send Occurrence Report as in Case I.
(*a*) On completion of investigation the case is found to be true.	Send the accused (or in bailable cases bail bond) with Charge-sheet, to the Magistrate having jurisdiction.
(*b*) On completion of investigation, the case is found to be false or evidence is insufficient to justify transmission of the accused to Magistrate.	Release the accused on bail and send bond with Referred Charge-sheet, through Divisional Inspector, to the Magistrate having jurisdiction.
6. The accused not found, but after investigation, the case is found to be true, and such facts elicited as would justify his arrest.	Send Charge-sheet to the Magistrate having jurisdiction asking for warrant.
7. The accused not arrested or no person accused. After full investigation it is found that no offence has been committed.	Send Referred Charge-sheet, through Divisional Inspector, to the Magistrate having jurisdiction.
8. After investigation it is found that the facts constitute an offence of a less grave nature than at first alleged, *e.g.*, charge of robbery found to amount in fact only to theft.	Send Referred Charge-sheet, through Divisional Inspector, to the Magistrate having jurisdiction, asking for authority to correct the record.
9. The parties concerned in a compoundable cognisable case, request the Police to stop investigation on the ground that a compromise has been effected.	Send Referred Charge-sheet, through Divisional Inspector, to the Magistrate having jurisdiction, for orders.

9. Investigation to be conducted on the spot if possible.—Police officers, when inquiring into cases under this Chapter, should not ordinarily send for persons who appear to be acquainted with the facts and circumstances of cases under enquiry to the station house for examination It is true that Police-officers have the power to require attendance of witnesses But this should never be done, save as a last resource or when circumstances render it necessary Police-officers should always bear in mind that they are mere detective officers going about, noting (in their note-books) such information as they may be able to obtain with a view to future proceedings, that this will be far better obtained, by going from house to house, and conversing with persons in the manner least likely to rouse their fears and cause reluctance to make disclosures that may result in their being obliged to appear before a Court of Justice to give evidence publicly, a public examination at a station house will always have this effect and therefore should be avoided as far as possible Whereas if the convenience of the people be studied and enquiry conducted in a conciliating and judicious manner, people will more readily disclose what they know At the same time, it is obvious that private enquiries must be very carefully watched, and men so employed be closely and constantly supervised —*Mad Pol Man*, *p* 90

10. Investigation in petty cases of theft in Madras.—The Police will record and report, but not investigate, cases of petty thefts not exceeding one rupee Such cases are cognisable by heads of villages If complaints of such offences are made to the Police they will refer the complainant to the Village Magistrates Heads of villages are required by cl 2, s 6, Reg IV of 1821, to report to the Police, after disposal, all such cases of petty thefts in which they shall have exercised the power of punishment granted to them. The Police will of course investigate such cases and prosecute them before the regular Magistrates under the sections of the Penal Code, if attended with aggravating circumstances, or if committed by old offenders or by professional thieves. They will similarly prosecute before the regular Magistracy all cases of salt in which the value of the salt involved (cost price *plus* duty) amounts to more than four annas, and also all cases of petty thefts no matter how small is the value of the property lost, which occur in Railway trains or on the premises attached to Railway lines or stations, *Mad. Pol. Man*, *Vol I pp* 74 *and* 75

11. Rules to guide Police-officers to use their discretion in taking up investigation of cognisable offences.—Abstention from investigation—Bengal.—The discretion to be exercised regarding this matter is vested in the Police-officer, and the responsibility of properly exercising it rests with him As a guide, how ever, to the manner in which this discretion might be exercised the following broad principles are laid down —

I Every reported cognisable offence should be investigated, when an investigation is asked for

II No investigation should ordinarily be made into the following classes of cases unless an investigation is asked for —

(1) Cases of house breaking or attempted house-breaking, when there is no theft and no clue to the offender

(2) Theft cases where the property reported to be stolen is—

(*a*) less than Rs 5 in value, and

(*b*) of such a nature as not to be easily identifiable, such as grain or fruit, and

(*c*) the informant has no suspicion as to the offender

(3) Assault cases when other charges such as theft are superadded, and the latter appear to be more than doubtful,

(4) Cases in which the criminality of the act charged depends upon the decision of a question in dispute, such as a question of title or possession, which it is within the province only of a Civil Court or of a Criminal Court under Chap VIII or Chap XII of this Code, to decide

Police officers must understand these are not *hard-and fast rules to be blindly followed* in every case These instructions indicate only general principles, and Police-officers are bound by law to exercise their *discretion in every cognisable case that is reported to them* —*Beng Pol. Code*, *pp* 374 *and* 375

United Provinces.—In the United Provinces of Agra and Oudh, no investigation can be made *without the request of the injured person* in cases of *theft* under ss 379 and 380 of the Penal Code, in which the value of the stolen property is less than Rs. 10, in cases of *house breaking by day* under ss 453 and 454 and *attempt at house-breaking* of this nature, unless there has been theft of property to the value of Rs. 10 or upwards, and in case of *attempt at house breaking by night* under ss 456—459 of the Penal Code —*Pol Man*, *N-W P and Oudh*, *Sec X*, *p* 139

Notes. 1.—The difference between s. 154 and s. 157—is this, that whereas every information covered by the former section must be reduced to writing as provided in that section, it is only information *which raises a reasonable suspicion* of the commission of a cognisable offence within the jurisdiction of a Police-officer to whom it is given which compels action under the latter section, although, of course, a report would be sent to the Magistrate.—*Punj. Cir., Chap XLV, p.* 171.

2. **From information received.**—The words "*from information received*" refer to the information given in s. 154; **14 C. W. N. 326 = 11 Cr. L. J. 201; 1914 M. W. N. 382 = 15 Cr. L. J. 622.**

REPORT.

3. **First report of an offence—"Occurrence Report."**—The report required by this section is the first report of an offence, which an officer in charge of Police-station is required to make to a Magistrate as soon as he receives information of an offence and before entering on its investigation. It is to be made direct to the Magistrate in order that he may have an early information and be in a position to act, if necessary, under s. 159 of the Code. A certified copy of the original crime report made by the *Police patel* to the officer in charge of a Police-station should be attached to the latter's first report.—*Bom. Pol. Man., p.* 91. The report under this section is the preliminary report before investigation commences, **4 C. W. N. 351; 32 A. 30; 1899 A. W. N. 87.**

4. **Necessity for report—Responsibility of Magistrates.**—Failure to send the report required by this section is a serious breach of duty which may lead to failure of justice, **4 S. L. R. 38 = 11 Cr. L. J. 498.** This section requires that immediate intimation of every complaint or information preferred to an officer in charge of a Police-station of the commission of a cognisable offence shall be sent to the Magistrate having jurisdiction. The object of this provision is obvious, and it involves more than a mere technical compliance with the law. The Magistrate is primarily responsible for the condition of the district as regards repressible crime, and he is not at liberty to divest himself of that responsibility, or to relax that supervision over crime which the law intends that he should exercise. It is his duty to know and consider each cognisable case as soon after its occurrence as possible. He should not rest content with reading the *challan* when the case comes up for trial, but he should watch the various steps taken by the Police and advise them in all cases whenever it may be necessary. Moreover, it is for the Magistrate, by the continuous study of diaries, to acquaint himself with what is going on of the salient and special kind referred to in the Code, as matters for his attention and possible interference. It is for the Police to keep the Magistrate constantly informed of them, **Smyth, p. 83.**

5. **Intimation of offences to Magistrates.**—District Magistrates should keep District Superintendents of Police informed as to the offences which each Magistrate in the district is (according to the class of the Magistrate and the general arrangements for the distribution of cases) to enquire into or try, in order that Police officers may always know who is the Magistrate empowered to take cognisance of a particular offence to whom the report referred to in this section is to be sent. *C. P. Cr. Cir., Part II, No.* 10.

6. **Transmission of the Report in Burma.**—In Burma, reports of the nature referred to in this section must be submitted to the Magistrate having jurisdiction through the District Superintendent of Police; or, if no such officer be resident at the station, through the Assistant Superintendent of Police; or, if there be no Assistant Superintendent in the station, through the Inspector. If no Distrct Superintendent, Assistant Superintendent or Inspector is resident at the station, the report must be submitted to the Magistrate having jurisdiction.—*Bur. Gazette*, 1879, *Part II, p.* 189.

INVESTIGATION.

7. **Investigation under s. 157 does not include every inquiry which a Police-officer may make.**—Most investigations are initiated on information recorded under s. 154 and vouched for by the informant. But the Police must frequently hear of alleged offences from less reliable sources, *e.g.*, village gossip, or the receipt of telegram, which, so far as authenticity goes stands in no better position. In such cases it is discretionary with the officer to take action or not before deciding as to the course to adopt, he may frequently deem it well to make a few preliminary and informal inquiries as to whether there is anything in what he has heard to render a formal investigation desirable, **1914 M. W. N. 382 = 15 Cr. L. J. 622.**

8. **Does this section empower the Police of one circle to investigate an offence in another?**—In **12 P. R. 1915 = 16 Cr. L. J. 551,** it was *held* that in s. 157 there was no provision preventing the Police of one Police-station from acting under that section in the jurisdiction of another Police-station.

i.e., a report made before the completion of the Police investigation or inquiry, but where such report is submitted after investigation, the Magistrate has no jurisdiction to act under this section, **4 C. W. N. 351.** In this case information was laid before the Police, charging a person with criminal trespass into a house with intent to have improper intercourse with one of the female inmates thereof and the Police reported that they did not believe that the object was to commit the offence stated, but that they *were not disinclined to* believe the charge of trespass, *held*, that the report was not one under s 157, and the Magistrate in such a case had no jurisdiction to act under this section, and his action not being a judicial proceeding, the direction of the Magistrate to prosecute the complainant for an offence under s 211 was set aside This case was followed in **32 A. 30.**

(i) *Magistrate has no power to make further inquiry when Police report is made after full inquiry* — It is only on receiving a report under s 157 that a Magistrate is competent to hold *a preliminary inquiry* under this section Where, therefore, a report of the commission of an offence has been made by the Police after *full inquiry* into the truth of the information given them as to the commission of an offence, the Magistrate to whom such report is made has no jurisdiction either under the section or under s. 202 to make a further inquiry into the same matter, **1899 A. W. N. 87.** The object of inquiry (or investigation) is to ascertain whether there are grounds *for believing the accusation* to be well founded *The section does not authorise a further inquiry* *See* also **32 A. 30, 17 C W. N. 824.**

(ii) *Section not applicable when complaint made direct to Magistrate* —If a complaint is made to a Magistrate himself he is bound to proceed under s. 200, **30 C. 923; 10 M. L. T. 120 = (1911) 2 M. W. N 74 = 12 Cr. L J. 463** and Note 4 to s. 156

2. Magistrate conducting inquiry must not try the case himself.—When a Magistrate took an active part in the capture of parties charged with the commission of an offence and tried them himself on that charge, it was *held*, that he was bound to state to the accused so far he could, what were the facts he himself observed and to which he himself could bear testimony, and the prisoner in such a situation had a right, if he thought it desirable, to cross-examine the Judge whose evidence should be recorded and form part of the record in the case The proper course, however, for the Magistrate to have taken in such a case would have been to decline to try the case and to ask that it should be taken by some other Judge, **20 W. R 76** *See* also **20 C. 857** and Notes under s 556 It is one of the general principles which govern the conduct of an English Court of criminal justice, that a person is not necessarily disqualified from presiding as a Judge or acting as a juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of inquiry or investigation, and it is quite erroneous to suppose that a Magistrate is bound to keep out of sight altogether the part which he has played in the matter and to pretend that he knows nothing about the facts excepting so much as the witnesses tell him in Court. It is always dangerous for any man in whose right conduct others are concerned, to set up and endeavour to carry out a fiction such as this It is most specially dangerous for a Judge who is under the grave responsibility which attaches to the office of a Criminal Judge, to attempt anything of the kind **20 W. R. 76.**

3. Otherwise dispose of the case —*I e*, by dismissing the complaint If the Police send a report that there is no sufficient ground for entering on an investigation, the Magistrate may dismiss the complaint He may take cognisance of the offence under s. 190, but he is not bound to take action, nor is he bound to examine the complainant first.—*M H C Pro of* 5*th February*, 1878

4 After disposal of report, Magistrate is functus officio.—The Police reported the cognisable offence to be false on information being given both of a cognisable and a non-cognisable offence and the Magistrate accepted the report and passed orders accordingly The Magistrate cannot subsequently order the Police to send up a charge sheet and if the charge sheet is sent accordingly, and proceedings are taken against the accused, the proceedings so commenced are bad and ought to be quashed **11 C. W. N. 832 = 6 Cr. L. J. 34.**

5. Power of Magistrate to order prosecution of persons not arrested by the Police.— *A* was sent up by the Police for an offence of criminal trespass before a Magistrate A Magistrate acquitted *A* and directed the Police to take action against *H*, who in his opinion, committed the trespass. *H* was thereupon sent up by the Police and convicted, *held*, that though the Magistrate was not empowered under s. 190 (1) (*c*) of the Code to take cognisance of the offence of his own motion, he had the power, on receipt of information from the Police, to order the prosecution of any person who, in his opinion, ought to be put upon his trial, *a fortiori* he can, after taking evidence know whom the Police ought to put up before him and order accordingly, **4 L. B. R. 137 = 7 Cr. L. J. 414.** *See* Notes under s. 190

Madras.—Investigation, as a rule, should never be refused unless it is clear that (*a*) there will be no evidence forthcoming; (*b*) the case is so trivial that it is best for all parties to leave it alone; (*c*) the case is clearly a civil one; (*d*) the case is really a petty assault to which theft may have been added. It must be remembered that investigation does not necessarily mean an investigation at the spot. Under provision (*a*), a Police-officer in trivial cases may decline to go to the spot and very often should do so. But refusal of investigation is a different matter and when there is a definite complaint of a serious crime, even if the complaint appears at first sight false, the complaint should almost always be registered and investigation held. It is difficult to lay down any rule on the subject, but the following rules may perhaps be of some assistance:—

(*a*) As a rule, *every complaint* of a cognisable offence should be investigated, either at the station or by visiting the scene of the alleged crime.

(*b*) As a rule there should be only two reasons for refusing investigation:—

(i) the triviality of the offence;

(ii) the absence of any procurable evidence in cases of a petty nature.

Under (i) in this (Madras) Presidency all cases of theft where the value of property is under one rupee may and should be, as a rule, refused investigation and the parties referred to the Village Magistrate. In all other cases the Police should investigate.

Under (ii) it must be remembered that it is only the *absence* of evidence and not the fact that the Police think it *false* that should be a reason for non-investigation. Such cases whould be complaints of attempts at house-breaking where no theft is alleged to have taken place, and the complainant is unable to give any reason for suspecting anybody—petty thefts of property under Rs. 3 in value where there is no clue whatever and the property is perishable and unidentifiable.

In such cases as these last, however, the action of the Police should be most carefully watched and any tendency to refuse investigation in cases other than those which strictly come under cl. 2 immediately checked.

It must be remembered that the mere suspicion that the evidence offered is false, is no reason for non-investigation, and whenever the complainant alleges the existence of any evidence, the case should be enquired into.

Practically the only cases in which much doubt can arise about the proper action of the Police are those in which the complaints are of attempted house-breaking, and in such cases if the complainant alleges that he has reasons for suspecting any particular person, or it is the case that there have been more attempts than one in the same village within a short time, or that there have been suspicious characters seen near the village recently, the Police should not refuse to investigate.—*Mad. Pol. Man., Vol. I, p.* 311.

12. **Where one Police-officer sees no ground, another Police-officer cannot investigate.**—When no sufficient ground for investigation has been found by an officer in charge of a Police-station, no other officer is competent to make such investigation, unless he is authorised by a Magistrate so to do.—*Cal. H. C. Cir. O. dated* 20*th July*, 1871.

Reports under s. 157 how submitted.

158. Every report sent to a Magistrate under section 157 shall, if the Local Government so directs, be submitted through such superior officer of Police as the Local Government, by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer in charge of the Police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

Note.—As to Burma, *see* Note 7 to s. 157.

Power to hold investigation or preliminary inquiry.

159. Such Magistrate, on receiving such report, may direct an investigation or if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of the case in manner provided in this Code.

Notes.—1. Magistrate may proceed under this section only when preliminary report under s. 157 is sent.—An inquiry can be made under this section only on a Police report submitted within the terms of s. 157,

prosecuted for giving false evidence in respect of his answers under s 193, I P C *See* **7 C. 121** and **10 C. 405.** It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength or by the aid of a statement supposed to have been given to a Police-officer, but which is not given on oath, which he has not signed, and which he has had no opportunity of verifying Such statements may be hurriedly taken down as rough notes, the Police-officer is not trained in taking evidence and the notes are often faired out by another officer They bear no resemblance to a deposition and ought to have no weight as such attached to them. We are aware that there are inconveniences in abolishing the direct liability for giving false evidence to the Police, but the balance of expediency seems to us to be in favour of the old law The provisions of ss 202 and 203, I P C, appear to us to afford a sufficient safeguard against false information."—*Sel Com. Rep* The omission of the word 'truly' in paragraph 2 supersedes the cases in **20 W. R. 41, 8 C. L. R. 236, 8 B. 216; 10 C. 405, 11 B. 659,** and follows the ruling in **7 C. 121 (F.B) = 8 C. L. R. 300, 7 P. R. 1896.** In **11 B. 659,** it was *held* that sanction was not necessary to prosecute a witness under s 193 for giving false evidence before the Police In **16 C. 349** and **Ratanlal 488,** the facts necessary to prove before a person could be prosecuted for giving false evidence before the Police were discussed. These cases are no longer of any importance

9. Privileges of witnesses.—

(*i*) *Not bound to answer incriminating questions*—A person examined under this section by the Police with respect to an offence with which he may himself be charged and convicted is not bound to speak the truth, and that in such a case a conviction for giving false evidence would be illegal, **Ratanlal 619.** A witness is not bound under this section to answer those questions put to him by a Police-officer, the answer to which would have had a tendency to expose him to a criminal charge, **Ratanlal 518** and **488.** When there is no liability imposed on the accused to inform the Police *proprio motu* of any offence mentioned in s. 44, he is bound to answer all questions put to him by the Police during Police investigation His admission of failure to give information would not expose him to criminal prosecution under s 176 I P C. when Police have information already from other sources, **Ratanlal 674.** *See* also cases cited in **26 C. 852.**

(*ii*) *Not liable to a charge of defamation*—A statement made in answer to a question put by a Police-officer under this section in the course of an investigation made by him is privileged and cannot be made the foundation of a charge of defamation, **16 M. 235.**

(*iii*) *Not liable in damages*—Nor will a suit lie for damages for words spoken in answer to question put by the investigating officer, **28 C. 794.**

(*iv*) *Cannot be prosecuted under s* 182, *I P C*—A statement made by a witness in answer to question put by the Police-officer investigating the case cannot be made the basis of a charge under s 182, I P C To give information in s 182, I P C, means to volunteer information **(1905) U. B. R. I. P C. 13 = 2 Cr. L. J. 474** *referred* to **35 P. W. R. 1914 = 227 P. L. R. 1914 = 15 Cr. L. J. 650.** *See* also **Ratanlal 124.**

(*v*) *Cannot be prosecuted under s* 211, *I P C*—A witness answering questions put to him by the Police cannot be convicted of an offence under s 211, I P C **Weir I, 193; 31 M. 506; 6 M. L. T. 133.**

10. No power to take security bond to appear before the Police.—There is no provision in the Code authorising a Police-officer to take security bond for the production of any person *before the Police* Such a bond *ab initio* void, and the Magistrate has no power to alter it and impose fresh conditions thereunder, **11 C. 77.**

RECORDING OF STATEMENT.

11. Not bound to reduce statement into writing.—It is not obligatory on the Station House Officer to reduce to writing any statement made to him during an investigation. Neither s 162 nor s 91 of *the Evidence Act* renders oral evidence of such statements inadmissible, though if the statements be actually reduced to writing the *writing itself*, cannot be treated as part of the record or used as evidence, except for the purpose of refreshing memory, **11 Bom. H. C. R. 120; 36 C. 281.**

12. When desirable that statements should be recorded.—The provisions of this section should not be utilised in any but "heinous cases.' *Heinous cases* include cases exclusively triable by Court of Sessions and those cases in which special reports are submitted through the Magistrate, either to the Commissioner only or both to the Commissioner and to the Deputy Inspector-General or Inspector-General of Police, *Beng Pol. Code, p* 432.

13. Mode of recording answers.—It is not necessary that the statements of witnesses recorded under this section should be elicited and recorded in the form of question and answer, **7 P. R. 1898.** It is sufficient it

160. Any Police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given; or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

Police-officer's power to require attendance of witnesses.

Notes.—1. **Order to attend must be in writing.**—A constable was sent by a Police Inspector to fetch some persons from whom the latter wished to make inquires regarding a theft. The order to attend was not in writing. While the constable was accordingly, taking two persons with him, *P* came up and threatened both of them and the constable with the Chief Constable's vengeance, and in consequence the two persons refused to accompany the constable who had to go without them. On these facts *P* was convicted under ss. 186 and 189, I.P.C., *held* that as an order under this section must be in writing, and a person summoned under such order cannot be forcibly *compelled*, by the person serving the order to attend, the presence of the constable with the two persons (who were not under duress) was an ordinary circumstance, and not a discharge of duty, and that therefore *P* was not guilty of an offence under s. 186, which does not apply to a rescue from illegal custody, **Ratanlal 850.** Non-attendance is not punishable under s. 174, I.P.C., where the order is not in writing, **Weir I, 86; Weir II, 123.** The order may be in a prescribed form and lithographed, but it is not a summons.

WHO MAY BE REQUIRED TO ATTEND.

2. **Only persons supposed to be acquainted with facts and circumstances.**—It appears to have become the practice of Police-officers in the mofussil to hold a regular investigation of *quasi*-judicial character in the presence of the accused and their agents, but this is not contemplated by the law which lays down that the Police-officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case, **33 C. 1023.**

3. **No power to compel a surety to attend.**—A Police-officer cannot require a surety to attend the Police-station to be examined and to give information as to the person for whom he stands surety, **1885 A. W. N. 40.**

4. **No power to compel the attendance of accused.**—This section was intended to apply only to the summoning by Station House Officer of witnesses or possible witnesses and not to compel the attendance of accused persons. Where an accused person refused to obey an order in writing improperly issued by a Police-officer under this section and the Police thereupon took her into custody, because she refused to obey the written order; *held*, that the Police constables concerned were rightly convicted of wrongful confinement, notwithstanding that the offence of which the person thus arrested was accused was a cognisable offence, **Weir II, 221.** This section does not authorise a Police-officer to require the attendance of an accused person with a view to answer the complaint made against him. The intention of the Legislature seems to have been only to provide a facility for obtaining evdience and not for procuring the attendance of the accused, **7 M. 274 (F.B.).**

FAILURE TO ATTEND.

5. **Witness bound to attend—Remedy against defaulting witness.**—If a witness fails to attend before a Police-officer making an investigation under this Chapter the proper course is to prosecute him under s. 174, I.P.C, **24 C. 320.**

DUTIES AND PRIVILEGES OF WITNESSES.

6. **No power to call an accused to produce documents.**—*See* **4 Bom. L. R. 644,** where it was *held*, that a Police-officer has no authority to call on the accused to produce any documents before him.

7. **Witness not bound to answer questions.**—A refusal to answer questions asked by a Police-officer under this section is not punishable under s. 176 or s. 179 or s. 187, I.P.C., as under the present Code there is no obligation to speak the truth as there was under the 1882 Code, **23 M. 544.** *See* also **12 W. R. 23; Weir I, III** and **Weir II, 123; 23 M. 544** (*footnote*); **27 P. R. 1908 = 9 Cr. L. J. 105; 6 S. L. R. 277 = 14 Cr. L. J. 302.**

8. **Witness not bound to state truth—Witness cannot be prosecuted for giving false evidence under s. 193, I.P.C.**—Witnesses cannot be prosecuted for giving false evidence, **1908 A. W. N. 22; 23 M. 544.** "We have amended this clause by reverting to the law as it stood under the Codes of 1861 and 1872. Under those Codes a person examined by a Police-officer was bound to answer all material questions, but was not liable to be

that it should not be open to the accused to allege that his witnesses have been tempered with by the Police — *C P Cr Cir, Part V, No* 12.

24. **Impropriety of taking down statements of persons immediately before their arrests.**—Where there is evidence in the hands of a Police-officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person professedly under this section and reduce it to writing, **27 C. 295**; but such a statement is admissible in evidence **5 C. 530.**

25. ***Instructions regarding corroborative evidence.***—The attention of all investigating officers is drawn to the great importance of testing the truth of statements made by witnesses from whom they get information. For instance, *A* states that he was travelling back to his home in a distant village after an unsuccessful attempt to purchase bullocks at several places, at a certain time and place he saw the accused running along with a blood stained knife in his hand The witness was alone at the time, and there was no one in the neighbourhood to corroborate or contradict him His reason or excuse for being on the spot at the time is such a common one that it necessarily excites distrust and few Courts would believe him unless there were over evidence, independent of his, against the accused. But he may all the same be a perfectly honest and reliable witness, and this might easily be established by following him up and by ascertaining from his co-villagers whether he did leave his village at the time and with the object declared, and whether he did visit certain places and attempt to purchase bullocks. The witnesses would not necessarily be taken to Court, but the prosecuting authority should be in a position to inform the Court, that he can produce such evidence if it be desired —*Beng Pol. Code, p* 376

161. (1) Any Police officer making an investigation under this Chapter *" or any Police-officer not below such rank as the Local Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer" may examine orally any person supposed to be acquainted with the facts and circumstances of the case

Examination of witnesses by Police.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture

Note.—Section confined to investigation under this Chapter.—*See* **16 C. 349.** This section is applicable to an investigation under s 156 (1) consequent on an arrest under s 55 (*c*), **1893 A. W. N. 124.**

† **162.** "(1) No statement made by any person to a Police officer in the course of an investigation under this Chapter shall if reduced into writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a Police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made

Statements to Police not to be signed, use of such statements in evidence.

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination

Provided, further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused"

* Words in inverted commas *viz*, "or any Police-officer ... requisition of such officer" were inserted by Act XVIII of 1923
† Sub-section (1) was substituted for the original sub-section (1) by Act XVIII of 1923.

such a statement is substantially an answer to one or more questions addressed to the witness before the statement is made. Ss. 164 and 364 do not apply to examination of witnesses. Nor can they be put on oath or affirmation, 15 A. 11.

14. **Statements of witnesses must not be recorded in the Special Diary merely to prevent the accused to have access to them.**—In 33 C. 1023 the practice of Police-officers to incorporate oral statements made to them by witnesses in the Special Diary under s. 172 in the belief that by so doing those statements could be kept from the knowledge of the accused is strongly condemned. Such statements whether recorded in a diary under s. 172 or not fall under the provisions of s. 162, and are liable to be produced under the conditions laid down therein. Ss. 161 and 145 of *the Indian Evidence Act* do not apply to those statements of witnesses.

15. **Attestation unnecessary.**—It is not illegal, though unnecessary, for a Police-officer recording a statement to obtain the signatures of by-standers to authenticate his record of such statement, 15 A. 11.

16. **Right of accused to inspect record and get copies of statement.**—*See* s. 162 and Notes thereto.

17. **Answers elicited not property of the Police.**—There is no prohibition against any person present at the time when depositions are being taken on confessions made, to take down in writing what either a prisoner or a witness says, 10 C. 256. *See* Note 8 to s. 155.

ADMISSIBILITY IN EVIDENCE OF STATEMENTS MADE TO POLICE.

18. **When not reduced to writing.**—The statement is always admissible subject to the provisions of *the Indian Evidence Act* and s. 162 does not deal with such statements, 11 Bom. H. C. R. 120; 36 C. 281. It is not illegal to examine a Police-officer for the purpose of impeaching the credit of a witness who gives evidence in favour of the accused, 27 A. 469. *See* 19 C. W. N. 217 = 16 Cr. L. J. 313, as to the danger of relying on statements made to the Police which are not judicially recorded.

19. **When reduced to writing.**—(*a*) Oral evidence of the statement may be given. S. 162 does not over-ride the general provisions of *the Indian Evidence Act*, 36 C. 281; 35 M. 247 and 397; 39 B. 58.—(*b*) *But the writing containing statement cannot be used in evidence*,—except under s. 162.

RIGHTS AND DUTIES OF POLICE.

20. **Interference by District Magistrate.**—A District Magistrate cannot interfere (except in the way of suggestion and advice) with the exercise of discretion given to a Police-officer to summon witnesses, Ratanlal 133.

21. **Convenience of witnesses should be studied and inquiry conducted in a conciliating manner.**—*See* Note 9 to s. 157. In 9 C. W. N. 199 = 2 Cr. L. J. 81, it was pointed out that it was improper that the Police should take a number of women away from their village to the Police-station, on the pretext that they wished to examine the women and that the examination might have been as well conducted at the women's own houses as at the Police-station. But the Code makes no provision as to the course to be taken by a Police-officer in regard to the attendance of *Purda ladies* at the investigation.

22. **No power to arrest or detain witnesses.**—The Police have no power to arrest or detain for a single moment persons whose evidence is required for the purpose of an investigation, 7 W. R. 3. It is left to the person summoned to obey. But in no case should force be used to compel attendance of such a person any more than a person summoned to serve on a jury. 'Causing attendance under this section does not amount to an arrest; and in no case can a Police-officer compel a witness by force to attend before him. A Police-officer may summon parties to a Police-station for the purpose of obtaining information from them; but if the voluntary action of such parties is in any way interfered with, such interference would constitute an arrest. Instances have occurred when suspected parties have been summoned to a Police-station for inquiry and have been detained all night. Unless they were detained voluntarily, such detention constitutes "*an arrest*." Under the orders of Government, No. 6355, dated 13th November, 1865, Police-officers, when causing the attendance before them of Railway employees, must send immediate information to the head of the department under which such empolyees are serving.'—See *Beng. Pol. Man., 2nd Ed., p.* 378.

23. **Binding over defence witnesses not desirable.**—It is extremely undesirable that an investigating Police-officer should bind over witnesses for the defence of an accused person whom he is sending up for trial and should send them up with the accused and the witnesses for the prosecution. It is advisable that the Police should have nothing to do with the witnesses whom the accused may wish to call for his defence, and

That copy may then be proved and the witness may be cross-examined on that statement under section 145 of *the Indian Evidence Act*, **6 Rang. 137; 29 Cr. L. J. 701**; *see* also **6 Rang. 672.**

3. **Want of power to investigate immaterial.**—If it should happen that the Police officer was not authorised to hold the investigation, his want of authority is immaterial having regard to s 156 (2), **2 C. W. N. 702 at p. 712.**

4. **Evasion of this section by sending witnesses to a Magistrate having no jurisdiction.**—A Police-officer has no authority to place witnesses before a Magistrate, unless they appear *voluntarily* *It is highly* irregular and the policy of the law, as embodied in this section is defeated, if a Police-officer with a view to fix the witnesses down to a particular statement, should cause persons to appear before Magistrates not having jurisdiction to deal with the case and thus get their statements recorded, because the Police-officer may be of opinion that the witnesses may be gained over, **29 C. 483**; *see* also **7 C. W. N. 220**; **27 C. 295** and Notes 22, 23 to s 164

ADMISSIBILITY IN EVIDENCE OF STATEMENTS OF WITNESSES TO POLICE.

5. **Admissibility of written statement in trial.**—(*a*) The record may be used only for the purpose mentioned in the section, *i e*, the accused may at the time the witness for the prosecution appears before the Court use the record for impeaching his credit, **33 C. 1023**; **32 B. 111 (F.B.)**, **34 B. 599**; **13 O. C. 7 = 11 Cr. L. J. 117.** *See* also **26 M. 191**; **8 C. W. N. 218**; **15 P. W. R. 1913 = 171 P. L. R. 1913 = 14 Cr. L J. 190**; **1 P. W. R. 1914.** But in **36 C. 281**; **35 M. 247** and **397** it was *held* that oral evidence of the statement may be given to corroborate a prosecution witness Under the old Code of 1882 the record could be used in favour of the accused.

(*b*) The person making the statement may be questioned about it and with a view to impeach his credit, the Police-officer or any person in whose hearing the statement was made can be examined on the point under s 155 of *the Indian Evidence Act*, **11 B. 657** and **659**, **9 C. 453 = 11 C. L. R. 569**; **17 A. 57**; **33 C. 1023.**

(*c*) In **11 B. H. C. R. 120**, it has been *held* that under the Code of 1872 the writing may be used for the purpose of refreshing memory But in **33 C. 1023** it is laid down that it is very doubtful whether a Police-officer could refresh his memory as to such statements unless the writing is already in and had been put to the witness who is alleged to have made the statement, and this ruling was approved in **13 O. C. 7 = 11 Cr. L. J. 117.** *See* also **6 C. L. R. 47**; **17 P. R. 1886**; **32 B. 111.** But a prisoner is not entitled to insist that a Police-officer should refer to the writing to refresh his memory, **8 C. 154 = 10 C. L. R. 81**; nor is the Judge bound to compel the witness to look at the diary to refresh his memory, **8 C. 739.**

6. **Inadmissibility of writing containing statement against the accused.**—(*a*) The statement taken down in writing, of a witness for prosecution, and recorded by a Police-officer cannot be admitted or used in evidence against the accused, **32 B 111 (F.B.)**, **17 P. R. 1886**; **4 S. L. R. 38 = 11 Cr. L. J. 498**; **13 Cr. L. J. 244 (Mad.).** It is illegal for a Magistrate trying an accused person to use as evidence against him the statements made by the prosecution witnesses before the Police by comparing them with their depositions and as a result of the comparison to convict the accused **9 Bom. L. R. 895 = 6 Cr. L. J. 224**; **9 Bom. L. R. 366 = 5 Cr. L J. 353.** (*b*) The statement cannot be used to impeach the credit of a defence witness whose statement may have been recorded by the Police, **15 A. 25.** *Per* BEAMAN, J, in **32 B. 111.** (*c*) Not to make up for the deficiency in the evidence of the prosecution witnesses, **Ratanlal 935**; **28 C. 348.** (*d*) It cannot be used as corroborative evidence of the prosecution witnesses against the accused, **22 B. 596**, **13 O. C. 7 = 13 Cr. L. J. 117.**

7. **Inadmissibility of writing in favour of the accused—Statement to Police cannot be used in favour of the accused.**—From the mere saving clause in this section (1882 Code) on behalf of accused persons, the general principle cannot be inferred that statement made by any person to a Police-officer under it may be used as evidence *for* an accused person, though it cannot be used *against* him. A saving clause cannot properly be looked at for the purpose of extending an enactment, nor can it give a new and different effect to the previous sections of the enactment, **11 B. 657.** It is not illegal to examine a Police-officer for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused at his trial, having previously given a statement to the Police-officer different from, and inconsistent with, his subsequent statement at the trial, **1905 A. W. N. 64**, which follows **11 B. 657**; **15 A. 25.** The law now adopts the Full Bench view in **19 A. 390.** *See* also **17 A. 57.**

8. **Inadmissibility of statement reduced to writing by the Police for other purposes.**—(*a*) *In a subsequent case*—There is nothing in this section which limits the prohibition of the use of such document, *viz*, the statement taken down in writing as evidence to a matter of the charge which is actually under investigation by the

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1) of the Indian Evidence Act, 1872.

Note.—This section has been much amended.—The effect of the amendment appears to be clearly to control the general provisions as to evidence contained in s. 157 of the Evidence Act. It is submitted that the words " . . . nor shall any such statement or any record thereof . . . be used for any purpose (save as hereinafter provided)" in the amended section seem to refer to statement, both oral and written inasmuch as the words "such statements" are placed in opposition to the word "record." In the former section as it stood before the present amendment it was provided that such writing was not to be used as evidence; but in the present amendment the words used are " nor shall any *statement* or any *record* thereof . . . be used for any purpose (save as hereinafter provided)." From this the intention of the Legislature is quite clear that the general provisions of s. 157, evidence Act are controlled by the special provisions contained in this section. So the statements or the record thereof are limited in their use as evidence to the specific purpose mentiond in the section, *viz.*, to contradict a prosecution witness in manner provided by s. 145, Evidence Act. In this connection the Select Committee say as follows ". . . but we do not think that power should be given to contradict by means of Police diaries a prosecution witness who has turned hostile, and still less should power be given in respect of a defence witness." (See *Sel. Com. Rep.*, clause 33.) The whole scheme of the section seems to be that section 162 as amended is only to be used for the benefit of the accused. It is submitted that the Legislature has approved the reasoning in **7 A. L. J. 468 = 11 Cr. L. J. 235.** *See* also **34 B. 599; 33 C. 1023.**

In light of the above view it is submitted that **36 C. 281; 35 M. 247; 39 B. 58** are no longer good law.

Notes.—1. Corresponding sections of the old Codes.—S. 145 of Act XXV of 1861 read.—'Any statement so reduced into writing shall not be signed by the person making it nor shall it be treated as part of the record or used as evidence.' S. 119 of the Code of 1872 read "No statement so reduced to writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence."

The 1882 Code enacted "No statement other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused."

By Act X of 1886, the word 'shall' was inserted before "used as evidence." It is *held* by the Calcutta and Madras High Courts that the change in the present section by the insertion of the words "nor shall such writing" must have been deliberate. There is nothing in the speeches or proceedings of the Legislative Council to indicate why the change was introduced.

See s. 63 of *the Bombay City Police Act*, which corresponds to this section, **32 B. 111.**

2. Scope of the Section.—This section does not over-ride the provisions of s. 27 of *the Indian Evidence Act*, so that confessional statement or statements to the Police made by accused persons leading to the discovery of relevant facts must not be excluded if the statements are recorded by the Police, **6 N. L. R. 180 = 12 Cr. L. J. 60.** The provisions of this section must be taken to modify the general provision of s. 157 of *the Indian Evidence Act*, **13 O. C. 7 = 11 Cr. L. J. 117.** A Police-officer may examine any person acquainted with the facts of the case, and he is not bound to reduce into writing any statement made by that person though if he wishes to do so, he may reduce it into writing. If he does so, the written statement though it may be used by the Police-officer to aid him in his investigation, is not to be used as evidence in the trial of the accused (subject to the proviso). When the person makes a statement to a Police-officer which is not reduced to writing by him, such statement is not inadmissible in evidence under this section, since it does not profess to provide for such a case. The Police may therefore be questioned as to such statement by the Counsel for the defence, as also any other person who may have heard it made. So also when it is reduced to writing, the section does not say that the Police-officer or such other person shall not be liable to be questioned as to it or bound to state the truth when so questioned, but that the writing shall not be used as evidence, **11 Bom. H. C. R. 120; 36 C. 281.**

2-A. The first paragraph of this section provides that no statement made to the Police in the course of an investigation shall be admissible at the trial of an offence under investigation at the time the statement was recorded. The second paragraph however, lessens the rigidity of the first, to a certain extent; if a witness is making in Court a statement which differs from the statement which he made to the Police. Then the accused or his Advocate may ask the Court to refer to the record of such statement and if it be found that there is any variation between the two statements the defence is entitled to a copy of the statement to the Police.

witness in the manner provided in s 145 of *the Indian Evidence Act* and it is quite clear also that it is not permissible for Police statements, whether oral or written, to be put in evidence in order to corroborate a prosecution witness or to contradict a defence witness To this extent the rulings in **22 B. 596** and **39 B. 58** are superseded by the enactment of the Legislature. **26 Bom. L. R. 965.**

Madras.—The words "any such statement" in the first paragraph of clause (1) of this section covers not only written statements, but also oral statements, **51 Mad. 967 (F.B.)**

Lahore.—The decisions in **6 L. 24** and **6 L. 171** support the Bombay view and disapprove of **5 L. 324**, **7 L. 264** upholds the decisions in **6 L. 24** and **6 L. 171.**

Calcutta.—The decision in **30 C. W. N. 142** agrees with the above Bombay case and holds that s 162 of the Code is clear enough to exclude any statement made by any person and directs that such statement shall not be used for any purpose not provided for by the section itself So a map prepared in a criminal case should not have thereon any statement made by a witness to the person preparing the map noted thereon Such statements in a map prepared by a Police-officer are inadmissible under s 162 and as hearsay evidence, **30 C. W. N. 503** agrees with **30 C. W. N. 142.**

Lahore.—In **7 L. 84** it was further held that s 162 of the Code applies to the statements of persons as witnesses examined by the Police in the course of an investigation and not to the statement of an accused person, and that it does not over ride or modify the provisions of s 27 of *the Indian Evidence Act*

Patna.—In **5 P. 63** it was also held that the main object of the amendment of the section is to prevent *the use of the statement of prosecution witnesses as corroboration under s 157 of the Evidence Act, see* also **8 Pat. 279.** Sections 161 and 162 of the Code do not over ride the general provisions of the law with regard to the admissibility of statements made by accused persons as laid down in ss 27 and 28 of *the Indian Evidence Act* of 1872

Contrary to the above Bombay decision it has been now held in **48 M. 640 = 48 M. L. J. 195** that the provisions of s 162 of the Code either as amended or as it stood before the amendment were not an absolute bar to the use of such oral statements at the trial for any purpose admissible under *the Indian Evidence Act*

11. Effect of wrongly admitting statement in evidence.—Where a Judge admitted in evidence a document recorded under s 162 and referred in his address to the jury, the High Court set aside the conviction as in the circumstances of the case it may have misled the jury, **13 Cr. L. J. 244 (M.)**

PRODUCTION, INSPECTION AND COPIES OF WRITTEN STATEMENTS.

12. Procedure for production and use of record of statements.—Records of statements are liable to be produced only under the conditions laid down under this section, *i e*, the accused may, at the time the witness appears before the Court, ask the Court to refer to them, and the Court may, if it thinks expedient in the ends of justice, furnish him with copies of such statements for the purpose of impeaching the credit of the witness.

Where after all the prosecution witnesses had been examined, the accused applied to the Court to summon a prosecution Police witness with his diary as a witness for the defence, *held*, that the application could not be granted But in such a case the Court ought to send for and peruse the statements recorded in the diary, and if, on such perusal it thinks that it would be expedient in the interests of justice to allow the accused to use such statement for the purpose of impeaching the credit of the witness, it would be open to the Court to furnish the accused with copies of the statements even at such a late stage and to recall the witness and permit further cross-examination But nothing except the clearest conviction in the mind of the Court that a miscarriage of justice would otherwise result would justify the adoption of such an unusually and highly inconvenient step, **33 C. 1023.**

13. Proof of and essential formalities for using the statement.—A Police-officer's notes of statements made to him in the course of an investigation and recorded by him under this section should, if used at all at the subsequent trial, be used only after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge, **16 A. 207.** The Police-officer who recorded the statements cannot be cross examined under s. 145 or s. 161 of *the Indian Evidence Act*, with regard to such statements, such cross examination being allowable only in regard to entries properly recorded under s. 172 *if the Police-officer refers to such entries for the purpose of refreshing his memory It is doubtful if*

Police-officer when the statement is made. It extends also to the use of such a document against the person who is alleged to have made the statement, **28 C. 348** and *see* Notes 21 and 19 below. Such a statement is not admissible under s. 35 of *the Evidence Act*, because it is not a public official record within the meaning of the section, it being not *necessarily* part of the official duty of the Police-officer to prepare such a document at all, **28 C. 348.** In **35 M. 397,** SUNDRA IYER, J., *dissents* from **28 C. 348,** and is of opinion that under s. 35 of *the Evidence Act* the prosecution may simply put in the record without calling the officers when it is desired to prove a statement made by a witness because it is quite sufficient under s. 35 that the entry is made *in the discharge* of official duty.

(*b*) *For prosecution under s.* 193, *I.P.C.*—The written statement cannot be made the basis of an order for the prosecution under s. 193, I.P.C., of the person making the statement, **1908 A. W. N. 22.** *See* Note 8 under s. 160.

(*c*) *For prosecution under s.* 211, *I.P.C.*—A statement under s. 161 made in answer to questions by the investigating Police-officer cannot be made the basis of a prosecution under s. 182, I.P.C., **15 Cr. L. J. 650 = 25 In. Ca. 978 ; 2 Cr. L. J. 474 (Bur.).** *See* also **20 M. L. J. 132 = 8 M. L. T. 87 = 11 Cr. L. J. 286,** noted under s. 154 where it was *held* following **31 M. 506,** that a statement under s. 162, is not a complaint or a charge and cannot be made the basis of a prosecution under s. 211, I.P.C. But *see* Note 21 below.

9. **Is oral evidence of a statement to the Police reduced to writing admissible?**—Under s. 157 of *the Indian Evidence Act*, an oral statement made to the Police during a Police investigation by a witness may be admitted at the trial by way of corroborating that witness's deposition. But this section enacts that if any such statement is taken down in writing, the writing cannot be used as evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but that the statement if not reduced to writing can, the answer is that the Legislature has chosen to alter its language in this section of this Code drawing a distinction between the statement and the writing. There is nothing, therefore, in the special provision of the existing Code to over-ride the general provisions of *Evidence Act* as to the proof by oral evidence of former statements, **2 C. W. N. 702** was decided under the old Code (1882); and this point was not decided in **32 B. 111 (F.B.); 36 C. 281.** All the Judges of the Madras High Court are unanimously of opinion that the law as interpreted by **36 C. 281** is correct, **35 M. 247** and **397.** In **39 B. 58,** the Bombay High Court too *held* that under s. 162 the writing only is excluded from evidence, but the right to prove any statement to the Police by oral evidence to corroborate the testimony of any witness is not taken away by the section. But in **34 B. 599** it was laid down that it is contrary to the plain intention of this section to allow an investigating Police-officer to be questioned in examination-in-chief about what the various witnesses said to him during the investigation. It opens an undesirably wide field for cross-examination and leads to the attention of the Court being directed and distracted from the true issues. In **33 C. 1023,** it was *held* that it would be quite unfair to accept the Police-officer's perfunctory readings of his diary as proof of the statement when he could not remember what had been said. In **7 A. L. J. 463 = 11 Cr. L. J. 235,** KNOX, J., refused to follow **36 C. 281** while KARAMAT HUSAIN, J., dissented from him and approved of the ruling. *See* also the judgment of SUNDER LAL, J., in **13 O. C. 7 = 11 Cr. L. J. 117** who is of opinion that the reasons for excluding from evidence the written record of such statement, apply with equal force to a *viva voce* recital of such statement from memory by the Police-officer, **17 A. 57.** But *see* **6 Pat. L. J. 241** approving **36 C. 281.** *See* also **26 Bom. L. R. 965** overruling **39 Bom. 58** and **22 Bom. 596.**

10. **How far is the rule as to corroboration by former statements under s. 157 of the Evidence Act modified by this section?**—The general provisions of s. 157 of *the Indian Evidence Act* must be taken to be controlled by the special provisions of s. 162, **7 A. L. J. 468 = 11 Cr. L. J. 235.** The rule contained in s. 157 of *the Indian Evidence Act*, is modified in the following respects, *viz.*: (1) as a general rule, the written records of statements previously made by witness to a Police-officer which is referred to in the section as 'such writings,' in the course of an investigation cannot be used as evidence; (2) such written record of the statement cannot be used (*a*) to corroborate the statement of a witness for the prosecution or (*b*) to corroborate a statement for the defence or (*c*) to impeach the credit of a witness for the defence, and (3) it may be used to impeach the credit of a witness for the prosecution if (*a*) the accused person requests the Court to inspect the written record of the deposition and (*b*) the Court thinks it expedient in the interests of justice to allow a copy of such statement being granted to him. *Per* SUNDER LAL, J, in **13 O. C. 7 = 11 Cr. L. J. 117.** Oral evidence of such statements may be given by the Police-officer, **36 C. 281; 35 M. 397; 39 B. 58.** *See* Note above.

Bombay.—In a Bombay case it is now held as the result of the latest amendment of s. 162 of the Code, that a Police statement can only be used for one purpose, and that is for the accused to contradict a prosecution

custody, or to the Police leading to the discovery of relevant facts, must be excluded if the statements have been recorded by the Police Such a result would render nugatory the provisions of s 28 of *the Evidence Act* and the omission of the former proviso leads one to conclude that s. 162 was considered to refer to statements of witnesses, **6 N. L. R. 180; 12 Cr. L. J. 60, 29 Cr. L. J. 400; 33 C. W. N. 257.** Statements of accused to the Police though reduced to writing not being confessions were *held* to be properly admitted in evidence, on being proved by oral evidence *See* also **15 P. W. R. 1913 = 171 P. L. R. 1913 = 14 Cr. L. J. = 190** and Note 19

17. Incriminating statements of accused made to Police is not admissible.—A statement made by an accused person to Police-officer is not admissible in evidence against him when he is on his trial for the offence he is charged with, **11 P. L. R. 1905.** This rule must be limited to confessions or admission of directly incriminating circumstance *See* ss 25 and 26 of *the Indian Evidence Act*, and **41 C. 601.** In **26 C. 569**, it was *held* that s 25 of *the Evidence Act*, applies to every Police-officers including Police officers of the Native States and is not restricted to the officers of the regular Police As to *Police Patels* in Bombay, *see* **17 B. 485; 19 B. 363.** *See* also **1 C. 207** at **p. 215, 1 C. L. R. 21; 26 C. 569.** A Police officer should not be allowed to depose to confessional statements, **15 Cr. L. J. 474 (Sindh)** In **35 M. 397** five Judges of the Madras High Court, *held* that previous statements of an approver being confessions made to a Police officer are inadmissible at the trial against an accused person under s 25 of *the Evidence Act*, while the other five were of opinion that the statements of approvers to the Police though inculpatory and confessional in their nature are not inadmissible under s 25 of *the Indian Evidence Act* when it is not sought to use them against the persons making them S. 25 does not preclude them from being given as evidence of a fact which goes to show that the statements of the approvers at the trial were true *See* also **13 A. L. J. 1077 = 17 Cr. L. J. 8** and **(1917) M. W. N. 875.**

18. Statements of accused to Police-officer not amounting to admission of guilt.—An admission made by an accused person may be proved if it does not amount to a confession, **3 N. L. R. 51 = 5 Cr. L. J. 434.** An admission made by an accused person to a Police-officer before arrest is admissible in evidence, **6 C. 530 = 7 C. L. R. 541.** *See* also **10 B. L. R. App. 2; 5 Bom. L. R. 312, 37 C. 467; 41 C. 601; 72 P. L. R. 1916 = 17 Cr. L. J. 183 = 33 In. Ca. 823.**

19. Accused's statement may be proved though writing containing it cannot be admitted.—It is not a correct interpretation of the meaning of this section that statements made by an accused person to a Police officer holding an investigation under this Chapter cannot be proved against him, whether they be reduced to

20. Confessional statements leading to discovery of facts.—S 27 of *the Evidence Act* is not intended to let in confessions generally, and no judicial officer dealing with that section should allow one word more to be deposed by a Police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him, **6 A. 509; 11 C. 635, 4 A. 198; 35 P. R. 1900 at p. 38; 12 M. 153; 11 B. H. C. R. 242; 10 B. 595, 25 C. 413; 14 B. 260; 28 P. R. 1894; 15 P. W. R. 1913 = 14 Cr. L. J. 190; 8 P. W. R. 1914 = 38 P. L R. 1914 = 15 Cr. L. J. 6; 15 Cr. L. J. 533 (M.)**.—While a statement forming part of a narrative made to the Police is not admissible in evidence, if it amounts to a confession that the accused himself committed the offence, **31 M. 127;** a statement that stolen property would be found in a certain place is admissible, **28 M. L. J. 352 = 15 Cr. L. J. 533.** The exception contained in s. 27 to the general rule in s 25 must be very strictly confined within its legitimate limits. When, therefore, the accused stated to the Police 'I will point out the place where I committed the murder' and pointed out the place, *held* the words 'I committed the murder' were inadmissible, **11 P. R. 1915.** Where there are several accused and it is not possible to say which of them gave the information leading to the discovery of facts, the whole of the evidence of the joint discovery is inadmissible, **9 P. W. R. 1914 = 63 P. L. R. 1914 = 15 Cr. L. J. 499.**

21. Statements as to ownership of property admissible.—Statements made by accused persons to Police-officers as to the ownership of property, which is the subject matter of the proceedings against them although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible in evidence with regard to the ownership of the property in any inquiry under s. 523 *held* by the Magistrate, **9 B. 131.** *See* also **6 C. 530 = 7 C. L. R. 541; 1 C. L. R. 21; 1 C. 207; 3 B. 12; 11 B. H. C. R. 242; 15 C. 587; 6 B. 34** and **6 B. 298 at p. 291.**

Police-officer can refer to statements recorded by him under this section, unless the writing is already in, and has been put to the witness who is alleged to have made the statement, **33 C. 1023.** But *see* Note 8 above. The law directs that the written statements cannot be used as evidence unless they are admitted in accordance with the provisions of this Code and *the Indian Evidence Act*, **9 Bom. L. R. 895 = 6 Cr. L. J. 224.** *See* **17 A. 57 ; 28 C. 348 ; 11 B. 657.** *See* **18 Cr. L. J. 844.**

14. Proviso—Right of accused to production and getting copies of statements.—(*a*) *Before commencement of preliminary inquiry—not entitled to production.*—Before the commencement of the preliminary inquiry against an accused person under remand, he is not entitled either under the general principles of the common law or under this Code to copies of statements of various persons recorded under this section or by a Magistrate under s. 164 [**20 M. 189 (F.B.)** *referred to*]. The question whether he is entitled to such copies cannot be determined with reference to the question, whether the statements are public documents as defined in s. 74, *Indian Evidence Act*, because whether any person has a right to inspect any particular public document is a question not dealt with by *the Evidence Act* and altogether outside its scope, **30 M. 466.**

(*b*) *After commencement of inquiry—entitled to production but getting copies discretionary with Court.*—The accused may at the time the witnesses appear before the Court ask the Court to refer to the statements and the Court may, if it thinks expedient in the interests of justice, furnish him with copies of statements for impeaching the credit of the prosecution witnesses, **33 C. 1023.** The accused can only get access to written statements made by the prosecution witnesses at the discretion of the Court. It is no longer a matter of right (*Per* BEAMAN, J.), **32 B. 111 ; 13 O. C. 7 = 11 Cr. L. J. 117.** It is only if the Magistrate considers it expedient in the interests of justice to grant such copies that the accused can obtain or use such copies. It is not necessary for the Magistrate to say that it is not expedient to grant copies, **26 M. L. J. 182 = 15 Cr. L. J. 289.** *See* **16 C. 610 ; 20 C. 642 ; 15 A. 25 ; 16 A. 207** and **17 A. 57,** decided under the old Code.

(*c*) Under section 162, Cr. P. C., a witness has to be "called for the prosecution, *i.e.*, he must be produced in Court, and if then the accused applies for a copy of his statement before the Police, the Court is bound to refer to the writing and to direct that the accused be furnished with a copy thereof subject to the proviso, then such a copy can be used to contradict the witness under Section 145 of *the Indian Evidence Act.* There is nothing in the section which requires that the cross-examination should have been opened and that the accused should have "laid the foundation" for the granting of a copy. The discretion which was vested in the Courts formerly of granting such copies has now been taken away and under the amendment it has now become imperative upon the Court to grant copies to the accused at his request. **7 Pat. 205 = 29 Cr. L. J. 297** and also **54 Cal. 307 ; 56 Cal. 840.**

(*d*) *After close of prosecution evidence application might be refused.—See* **33 C. 1023 ;** Note 12 above.

(*e*) *Conviction without disposal of an application for copy illegal.*—Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the Police during their investigation in the Special Diary and then returned them to the Police without recording an order that he did not think it expedient in the interests of justice to furnish the accused with a copy, and convicted the accused ; and the conviction was confirmed on appeal by the Sessions Judge, the High Court set aside the conviction and directed the Sessions Judge to re-hear the appeal and send for the statements recorded by the Police and if he found anything in them of advantage to the accused to also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements, **36 C. 560.**

15. Accused not entitled to inspect the record, but only to the copy.—This section debars the accused person from inspecting the record of the statement of the witness to the Police. If the ruling in **36 C. 281** is correct, then under s. 161 of *the Evidence Act*, the accused may be entitled to inspect the writing if it is used to refresh the memory of the Police-officer giving oral evidence of the statement. *Per* SUNDER LAL, J., in **13 O. C. 7 = 11 Cr. L. J. 117.**

STATEMENTS OF ACCUSED PERSONS.

16. Does the section deal with the statements of accused persons made to the Police and recorded by them ?—S. 162 of the 1882 Code contained the following proviso " nothing in this section shall be deemed to affect the provisions of s. 27 of *the Indian Evidence Act.*" This provision has been omitted in this Code, and it must only be because it was unnecessary. It has never been held or contended that, under the present law, s. 162 over-rides s. 27 of *the Evidence Act*, so that the confessional statements made by person in Police

29. Miscellaneous.—Statements by an approver made to the Police before he was tendered pardon are covered by this section—**9 Lah. 339.** Where a witness was tendered for cross-examination without being examined by the prosecution and is discharged without being cross-examined the defence is not entitled to a copy of his statement to the Police, **7 Pat. 153.**

No inducement to be offered

163. (1) No Police officer or person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24

(2) But no Police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will

Notes.—1. Evidence Act, s. 24.—Confession caused by inducement, etc, irrelevant in criminal proceedings.—'A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him No confession made to a Police officer shall be proved as against a person accused of any offence —S 24 *Evidence Act* *See* **1 B. L. R. O. Cr. 13, 1 P. R. 1899, 9 B H. C. R. 358, 20 B. 165, 20 W. R. 33** See *Amir Ali* and *Woodroffe*, Indian Evidence Act, ss 24 to 29, for a discussion of the Law on the subject of confessions

2. Police-officer does not include a Village Magistrate.—A Village Magistrate is not a Police-officer and therefore a confession made to him is not inadmissible in evidence, **7 M. 287.** As to village headmen in Madras, see *Explanation* to s 26 of *the Evidence Act* and *Mad, Pol Man Vol I p* 96 *See* Note 17 to s 162

3. Who are "persons in authority."—*A too restrictive meaning should not be placed on the words* **9 C. W. N. 474.** According to SERGANT, C J, "the test would seems to be, had the person authority to interfere with the matter and any concern or interest in it would appear to be sufficient to give him that authority **9 Bom. H. C. R. 358.** So a Travelling Auditor in the service of a Railway Company, **9 Bom. H. C. R 358,** a Police patel, **3 B. 12,** an Honorary Magistrate, **1 W. R. 24,** a Magistrate recording a confession **10 C. 775; 2 A. 260,** Thugyi or village headman, **13 Cr. L. J. 681 (Bur.) 6 Bur. L. T. 109; 14 Cr. L J. 417.** Village Magistrate, **28 M. 38** members of a *panchayat*, **11 C W. N. 904 = 6 Cr. L. J. 154, 9 C. W. N. 474,** have been held to be persons in authority, but *see* **4 A. 46** and **4 Bom. L R. 785** A *Zaildar* is a person in authority, **17 Cr. L J. 226 = 34 Ic. Ca 642 (Pun)** members of *salish* (*panchayat*) are persons in authority, **20 C. W. N. 512 = 23 C. L. J 477 = 17 Cr. L J. 188**

English Law.—*See* **9 Bom. H. C. R. 358** as to applicability of English cases An inducement to confess *does not render the confession inadmissible unless it was held* out *by a person in authority* or *by person acting* in the presence of and without the dissent of a person in authority, *R* v *Pountney*, **7 C.** and **P. 302.** All who are engaged in the arrest, detention prosecution or examination of a prisoner are considered as persons of such authority that their inducements will exclude any confession thereby obtained Thus an inducement *held* out by the prosecutor, the prosecutor's wife or his attorney, or by a constable or other officer, or by some person assisting a constable, or assisting the prosecutor in the apprehension or detention of the prisoner, or by a coroner or a Magistrate acting in the case or other Magistrate, a Magistrate s clerk or by a gaoler, or by a person having authority over the prisoner as the master or mistress of a servant in the case of an offence as against the person or property of either or by a person in the presence of one in authority with his assent whether direct or implied, will be sufficient to exclude a confession made in consequence of such inducement. *Russell on Crimes, p* 2158 *See* also *Ibrahim* v *King*, **10 C. W. N. 705 (P.C.).**

4 What inducement, threat or promise will exclude confessions?—The inducement must have reference to the charge against the accused, that is the charge of an offence in the Criminal Courts, **4 A. 46** The inducement must have been made for the purpose of extorting a confession of the offence, the subject of that charge It must reasonably imply that the prisoner s position with reference to it will be rendered better or worse according as he does or does not confess And if the inducement be made as to one charge, it will not affect a confession as to a totally different charge An inducement relating to some collateral matter unconnected with the charge will not exclude a confession The inducement need not be expressed but may be implied from the verdict of the person in authority, the declarations of the prisoner or the circumstances of the case, nor need it be made directly to the prisoner It is sufficient if it may be [illegible]

DYING DECLARATIONS.

22. **Instructions regarding dying declarations.**—When a person whose evidence is required is in imminent danger of death, his statements should be recorded by a Magistrate exercising judicial functions. If this cannot be arranged for and it becomes necessary for some other person to record this dying declaration it should, if possible, be made in the presence of the accused or of attesting witnesses. A dying declaration, made to a Police-officer should, under the provisions of this section, be signed by the person making it.—*Beng. Pol. Code, p.* 377. It is advisable where a dying declaration is elicited by questions to set out the questions and answers, and, if possible, it should be taken in the presence of the accused who should then be allowed to cross-examine if he likes, **6 C. W. N. 72.**

22-A. **Dying declaration, its evidentiary value.**—In the case of a dying declaration which by the law of this country assumes a character widely different from what it is under the Engish Law, which is relevant under *the Indian Evidence Act* whether the person who made it was or was not at the time, when it was made under the expectation of death, and the weight to be attached to which depends not upon the expectation of death, which is a guarantee of its truth, but from the circumstances under which it was made and upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not, **52 C. 987 = 29 C. W. N. 738.** (*R.* v. *Mitchell*, 17 Cox, **C. C. 503** and **507** *referred to.*)

23. **Preliminaries to be ascertained when a man is in a dangerous condition and his statements are necessary.**—When a Police-officer making inquiry in any case has reason to believe that a person whose statements may have an important bearing on the case, is in a dangerous state and likely to die before the completion of the proceedings, or before his deposition can be taken on oath in the presence of the accused before a Magistrate, he should be most careful first to ascertain in the presence of respectable witnesses, the apparently dying man's impression of his own condition, and next to take down his statement *verbatim.—Beng. Pol. Man., p.* 379.

24. **Signs might be treated as verbal statements.**—In **7 A. 385 (F.B.)**, it was *held* by the Full Bench, that where the deceased at the time of questioning was conscious and able to make signs in response to questions asked, the questions put and the signs taken together, might properly be regarded as *verbal statements* made by a person as to the cause of her death, within the meaning of s. 32 of *the Evidence Act* and therefore evidence to prove the questions put and signs made was admissible. In such a case it is essential that the statement should be a true record of what actually took place and should show on the face of it the questions put and the nature of signs made in reply, **2 P. R. 1886 ; 9 P. R. 1900.**

25. **Dying statement made in absence of accused—admissibility.**—The dying statement of a deceased person must be taken in the presence of the accused ; if not so taken the *writing* cannot be admitted to prove the statement made. The statement may, however, be proved in the ordinary way by a person who heard it and the writing may be used, for the purpose of refreshing the witnesses' memory, **8 C. 211 = 10 C. L. R. 11; 6 C. W. N. 72** and **921 ; 13 P. R. 1886 ; 6 Bur. L. T. 68 = 14 Cr. L. J. 396.** In **6 C. W. N. 921,** where a dying declaration had been recorded by a Police Sub-Inspector and attested by certain witnesses and the record of such statement was made, evidence, *held*, the writing could not be made evidence, but that the statements made by the deceased might be proved by persons who heard them. *See*, however, **16 Cr. L. J. 759 (M.); 7 L. 91; 49 C. 353.**

26. **To render dying statements admissible, the accused must be on his trial for causing death.**—In **25 B. 45** a statement made by the deceased to and recorded by a Police *jemadar* to the effect that the accused who was concerned with dacoity, had stabbed him on the right side of the chest, was rejected on the ground that it was not shown that the death of the deceased was caused or accelerated by the dacoity. *See* also **7 L. B. R. 33 = 6 Bur. L. T. 183 = 14 Cr. L. J. 510.**

27. **Dying statement must be duly proved.**—A dying statement which had been proved by taking evidence of the Magistrate who recorded it, should not be accepted in evidence without such proof. The fact that the Magistrate who recorded the statement is the same as the committing Magistrate is legally insufficient to prove the dying declaration, **17 P. R. 1911 = 13 Cr. L. J. 225.**

28. **Dying statement how proved.**—Where the document containing the dying declaration was not signed by the deponent and the Police-officer was not bound by law to take it down in writing ; *held*, that the proper method of proving the oral statement of a dying man was by the oral testimony of any person who heard it, he being allowed to refresh his memory by reference to the notes he made or read at the time, **10 N. L. R. 19 = 15 Cr. L. J. 243.** *See* Note 25.

that this confession was voluntarily made It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him

(Signed) A B,
Magistrate

Explanation —It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case

Note —The section as amended confines the recording of confessions only to the superior Magistrates mentioned therein —The Select Committee in this connection, says that it is intended that under the section third-class Magistrates should have no power to record confessions, and that second-class Magistrates should not do so unless specially empowered The amendment makes it obligatory upon the Magistrate to record the fact that warning had been given by the Magistrate to the accused as provided by sub-section (3).

I.—SCOPE AND OBJECT OF THE SECTION.

Notes —1. Section applicable to Presidency towns of Calcutta and Bombay.—In the amended section a Presidency Magistrate is specifically mentioned Therefore it is clear that the section applies to the Presidency towns of Calcutta and Bombay, as the specific mention of a Presidency Magistrate in the amended section would be construed as a provision to the contrary under sub-section 2 of section 1 of the Code So the decisions in **15 C. 595** and **21 B. 495** lose force so far as this section is concerned

But it is now *held* by the Calcutta High Court, that s 164 of the Criminal Procedure Code does not apply to a confession recorded in Presidency towns in the course of a Police investigation not *held* under the orders of a Presidency Magistrate under ss 155 and 156 in spite of the alteration that the section has undergone by the amendments by Act XVIII of 1923, **52 C. 67.** (*Emp* v *Panchcowri Dutt.*)

In **30 C. W N. 454** where at the request of the Burdwan District Police the Calcutta Police arrested the accused and brought him before the Presidency Magistrate in Calcutta and the Presidency Magistrate did not warn the accused and did not even inform him that he was a Magistrate *Held* although the investigation under Chapter XIV was being *held* by the Burdwan Police, still the accused's arrest in Calcutta and his production before the Magistrate must be regarded as something in the course of that investigation under Chapter XIV and the Presidency Magistrate was therefore bound to record the confession strictly in compliance with s 164 of the Code

In **50 B. 111** it was *held* that s 164 does not apply to the Police in Bombay as the Bombay Police do not carry on their investigations under Chap XIV of the Criminal Procedure Code Therefore a confession recorded in Bombay of an accused brought before the Magistrate by the Bombay Police need not have the formalities and the certificate under s. 164 of the Code

But the Patna High Court has held contrary to the Calcutta and the Bombay view In **5 Patna 171** it is *held* that s 1 of the Code bars the application of the Code to the Police in Presidency towns and not to a Magistrate and since the amendment of s 164 in 1923 the Presidency Magistrate is empowered to record a confession in Calcutta in the course of a Police investigation.

Per BUCKNILL J—Even though the Police in Calcutta may not conduct their investigations in precise accordance with the provisions of Chapter XIV the construction of s. 164 which would exclude its utilisation in Calcutta during a Police investigation or at any time afterwards before the commencement of the enquiry or trial is to read it in a strained and unnatural sense. **Panchcowri Dutt, 52 C. 67** and **15 C. 595 (F B.)** *disapproved.*

2. Object of the section.—The object of Police proceedings is to collect information as a preliminary step to the production of evidence in a judicial proceeding against an accused person. For this purpose any person may be examined, and any statement may be reduced to writing by the Police, but no statement made to the Police (with the exception specified in the proviso to s. 162) can be used as evidence against the accused. To these provisions s 164 seems to be supplementary The Magistrate may prepare, what the Police may not, a record of any statement, be it confession or not, which is made to him before judicial proceedings commence Proof of such statements is not prohibited, on the contrary, express provision is made for proving the document in s. 80 of *the Evidence Act* (where it is distinguished from a record of evidence) and in s 533 *infra.* It is not expressed nor is it implied in the text of this section, or in the context, that the statement of an accused person cannot be recorded, unless it is a confession. It is easy to understand that the interests of justice may require that there should be some means of preparing a documentary record which shall be

come to his knowledge. *Woodroffe and Amir Ali's Evidence Act*, *5th Edn.*, *p.* 258. Saying to the prisoner that it will be better for him to confess is an inducement sufficient to exclude the confession, **2 East P. C. 659; 10 C. 775; 9 Bom. H. C. R. 358.** So also I daresay you had a hand in it, you may as well tell me all about it, *A.* v. *Croydon*, **2 Cox 67**; 'you had better pay the money than go to jail,' **9 Bom. H. C. R. 358**; 'if you confess the truth nothing will happen to you,' **5 N. W. P. 86**; 'tell me what really happened and I will take steps to get you off,' **3 B. 12.** 'If you confess to the Magistrate you will get off,' **1 W. R. 24**; 'I will get you released if you speak the truth,' **8 W. R. 13**; if he made a full confession, the Court would take this into consideration in awarding punishment, **1 Bom. L. R. 289.** An admission obtained from a prisoner by persuasion and promises of immunity by the Police ought not to be received in evidence, **9 W. R. 16.** *See* also **1 P. R. 1899; 9 P. R. 1894.** *See* also **17 Cr. L. J. 226 = 34 In. Ca. 642 (Pun.)**.

5. **To use oppression and trickery to obtain confession is very reprehensible.**—All oppression and trickery in regard to obtaining confessions are to be avoided by the Police under pain of the severest penalties and the practice of employing private individuals to worm out confessions from accused persons is strictly prohibited. Nothing so clearly shows want of detective tact, talent and resource, and of patient industry in a Police-officer as the resort to foul means to obtain confession. The most ignorant and clumsy can make out a case if he can torture the culprit till he tells him all about it. True detective talent and sagacity manifest themselves in patient and unremitting industry in weaving round the culprit such a network of undoubted facts and damning circumstances gathered from a variety of sources, that he cannot escape.—*Mad. Pol. Man.*, *p.* 95. **7 W. R. 56; 9 W. R. 16; 20 W. R. 33; 9 B. H. C. R. 358; 4 A. 46; 6 B. 34.**

6. **Pressure on Subordinate Police-officers to detect cases forbidden.**—Gazetted Police-officers are particularly warned against putting pressure on their subordinates by injunction to detect particular case or cases generally. When enrolled Police-officers fail to detect offenders owing to want of intelligence, industry, or integrity in their investigations, it shall be the duty of the District Superintendent of Police, or other inspecting officer, to point out the clues that ought to have been followed, the steps that ought to have been taken, the places that ought to have been visited, the persons that ought to have been interrogated, and the conduct that should have been adopted or avoided in the course of such investigations, and to take such steps as may be necessary for the punishment of neglect or misconduct.—*See Ord. and Rul.*, *Punjab*, *s.* 10-*A*, *p.* 284.

7. **Nominal presence of Magistrate not sufficient.**—It is only when properly made to the Magistrate that the confession of an accused can be used as evidence against him. The mere standing by of the Magistrate when the confession is being made to the Police is not sufficient, **12 W. R. 82; 8 P. W. R. 1914 = 38 P. L. R. 1914 = 15 Cr. L. J. 6.**

Power to record statements and confessions.

* **164.** (1) "Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Local Government may, if he is not a Police-officer," record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

*(3) "A Magistrate shall before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate" shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

* "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe"

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* The words in inverted commas, *viz.*, "Any Presidency Magistrate..............Police officer" were substituted for the words "Every Magistrate not being a Police-officer may" by Act XVIII of 1923. The words in inverted commas in sub-sec. (3), *viz*., "A Magistrate shall........................no Magistrate" were substituted for the words "No Magistrate" by Act XVIII of 1923. The words "I have explained..................and I believe" were substituted for the words "I believe" by the same Act.

5. Section applies only to statements recorded before inquiry or trial commences.—Where during an inquiry under s. 202, the Magistrate recorded a statement made by a person against whom the complaint was filed, *held*, that the statement cannot be considered as having been recorded under this section or s. 364, and being a statement made when the deponent was in the position of an accused person, cannot be evidence, **32 C. 1085.** *See* also **15 P. R. 1894; 29 Cr. L. J. 697.**

III.—ADMISSIBILITY IN EVIDENCE OF RECORD MADE UNDER THIS SECTION.

6. Admissibility of statements made in the absence of the accused.—Statement of witnesses recorded under s 164 in the absence of the accused cannot be used as evidence against him They are admissible only for contradicting the statements made by the witnesses at the trial and not for any other purpose **17 O. C. 363.**

7. Applicability of s. 91, Evidence Act discussed.—It is not clear how s. 91 of *the Evidence Act* can apply to a confession recorded under this section, for, an extra judicial confession to a Magistrate is not a matter required by law to be reduced to writing, it is merely a matter which a Magistrate is authorised to reduce to writing In this respect it differs from an examination of an accused person under s 364 which is a matter required by law to be reduced to writing A confession recorded in due conformity with this section is liable to be excluded if it appear to be irrelevant under s. 24 of *the Evidence Act* and a *fortiori*, one irregularly recorded should be so liable, **53 P. R. 1887; 21 P. R. 1881.** *See* also **33 M. 413.** Statements made by the accused in a departmental inquiry are not confessions within the meaning of s 164 and are therefore not matters required by law to be reduced to the form of a document They are legally admissible in evidence although they are wanting in the formalities and safeguards prescribed by this section, **36 A. 222.** *See* **3 P. 872.**

8. Effect of s. 21, Evidence Act—Relevancy of admission of accused.—S 21 of *the Evidence Act*, no doubt lays down the general rule that admissions are relevant and may be proved as against the persons who make them, but that rule must be taken subject to the special provisions relating to confessions and statements of accused persons, enacted in ss. 24, 25 and 26 of *the Evidence Act*, and ss 164 and 364 of the Criminal Procedure Code Were it otherwise, confessions and statements of accused persons which are not recorded in accordance with the requirements of ss 164 and 364 of the Criminal Procedure Code might nevertheless be proved as admissions by the accused, and the wholesome provisions laid down in those two sections practically reduced to a nullity This could never have been intended *Per* BANERJEE, J, **2 C. W. N. 702** at **p. 714, 8 C. W. N. 22**; but in **37 C. 467** it was *held*, that sections 164, 342 and 364 of the Code are not exhaustive, and do not limit the generality of s. 21 of *the Evidence Act* as to the relevancy of admissions, **Ratanlal 679** *referred to* and *doubted.*

9. Court may reject confession duly recorded and purporting to be made voluntarily.—It is open to any Court under s 24 of *the Evidence Act* to reject a confession tendered by the prosecution, if any ground of exclusion specified in that section is made to appear, notwithstanding that it has been duly recorded under this section, and notwithstanding that at the time of recording, it apeared to be a voluntary confession, but the circumstance that confession purported to be made voluntarily is one to be taken into account, and is a fact of which the accused person may reasonably be expected to give some satisfactory explanation **51 P. R. 1887.** *See* also **9 C. L. J. 663.** But a confession under this section made to a Magistrate, other than the committing Magistrate, if tendered on the part of the Crown, cannot be rejected on the sole ground that the accused had been a long time in the hands of the Police, **Ratanlal 720.**

10. When prisoner does not cease to be in Police custody.—When a prisoner in Police custody is brought before a Magistrate for the purpose of having his confession recorded, he does not cease to be in the custody of the Police, even though no Police-officer is in the room, while the confession is being recorded, **Ratanlal 835**; but the confession is none the less admissible if it is taken in conformity with the strict provisions of the law by a Magistrate, **24 P. W. R. 1909 = 10 Cr. L. J. 584; Ratanlal 720.**

IV.—COMPETENCY OF MAGISTRATES TO RECORD CONFESSIONS, ETC.

11. Only Magistrates not being Police officers can record.—Police-officers having magisterial powers are *not competent to record statements or confessions under this section*, **1 C. 207; 17 B. 485.** But it was *held*, in Burma that a Magistrate exercising Police powers and possessing the title of a Police-officer, can record a confession, but a Magistrate so doing should be exceedingly careful to record fully the circumstances under which he records the confession, both in order to show that the confession was voluntarily made and also that he has, so far as possible, divested himself for the time being of his Police authority and of his Police surroundings or other signs of such authority before proceeding to record such confession, **7 Bur. 100.**

available as evidence of information elicited during Police investigation, and that the power of preparing such record, which is withheld from the Police as to statements made to them, should be conferred upon a Magistrate, as such, as to statement made to him. The distinction that is made in this section is between statements that are confessions and statements that are not; and not between the persons by whom statements of either character are made; and it is made for the purpose of prescribing different modes of record. The section certainly is not intended to make Magistrates the instruments of Police, for the purpose of recording statements at the desire of the Police, irrespective of the desire of the persons produced for the purpose of making statements; and it is easy to conceive circumstances under which a Magistrate would be fully justified in refusing to record the statement of a person accused or not accused, who was produced by the Police for the purpose, although the statement was not a confession, *per* PLOWDEN, J., **2 P. R. 1893.**

3. **Section applies to 'statements of witnesses' as well as to 'confessions' of persons who may be charged.**—This section authorises a Magistrate to record the statement of a person who appears before him as a witness, as well as the confession of a person accused of an offence, **2 B. 643.** The section provides for the recording both of statements of persons proposed to be called as witnesses and of persons whom it is proposed to charge with an offence. The former are called statements of persons and are recorded on oath, and the latter are called confessions and not recorded on oath, but in the manner prescribed by s. 364, **5 S. L. R. 174 = 13 Cr. L. J. 33.** The word 'statement' here means the statement of a witness, as opposed to the confession of the accused. The method prescribed for recording such statement is strongly confirmatory of this view, *per* MACLEAN, C.J., **2 C. W. N. 702.** If the term 'statement' was intended to include statements of accused persons as well as those of witnesses, it must have directed the former class of statements to be recorded in the manner prescribed in s. 364, instead of directing as it does, that statements within the meaning of the section are to be recorded in the manner in which evidence is recorded while confessions are to be recorded in the manner prescribed in s. 364. The reason why this section provides only for recording that class of statement of the accused which are or purport to be confessions and does not provide for the recording of statements of accused persons other than confession is that the section relates to a stage of the case, namely, the Police investigation stage, at which statements of the accused which are other than voluntary confessions, and which are to be elicited by this examination are not intended to be obtained from him. *Per* BANNERJEE, J., **2 C. W. N. 702 at p. 715.** But this view has not been generally accepted. *See* **8 C. W. N. 22; 5 S. L. R. 174 = 13 Cr. L. J. 33; 9 M. 224.** Section 161 distinguishes sharply between statements of witnesses and confessions of accused persons. The same utterance might be regarded as a confession from one point of view and as a statement from another point. It all depends on the connection in which and the purpose for which it is sought to be used (**35 M. 397** at **p. 490** *referred to*). A Magistrate may record what anyone has to say to him as a 'statement' or 'a confession' adopting the procedure appropriate in each case. Where the utterance is so recorded its use for a different purpose is objectionable, **17 Cr. L. J. 195 = 34 In. Ca. 307 (M.).** The word "statement" in s. 164 of the Code is not limited to a statement by a witness, but includes that made by an accused and not amounting to a confession. Such statements must be recorded under the section, and cannot be proved orally by the recording Magistrate when not so recorded, **49 C. 167.**

Where an accused person makes a statement before a Magistrate under s. 164 and the statement is not a confession, but is of a self-exculpatory character, it is still admissible in evidence against him at his trial as evidential of a fact relative to the prosecution case, **4 P. 327.**

II.—AT WHAT STAGE STATEMENTS, ETC., MAY BE RECORDED.

4. **Section applies only to confessions made during investigation or after investigation but before inquiry or trial.**—A confession under s. 164 must be made either in the course of an investigation under Chapter XIV or after it has ceased and before the commencement of the inquiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the Police investigation. Where a number of persons were arrested on the 1st May, and the confessions of some of them were recorded on the 4th and 5th, while others were brought in subsequently and their confessions taken while the Police investigation was then actually going on, and on the 17th an order under s. 196 was obtained and the Police report sent in, and on the next day the examination of the prosecution witnesses began. *Held*, that the Magistrate did not take cognisance under s. 190 of the Code, nor did the inquiry commence on the 4th, and that the confessions were taken in the course of an investigation under Chapter XIV, **5 C. 954** and **5 A. 253** are no longer law; **32 C. 1085** *distinguished*, **37 C. 467** at **pp. 494—497.**

V.—DUTIES AND POWERS OF MAGISTRATES IN RECORDING STATEMENTS AND CONFESSIONS.

18. Nature of Magistrate's function under the section.—A Magistrate acting under this section is neither taking part in the investigation by the Police, nor acting judicially (*See* **1899 A. W. N. 39.**) This Chapter gives him no power either to require the attendance of any person or to examine any person, nor is there any obligation imposed upon persons making statements to a Magistrate corresponding to that imposed by s 161 upon persons interrogated by the Police. It seems that a Magistrate has no power to administer an oath or affirmation to any person whose statement he records His function is simply to prepare a record in the manner and subject to the conditions prescribed in this section. A Magistrate before whom any person is brought up by the Police with a view to exercising his magisterial powers under this section is at liberty to endeavour to ascertain from him whether he is "disposed to make a statement of his own free will, and until it appears that he is so disposed, the Magistrate is at liberty to bring to his notice that he is not under *any obligation to make a statement, and that any statement he does make may be used against him* A statement may of course be *voluntary*, though it is not spontaneous, to the extent that the idea of making a statement has been suggested by some person, as for instance by the Police-officer *Per* PLOWDEN, J, **2 P. R. 1893.** But as regards administering oath to witness, *see* Note 28 below

19. Duty of Magistrate before recording confessions or statements—Notifications.—No Magistrate should record any confession or statement under this section, until he has first recorded in writing his reasons for believing that the accused is going to make such statement voluntarily and until he has explained to the accused, that he is under no obligation to answer any question at all and warned him that it is not intended to make him an approver and that anything he says will be used against him If the Magistrate has a doubt as to whether the accused is going to speak voluntarily, he should remand him to the sub-jail before recording the confession or statement, such confession or statement should not in any case be recorded nor the warning abovementioned given in the presence of the Police-officers who have arrested or produced the accused, and if in any case the Police desire to use against others the information given to them by a person in custody they should apply for sanction to make that person an approver and a statement under this section should not first be taken from him.—*Mad G O No* 2883, *Judicial, dated 17th December*, 1887 [*the whole of the G O from which the above is an extract and the representation of the High Court which led up to it, are worth careful study*] It is desirable that Magistrates should act with deliberation in examining persons brought before them for the purpose of making confessions and should as far as possible, satisfy themselves that the confession is voluntary, and this not merely from the declaration of the accused, but from an attentive observation of his demeanour *Wilkins, p* 2 In cases sent to Magistrates, in order that the confessions of accused persons may be recorded under this section, the Magistrates should invariably satisfy themselves that the confessions are voluntary by all means in their power, including the examination of the bodies of the accused whenever feasible and should the accused persons consent to such examination The record of confessions should distinctly show whether the bodily examination has been made or not and, if not made, whether the omission was due to reluctance on the part of the accused In the event of such examination revealing *prima facie* grounds for suspecting violence, the Magistrate should have such accused persons examined by a medical officer *Bom Govt Gaz*, 1900, *Pt. I, p* 919, *Bom. H C Cr Cir, p* 19

20. Voluntary character of confession should be first ascertained.—No hard-and-fast rule can or should be laid down as to the procedure which should be adopted when an accused person is placed before the Magistrate for the recording of a confession, but it is not sufficient to put one comprehensive question as to the nature of the confession or to make a note at the commencement of the record that the accused has been warned not to confess through any fear or inducement and that the Police have been removed. A Magistrate ought, by putting questions which occur to him, to make himself conscientiously satisfied that the man is a free agent and that the confession he makes is a voluntary confession and that he has not been forced or deceived into making it, **15 Cr. L. J. 633 (Oudh)**, **25 B. 543.** *See* also **18 Cr. L. J. 721.** Where a Magistrate recorded a confession of the accused under this section without first satisfying himself about its being voluntary and then at the end of it put one comprehensive question as to the nature of the confession. It was *held*, that he had not complied with the provisions of this section, which clearly denote that the Magistrate should not proceed to record any confession unless he first had reason that the person was about to make it voluntarily and that he should, therefore, have begun by enquiring into that point. The unjustifiable violence used to the accused before his arrest, the illegal detention of the accused in

12. **Honorary Magistrate cannot record unless specially empowered.**—An Honorary Magistrate who is a member of an independent Bench with third-class powers and who is not specially authorised in that behalf, cannot act independently (*i.e.*, when not sitting on the Bench), and record statements or confessions under this section, **29 C. 483.**

13. **Village Magistrates not to record confessions.**—Village Magistrates are absolutely prohibited from reducing to writing or taking the signature of an accused person to any confession or statement whatever made by him. *Madras G.O. No.* 2883, *J., dated* 17*th December*, 1887, *as amended by G.O. No.* 1881, *dated* 1*st November*, 1909.

14. **Confessions may be recorded by a Magistrate subsequently conducting inquiry or holding trial.**—The cases in **5 C. 954** and **10 Bom. H. C. 166** were decisons based on the Code of 1872 and are no longer law. It is now provided that "*every*" Magistrate may record a confession, the word "*every*" being substituted for "*any*" and the explanation has also been added. These alterations make it clear that it can no longer be contended that a confession recorded by a Magistrate who afterwards holds the inquiry is outside the provisions of s. 164, **37 C. 467** at **p. 498.** Howsoever a confession may have been recorded, whether under an investigation or during a judicial inquiry, it is no longer material, because this Code (of 1898) has placed them all on the same footing in regard to the means of providing a remedy for a defect in recording such a statement. At any rate in whatever stage of the proceedings the statement may have been recorded, if it was admissible as evidence it would not become inadmissible, because the Magistrate may have thought proper to conduct the subsequent proceedings in the case, **3 C. W. N. 385** at **p. 391.** A Magistrate is not debarred from recording the confession of an accused person by the circumstance that it may afterwards be his duty to hold a preliminary inquiry, **Ratanlal 121.**

15. **Confession before a Magistrate not having jurisdiction in the case.**—The practice of taking prisoners before Magistrate not having jurisdiction in the case, for the purpose of getting a confession recorded, is not generally desirable, but such a confession legally admissible in evidence when duly proved, **7 B. H. C. R. Cr. Ca. 56 ; 24 P. W. R. 1909 = 153 P. L. R. 1909 = 10 Cr. L. J. 584.** But such a confession cannot be used without evidence being given as to the identity of the person who made the confession. There is no presumption under s. 80 of *the Evidence Act*, **11 C. 580.** Compare **8 P. W. R. 1914 = 15 Cr. L. J. 6.**

16. **Magistrate directing Police investigation not disqualified from recording statement under this section.**—It is the duty of the Magistrate who directs a Police investigation or who holds a preliminary inquiry under this Code to record statements under s. 164. It is his duty to see that accused confesses voluntarily and to record his confession truly. The Magistrate is not disqualified from performing those duties merely because he took part in the Police investigation. On the order hand, the Magistrate's personal relations with the investigating Police should not be such that an accused who had been forced to make a false confession by the Police would think it of no avail to tell the truth to the Magistrate, **5 S. L. R. 31 = 12 Cr. L. J. 489.**

17. **Confesssion before a foreign Court.**—A confession made before a foreign Court cannot be used against an accused person unless it is sworn to like confessions made to private persons, **Weir II, 125.** A confession made by an accused before a Magistrate in a Native State cannot be admitted into evidence under s. 80 of *the Evidence Act.* The Magistrate recording the confession must be examined to prove the confession before it can be used as evidence, **16 Bom. L. R. 261 = 2 Bom. Cr. Ca. 197 = 15 Cr. L. J. 433.** *See*, however, **13 A. 595; 22 B. 235; 2 P. R. 1909.** In the last case it was *held* that a confession made to a Magistrate in a Native State was admissible in evidence in a trial in British India if it is duly recorded in proceedings under and in the manner required by the Code. Such a confession is none the less admissible, even though the provisions of the Code have not been in every respect strictly observed *provided* the accused has not thereby been prejudiced on the merits and the fact that he made the statement is proved by evidence. The mere fact that the statement was actually written not by the Magistrate himself, but by the Munshi, does not in any way injure the accused as to his defence on the merits. But a confession so recorded is not entitled to the same weight as a confession recorded by a British Magistrate in strict compliance with the term of the Code, and Courts should hesitate to convict the accused upon such a confession standing alone, **8 P. R. 1907.**

17-A. **Confession recorded outside British India by a Magistrate having jurisdiction in British India.**—It is very doubtful whether a Magistrate, having jurisdiction within a district in the United Provinces, who takes down a confession in a place outside British India (*e.g.*, in the State of Gwalior), in connection with an offence committed in that district, does thereby record or has power to record a confession within the meaning of s. 164 of the Cr. Pro. Code, **19 A. L. J. 355.**

guilty escape with impunity He should always, therefore, record whether the accused has been brought up from the Police custody or from the jail, and whether the Police-officers who made investigation in the case were present in Court while the accused was making his statement, **1 C. P. Cr. 115.**

26. Magistrate bound to warn prisoner.—The Select Committee say "we consider that a statutory obligation should be laid on a Magistrate acting under this section to warn an accused person about to make a confession that the same may be used against him and we think that the certificate prescribed by sub section (3) should record the fact that the warning had been given" It is now obligatory on every Magistrate acting under this section to warn the person making a statement to him that it might be used against him and that he is not bound to make a confession

27. Statements of witnesses should be recorded by Magistrate when fresh.—In some districts it is the practice with the Police to wait for the Chemical Examiner's report before sending up a case to the Magistrate for trial It is however of the greater importance in serious charges that the statements of witnesses should be recorded, by the Magistrate when fresh It is contrary to the wish of the Government to wait for the Chemical Examiner's report in such cases, but the other evidence should be placed before the Magistrate as soon as it appears that *prima facie* case is made out —*Beng Pol. Code, p* 383

28. Magistrate can administer oath—Prosecution for false statement.—A Magistrate acting under this section has power to administer an oath, and a charge of perjury can be framed with regard to such statements when he is so acting **16 M. 421.** A Magistrate acting under this section is a Court acting in the discharge of a duty imposed upon him by law and is therefore authorised to administer oath under s 4 of *the Indian Oaths Act* (X of 1873) **29 M. 89, 5 S. L. R. 174 = 13 Cr. L. J. 33; 22 A. 115;** even to a suspected person, **8 Bom. L. R. 589 = 4 Cr. L J. 183,** but *see* **32 C. 1083.**

But no oath can be administered to an accused under s 341 (4) and a *confession* recorded on oath is not a confession and is inadmissible in evidence, **10 C. P. Cr. 16.** He cannot be examined as a witness, but can be questioned only to the extent and for the purpose specified in s 342 But *see* **3 P. R. 1880.** *See* also **27 C. 455,** where it was *held* that it was illegal for a Magistrate to administer an oath to an accused person for the purpose of obtaining information on which to take proceedings

29. Is recording a statement under this section a judicial proceeding?—By the Full Bench decision in **45 B. 834 = 23 Bom. L R. 1,** it is *held* that a statement recorded by a Magistrate in the course of a Police investigation under s 164 of the Cr Pro Code, is not evidence in a stage of a judicial proceeding within the meaning of explanation 2 to s 193 I P C The decisions in **8 B. 216, 16 M. 421** and **29 M. 89** laying down to the contrary were dissented from

30. Magistrate must not allow others to intervene in examining witnesses—There is no warrant or justification for the intervention of a third party as a questioner, directly or indirectly, of a confessing prisoner, **9 C L. J. 663, 13 C W. N. 861**

VI.—CONFESSION SHOULD BE VOLUNTARY.

31. Confession must be free and voluntary.—A confession to be admissible must be free and voluntary, that is, must not be extracted by any sort of threat of violence nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence by persons in authority because under such circumstances the party may have been induced to say what is not true. "A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement being given in evidence, and although it may be put that when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything let it be true." *R* v *Furley*, **1 Cox. 76.** It is not part of the duty of a Magistrate to tell the accused that anything he may say will go as evidence against him, **10 C. 775.** *See* Note 26

It is not legal to use either as against the person making it or against his co-accused [illegible] is the direct outcome of the confessing accused being given to understand that, if he co[illegible] [illegible] reasonable prospect of his receiving a pardon. Such confession is not admissible in evi[illegible] **45 A. 633.**

32. On whom does the *onus* lie to prove that confession was voluntary?—I[illegible] of proof lies upon the prosecution, *R* v *Thomson* (1893) [illegible] free and voluntary [illegible] be prosecution must prove affirmatively that the confession was [illegible]sion

Police custody for more than 24 hours after his arrest, and the marks of violence on his person unexplained are sufficient to vitiate the voluntary character of the confession of the accused and to make it admissible in evidence, **1 Bom. L. R. 357.** Unless the Magistrate has made a real and substantial inquiry as to the voluntary nature of a confession, a confession even before him is inadmissible in evidence, **3 L. B. R. 173 = 4 Cr. L. J. 198.** The omission of the Magistrate to question the accused before recording his confession is a fatal defect rendering the confession inadmissible, **3 L. B. R. 213 = 4 Cr. L. J. 358.** *See* also **3 L. B. R. 1.** In **40 C. 873** it was, however, *held* that the fact that, the Magistrate instead of asking the accused about the voluntary nature of the confession at the commencement of the confessional statement asked him at the end, was merely a defect of form that did not alter the character of confession. In **8 Bom. L. R. 950** it was laid down that the questioning need not precede the taking of the confession.

21. **Duty of Magistrate recording depositions of witnesses sent up by the Police.**—A Magistrate should abstain from recording the evidence of witnesses sent up by the Police unless he has some assurance from them that they attend voluntarily and are making statements to him voluntarily. In the case of an accused, the Magistrate is bound to make a certificate to that effect. In the case of witness, too, it is important there should be equal safeguard, although they are not required by law, **7 C. W. N. 345.** *See* also **4 C. W. N. 49.** A Magistrate ought to be so satisfied *before* he proceeds to record the statement or confession, **5 A. 253; 3 C. W. N. CIII.**

22. **Impropriety of taking down statements of witnesses with a view to fix them to those statements.**—Where a witness made a statement before the Police incriminating the accused, and the Police-officer without attempting to expedite the completion of the investigation or sending up the whole case to the Magistrate sent only that witness to be examined by the Magistrate under the section, and the Magistrate examined her and recorded her statement as that of a witness and added a note that the statement was taken in the presence of the accused who had an opportunity to cross-examine her but did not do so. *Held*, that this section was not intended to enable the Police to obtain an incriminating statement by some person and as it were to put a seal on that statement by sending in that person to a Magistrate practically under custody to have her examined before the judicial inquiry or trial, and therefore compromised in her evidence when judicial proceedings are regularly taken. It may be observed that the law does not require that, in the case of a witness so examined, there should be a certificate after proper inquiry that the statement has been voluntarily made, but the law also expressly protects a witness from unnecessary restraint or inconvenience at the hands of the Police. A statement thus obtained always raises suspicion that it has not been voluntarily made, **27 C. 295.** *See* also **7 C. L. J. 246 = 7 Cr. L. J. 315,** where it was *held* that in a trial by jury, the Judge ought to tell the jury that evidence of witnesses taken under this section for the purposes of pinning them down to certain statements must be accepted with a geat deal of caution. It is highly improper for a Magistrate to take during the investigation by himself of a criminal case, the statements of certain witnesses on solemn affirmation out of Court and in the absence of the accused, with the avowed object of proceeding criminally against the witnesses should they subsequently in open Court deviate from the statements formerly made, **Ratanlal 66.** *See* also **4 C. W. N. 49.**

23. **Magistrate not to examine or question the deponent.**—Under this section a Magistrate is entitled in the course of a Police investigation to record any voluntary statement made by the accused person, but he is not entitled to examine him in respect of the facts of the case. That power is only given by s. 342 under which he may examine the accused in respect of the evidence recorded against him for the purpose of explaining such evidence. It is improper to cross-examine the accused, **5 C. W. N. 864; 2 P. R. 1893.** The examination of the accused must not be made with a view to elicit the truth out of his mouth by constant questions as though he were a witness, **5 C. P. Cr. 13.** But the mere fact that a statement was elicited by a question does not make it irrelevant as a confession under this section or s. 29 of *the Evidence Act*, though such fact may be material on the question of its voluntariness, **37 C. 467** at **p. 498; 15 W. R. 71** *referred to.*

24. **Must not hold out any inducement.**—In **Weir II, 137,** the conduct of a Magistrate in holding out to a prisoner who had already confessed, the inducement that in case he made a further confession, he will be admitted as an approver, was *held* to be most improper. *See* Note 4 to s. 163.

25. **Magistrate ought to be careful of the interests of accused as of prosecution—He should endeavour to ascertain the truth.**—In recording confessions or, incriminating statements of accused persons in preliminary inquiries, the Magistrate ought to be as much careful of the interests of the accused as of the prosecution, to ascertain the truth of the case, and endeavour that the innocent may not be convicted or the

the provisions of the law which is cured by s. 533, as much as non-compliance with any other provision but there is a difference between non compliance, an omission to do something which a person is directed to do and a direct violation of the law, and the section seems to assume that the confession has been recorded in accordance with the provisions of the law It is a section which provides a remedy in cases in which certain provisions of the law have not been fully complied with by the Magistrate and, operating as it does against the accused person and not in his favour, it must be strictly construed It would, we think, be extremely dangerous so to construe it as to include not only omission to comply with the law, but infractions of it. *Per* MACPHERSON and HILL, JJ, in **17 C. 862** at **p. 871**, *doubted in* **18 C. 549** *and dissented from in* **21 B. 495** and **23 B. 221.** But failure to comply with the rules prescribed by Government which have not the force of law does not preclude admission of evidence to prove the character of the confession but such a failure might be a circumstance to be considered in deciding the question whether the confession is made voluntarily or not, **33 M. 413.** *See* also **4 C. 696.**

The record of a confession did not show that the accused was warned by the Magistrate that he was not bound to make a confession and did not in clear terms show that the accused had been asked whether the statement was made voluntarily The Magistrate was examined and he deposed that he had cautioned the accused and explained to him that he was not bound to make a statement, but that if he did so it might be used in evidence against him *Held*, that the confession was admissible **3 P. 872** (**2 L. 325** dissented from) *See* also **6 L. 58.**

38. Police-officers not to be present at confessions or statements.—A confession or statement should not in any case be recorded nor the warning that anything he says will be used against him be given in the presence of the Police-officers who have arrested or produced the accused. *Madras G O No* 2883 *J. dated 17th December*, 1887, *as amended by G O No* 1481, J, *dated 1st November*, 1909 It is not desirable that the Police-officer making an investigation under this Chapter should be present when a confession is recorded under this section, nor should any Police-officer remain in the Magistrate s Court, except such as may be necessary to secure the safe custody of the accused person, which, however, can usually be done by the Magistrate's attendants other than Policemen The record of the circumstances should include a statement that these requirements have been complied with —*Bom H C Cr Cir*, *p* 2. A Police-officer should not be allowed to suggest questions to be put Though a confession so taken would not be inadmissible as evidence the Court would not attach much weight to it, as such a course would suggest that the Magistrate is not conducting the inquiry himself *See* **9 C. L. J. 663.** It is highly irregular for a Magistrate recording a confession to obtain from the Police a report of what the accused is alleged to have stated to them, before he begins to record the confession In **11 C. L. J. 273 = 11 Cr. L. J. 247,** it was *held*, that a confession taken in jail by a Magistrate with the Police-officer in the next room and subsequently retracted could not be acted upon unless supported by very good corroboration.

39. Confession recorded in a different language.—It seems that the provisions of this section as read with s 364, would not be complied with, where answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown that it was impracticable to have taken down the answers in the language in which they were given, and further that there would be grave doubt if such a defect could be cured by s 533 **15 C. 595.** *See* **17 C. 862; 18 C. 549; 2 C. W. N. 702; 9 M. 224; 8 C. 618 (Note) = 1 C. L. R. 1, 14 C. 539, 21 B. 405** at **p. 501; 23 B. 221; 1892 A. W. N. 60, 10 O. C. 112 = 6 Cr. L. J. 94; 22 C. 817.** A Magistrate when recording a confession put the question to the accused in *Marathi* and the accused gave his answers in the same language, but the Magistrate recorded the confession in English After the examination was concluded the Magistrate read out the confession sentence by sentence and the *Sheristadar* translated it into *Marathi* and then the accused admitted it was correct, *held*, having regard to the provisions of s. 533, and the parol evidence of the Magistrate and the *Sheristadar* at the trial, that the confession was admissible and that the error had not prejudiced the accused as to his defence on its merits, **4 Bom. L. R. 785,** where **9 M. 224** is *distinguished.*

40. Translation of confession should be filed with record.—Whenever a confession recorded under this section and written in the vernacular is used as evidence in a trial before a Court of Session, a translation of it should be made and filed with the memorandum made by the Judge of the evidence taken by him under s. 356 and should form part of the record —*Bom. H C Cr Cir*, *para.* 38-*A*, *p* 30

41. Confession recorded by Magistrate's clerk.—Although the terms of ss. 164 and 364 are to be strictly observed by the Magistrate actually taking down the confession himself, the defect of a confession

See also *Ibrahim* v *The King*, 18 C. W. N. 705 = 15 Cr. L. J. 326 (P.C.) where all the cases are reviewed. It is submitted that the law in India ought to be the same. *See* 2 Bom. L. R. Journal 157. But in 25 B. 168, it has been *held* that in this country a confession is *prima facie* admissible unless the accused proves that the confession was not voluntary, disapproving of *Bom. H. C. Cr. Ruling* 3 *of* 1898. *See* also 2 C. W. N. CXXV and *Amir Ali's Evidence Act*, p. 250.

33. **Duration of Police custody is an important element in determining the voluntary character of the confession.**—Confession after an accused person has been in Police custody for some time is always open to grave suspicion, 9 A. 528 at p. 566; 6 C. W. N. 380. The fact and duration of Police custody is very properly regarded as having a material bearing on the question whether confession is voluntary or not, 13 C. W. N. 861. When a Magistrate records the confession of a person who had been in detention by the Police, he must ascertain and record, for the purpose of satisfying himself that the confession was voluntary, how long the accused has been in the custody of the Police. Where there is no record of such questioning, it is the duty of the Sessions Judge to whom the case has been committed to send for the Magistrate and satisfy himself on the point before holding the confession to be relevant, 25 B. 543. When it appeared that an accused person was illegally confined in solitary confinement for about a fortnight, that the Police had access to him, that pressure was brought to bear upon him through his father, mother and brother, that the desirability of a confession was pressed upon him by the District Magistrate as a means of saving himself and his relatives from threatened pains and penalties, that his father was illegally arrested and detained in *hajut* for a long time without any charge, that he then made a confession which was recorded without legal precautions and in the immediate presence of an officer who was the head of the Police and was officially and personally interested in the case and who put incriminating questions to accused and helped in amplifying the confession, and finally that the confession was retracted as soon as the accused was produced in Court. *Held*, such confession was not voluntary and not admissible in evidence, 9 C. L. J. 663; 15 Cr. L. J. 633 (O.); 1885 A. W. N. 59.

34. **Voluntariness of confessions should appear at the beginning of a statement.**—The fact that confession is made voluntarily, and that the accused was warned that he was not bound to make it, should appear at the beginning and not at the end of the statement, Weir II, 136. The only questions permissible are as to whether or not the confession is made voluntarily, 10 B. H. C. R. 166 at p. 175; 17 C. 862 at p. 871. Incriminating questions are highly improper.

35. **Duty of Appellate Court when voluntary nature of confession is impugned.**—The Court of Appeal is not precluded from inquiry into the nature of a confession, to see whether it was voluntary or not, because the recording Magistrate attached at its foot the memorandum prescribed in s. 164. It is a duty clearly incumbent on the Court of Appeal, when the spontaneity and voluntary nature of the confession is impugned, 9 C. L. J. 663.

VII.—FORMALITIES TO BE OBSERVED AND OMISSIONS THEREOF.

36. **Formalities to be observed in recording confessions.**—Whenever a statement or confession is made by any person in the presence of a Magistrate under this section, the Magistrate, in order to make it admissible as evidence against such person, should specially record the circumstances under which the statement or confession is made, and in whose custody the person is at the time, and he should carefully observe the following formalities —

(1) Every question and every answer must be recorded in full (s. 364).

(2) The signature or mark of the accused person must be affixed (s. 364).

(3) The Magistrate must make a memorandum at the foot of the confession as stated at end of this section—*Bom Cr. Cir.*, 1. *See* 1 B. 219 and 25 B. 168.

37. **Provision as to the mode of recording confessions are mandatory.**—The provisions of this section read with s 364 are imperative, and s 533 *infra* will not render a confession admissible where no attempt at all has been made to conform to its provision *Per* PARKER, J., 9 M. 224. That section does not contemplate to provide for any non-compliance with the law in this respect. S. 533 would only come into operation when a confession or other statement of an accused person recorded under this section and under s. 364 was tendered, but a confession tendered in direct violation of those sections would not be a confession recorded under them; and the recorded statement to be proved must mean a statement recorded in accordance with the provisions of the Act and not in violation of them. It may be argued that, if the Magistrate recording the confession, records it in a language other than that directed by law, there is on his part a non-compliance with

51. Recording Magistrate may be examined to prove statement voluntary.—Where a District Magistrate refused to make the memorandum referred to in this section, because it appeared to him that the statement was not the accused's free and spontaneous statement, but was made by him in consequence of certain hopes which a constable held out to the accused, which he thought might probably be realised, the Appellate Court directed that the District Magistrate might be examined under s 533 as to the statement made by the accused before him and on the District Magistrate proving that the statement was made voluntarily, the same was admitted in evidence, **8 O. C. 395**; and **113 I. C. 65 = 30 Cr. L. J. 49**, but *see* **17 Bom. L. R. 898 = 3 Bom. Cr. C. 110**, and also **2 P. R. 1909; 12 Cr. L. J. 15 (All.)**

52. Confessions used in evidence, how quoted.—Whenever a statement or confession is recorded under this section, the Magistrate recording the statement or confession should indicate thereon the section of the Code under which it is recorded, and the Judge or Magistrate who afterwards makes use of the document as evidence should quote, at the head thereof, by its name and serial number, the case or proceeding in which such document is recorded.—*Bom H C Cr Cir*, *p.* 3.

VIII.—RETRACTED CONFESSIONS.

53. Effect of confession subsequently retracted.—It is unsafe for a Court to rely and act upon a confession which has been retracted unless upon a consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true, *i e*, to say, usually unless the confession is corroborated by credible independent evidence, **18 A. 78; 27 C. 295; 23 C. 629; 6 S. L. R. 34; 3 P. W. R. 1907; 10 M. 295; 12 M. 123; 19 M. 482.** Retracted confessions are always open to suspicion, **22 C. 164.** But it is not illegal to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact, **30 P. R. 1914 = 264 P. L. R. 1914.**

54. Corroborative evidence not absolutely necessary, but generally required.—A retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case There is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars The use to be made of such a confession is a matter of precedence rather than of law,' **19 B. 728; 23 B. 316; 20 A. 133; 29 A. 434.** *See* also **1885 A. W. N. 221; 6 W. R. 73; 8 W. R. 40; 11 Bom. H. C. R. 137; 11 W. R. 20; 12 W. R. 49; 16 C. W. N. 1105; 30 P. R. 1914 = 50 P. W. R. 1914 = 264 P. L. R. 1914 = 15 Cr. L. J. 626, 15 P. W. R. 1915; 11 P. W. R. 1915; 31 Bom. L. R. 565.** "It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent and corroborated evidence The weight to be given to such a confession must, it is clear, depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction It is obvious that a confession in itself reasonable and probable must, if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval There are other circumstances which may go to diminish or to increase the weight that should be attached to a confession, **21 M. 83 at p. 88; 23 B. 316; 2 C. W. N. 637; 16 P. R. 1903 and 24 P. W. R. 1909 = 10 Cr. L. J. 584; 24 P. R. 1910 = 33 P. W. R. 1910 = 11 Cr. L. J. 604; 30 P. R. 1914 = 15 Cr. L. J. 626.** 'If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge is bound to act, so far as that prisoner is concerned on that confession which he believes to be true Where a confession is not supported by the evidence of witnesses, a Judge must examine very carefully to see whether it gives those details which indicate that is a natural narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed, and is not merely a parrot like repetition of a story put into the man's mouth,' **20 A. 133 at p. 134, 10 M. 295; 14 Cr. L. J. 179 (Bur), 30 P. R. 1914 = 15 Cr. L. J. 626.** *See* also **6 P. W. R. 1916**, where **30 P. R. 1914** was followed.

55. Magistrate must inquire into all material points.—Where a confession is retracted, it is the duty of the Court that is called to act upon it, especially in a case of murder, to inquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true, **3 Bom. L. R. 441.** Where confessions are retracted, allegations are frequently made of ill-treatment or other improper inducement on the part of the Police Such allegations should be carefully inquired into and considered, **8 B. H. C. R. Cr. Ca. 126.**

56. Mere retraction is no proof of unlawful inducement—English practice different.—In this country a confession duly recorded and certified under this section is admissible in evidence against the person making it (even though it is subsequently retracted), unless shut out by the provision of s. 24 of *the Evidence Act*

having been recorded by the Magistrate's clerk can be cured under s. 533 by examining the Magistrate, **2 P. R. 1909.** *See* also **14 C. 539**; but a Police-officer ought not to be employed, **9 C. L. J. 55.**

42. Statement made through an interpreter in a language other than the Court language.—When the statement or confession is made through an interpreter in a language other than that of the Court, it is not necessary that it should be recorded in that language. The language in which it is conveyed to the Court by the interpreter is the language in which it should be recorded, **5 C. 826.**

43. Refusal of accused to sign confession.—An accused person who refuses to sign a statement made at his trial in answer to questions put by the Court commits no offence punishable under s. 180, I.P.C., **4 B. 15**; **3 L. B. R. 199.** *See* **10 B. H. C. R. 166** at **p. 177** as to the object of requiring the accused to sign. *See* also **9 C. L. J. 55.** The signature is unnecessary when the confession is made to the trying Court, **3 C. 756.**

44. Thumb-impression is not signature.—Where a document purporting to be a confession of an accused person who was able to write, bore a thumb-impression close to the printed words '*signature or mark of the accused*' in the place where if he had signed, he would have placed his signature; *held*, that the *thumb-impression* was not a signature within the meaning of s. 3 (52) of *the General Clauses Act X* of 1897 and therefore the provisions of this section had not been complied with, **32 C. 550.**

45. Signature of Magistrate essential.—The record of the confession as well as the memorandum must be signed by the Magistrate, **3 C. W. N. 387.** The section does not require a memorandum that a *statement* as distinguished from a confession was made voluntarily, **27 C. 295.** Having regard to s. 533, the following decisions are no longer law, **10 B. H. C. R. 497**; **5 C. 954** = **6 C. L. R. 297**; **5 C. 958** = **6 C. L. R. 353**; **4 C. 696**; **5 C. L. R. 209.**

46. Irregularity in making memorandum.—A confession does not not become inadmissible merely because the memorandum required by the law to be attached thereto by the Magistrate has not been written in the exact form prescribed, **3 A. 338,** but *see* **6 B. 288.** But such a confession cannot be admitted under s. 80 of *the Evidence Act* without proof of its having been properly made, **7 C. W. N. 220.** *See* also **9 M. 224**; **18 C. 549**; **12 A. 595**; **8 O. C. 395**; **2 P. R. 1909**; **15 N. L. R. 19** = **15 Cr. L. J. 243** *following* **7 C. P. L. R. 14** and **40 C. 873.** *See* also **6 L. 58.** *See* also Note 37 above.

47. Omission to record the circumstances under which confession is made.—The omission of the Magistrate before whom the confession of an accused person was made to record the circumstances that the accused was not in the custody of the Police at the time does not invalidate the confession, if the requirements of the Code were complied with by the Magistrate when he recorded the confession, **Ratanlal 534**; **5 C. 958.**

48. Recording confession in narrative form.—The confession of an accused person was recorded in a simple narrative form instead of in the shape of question and answer as required by s. 364. There was nothing in the character of the confession, or in the circumstances of the case to lead to the inference that the accused had been prejudiced by the error. *Held*, that the error did not affect the admissibility of the statement in evidence, **8 C. 616**; **4 Bom. L. R. 785** at **p. 787**; **9 C. L. J. 55**; **14 C. 539** and **23 B. 221**; **12 C. L. R. 120.** See *contra* **10 B. H. C. R. 166** and **497.** *See* also **1909 U. B. R. 1 Ev. 3** = **11 Cr. L. J. 41.**

49. Omission to record that confession was voluntarily made.—Where in reply to the questions of the committing Magistrate, the accused made confessional statements which the Magistrate recorded and subscribed thereto the following declaration:—"The statement made by this prisoner in my presence and hearing is taken down fully. It is read over to him and acknowledged to be correct." *Held*, the statements, were not admissible in evidence, the provisions of this section not having been followed, **Weir II, 140** where observations are made as to the duty of the magistracy in recording confessions. In **12 Cr. L. J. 15 (A.)**, however, where the accused was convicted on his confession recorded by a Magistrate who omitted to make the memorandum at the foot of the record to the effect that he believed that the confession was voluntarily made, the Judges of the High Court before whom the case came on appeal sent for the Magistrate who deposed that he believed that the confession was voluntarily made and that he inadvertently omitted the words. The Judges *held* that though ordinarily such a statement made by the Magistrate would be received with full confidence, in the circumstances of the case they would not act on the confession. *See* also **8 O. C. 395**; **2 P. R. 1909**; **6 L. 183.**

50. Memorandum referred to in s. 364 not necessary.—Under the present amendment it is obligatory on the Magistrate to certify that the warning was given to the accused that if he makes a confession the same would be used against him. Therefore, omission to record such certificate would be illegal.

elucidation of guilt as is supposed, for it continually happens that, while the Police have been occupying themselves in getting the confession many of the traces of the crime, which, if at once followed up, would have produced valuable proof have disappeared. To repeat a phrase, I used on a former occasion, instead of working *up to* the confession, they work *down from* it with the result that we frequently find ourselves compelled to reverse convictions, simply because, beyond the confession there is no tangible evidence of guilt. Moreover, I have said, and I repeat now, it is incredible that the extraordinarily large number of confessions which come before us in criminal cases disposed of by this Court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented I may claim some knowledge of, and acquaintance with, the ways and conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add that during fourteen years' active practice in the Criminal Courts in England I do not remember half a-dozen instances in which a real confession, once having been made, was retracted In this country, on the contrary, the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in *havalat*, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered I say it in no harsh sense of disparagement but it is impossible not to feel that the average Indian Policeman, with the desire to satisfy his superiors before, and the terms of the Police Acts and Rules behind him, is not likely to be over nice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess," **6 A. 509 at p. 542.**

61. Caution in relying upon confessions or admissions—Precautions to be observed in the investigation of crime.—It is necessary to warn Police-officers against the practice of unduly relying upon confessions or admissions made by persons suspected of the commission of an offence, and thereby failing to place before Courts cases fully investigated and, at the same time, complete and supported by the best evidence which can be procured Experience shows that a person guilty of serious crime rarely gives an accouut of his acts and motives in accurate detail Even, while admitting the commission of a crime, he will resort to various devices whereby he hopes to lessen his criminality in the eyes of the Court. The inaccuarcy may consist in putting forward false and plausible motives for his act, in exaggerating or extenuating, as he thinks more expedient, the surrounding circumstances, in introducing other persons againt whom he entertains a grudge as participators in his act or in any other expedient which may at the time commend itself to his brain The Police may be and often are led first, into adopting one of the inaccuracies and next into supporting it by evidence as to motive or surrounding circumstances, and this evidence, having no foundation is easily shown at the trial to be worthless The prisoner then has only to retract his confession, and the Court has no alternative but to acquit. A still more reprehensible practice is that in which an officer neglects to collect evidence, and adopts a confession blindly in order to save himself the trouble and worry of a protracted investigation.—*C P Pol. Man*, *p* 168, *Reg. and Ord*, *N W P*, *p* 363

The Inspector General expects officers in cases investigated by them to look out vigilantly for and to work throughout upon evidence of a reliable character The crimes are few in number, which are not accompanied by traces which can be linked together and formed into a chain of reliable proof All clues should be carefully followed up, patient inquiry must be made from everyone who is likely to have been connected with events which the investigation shows did precede, or which may in the ordinary course of things be presumed to have preceded the crime The same treatment should be applied to events which may appear to have accompanied or followed in point of time the traces which have come into the hands of the Police. All statements made by persons likely to be implicated in the offence must be accepted with extreme caution. These statements should invariably be tested whenever the opportunity presents itself for such a test by the examination of all places things and people mentioned in them If these statements are not corroborated, or on the face of them appear improbable, the want of corroboration or the improbability must be pointed out and explanation called for, and the clue, if any, afforded by the explanation tested over and over again, until statement is proved false, or is capable of being corroborated in whole or in part by good and independent evidence.—*Reg and Ord*, *N W P*, *s* 10, *p* 363.

62. Evidence to corroborate confessions must be obtained—Prosecution must not be launched on confession alone.—It should be clearly realised that the successful recording by a Magistrate of the confession of an accused person is not a final, but is rather an initial stage of the investigation The next step is to obtain the corroborative evidence without which confessions ordinarily are discredited by the Courts. If the confession be true evidence in support of some portion of it will be forthcoming and should be collected. When in

A mere subsequent retraction of a confession which is duly recorded and certified is not enough in all cases to make it appear to have been unlawfully induced. The law in England is not quite the same as to the relevancy and admissibility of confessions [L. R. (1893); 2 Q. B. D. 12]; as the Court there has to decide whether it has been proved *affirmatively* to be free and voluntary, 25 B. 168; 6 L. 415.

57. **Retracted confessions should carry practically no weight against persons jointly tried with the maker.**—It is not made on oath, it is not tested by cross-examination and its truth is denied by the maker himself who has lied on one or other of the occasions. The very fullest corroboration whould be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath, 28 C. 689. As to the value of confession in joint trials, *see* 6 B. 288; 6 C. 279; 10 B. L. R. 453 = 19 W. R. 67; 10 B. L. R. 455 (Note) = 19 W. R. 16; 15 C. W. N. 593 = 12 Cr. L. J. 286. Such a confession cannot stand higher than accomplice testimony which generally requires corroboration, 4 C. 483 = 3 C. L. R. 270 = 10 B. 231; 2 C. W. N. 749; 17 A. 524; 23 M. 151; 19 M. 482; 15 B. 66; 22 A. 445; 11 O. C. 328 = 8 Cr. L. J. 393; 12 O. C. 418 = 11 Cr. L. J. 71; 11 A. L. J. 73 = 14 Cr. L. J. 112; 264 P. L. R. 1914 = 50 P. W. R. 1914 = 30 P. R. 1914 = 15 Cr. L. J. 626; 163 P. L. R. 1915 = 22 P. W. R. 1915; 6 Bur. L. T. 47 = 14 Cr. L. J. 179; 29 A. 434; *see* also 31 Bom. L. R. 565. As to the proof of confessions made in the absence of the co-accused. *See* 6 B. 124; 7 C. 65 = 8 C. L. R. 352; 10 C. 970. *See* also 17 Cr. L. J. 226 = 34 In. Ca. 642 (Pun.). But *see* 6 L. 415.

58. **Self-exculpatory statements.**—A statement was taken from a woman under this section to the effect that another person had murdered the deceased and had deposited the dead body in a certain place. She pointed out the place where the dead body had been buried and delivered up the jewels which the deceased had been wearing at the time of the murder. This statement was put in evidence at the trial of the deponent and the other person for murder. *Held*, the statement was inadmissible against the co-accused, because though when it was made, the deponent was a witness, she was no longer a witness at the trial and the co-accused had no opportunity of cross-examining her as to the facts and allegations contained therein. Further, it was inadmissible on the charge of murder against the deponent herself, who withdrew the same at her trial alleging that she was coerced into making the same, because it was no confession of guilt on her part and she did not implicate herself as a participator in the murder, 2 A. L. J. 100 = 2 Cr. L. J. 59. *See* also (1911) 2 M. W. N. 375. But *see* 4 p. 327.

IX.—POWERS AND DUTIES OF THE POLICE.

59. **Police-officer cannot compel witness to go to a Magistrate or to make statement.**—There is no provision of law which empowers a Police-officer to require a witness to go before a Magistrate not having jurisdiction over the offence to have his statement taken under this section, **Ratanlal 468.** S. 164 was not intended to enable the Police to obtain an incriminating statement, by some person and as it were to put a seal on that statement by sending in that person, practically under custody, to a Magistrate, 27 C. 295. The object of s. 162 which declares that a Police-officer shall not record a statement made to him by a person under examination would be defeated if he can cause certain persons to appear before a Magistrate not competent to deal with the case and to get the statements of the persons to be recorded by him, 29 C. 483. If a Police-officer has reason to believe that the witnesses are likely to be gained over by the accused or his party, he should send the accused and his witness to the Magistrate having jurisdiction without delay. A Magistrate having no jurisdiction can, however, record the statement of a witness under this section, if the witness appears *voluntarily* before him. *See* also 7 C. W. N. 345.

60. **Experience of Mr. Justice Straight as regards confessions in this country—Reprehensible conduct of Police in directing their attention to secure confession.**—" My experience in this Court has conclusively satisfied my mind of two things; first, that in almost every case of serious gravity or difficulty, the primary object towards which the Police direct their attention and energies is, if possible, to secure a confession; secondly, that such confessions, if subsequently retracted, is, an item of judicial proof, unless corroborated by strong and independent evidence, positively worthless. It requires no very vivid imagination to picture what too often takes place when two or three of these not very intellectual or highly-paid Police officials are called away to a village to investigate a grave crime of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons instead of by searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is. But, as I have more than once been constrained to remark from this Bench, the effect of this sanction given by s. 164 of the Criminal Procedure Code to a Magistrate recording in the course of the investigation the confessions of accused persons thus obtained, not from the hands of the Police, is not so beneficial to the

thing for which search is to be made" and such subordinate officer may thereupon search for such thing in such place

(4) The provisions of this Code as to search warrants "and the general provisions as to searches contained in s 102 and s 103" shall, so far as may be, apply to a search made under this section.

*(5) Copies of any record made under sub section (1) or sub section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognisance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate.

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

Note.—Referring to the amendment of this section, the Select Committee say.—"Suggestions have been made that section 165 as redrafted by the bill goes too far and that it should only permit a search to be made for something specified We think the utility of the section would be largely impaired if effect were given to these suggestions, but we have provided a safeguard by requiring that an officer acting under sub-section (1) or sub-section (3) shall record in writing his reasons for making a search or requiring a search to be made'

Safeguards to protect the individual from unnecessary trouble have been introduced by the amended section by requiring the Police-officer to record in writing the grounds of his belief and the thing of which search is to be made and sub-section (5) it is obligatory to send a copy of the record to the nearest Magistrate and a copy to be supplied to the owner on application

Notes.—1. Provisions for searches.—*See* ss 96—99 The Court can issue a search warrant under s 96 or *in lieu* of that the Magistrate may himself search under s. 105, s 165 deals with searches by a Police-officer and not by a Magistrate **36 C. 433 at p. 448**

2 At what time house-search to be made.—*United Provinces Rules*—House search may be made at any time House-search by night is neither illegal nor contrary to orders still when the search can be delayed without danger to the chance of recovering property, it should be postponed till sunrise In *excise cases* however search should only be made between sunrise and sunset. In *excise* and other cases, the senior Police-officer with the search party shall always enter the premises himself and not allow the informer to enter the premises without first searching, irregularities in this procedure lead to oppression, false charges and frequent acquittals—*Reg and Ord, N W P, s* 10, *p* 273 *See* **27 C. 692.**

Bengal Rules—Search must be made between sunrise and sunset, though it is not illegal if made by night under special circumstances rendering delay dangerous to the chance of recovering property, etc. In such a case the fact must be reported to the District Superintendent of Police for the information of the Magistrate having jurisdiction If a search is required in any place within the limits of another station, it can only be made through the officer in charge of the latter, on the requisition, oral or written of the former—*Ben Pol Man*, *2nd Ed*, *pp* 222 *and* 402.

Madras Rules—Though the law does not require searches to be made by daylight, yet great circumspection is required and as a rule, daylight should be awaited precaution being taken to get inmates out of the house, if the case is a grave one.—*Mad Pol. Man*, *Vol I*, *p* 114

3. The conduct of searches.—Before entering the premises the exterior of the place to be searched will be examined, and it will be ascertained whether there is easy access or opportunity of introducing articles without the knowledge of the inmates, precautions will be taken to prevent this being done while the search is in progress. *The Police-officer or other persons who are to make the search will submit* to be searched in the presence of the witnesses before he and they go in No one else should be allowed to enter, and the search should be carried through from beginning to end in the presence of the witnesses.—*C P Pol. Man.*, *p.* 164

Madras Rules—(a) The law requires that search be made in the presence of two or more respectable persons. If possible, the head of the village should be present. Care must be taken that these persons observe every part of the search Great attention must be paid to getting respectable witnesses and to seeing that they

* Sub-section (5) has been added by Act XVIII of 1923

his search for corroborative evidence the investigator satisfies himself that the statements in the confession are false, he then realises that an attempt is being made to wreck his inquiry, and that it is his business to defeat this attempt by collecting independent evidence. If, on the other hand, the statements are true, he should be prepared with evidence to support them so as to secure against the not improbable contingency of the confession being subsequently retracted. All the rulings of the Courts are to the effect that it is incumbent upon the Police-officers to test the truth of confessions in every possible way.—*Beng. Pol. Code, p.* 377. The Police are directed never to prosecute upon a confession alone, however spontaneously given. The only use they should make of admissions made by an accused person is to follow up every clue so given, and to establish every fact and circumstance so indicated from other unquestionable sources. It will then make little odds whether the admission is repeated or not. Frequently, it is far better, when convincing proof can otherwise be produced not to allude in the judicial prosecution to admissions made before the Police only, but to rest the case entirely on the facts established by other testimony.—*Mad. Pol. Man., p.* 95. A Superintendent present at the spot would attach no weight to a confession but would, as far as possible, make the evidence for the prosecution complete independently of it. A confession may lead to such evidence, but should not be accepted as a substitute for it.—*Bom. Pol. Man., p.* 19.

X.—MISCELLANEOUS.

63. **Confession before Village Magistrate whether admissible?**—A Village Magistrate is not a Police-officer and therefore a confession made to him is not inadmissible in evidence, **7 M. 287**; but if the accused is in Police custody, his confession to a Village Magistrate is inadmissible, *see* the explanation to s. 26 of *the Evidence Act.*

64. **Prosecution for false evidence.**—There is no legal objection to framing a charge in the alternative under s. 193, I.P.C., against an accused for making contradictory statements one under this section and the other before the Court, **1908 A. W. N. 73 = 7 Cr. L. J. 302; 22 A. 115.** *See* Notes 28 and 29 under Heading V.

65. **Right of accused to have copies of statements.**—Before the commencement of the preliminary inquiry against an accused person, he is not entitled either under the general principles of common law or under the Code to copies of statements of various persons recorded by a Magistrate under ss. 162 and 164, **30 M. 466.** But an accused person is entitled to copies of the statements recorded under this section if such witnesses were to appear at the trial, **30 Cr. L. J. 760; A. I. R. 1929 Lah. 429.**

66. **Oral confessions.**—There is nothing in the law to support the proposition that in order to make an oral extra-judicial confession admissible in evidence, it must be recorded, **11 P. R. 1918 (Cr.)**. But in **21 Bom. L. R. 1065,** SHAH, J., *held* that oral confession before a Magistrate was not admissible and HAYWARD, J., held it otherwise when it was proved by the testimony of the Magistrate.

Search by Police-officer.

* **165.** (1) " Whenever an officer in charge of a Police-station, or a Police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the Police-station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A Police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person."

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he † " may after recording in writing his reasons for so doing " require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, ‡ " specifying the place to be searched and so far as possible the

* Sub-sections (1) and (2) were substituted for the original by Act XVIII of 1923, s. 36. Sub-section (5) was added by Act XVIII of 1923, s. 36.

† The words in inverted commas; *viz*., " after recording . . . . so doing " in sub sec. (3) were inserted by Act XVIII of 1923.

‡ The words in inverted commas, *viz*., " specifying. . . . . to be made" in sub sec. (3) were substituted by Act XVIII of 1923.

in the Station house Register his reasons for deciding to search or cause search to be made in any house This should, as a rule, be done before the S H O proceeds himself to the search, or issues his order in writing to his subordinates Inspecting officers will carefully look into this matter when examining Crime Registers and Note Books and ascertain if the reasons for searching were recorded before the search was made—which should always be done if possible —*Mad Pol Man., Vol I, p* 114

Where the search was conducted by a Sub-Inspector without recording any order in writing and giving his reasons under s. 165 and on the threats of the Sub-Inspector the accused, on being assaulted struck two blows on the forehead of the Sub-Inspector which proved fatal. *Held*, that the accused had a right of self-defence against the assault on his person and could not be said to have voluntarily caused death and was entitled to an acquittal, **23 A. L. J. 1037.**

9. Persons empowered to search.—Under s 12 of Act V of 1861 it has been declared that the Extra Assistant Superintendents of Police, attached to a detective department shall have the powers of officers in charge of Police stations for the purpose of searching houses in each district where they may be employed. They, Extra Assistants, while exercising these powers can, under the terms of this section, by written order in any particular case, direct the Head Constables in the detective department who are subordinate to them to make search in any house or place —*Beng Pol Man., 2nd Ed, p* 402.

10 District Magistrate cannot search under this section.—This section deals with searches by a Police-officer, and not by Magistrate, **36 C. 433 at p. 448**

11. Deputation of Subordinate Police-officer by the S. H. O. must be by an order in writing.—**7 N.-W. P. H. C. R. 209,** the conviction of the accused under ss 143 and 353, I P C, for resisting a search, was quashed on the ground that the subordinate Police-officer conducting the search was not empowered by an order in writing A subordinate Police-officer is not empowered without a warrant to enter a house in search of *property, though he may certainly do so in search of a person who is charged with having committed an offence* for which he is liable to be arrested without a warrant, **7 B. H. C. R. Cr. Ca. 50, 8 S. L R. 1 = 16 Cr L. J. 15**; but *see* **1892 A W. N. 1.** If a constable goes for search without any written authority, he does not under sub-sec. (3) of this section, lawfully exercise the power of a public servant. To such a case s 99, I P C, has no application, **6 C. L. J. 753 = 6 Cr. L. J. 439.** *See* as to the question of private defence, **18 A. 246** and **8 S. L. R. 1 = 16 Cr. L. J. 15.**

12. Police-officer must conduct search in person.—In **17 M. L. J. 323 = 6 Cr. L J. 105,** where an Inspector acting under this section seated himself outside the house of the accused and sent a constable into the house to conduct the search. The accused asked the constable for a list of the articles he had come to search for and when none was produced he objected to the search being carried out by the constable, and pushed him out, it was *held* distinguishing **19 M. 349,** that the accused could not be convicted under s. 353, I P C. The Inspector himself should have personally conducted the search and he was not justified in sitting outside and directing a subordinate to search without giving a written order specifying the articles to be searched for This ruling was *dissented* from in **23 M. L. J. 445 = (1912) M. W. N. 1111 = 13 Cr. L. J. 763,** and it was *held* that all that was intended by this clause was that the officer should be present on the spot and exercise a general supervision over the search in contradistinction to the cases where he is unable to go to the spot and therefore deputes a subordinate by a written order to conduct the search in his place.

12-A. Place must be within the local limits of the circle.—A Station house Officer has no power to search any place beyond the local limits of his circle, **8 S. L. R. 1 = 16 Cr. L. J. 15.** The procedure under s. 166 must be adopted. *See*, however, **12 P. R. 1915 = 16 Cr. L. J. 551.** A Police-officer conducted a search in a house not situate within the local limits of his circle, accompanied by a Police constable of the circle in which the house was situate, but the constable had no order from his own officer While engaged in the search they were assaulted; *held*, the search was illegal and the conviction under s 353 was set aside, **16 Cr. L. J 589 (A)** But *see* Note 1 to s 166

13. Search without warrant for stolen property.—No house should be searched without warrant merely because the occupier is a registered bad character Such a search should only be made under the circumstances mentioned in this section and when the Police-officer has reason to believe that the thing searched for will be found in the house to be searched Police-officers should record in their diaries the reason for such search though they are not obliged to give the name of the person upon whose information they act. When suspected property is found in a house, all the property in the house is not to be seized. Property seized

actually enter the places searched and stand over the searching officer observing every part of the search. (*b*) Before entering the premises, care will be taken to examine minutely the exterior of the place to be searched, and to observe whether there is easy access or opportunity of introducing articles without the knowledge of the inmates. A note of this point will be then and there made. The persons or the Police-officers who are to enter will be scrupulously examined before the witnesses, before going in; not more than two should be allowed to enter, and they should search together and in the presence of the witnesses. (*c*) Should anything be discovered, care will be taken to observe with great minuteness all facts and appearances relating to it—whether it would be possible for the article to be placed where found without the knowledge of the inmates, etc., and a note of the fact should be made then and there. The witnesses should be invited to give their opinions freely on these points. These opinions should be noted down. Police officers will be carefully instructed as to the utter futileness of this kind of evidence when the article found is some small common article of no great value, easily concealed, about the clothes of the searcher or easily thrown into the place where found, and bearing no proportion to the property lost. District officers will vigorously enquire into every case in which there is the slightest suspicion of foul play, and prosecute every man connected with a case in which these practices have been resorted to.—*Mad. Pol. Man., Vol. I, p.* 113.

4. **Search to be in the presence of witnesses.**—*See* s. 103, which provide that search should be made in the presence of witnesses. The Advocate-General has given as his opinion that a respectable inhabitant of the locality is under an obligation to attend and witness a search when called upon to do so by a Police-officer about to make the search and that, if he departs without lawful excuse before the completion of the search, without signing the search-list, he would be guilty of the offence described in s. 187, I.P.C. The offence would fall under the first portion of s. 187, in case of searches under ss. 165 and 166, Cr. P. C., and in the case of searches instituted upon a search-warrant, under the second paragraph of the section.—*M. P. O. No.* 23 *of* 1900.

5. **Search-list should be prepared.**—A list of all seized things in the course of a search and of the places in which they are respectively found should be prepared by the officer superintending the search and be signed by the witnesses called upon to witness the search. Such lists will be carefully prepared in trifoil at the scene of search immediately after the search has been completed, the original being sent with an Occurrence Sheet to the Magistrate having jurisdiction, the counterfoil being attached to the Station-house report of the day and the trifoil kept at the station. The Police-officer conducting the search must have in his note-book a list of all articles found with full particulars of how and where each article was found.—*Mad. Pol. Man., Vol. I, p.* 114.

6. **No house should be searched unless search will result in finding things sought for.**—It is a common practice when a theft or burglary has been committed and for some reason or other the Police suspect a particular person, search this person's house in the hopes of finding the stolen property, and to carry off to the Police post anything found in the house, though it is not the property of which the Police were in search and is of an everyday description, *e.g.*, pots and pans, knives, jewellery of trifling value, clothes and so forth. The articles seized are exhibited at the station-house, and claimants are invited to come forward. The result naturally is that many of the things are claimed, and the person whose house was searched is charged on most unsatisfactory evidence with theft of being in possession of stolen property. This procedure is wholly incorrect. Before a Police-officer can seize any property, he must have reason to believe it to have been stolen or that some offence has been committed with reference to it. No house should be searched unless there is some reason to believe that the search will result in the finding of the things sought for.—*C. P. Pol. Man., p.* 108.

7. **House-search not to be made on mere suspicion of complainant, but on inquiry into circumstances of the case.**—The indiscriminate search of houses should be discouraged as much as possible. The spirit of this section should be strictly observed. Frequently houses are searched on the mere assertion of the complainant that he suspects the owner, without any inquiry into the circumstances of the cases, or the grounds upon which the assertion has been made. By such procedure the feelings of respectable persons are wantonly outraged.—*Bom. Pol. Man., p.* 96.

Superintendents of Police and their assistants will bring to the notice of their District Magistrates, instances of search-warrants being issued to the Police on sufficient grounds by Sub-Magistrates.—*Mad. Pol. Man., Vol. I, p.* 114.

8. **Reasons for search to be recorded beforehand.**—In every case in which an officer in charge of a Police-station exercises the powers vested in him under this section he will record concisely but explicitly

*(3) "Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another Police-station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer, in charge of a Police station or a Police-officer making an investigation † under this Chapter to search, or cause to be searched any place in the limits of another Police station, in accordance with the provisions of section 165, as if such place were within the limits of his own station

*(4) Any officer conducting a search under sub section (3) shall forthwith send notice of the search to the officer in charge of the Police-station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 103, and shall also send to the nearest Magistrate empowered to take cognisance of the offence, copies of the records referred to in section 165, sub-sections (1) and (3)

*(5) The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub-section (4)

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost"

Note —Search conducted by Police-officer of another circle—It should be noticed that under s. 166, as amended by the addition of sub-clause (3) an officer in charge of one Police-station, under circumstances mentioned in that sub-section is authorised to search or cause to be searched any place within the limits of another Police station in accordance with the provisions of s 165 as if such place were within the limits of his own station

Procedure when investigation cannot be completed in 24 hours

167. (1) Whenever ‡ "any person is arrested and detained in custody and it appears that the" investigations cannot be completed within the period of 24 hours fixed by section 61 and there are grounds for believing that the accusation or information is well founded, the officer in charge of the Police-station § "or the Police officer making the investigation if he is not below the rank of Sub-Inspector" shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused|| to such Magistrate

(2) The Magistrate to whom an accused person is forwarded under this section may whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding 15 days on the whole If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction

¶ Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Local Government shall authorise detention in custody of the Police

(3) A Magistrate authorising under this section detention in the custody of the Police shall record his reasons for so doing

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate

* Sub-sections (3) to (5) were added by Act XVIII of 1923, s 47

† The words "under this Chapter" have been omitted by Act XVIII of 1923

‡ The words "any person ... appears that the" were substituted for the words "it appears that any" by Act XVIII of 1923

§ The words "or the Police-officer ... Sub-Inspector" were inserted by Act XVIII of 1923

|| The words "(if any)" have been omitted by Act XVIII of 1923.

¶ The proviso was inserted by the Cr P C (Amendment) Act, 1923.

must be either alleged or suspected to have been stolen or found under circumstances which created suspicion of the commission of an offence and nothing can justify the seizure of the whole of a man's property because he is suspected of having stolen some particular article or articles—*Beng. Pol. Code, p* 380.

14. **Does section authorise a general search?**—This section does not authorise a general search (*e g.*, for stolen property). It speaks of a specific document or thing which may be the subject of a summons or order under s. 94, **38 C. 304.** *Semble* the section is confined to the production of something which is considered necessary for the conduct by the Police-officer of an investigation into an offence which he is authorised to investigate and does not cover, *e.g.*, a search for arms generally, **38 C. 433 at pp. 440, 448, 452.** The law does not empower a Police officer to search an accused's house for anything but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorised and law cannot be got over by using such an expression as 'stolen property relevant to the case' Such expressions are vague and misleading and the terms of the law are extremely specific, **16 C. W. N. 1078 = 13 Cr. L. J. 764.** This section does not prevent a Police-officer from making a search of an accused's house for 'specific stolen property relevant to the case.' It only prohibits making a search for 'stolen property generally,' **38 Cr. 304** and **16 C. W. N. 1078** *distinguished*, **41 C. 261.** This section does not authorise a general search on the chance that something may be found, the things searched for should be specified, **13 A. L. J. 979 = 38 A. 14.** *See* also **35 M. L. J. 127.**

15. **Power of search under other Acts.**—(*a*) Under s 23 of Act V of 1861, it is lawful for every Police-officer, for the purpose mentioned in that section, without a warrant to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters; as to searches for contraband salt, *see* s 28 of Bengal Act VII of 1864, ss. 21 and 23 of Madras Act I of 1882, s. 8 of Bombay Act VII of 1873, and ss. 15 and 18 of Act XII of 1882, (*b*) as to *excise* articles, *see* Bengal Act VII of 1878; (*c*) under s 7 of Act XIX of 1858, for stamped paper not bearing the proper distinguishing mark and not authenticated as having been purchased from Government, (*d*) searches under s. 30 of *the Indian Arms Act* XI of 1878, may in Bengal be conducted only in the presence of a Magistrate or Police officer not below the grade of Inspector—*Cal. Gaz.*, 1878, *Pt II, p* 850 (In the Chittagong division, this has been extended to Police-officers not below the grade of Sub-Inspector —*Cal Gaz.*, 1889, *Pt I, p.* 73) *See* p. 138.

See s 153 as to the inspection of weights and measures

16. **Police not bound to disclose source of information.**—No Police-officer shall be compelled to say whence he got any information as the commission of an offence. *See* s. 125 of *the Evidence Act.*

17. **Action for damages on account of illegal search.**—The power of search given under this section is incidental to the conduct of investigation into any offence which a Police-officer is authorised by law to investigate Therefore if he makes investigation into a non cognisable offence he has no right to enter into a house to make search under this section. If he does so he acts illegally and an action for damages will lie against him for illegal search, **24 C. 691.** *See* also **36 C. 433.**

18. **Penalty for vexatious search** is imprisonment for two months, or fine of Rs. 500, or both—*Bom. Dis Pol Act*, s. 63

19. **The consequences of an illegal search.**—*See* Note to s. 537 on illegalities in summonses, warrants, etc , Note 24

When officer in charge of Police-station may require another to issue search warrant

166. (1) An officer in charge of a Police-station *"or a Police-officer not being below the rank of Sub-Inspector making an investigation may" require an officer in charge of another Police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

* The words in inverted commas, *viz*, "or a Police-officer...... .... may," were inserted by Act XVIII of 1923.

under s 344 by a warrant remand an accused for any term not exceeding 15 days at a time, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand, **36 C. 168.**

6. **Further remand how obtained.**—When in the course of a Police investigation, inculpatory facts against the accused have come to light, but the case is not in a state for submission to the Magistrate having jurisdiction, the accused should be forwarded, under this section, to the nearest Magistrate, for the purposes of remand A copy of the entries in the diary directed to be kept under s 172 should be forwarded at the same time. No detention of the accused is justifiable on account of delay in preparing the diary or copy thereof —*Ibid.*, *p* 3, **19 A. 390** at **p. 404** The nearest Magistrate may be a Magistrate having jurisdiction or not. In the town of Madras *the Commissioner of Police* is a Magistrate within the meaning of the section

7. **Accused must be forwarded to Magistrate.**—Before a Magistrate remands an accused person to Police custody, the accused must be produced before him **16 C. W. N. 145 = 13 Cr. L. J. 65.** It is illegal to remand on the application of the Police, an accused not produced in Court, **39 P. R. 1867.**

8. **Remand to be granted in cases of real necessity.**—A remand to Police custody ought only to be granted in cases of real necessity, and when it is shown in the application that there is good reason to believe that the accused can point out property or otherwise assist the Police in elucidating the case The Police are too often desirous of retaining the accused in their custody for a longer period than 24 hours, merely in the hope of extracting some admission of guilt from him. This is contrary to s 163, etc., and to the spirit of the Code generally, and Magistrates must be careful not to facilitate this object by too great a readiness in granting remands —*Punj Cir*, *p* 176

9. **Reasons for remand must be given and must show necessity.**—Reason must be given, **16 C. W. N. 145 = 13 Cr. L. J. 65.** A Magistrate has no authority to further detain the accused in custody without some reason made manifest to him either in the shape of sworn testimony given before him or in some other form, **20 W R. 23.** Magistrates in recording their reasons for the detention or remand should set forth all the information they are able to obtain on the subject, **1885 A. W. N. 59.** The reasons which are to be recorded must be reasons showing the particular necessity which exists in each particular case for leaving the prisoner in the hands of the Police Under no circumstances should an accused person be remanded to Police custody unless it is made clear that his presence is actually needed in order to serve some important purpose connected with the completion of the inquiry In all other cases in which time is required by the Police to complete the inquiry the accused persons should be detained in magisterial custody —*Ibid.*, *p* 177, **23 B. 32.** Sub-sec. (3), by requiring a Magistrate to record his reason for authorising detention in Police custody, contemplates that the Magistrate shall consider whether on the facts placed before him, there are good grounds for allowing such detention. There should be at least something to satisfy the Magistrate that the presence of the person arrested, while the Police investigation was being *held*, would assist in some discovery of evidence, and that his presence was indispensable for this purpose, as for instance when he had confessed before the Magistrate and had pointed out some of the properties sto en and was waiting to do more, but was unable to do so because the Police were by law unable without a special order to detain him In ordering further detention in Police custody when there are good reasons for such an order, a Magistrate should invariably limit the terms as much as possible to what may be necessary, for the object in view, **11 C. W. N. 554 = 6 Cr. L. J. 86.** That the accused will have to be taken to the place of occurrence for individually pointing out the places of their action and journey in committing a dacoity and also for their identification is not a sufficient reason for their remand, **7 C. W. N. 457.** A person cannot be detained on a mere expectation that time would show his guilt, **17 P. R. 1872; 43 A. 186 = 18 A. L. J. 1114.**

10. **Remand for indefinite period illegal.**—Remand should always be for a fixed period, and in no case is it legal to grant a remand *sine die* —*Punj Cir*, *p* 177 The intention of the Legislature is that an accused person should be brought before a Magistrate competent to try or to commit for trial with as little delay as possible, **6 M. 63.**

11. **Procedure for obtaining remand in N.-W. P.**—When the accusation or information is not well founded, and when inquiry is *per contra* so imperfect as to leave it doubtful whether the "reasonable suspicion" on which the accused was arrested will be capable of confirmation or not, and yet that reasonable suspicion has not been removed at the expiry of hours, it is incumbent on the officer in charge of the station to forward his prisoner to the nearest Magistrate with a copy of the entries in the diary relating to the case stating

Notes.—1. Referring to the amendment to this section, the Select Committee say: "In s. 167, however, which confers a power to ask for a remand we would confine the operation to investigating officers not below the rank of Sub-Inspector.

We consider that the bill does not go far enough in its restriction of the Magistrates who should be authorised to remand to Police custody. We would confine the power to first-class Magistrates and second-class Magistrates specially empowered.

S. 61 provides that persons arrested shall not be detained by the Police for more than 24 hours. S. 344, provides for remand during inquiry or trial. *See* Notes to s. 61.

2. **Detention and remand defined—s. 167 and s. 344.**—For the purposes of Police rules "*detention*" means detention in Police custody, in a Police lock-up or otherwise and "*remand*" means remand to custody in a magisterial lock-up or to a Magistrate's camp guard, or under bail or recognisances, during a postponement or adjournment of an inquiry or trial. The broad distinction between this section and s. 344, that this section applies to cases which have been instituted on a Police report and are still under investigation, whereas s. 344 refers to cases already on the file of the Magistrate in which the inquiry or trial has begun or is about to begin. Section 344 relates to proceedings in inquiries or trials and has nothing to do with Police investigations, and it contemplates a remand to jail, not to Police custody, **23 B. 32.**

3. **When order for detention may be applied for.**—When, in the investigation of a cognisable case, it is necessary to arrest the accused person at an early stage of such investigation and it is apparent that such investigation cannot be complete within 24 hours after such arrest, the investigating Police-officer may apply to the nearest Magistrate for a special order authorising such further detention as may be reasonable and necessary upon anyone of the following grounds, *i.e.*, to say—

(*a*) To compare the accused's footprints with the tracks to and from the scene of the offence, when the distance renders it impossible to make such comparison by daylight within the first 24 hours after arrest

(*b*) When the accused persons offers to point out stolen property, or property taken in the offence, or weapons or other articles with which the offence was committed, or evidence of value in the case, and there is reason to believe that such offer is made *bona fide*, and it is impossible to proceed to the place and obtain such property, weapons, articles or evidence within the first 24 hours after arrest.

(*c*) When it is necessary to ascertain whether persons along the supposed route taken by the accused or injured person, recognise the accused person, and when, by reason of distance, it is unreasonable to expect persons to come forward upon the chance of being able to give evidence and it becomes essential to take the accused along such route, and it is impossible to do so by daylight, within the first 24 hours after arrest.

(*d*) And other good and sufficient reason for such detention.

Explanation.—Except for valid reasons, similar to those stated above, applications for detention shall be discourged and no such application shall be made on the ground that an accused person is likely to confess. —*Rul. and Ord.*, *Punj.*, *p.* 387.

4. **Remand under what circumstances allowed.**—Special orders for the detention of accused persons under this section must not be granted to the Police without good and sufficient cause shown; as a general rule, accused persons should be brought before the Magistrate having jurisdiction, who, if further investigation seems necessary, can adjourn his inquiry from time to time under s 344, Cr. P. C. When, however, a prisoner is brought before a Magistrate under this section, the Magistrate before granting an order for his detention must be satisfied that—

(*a*) there is substantial ground for suspecting that the prisoner had committed a definite offence such as to warrant his arrest and detention, and that

(*b*) his remaining in the hands of the Police is really necessary; such detention may often tend to defeat justice rather than further it, and should not be ordered without evidence sufficient to warrant it on the principles above stated. The High Court will regard as a serious dereliction of duty any failure on the part of any Magistrate to exact and enforce strict compliance of the law on the part of the Police.—*Bom. H. C. Cr. Cir.*, *p.* 2.

5. **Right of Magistrate to remand.**—Under this section a Magistrate on the mere perusal of the entries in the Police diaries relating to the case to which the accused have no access may from time to time authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. Thereafter he can

Note.—Evidence to be sent in as found.—A preliminary inquiry before a Magistrate is not the same thing as a trial before a Judge. The evidence should be sent in as found, not kept by the Police till they have made it all complete, **5 W. R. 6.**

Release of accused when evidence deficient.

169. If, upon an investigation under this Chapter, it appears to the officer in charge of the Police-station "or to the Police-officer making the investigation"* that there is not sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognisance of the offence on a Police report and to try the accused or commit him for trial

Note.—Referring to the amendment of the section.—The Select Committee say We see no cogent reason for the first amendment of ss 169 and 170 which substitutes the words 'upon the completion of an investigation' for 'upon an investigation' 'In the case of s. 169 we agree that the power contemplated by the section should be exercisable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub-Inspector With regard to s 170, however, we consider that the direct responsibility for sending up case should rest with the officer in charge of the Police-station. S 168 undoubtedly contemplates that the officer in charge is to assume responsibility and to enable all investigating officers to send up cases under s 170 without reference to the officer in charge would tend to make s. 168 of no effect.

The words "to the officer making the investigation" give power to such an officer to release on bail an accused person if there is not enough evidence against him This agrees with para. 156 of the report of the Police Commission

Notes.—1. Forms.—For forms of bonds to be executed under this and the next section, *see* Sch V, Nos 25 and 26

2. Deposit of cash or Government promissory notes.—Under s. 513, a Police-officer has discretion to permit the deposit of a sum of money or Government promissory notes to such amount as he thinks fit, in lieu of bond or sureties.

3 Rules regarding bail.—It should be noted that the bail or recognisance bond taken from persons in a case reported in Form B differ from the bonds taken in cases reported in Form A Persons executing the former need not appear in Court, unless their attendance is required by the Magistrate but those executing the latter must appear on the day fixed by the Police-officer and mentioned in the bond. The first are taken under s. 169, and the second under s 170 of the Code —*Beng Pol Code*, *p* 385

4. Application for withdrawal of complaint.—A Police-offier is not authorised to entertain an application for withdrawal of a complaint The permitting a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate by ss 248 and 345, and the Police have no authority to interfere in such matters, **Ratanlal 91.**

5. Action of Police subject to control of Magistrate.—The admission to bail by the Police under this section, being a purely provisional arrangement, when the Magistrate determines that there is a *prima facie* case of a non-bailable offence, the accused should be re-arrested and forwarded to the Magistrate in custody, **Ratanlal 121.**

6. Police to fix date in bond.—Where a security bond is taken by the Police for the appearance before Magistrate of an alleged offender under the Railway Act, Police-officer shall fix a date in the bond and warn witnesses to appear on the date. They shall at once inform the Magistrate concerned of the nature of the crime charged, the date fixed and the number of witnesses to be heard.—*Oudh Cr Dig*, *p* 6

Case to be sent to Magistrate when evidence is sufficient.

170. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the Police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognisance of the offence upon a Police report and to try the accused or, commit him for trial, or, if the offence is bailable and the

* The words "or to the Police-officer making the investigation" were inserted by Act XVIII of 1923

the charge and the grounds of suspicion on which arrested and which are under investigation. The District Superintendent, or Head Police-officer in attendance on the Magistrate, will draw up a remand sheet with which to adduce the prisoner before the Magistrate, and on which he should obtain an order for the detention of the accused, pending the completion of the investigation.—*Reg. and Ord., N.-W. P., s.* 19, *p.* 362.

12. Procedure for obtaining remand in Bengal.—The grounds upon which the application to the Magistrate is based must be distinctly stated and be at once communicated to the District Superintendent. Every application for remand shall be made personally by the Chief Police-officer present to the Chief Magistrate officer present. Thus at a headquarters station the District Superintendent and at a sub-division the officer in charge of the sub-district should appear before the Magistrate of the district or sub-divisional officer, as the case may be, to make such an application, unless it is impossible, owing to the absence of one of the officers concerned, or to some other exceptional cause.—*Beng. Pol. Code, pp.* 379—388, **16 C. W. N. 145 = 13 Cr. L. J. 65.**

13. Period of remand not to exceed 15 days.—The right construction of this section is that in Police investigations the period of remand cannot exceed in all 15 days including one or more remands, **11 M. 98; 23 B. 32; 1 W. R. 5; 19 W. R. 36; 5 B. H. C. R. Cr. Ca. 31.** *See* Notes to s. 61 at pp. 96 and 97. *See* **24 P. R. 1902,** where a person was kept in custody for ten months. As to place of detention, *see* **7 W. R. 3** at **p. 6.**

14. Magistrate to take notice of accused's detention for more than 24 hours.—Every Magistrate should on an accused person being brought before him under this section, because the Police investigation has not been completed, note when the accused was first sent for by the Police and when he arrived at Court, and how long he has been under the surveillance or influence of the Police. If, making due allowance for time spent in travelling, the 24 hours' detention allowed has been exceeded, notice should invariably be taken of the matter, and the Magistrate of the district should call the Police to account. Subordinate Magistrates should not fail to bring every known instance of unauthorised detention to the notice of the Magistrate of the district. The whole period of detention by the Police under this section cannot exceed 24 hours *plus* 15 days, exclusive of the time occupied in travelling to the Magistrate's Court after the arrest of the prisoner. When this time has expired, any further order of remand must be passed under s. 344, after the case has come before a Magistrate having jurisdiction for trial.—*C. P. Cr. Cir., Part II, No.* 12, *see* also **1885. A. W. N. 59.**

15. Practice—Copies of remand order to be submitted to Divisional and District Magistrates.—Copies of all orders of remand together with reasons for such orders shall be transmitted by Subordinate Magistrates to the Divisional and District Magistrates within 24 hours from the date of the same.

16. Custody under order of Magistrate, lawful custody.—While a case was being investigated under this Chapter by *A*, a Police-officer, *T* presented a petition to the Magistrate having jurisdiction to try the case accusing *W* of being concerned in the commission of the offence and prayed that he might be arrested and sent to the Police-officer investigating the case. *W* was accordingly arrested and brought before the Magistrate who, having examined *T* on oath and taken *W's* statement, made an order on the petition to the following effect:—"As no Police report has been made on this matter, and the petitioner only has presented this petition ordered that these papers of *W* be sent to the District Superintendent of Police; and if a report of the matter be made, the case may be sent up according to rule with the papers." In accordance with his order, *W* was taken to the Superintendent and was sent by the officer to *A* who, on negligently allowing *W* to escape, was tried and convicted under s. 222, I.P.C., it being *held* that the order of the Magistrate might be taken to have been passed under this section, and therefore that *W* was lawfully committed to the custody of *A*, **6 A. 129.**

17. Arrests under Chapter VIII not governed by this section.—Where a person dealt with under Chapter VIII was arrested and on the application of the Police was remanded to Police custody to enable the Police to arrest others jointly accused with him, *held* that the order of remand was illegal, as this section applies only to investigations under Chapter XIV and gives no authority to a Magistrate to remand an accused person in custody under Chapter VIII. **5 Bom. L. R. 27; 8 C. W. N. 779; 36 A. 262.**

Report of investigation by subordinate Police-officer.

168. When any subordinate Police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the Police-station.

8. In case of an offence under the Railway Act when case should be sent as cognisable.—When an arrest is made under *the Indian Railway Act* of a person who there is reason to believe, will abscond or whose name and address are unknown and he refuses to give them, or when given are reasonably believed to be incorrect, the case should be sent to the Magistrate in accordance with this section as a cognisable case as defined in cl. (*f*) of s 4 although the offence alleged against the accused be not itself cognisable —*Bom H C Cr Cir, para* 10-*a*, *p* 4

9. When copy of bond to be sent to Commanding Officer.—If the complainant or other person is a soldier in His Majesty s Army the officer in charge of Police-station should immediately after taking such bond, send a copy thereof to the Commanding Officer of the Regiment in which he is serving —*Bom Pol Man*, *p* 90

10. Copy of Police charge-sheet cannot be given at the beginning of trial.—At the beginning of a trial in a Presidency Magistrate's Court, an application was made on behalf of the accused for a copy of the Police charge-sheet, which contained the whole of the prosecution evidence as set forth by the Police, and extracts from, if not copies of the Police diaries The application was rejected by the Magistrate, *held*, that the Magistrate was not wrong in refusing the application at the stage of the proceedings and the High Court would not interfere in revision, **19 M. 14.** In commenting on this, the *Madras Law Journal* observes (**6 M. L. J. 184**). ' We think this decision is likely to work considerab'e mischief The learned Judges no doubt expressed themselves somewhat guardedly that at the stage of the proceedings they would not in revision set aside the order of the Magistrate refusing a copy of the charge-sheet The Subordinate Magistrate is apt to extend the scope of this decision to all cases It seems to us that the Police charge sheet corresponds to the complaint of the private individual on which criminal proceedings are initiated S 191 of the Cr P C specifies the modes in which criminal proceedings are started, the complaint of a private individual and the report of the Police being the modes in which the jurisdiction of the Magistrate is invoked The accused is entitled to a copy of the complaint and for the same reason to a copy of the charge sheet The fact that the charge sheet may contain matters which are also in the diary is no argument in favour of refusing a copy For as we have more than once pointed out, s 161 places the result of the Police investigation on a footing entirely different from the diary under s 172." It is to be borne in mind that from the description given by the Magistrate of the Police charge-sheet, it more resembled a brief for the prosecution prepared for Magistrate s information than a mere complaint

Complainants and witnesses not to be required to accompany Police-officer

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a Police-officer,

Complainants and witnesses not to be subjected to restraint

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond

Recusant complainant or witnesses may be forwarded in custody

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the Police-station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Notes.—1. No objection to complainant or witness accompanying Police of his own accord.—Under the corresponding section of the 1872 Code, it was provided that no Police-officer should accompany the complainant or his witnesses. It seems to have been found that in many jungly and uninhabited places the complainant and his witnesses were often glad to avail themselves of the escort and protection of the Police and hence the change in the language of the opening paragraph of this section

2. Restraint exercised upon witness by Police illegal.—Where a witness was kept under surveillance for four days by the Police and the Sessions Judge considered that under the circumstances of the case they were perfectly justified in keeping her in this state *Held*, that there is no warrant for the Police to subject a witness to any unnecessary restraint whatsoever, and the control exercised over the witness being unnecessary her evidence cannot be accepted as that of a witness speaking voluntarily, **4 C. W. N. 49 at p. 54.** Disobedience of the provisions of this section will be punishable under s. 166, I P C

accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a Police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) The day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody.

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

Notes. 1.—On a day fixed, *i.e.*, on a particular day, **11 W. R. 47**; but not after a long interval, **6 W. R. 52.** This is the only section under which a Police-officer can take recognisances from an accused person for his appearance before a Magistrate. He can exercise this power only after the investigation is complete.

2. Evidence should be sent in as found.—In a preliminary inquiry before a Magistrate, the evidence should be sent in as found, and not kept by the Police till they have made it all complete, **5 W. R. 6.**

3. Accused to be sent to Magistrate when substantial case is made out.—When the facts brought to light constitute a case which can properly be submitted to the Magistrate having jurisdiction, the accused should be sent immediately to such Magistrate according to the provisions of this section. If the first step of the Police investigation discloses a substantial case against the accused, he should at once be forwarded as contemplated in this section, *B. H. C. Cr. Cir., p.* 3.

4. Case must be sent to the Magistrate who ordered the Police inquiry.—When a Magistrate having cognisance of a case refers it to the Police for inquiry and report, the Police have no power to prefer a charge-sheet before another Magistrate and the latter has no jurisdiction to take cognisance of the case, **16 Cr. L. J. 466 (M.)**

5. Binding over witnesses for prosecution.—When a District Superintendent in looking into the case nds that any witnesses have been unnecessarily sent in, he should at once report the circumstances to the Magistrate, in order that the witnesses might be discharged before the trial, should the Magistrate think proper. When such witnesses are dismissed, the Superintendent should inform the Police-officer who sent up the case and point out the reasons of their not being required, thereby instructing him in his duty.—*Beng. Pol. Man.*, 2*nd Ed.*, *p.* 382.

6. Police not to bind defence witnesses.—It is not the duty of the Police to bind over and produce before the Magistrate the witnesses for the defence. This section and s. 173 refer to witnesses in support of the complaint, and it cannot be supposed that the power of detaining witnesses in custody which is given by s. 171 was intended to apply to the prisoner's witnesses. Further, ss. 211, 244 and 257 assume that when the case comes on before the Magistrate, the witnesses for the accused will, in general, not be in attendance. A little delay may sometimes arise. But considering the quantity of irrelevant evidence which prisoners are always anxious to adduce, it is probable that grave inconvenience would arise, if the Police were instructed to bind over their witnesses.—*Mad. Pol. Man., Vol. I, p.* 90.

7. Payment to witnesses.—For rules in Bengal, see *Calcutta Gazette*, 1895, *Pt. I*, *p.* 621. *See* also Notes to s. 544.

an inner room in Devidin's house, both of them stained with blood. A blood-stained dhoti was also found hidden in the thatch of the same building. Both Devidin and Nain Sukh were thereupon arrested. Ramlall Gorait identifies the *gurrasa* as belonging to Nain Sukh. He also recognised the sword. Bihari, dhobi, stated that he had frequently washed the dhoti for Devidin. I carefully wrapped paper round the sword and *gurrasa* head to preserve the stains of blood.

5 *p m.*—Nain Sukh volunteered to state that Devidin had committed murder in his company, that they took two silver *karas* from the body of deceased that it might appear that he had been killed by robbers, and that these ornaments had been buried by him and Devidin under a bush in Devidin's field.

5 30 *p m*—I, the Inspector, taking the prisoners and Lalljee, Srikrishna and Thakur Pershad, Malguzars and residents of Goonia, made search in the field, and found the two *karas* buried as indicated. The ornaments were identified by the complainant and they were then carefully labelled and numbered. An accurate list of them will be found in column 10 of the trial-sheet. Devidin's wife admits that deceased came to see her on the evening of his death. She said her husband returned home suddenly and found them together. Deceased then left her house and her husband after digging up his sword from the ground (where he had buried it for concealment) followed deceased, attended by Nain Sukh, his servant. The latter carried a *gurrasa*.

6 *p m*—Inquiry completed. Prepared trial sheet and despatched it with the two prisoners, the two *karas*, the sword *gurrasa* and blood stained cloth in custody of constables Puran Singh and Sudhan Khan. The constables were instructed to lodge the prisoners at the station for the night and proceed to headquarters in the morning. Security bonds for appearance before the Court on the 13th instant have been taken from complainant and witnesses, and are attached to the trial-sheet.

(Sd) MAHOMED HUSSAIN,
District Inspector

N B—The case diary should contain only such information as will indicate clearly what is being done in order to complete the case. It should contain only facts. No hypothesis or theory should be entered.—*C P Pol Man*, *p* 159. In addition to the particulars required by this section, the diary should show (*a*) date of despatch, (*b*) constable in charge, (*c*) number of the constable and his rank, (*d*) beat or duty, (*e*) number of constable met and of what station, and (*f*) information obtained.

3. Proper use of the special diary.—In **19 A. 390,** the Full Bench laid down the following rules as to the use of the special diary:—

(*a*) *Extent of its use*—If the special diary has been used by the Court to contradict the Police-officer who made it, or by *the Police-officer* who made it to refresh his memory, the accused person or his agent has a right to see that portion of the diary which has been referred to for either of these purposes, that is to say, the accused person or his agent is entitled to see the particular entry which has been referred to and so much of the diary as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry so used but no more. *See* **8 C. 739.**

(*b*) *Court cannot make a standing order for their production*—A Sessions Judge although he has power *in any particular case* which is before him to send for the special diaries connected with the case, if he thinks it necessary to peruse them, has no authority to issue a general order that *in every case* committed for trial to the Court of Session, and in every criminal appeal, the Police diaries shall be submitted to the Court *simultaneously with the Magistrate's record of the case. Such an order was said to be illegal.*

(*c*) *Accused not entitled to copy*—In no case is an accused person entitled as of right to a copy of any statement recorded by a Police-officer in the special diary, prepared under the authority of this section (though under the new proviso to s. 162, *supra* he can be furnished with a copy, if the Court thinks it expedient in the interests of justice).

(*d*) *How the Court might use the special diary*—(i) The special diary might be used by the Court to assist it in the inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused, but the entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained.

(ii) The special diary might also be used by the Court for the purpose of contradicting the Police-officer who made it, and the special diary might be used by the Police-officer who made it, but *by no witness other than such officer*, for the purpose of refreshing his memory.

172. (1) Every Police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

Diary of proceeding in investigation.

(2) Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the Police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such Police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

Notes.—1. Provisions of the Indian Evidence Act.—" Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases cross-examine the witnesses thereupon," s. 161. A witness may be cross-examined as to previous statements made by him in writing or reduced to writing and relevant to matters in question without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for the pupose of contradicting him, s. 145. *See* also ss. 159 and 160.

2. Sample of Case Diary—

Police-station ... ...

Number of intimation under s. 157, *Cr. Pro. Code.* } ... ...

Case Diary No. ... ...

Offence.—Murder, s. 302, *I.P.C.*

January 12*th*, 1891, 8 *a.m.*—Budhu, complainant, resident of Dharampet, came to the station and reported that his brother, Sukhlall, had left his house on the previous evening to visit a neighbour, and as he did not return during the night, a messenger was sent to enquire about him. The messenger (Ramlall Gorait) came back and reported to Budhu that the body of Sukhlall was lying by the side of the road between M. Dharampet and M. Paldi, with the head laid open by a sword cut. Therefore the complainant demanded enquiry.

8-30 *a.m.*—I, Narain Lall, Sub-Inspector, started for the spot.

9-30 *a.m.*—I arrived in the village of Dharampet and commenced enquiries. I found the body of Sukhlall lying at the place indicated by the complainant. Life was extinct, and the corpse, which had three sword cuts on it, was first made the subject of an inquest under s. 174, Cr. P. C. (the *Panchayatnama* duly signed, has been forwarded to the Magistrate having jurisdiction) and then sent, in the custody of constable Asgar Ali, to the Civil Surgeon for examination. The usual descriptive roll was sent with the corpse.

10 *a m.*—Ramlall Gorait was despatched in search of Hira, a man suspected by complainant.

10-25 *a.m.*—Inspector Mohamed Hussain arrived, and, under express orders from headquarters, took over the investigation.

(Sd.) NARAIN LALL,
Sub-Inspector.

On arriving, I, Mohamed Hussain, Inspector, in accordance with express orders given to me, took charge of the case. In the course of enquiries I found that deceased had an intrigue with the wife of Devidin, Brahmin, living in a hamlet about 600 yards from the village where deceased resides, and that deceased left his house last evening with the intention of meeting Devidin's wife.

4 *p m.*—Ascertained from Dadu Kahar that Devidin and Nain Sukh were seen following deceased towards the village of the latter and that these two men were armed—one with a sword, the other with a *gurrasa.* I therefore searched the house of these two men in the presence of themselves and Jadab Chander Mukerji and Mohan Singh—two respectable inhabitants of the place. The arms indicated by Devidin were found buried in

10. Police-officer cannot be compelled to refresh his memory by referring to his diary.—A prisoner on his trial is not entitled to insist that a memorandum made by a Police-officer shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory. The right is the right of the Court, **8 C. 154 = 10 C. L. R. 51.** In this case WILSON, J., remarked: "I know of no authority for saying that a witness can be compelled to refresh his memory from any document unless the document is either in the possession of the party who desires to put it to the witness or is at least such as we can insist on having produced." *See* also **9 C. 455** and **8 C. 739.**

11. Court has no power to make a general order for production of diaries.—A Sessions Court has no power to make a general order for production of Police diaries in all criminal appeals before it, but only to summon the diaries when and as required in each particular case, **1894 A. W. N. 181.**

12. Police diaries cannot be placed before the Jury.—They are useful, not as evidence but to aid the Court in trial so as to enable it to make a thorough inquiry on all material points and to elicit in the examination of witnesses, and especially of Police witnesses, the real facts of the case. A Sessions Judge cannot rely on Police proceedings or put the same to the jury without examining Police-officers as witnesses so as to explain such proceedings, **27 C. 295.**

13. Mode of using statements in Police diaries.—Statements contained in the Police diaries may be used, *e.g.*, for the purpose of assisting the Court in the examination of witnesses, but no statements in the diaries can be used as evidence, **1894 A. W. N. 155; 10 C. W. N. 600 = 3 Cr. L. J. 408.**

14. Object of maintaining diaries.—The early stages of investigation which follow on the investigation of a crime must necessarily in the majority of cases be left to the Police and until the honesty, the capacity, the discretion and judgment of the Police can be thoroughly trusted it is necessary for the protection of the Police against criminals, for the vindication of the law and for the protection of those who are charged with a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day by the Police-officer who was investigating the case and what were the lines of investigation upon which the Police-officer acted, **19 A. 390; 16 C. W. N. 145 = 13 Cr. L. J. 65.** The Police diaries are generally useful in the inquiry or trial as suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused. The diaries are often, when regularly kept, of the very greatest use in enabling Criminal Courts to test the value of the testimony of witnesses especially those belonging to the Police, to establish dates and to ascertain particulars which enable such a Court to judge of the weight to be attached to the evidence given at the trial. Moreover, being indicative though not of probative effect, they may furnish the means of directing appropriate questions or supply the basis of a cross-examination. It requires the utmost discrimination and discretion to make a proper use of such records and while they may fairly be appealed to for the history of the several stages through which the Police investigation into a crime has passed, they afford no safe or certain material from which conclusions of guilt can be drawn, **1 Leg. Rem. 26.** *See* also **1 P. W. R. 1915.**

15. Statements taken in absence of accused.—Although under s. 145 previous statements made by witnesses may be used for the purpose of contradicting statements made by them subsequently at the trial of the accused person, yet they cannot, if they have been made in the absence of the accused, be treated as independent evidence of his guilt or innocence. S. 288, will not avail anything for this purpose, **23 C. 361.**

16. Mode of submitting station diaries.—Station house reports will be sent from the station house to the Divisional Inspector who will check and verify the information contained in them and will then forward them to headquarter or sub-division office, as the case may be. Inspectors will send [illegible] at once to their station house officers when anything in their reports calls for explanation or remark, noting in red ink thereon what they have done for the information of the office, and, if necessary, the office can return through Inspectors, the station house reports for further remarks. In the office a general supervision [illegible] be maintained in order to secure due attention of Inspectors, and to check register.—*Mad. Pol. Man., Vol. I, p.* [illegible]

17. Production of other Police records.—When other Police records are required in a case, the officer in whose custody they are, should be summoned to produce them or certified copies of them [illegible] the provisions of *the Evidence Act.* No document, precept or official paper of any kind or any copy [illegible] paper, belonging to or in the custody of the Police, will be furnished to any private individual [illegible] not authorised by law to require it, unless a precept of a competent Court, or order of a competent [illegible] requiring him to give it, be presented to the Superintendent of Police.—*Mad. Pol. Man., Vol. I, p.* [illegible]

4. **When accused entited to inspect diary.**—The proper procedure is for the accused at the time the witness whose statement is recorded appears before the Court to ask the Court to refer to such writing and furnish them with copies, **33 C. 1023** and *see* Note 14 to s. 162. The accused may look at the particular writing before or at the time the witness uses it to refresh his memory, **8 C. 789.**

5. **Special diary is a privileged record—Statements of witness examined not to be entered in the special diary.**—The proceedings in case of investigation subsequent to information will be recorded in a special diary which is a privileged record, only to be referred, not as evidence by the Court for its own information. The statements of witnesses for the posecution, recorded by an investigating Police-officer, form no part of the diary; such statements therefore shall not be entered in the special Police diary, but shall be separately recorded.—*Reg. and Ord., N.-W. P., s.* 10, *p.* 268. In **33 C. 1023** the practice of incorporating such statments in the special diary was severely condemned. The privilege given by this section does not extend to statements taken under s. 161 and entered in a diary kept under this section, **20 C. 642.** The diary must contain everything material heard or done by a Policeman in the course of the day with reference to his work; and for obvious reasons is not subject to inspection by the parties. It is not necessary to enter into the diary the statements made by witnesses on an oral examination made by a Police-officer. The fact that a Police-officer examined certain witnesses is a part of his proceedings, but the actual statements of the witnesses are not proceedings of the Police-officer, but he may lawfully reduce into writing *in the special diary* the full and unabridged statement made by a person whom he is examining or has examined, and if he does so, his record of such statement is part of the special diary, and is just as much privileged as any other entry in the diary, **19 A. 390 (F.B.).**

6. **Statements of circumstances ascertained in investigation.**—These should be as brief as is consistent with clearness and need not include statements or report, *in extenso*, or copies of Panchanamas or other proceedings. When statements are taken separately, the diary need contain only a brief reference to the recorded statements. The fact that the Panchanamas have been recorded or reports made should be entered as part of the history of the investigation; but a statement of their contents should appear, if at all only as a portion of the narrative of results.—*Bom. Pol. Man., p.* 89.

The case diary must contain only such information regarding the *results* of investigation as will indicate clearly what is being done in order to complete the case. It shall record facts only; no hypothesis or theories of the officer making the investigation will be entered.—*C. P. Pol. Man., p.* 159.

7. **District Magistrate must see that the diary is regularly kept.**—The Magistrate of the district should see that the diary is regularly kept up and that each day's diary has been forwarded to, and has regularly reached, the District Superintendent in course of post, this being the only security against the contents being ante-dated.—*Punj. Cir., p.* 174.

8. **Neither Police diaries nor reports are evidence.**—Neither Police diaries nor Police reports are evidence of the matters stated therein. The facts stated therein must be proved by examining the writer as a witness, **Weir II, 143; 1883 A. W. N. 145; Weir II, 142; 19 A. 390 (F.B.).** In **10 C. W. N. 600,** it was *held* that facts and statements written in the Police diaries cannot be used as materials to help the Court in a Criminal trial to come to a finding on the evidence in the case, and that what the Court should do with the Police diaries is to discover out of them any matter of importance bearing upon the case and then call for the necessary evidence to have the matter legally proved. *See* also **15 C. W. N. 47; 1 P. W. R. 1914.** *The provision any criminal Court may send for Police diaries to aid in such inquiry or trials, etc.*, does not authorise a Court in making a summary of their contents part of its judgment, and apparently making the s[illegible] contained therein virtually evidence in the case, **1894 A. W. N. 155.** Diary ought not to be referred [illegible] tive evidence when the witness who made it did not use it to refresh his memory, **15 Cr. L. J.** [illegible] de by the investigating Police-officer under s. 172, *Cr. Pro. Code*, may be used under that se[illegible] hich tries the case by suggesting means of further elucidating points which need [illegible] terial for the purpose of doing justice between the Crown and the accused, [illegible] n by themselves be taken to be evidence of any date, fact, or statement [illegible] cer who made the diary may be confronted with it, but not any other [illegible] 475 *approving* **19 A. 390 (F.B.).**

[illegible] **ay be made part of record.**—Notes of Police-officers of seditious [illegible] may be allowed to become part of the record in the case if [illegible] ficers, **32 M. 3** at **p. 13.** It is only the officer who made the [illegible]

6. Report in the form prescribed.—The final or completion report under this section is what is known as 'Charge-sheet.' The superior Police-officer making an investigation is the proper person to prepare and submit the charge-sheet —*Mad Pol Man*, *Vol I, p* 83 It is special report bearing upon a particular case coming up for investigation and must be submitted to the Magistrate. It should contain all necessary information, and Police-officers must pay particular attention to the preparation of the same. In Municipal cases the charge-sheet, in which offences should be consecutively entered, will be a duplicate of the Case Register, the word 'Charge-sheet' being prefixed to the form The book containing the charge-sheets must, when full, be deposited in the Magistrate's record room—*Mad. Pol Man*, *Vol I, p 83*

The High Court have directed that, when it is necessary to put in evidence the substance of a report, the report itself should be called for and not the Crime Register and that the register should be called for only in cases in which it is shown that its production cannot be dispensed with and the purpose for which it is required cannot be effectively answered by the production of an office copy, *Mad Pol Man*, *Vol. I p* 118.

7. Police report must set forth nature of information.—The Police report referred to in s 190 (1) (*b*) is the report made by the Police under this section, **5 S. L. R. 1 = 12 Cr. L. J. 92; 6 S. L. R. 82 = 13 Cr. L. J. 752.** Having regard to the language of s 190 (1) (*b*), a Magistrate should not act on a Police report which does not set forth the nature of the information If he does take cognisance of an offence on such a report, his proceedings are liable to be set aside, **37 C. 49.**

8 Can a Magistrate ignore a Police report and order further inquiry by Subordinate Magistrate?—Where a Magistrate who might have under s 190 (*c*) taken cognisance of the case on a Police report did not do so, but proceeded to make over the case to Subordinate Magistrate for inquiry and report as though the matter he was dealing with was on a complaint under s 200 *held*, that the proceedings of the deputed Magistrate so far as they bore on the case based on a Police roport were not in consonance with the provisions of law, **17 C. W. N. 1004.**

8-A. A final report by the Police to a Magistrate stating that the evidence was insufficient to support a charge and when the Magistrate accepts that report it is not open to the District Magistrate to call for a charge sheet, **7 Pat. 561.**

Police to inquire and report on suicide, etc.

* **174.** (1) The officer in charge of a Police station or some other Police officer specially empowered by the Local Government in that behalf on receiving information that a person—

(*a*) has committed suicide, or

(*b*) has been killed by another, or by an animal, or by machinery, or by an accident, or

(*c*) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and unless otherwise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Sub-divisional Magistrate shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any) such marks appear to have been inflicted.

(2) The report shall be signed by such Police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Mag[illegible] [illegible] Sub-divisional Magistrate

(3) When there is any doubt regarding the cause of death, [illegible] reason the Police-officer considers it expedient so to do, he shall, subject [illegible] Government may prescribe in this behalf, forward the body, with a view [illegible] the nearest Civil Surgeon, or other qualified medical man appo[illegible]

* For the form in which ss 174 175 and 176 should be read in their application [illegible] ordinary original civil jurisdiction of the High Court at Madras, see s 4 (2) of Act [illegible] Code Ed 1902 Vol I p 1885

18. **Privy Council's observations.**—On the use of Police diaries to test the credibility of witnesses, **19 Bom. L. R. 510.**

Report of Police-officer.

* **173.** (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the Police-station shall—

(*a*) forward to a Magistrate empowered to take cognisance of the offence on a Police report, a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(*b*) communicate, in such manner as may be prescribed by the Local Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of Police has been appointed under section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the Police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge, of such bond or otherwise as he thinks fit.

†"(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial:

† Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost."

Notes.—1. The number of investigations into a crime is not limited by law and where one has been completed by the submission of a report, another may be begun on further information being received, **35 M. L. J. 127.**

2. **No investigation is complete until the report is submitted.**—*See* Note 9 to s. 155.

3. **Order to strike off case is not judicial.**—The Magistrate's order directing a case reported to him by the Police under this section to be struck off is not a judicial order dismissing a complaint or discharging an accused which can be reviewed by the Sessions Judge under s. 437, **Ratanlal 521.** *See* also **Ratanlal 91** and **121,** *referred to* in Notes 4 and 5 to s. 169.

4. **Right of accused to copies of report before trial.**—Under the new sub-section (4) an accused is entitled, on application, to a copy of any report forwarded under this section, before the commencement of the inquiry or trial.

Note.—Under the amended section it is the duty of the Police-officer under sub-clause (1)(*b*) to communicate the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given. Under the new sub-section (4) an accused person is entitled, on application, to have a copy of any report forwarded under this section, before the commencement of the inquiry or trial.

5. **Three kinds of reports contemplated.**—This Chapter contemplates three kinds of reports at three different stages of the Police investigation. The *first* is a preliminary report under s. 157, from the S H. O. to the Magistrate. The *second* is under s. 168 from a subordinate Police-officer to the S. H. O., and the *third* or final report is the one referred to in this section. In all cases coming under Chapter XVI, I.P.C.—Offences affecting the human body—arrest must be made and charge-sheets submitted as in all other cases with all reasonable promptitude. The want of medical officer's certificate will not justify any delay. Medical officers can be examined orally like other witnesses and their statements must be recorded and made use of.—*Mad. Pol. Man*, *Vol. I*, *p.* 84.

* Sub section (1) has been substituted in the place of the old sub-section by Act XVIII of 1923.
† Added by Act XVIII of 1923.

In the Punjab, all Magistrates of the first and second class have been specially empowered to hold inquests under this section —*Punjab Gazette*, 1883, *p* 23

6. There can be no inquest unless the body is forthcoming—It seems necessary to point out that where the body is not found or has been burned, there can be no investigation under this section. In such cases, if there are reasonable grounds for suspecting that a cognisable offence has been committed, the Police-officer should make an ordinary investigation without summoning persons to be associated with him. It has been the practice for Police-officers in charge of stations and superior Police-officer, *mero motu*, and also under departmental orders, to hold a second or further investigation in one and the same case. There is no writ in the Punjab or *melius inquirendum*, and as, in the Coroner's Act (*see* s 11), it is assumed that Coroners have the power to make further inquisitions, the practice seems perfectly good *See also* **27 P. R. 1908 = 9 Cr. L. J. 105.**

7. Inquest reports must be distinguished from final reports under s. 173.—A *verbatim* report of the statements of witnesses examined at the inquest may often be of great use to the Court in testing the value of the evidence subsequently given, **(1911) M. W. N. 138. Madras Rules.** Inquest reports must be distinguished from final or completion reports referred to in s 173 Inquest reports are to be written up and completed on the spot where inquest over corpse is being held Immediately the inquest is closed, the report thereof will be put into a cover and handed over in the presence of *Panchayatdars* to the constable about to take the corpse to the medical officer s station for examination —*Mad Pol Man., Vol I, p* 85

8. Bengal Rules.—'The Lieutenant Governor does not think that special diaries are intended or necessary in all cases of inquiry into unnatural deaths The report prescribed in s 174, Cr P Code, is very much the same in character as the special diary of s 172. If the Police-officer investigating see reason to suspect crime, the inquiry becomes one under s. 172 and special diaries become as a matter of course necessary, but, in ordinary cases, in which the inquiry is made and completed in a few hours, there seems to be no necessity for reporting the facts, first, in a special diary and then in the report prescribed by s. 174 When, however, the inquiry is prolonged or lasts over more than one day, the diary should be sent to inform the District Superintendent and Magistrate of what is going on.

The Lieutenant-Governor would therefore rule that in cases of any complexity, or in which the inquiry lasts over one day, or in which crime is suspected, special diaries should be sent in anticipation of the final report which will be made under s. 173 if a crime is detected, and under s 174 if the death is from accident or unnatural causes It is to be understood that in the station diary everything done by the Police will be entered—*Beng Pol. Cir*, 1872, *p* 107

9. Form of Inquest Report.—

MADRAS POLICE

District Division Station. Inquest report on the body of a person found dead at on

1 Deceased s name, sex, age, caste, calling, father s name and residence.	
2. By whom first found dead and when	
3 By whom last seen alive, where and when, and in whose company	
4 Height, colour and descriptive marks.	
5 Married or single, if female, was she the only wife?	
6. State of the corpse, if any wounds, particulars thereof and list of all property found on the corpse.	
7 Minute description of exact spot where the corpse was found, if water, depth thereof.	

Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Fort St. George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorised to hold inquests.

(5) The following Magistrates are empowered to hold inquests, *viz.*, any District Magistrate, *"Sub-divisional Magistrate or Magistrate of the first class" and any Magistrate, specially empowered in this behalf by the Local Government or the District Magistrate.

I.—INQUEST REPORTS.

Notes.—1. Powers of village headmen in Bombay.—S. 11, *Bombay Village Police Act* VIII of 1867, authorises Police patels to hold inquests in cases of sudden or unnatural deaths. The law empowers them to take evidence on oath and is obviously intended to make justice effectual by means of prompt inquiry in the face of all villagers and by delivery of a verdict of men not open to the suspicions of undue zeal, often alleged against the District Police.

Like any other Coroner's inquest, it saves the innocent from false charges, as people are not likely to bring such charges against an innocent man, when they have kept silence at the inquest. But the inquest under s. 11 of the Act must be *held forthwith* so that all the circumstances of the murder might be reported forthwith to the District Police, **Ratanlal 740.**

Refusal to serve on an inquest, when called on by a Police patel, specially empowered under s. 15 of *the Bombay Village Police Act* VIII of 1867, is not a refusal to obey a lawful order of a Police patel, punishable by the Police patel himself under that section, **Ratanlal 614.**

2. Power of village headmen in Madras.— A village headman acting under s. 174 has only the powers of a Police-officer acting under s. 175, **1910 M. W. N. 366 = 8 M. L. T. 198.** Under the 1861 Code, it was the *duty* of village headmen in Madras and Bombay to make the inquiry and report, and apparently it was intended that the Police should not hold inquests where a head of the village was at hand. Now the word '*may*' in sub-sec. (4) indicates that the village headman and the Police-officer are to hold each a separate and independent inquiry.—*See s.* 13 *of Mad. Reg. XI of* 1816.

3. Inquest in the Presidency towns of Bombay and Calcutta.—See *the Coroner's Act* IV of 1871 printed in the Appendix. That Act was framed on the principles and on the forms of a regular inquiry by a Magistrate. Evidence is given on oath before a jury who may question the witnesses; and evidence on behalf of the accused must also be received. Also confessions made to a Coroner are to be considered as confessions to a Magistrate. The evidence is recorded in writing and submitted to the High Court and the Coroner has also the power to arrest the accused after verdict. The Act also gives the Coroner power of commitment. Historically this power is a relic of the larger jurisdiction at one time held by that officer, **16 B. 159 at p. 160.**

4. Coroner's Court not an open Court.—In England it has been *held*, that the Coroner, though nowhere expressly ordered to hear witnesses on both sides, is bound, by the rules of justice to hear one side as well as another, seeing that his sole object is the truth (**2 Hale P. C. 60**; *Reg.* v. *Ingham*, **5 B. & S. 257**). As the inquiry is wide and indeterminate, and no individual is charged, and it may end in no accusation being made at all, there is good ground for holding that the Coroner's Court is not an open Court and that the Coroner has a discretion as to admitting persons not interested or not closely connected with the inquiry. Cases may occur in which privacy may be requisite for the sake of decency; others in which it may be due to the family of the deceased; and the propriety of the Coroner's decision on the subject cannot be questioned. *Garnett* v. *Ferrand*, **6 B. and C. 611.**

5. Magistrates empowered to hold inquests.—District Magistrate should inform District Superintendents of Police which of the Subordinate Magistrates have been authorised under s. 37 read with this section to hold inquests. The District Superintendent of Police will thus be enabled to instruct his subordinates as to the particular Magistrates to whom the intimation required by this section is to send, and the intimation will give those Magistrates the opportunity of proceeding under s. 176 *post*, when it may be desirable to do so.—*C. P. Cr. Cir., Part II, No.* 10.

* The words "Sub-divisional Magistrate or Magistrate of the first class" were substituted for the words "or Sub-divisional Magistrate" by Act XVIII of 1923.

12. Sudden or suspicious death of an European.—Whenever information of the sudden or unnatural death of an European is reported at a Police station, the officer in charge of the station shall send an urgent immediate information to the District Superintendent, and the Inquest Report, required by s. 174 of Act X of 1882, shall be taken by an European officer, and unless death has been caused by violence, the marks of which are apparent, no native officer shall have the right of examination of the body Under no circumstances shall any examination be taken when the deceased is of the female sex In such case a Police-officer, not below the rank of Head Constable, will remain with or accompany the body till receipt of orders from the Magistrate.—*Reg and Ord., N W P, s.* 10, *Art* 156, *p* 275

13. Unnatural death of Soldiers.—" It appears to the Government of India that it will be better, if inquiries into cases of sudden and unnatural deaths of soldiers, are made by Magistrates and not by the Police. The Police should, however, report all such occurrences to the Magistrate.' —No 1398, dated 10th October, 1878.

14. Rules in force in the N.-W. P. as to holding Inquests.—The inquest should be *held* before the body is touched or removed, and the 'report' should state the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner or by what weapon, or instrument if any, such marks appear to have been inflicted, the position, length, breadth and depth of wounds being accurately described. The report shall be signed by the Police-officer and other persons or by so many of them as concur therein

The personal opinions of the persons called upon to attend the inquest and of the Police-officer regarding the supposed facts of the case, *i e*, as to who struck the blows or killed the deceased, or for what reasons, must on no account be entered in the 'report' of inquest, these are matters which will find entry in the special diary of the investigation, but the 'report of inquest" must be confined to the 'apparent cause of death" to the existence of marks of violence or otherwise, and as to manner, or by what weapon or instrument such mark seem to have been inflicted —*Reg and Ord*, *N W P*, *p* 275

15. Procedure to be observed in Inquests in cases of death caused by poisoning, etc.—In order to obtain as much important medico legal evidence as is possible in cases of poisoning or death, the following rules are laid down for the guidance of officers investigating —

A—In cases of suspected poisoning

(1) Any food, especially flour and sweetmeats, drink, tobacco or drugs, and especially the food and drink last partaken of by the deceased, should be carefully brought away and sealed and forwarded.

(2) Any vomited matter which may be on the person or bed should be carefully swabbed up, with a rag, which should be put into a packet and sealed up and forwarded.

(3) Any clothing, matting, wood, mud flooring or manure or dirt heap into which any vomited matter has soaked, should be forwarded under a sealed cover

(4) The contents of any vessel containing vomited matter should be carefully put into a bottle, and sealed up and forwarded

Information on the eight following points will be elicited as early as possible, and entered in the special diary in due order —

(i) the interval between the last time—that the person, who is supposed to have been poisoned, ate or drank anything, or took any medicine, and the first appearance of symptoms of poisoning,

(ii) the interval between the last time of eating or drinking either food or medicine, and the occurrence of death (if death occurred),

(iii) whether the person moved from the place where the first symptoms were noticed, and, if so, how far he went,

(iv) what the first symptoms of poisoning were,

(v) whether vomiting or purging occured,

(vi) whether the person became drowsy or fell asleep,

(vii) whether any cramps or twitching of the limbs were observed, or tingling of the skin or throat complained of

(viii) any other symptoms noticed.

7 (*a*). Is the well public or private property? If the latter, to whom does it belong?	
7 (*b*). Is it near a public road or pathway?	
7 (*c*). Has it a parapet wall and float?	
8. By what relatives body is recognised and their statement shortly given. Blood relatives always to be examined, if there be any.	
9. Abstract of evidence of other persons examined.	
10. Apparent cause of death.	
11. If by violence, apparently by what weapon?	
12. If any persons are suspected, who and why?	
13. If corpse is not sent for medical examination, why?	
14. If corpse is sent, for what purpose and by whose order, and No. of constable who went with it.	
15. By whose orders the corpse was buried?	
16. Verdict.	
17. Name, caste, calling and residenee of persons composing inquest.	
18. Signatures of Panchayatdars.	
19. Station House Officer's signature.	
20. If name and residence of deceased be unknown, state what steps have been taken to ascertain the same and secure identification. To what stations have proclamations been sent?	

10. Apparent cause of death.—It is not proper to enter in column 10 of the Inquest Report any mere suspicion of foul play or any mere opinion. In case of doubt, the officer conducting the inquest should proceed under sub-sec. (3). In all cases, evidence of the condition of the body when first discovered and of the surrounding circumstances should be recorded.—*Oudh Cr. Dig.*, *p.* 9. But the personal opinions of the persons called upon to attend the inquest and of the Police-officer regarding the supposed facts of the case, *i.e.*, as to who struck the blows or killed the deceased, or for what reasons, must on no account be entered in the Inquest Report. These are matters which will find entry in the special diary of the investigation. The Inquest Report must be confined to the points specified in the section.—*Reg. and Ord.*, *N.-W. P.*, *p.* 275.

11. Death in Jail.—*See* ss. 15 and 17 of *the Prisons Act* IX of 1894, as to the course to be taken on the death of any prisoner in jail.

UNNATURAL OR SUDDEN DEATH OF A HUMAN BEING

(A)—*Investigation by whom to be made*

(a) *When officer in charge of Police-station to hold investigation*—Except in the cases hereinafter excepted, the officer in charge of every Police station, on receiving notice or information of the unnatural or sudden death of any person, when the body of such person is within the local jurisdiction of such Police-station shall immediately give intimation thereof to the nearest Magistrate duly authorised to hold inquests and shall proceed to the place where the body of such deceased person is, and hold the inquiry in the manner provided by s 133 (now s. 174) of the Code *

(b) *Exceptional cases*—The cases mentioned in the last preceding paragraph, excepted from the ordinary rule, shall be as follows that is to say —

(1) When notice or information is received by the officer in charge of a Police-station of the unnatural or sudden death of a person in a military cantonment, or of a person who has met his death by injuries unlawfully inflicted by a military person or camp follower, the Cantonment Magistrate or the nearest competent Magistrate (in the event of the office of the Cantonment Magistrate being filled by an Assistant Cantonment Magistrate who has not been specially empowered to hold inquests, and in places beyond cantonments), as the case may be, shall, without delay, be specially invited to hold an inquest, under the provisions of s. 135 (now s. 176) of the Code,

(2) if, in the cases mentioned in sub-sec. (1), the Magistrate in question fails to hold such inquest the District Superintendent of Police, or, in his absence, the Assistant District Superintendent of Police, shall hold an investigation under combined provisions of ss. 133 and 137 (now ss. 174 and 176) of the Code,

(3) in the case of soldiers, an inquest under the Criminal Procedure Code shall be held whether Military Courts of inquest are held or not. If the case mentioned in sub-sec. (2) neither the District Superintendent of Police, nor the Assistant District Superintendent of Police is available the officer in charge of the Police-station concerned shall hold the investigation,

(4) on occasion of a death by violence in a military prison, when an inquest has been held by a Magistrate duly authorised to hold inquests, the Police shall not make investigation into the cause of death, †

(5) in the case of the unnatural or sudden death of an European soldier, non-commissioned or commissioned officer, the Police shall confine their action to an immediate report to the nearest Magistrate duly authorised to hold an inquest, and to an entry in the station diary In such a case the inquest shall be held under the provisions of s. 135 (now s 176) of the Code, and not under those of s 133 (now s 174), ‡

(6) on occasion of an unnatural or sudden death within the walls of a prison, § and

(7) in cases in which a Magistrate, duly authorised to hold an inquest, has held an inquest in substitution for the Police inquiry

(c) *Deaths in prisons*—(1) Officers commanding prison guards shall, for the purposes of s. 133 (now s 174) of the Code possess the powers of an officer in charge of a Police-station

(2) On occasion of an unnatural or sudden death within the walls of a prison, it shall be the duty of the jailor to report the facts forthwith to the officer commanding the prison guard.

(3) On receipt of such report, such officer shall proceed to the spot and place a guard over the body with orders not to allow the body or anything which may have moved to and cause the death of the deceased to be touched until the arrival of a Magistrate, and such officer shall, at the same time, send immediate intimation to the senior Magistrate present at the station, with a view to an inquest being held. ‖

* *Cf* s. 8 of Act IV of 1871 and s. 1 of 6 and 7 *Vict*, c 12

† Section 133 (3), (4) of Statute 44 and 45 *Vict.*, c 58 (*The Army Act* 1881), provides for an inquest being held in a military prison by the nearest Magistrate duly authorised to hold inquests in the case stated in the text It further provides that where there is no competent civil authority available, the commanding officer shall convene a Court of Inquest

‡ This rule has been framed under the orders of the Government of India. It governs sub-secs (3) and (4)

§ *See* Jail Circular Memo. 4 of 1881 forbidding Magistrates in charge of jails to hold such inquests in such cases unless it is unavoidable

‖ Such inquests are to be held "whenever a prisoner dies from the effects of punishment or within 30 days of receiving such punishment or with any injuries or marks of such punishment on him, or whenever there is any possibility of any doubt, or complaint, or question concerning the cause of death arising or whenever a prisoner dies from the receipt of any injury, or within 30 days of the receipt of any injury, whether inflicted by himself or by anyone else or incurred in the performance of any labour or work, from the attack of any animal or in any way whatsoever. s — 245 *Jail Manual*.

B.—In cases of hanging or strangulation.

(1) If possible, before the body is cut or removed, the strangulating medium should be noted, and any lividity of face, especially of lips and eyelids, any projection of the eyes, the state of the tongue, whether enlarged and protruded or compressed between the lips, the escape of any fluid from mouth and nostrils, and the direction of its flow.

(2) When the body is cut down, or the strangulating medium removed, particular note should be made of the state of the neck, whether bruised along the line of strangulation.

(3) The direction of the mark must be noted, whether it is circular or oblique.

(4) The state of the thumbs should be noted, whether crossed over the palm.

(5) The materials by which hanging or strangulation has been affected should, if possible, be brought away and forwarded.

C.—On finding a body in a tank or well.

(1) Any marks of blood around the mouth, or on the sides of the well or tank should be noted.

(2) When the body is removed, any external marks of injury, especially about head and neck, should be examined for and noted.

(3) The state of the skin should be noted whether it is smooth or rough.

(4) The hand should be examined, and anything they may hold should be carefully removed.

D.—In the case of a body found murdered in an open field.

(1) The number, character and appearance of any injuries should be noted.

(2) If a weapon is found it should be covered with paper, and any marks of blood should be sealed, and any adherent hairs should especially be noted and preserved.

(3) In the case of an exposed infant, the state of the cord, especially if tied, and any marks of violence should be noted.

E.—In the case of a presumed murder and burial of the remains (exhumed body).

(1) Any marks of violence, especially about the skull, should be examined for and noted.

(2) Any indications of sex should be noted, and a jaw and the bones of the pelvis at least brought away.

(3) If there are any suspicions of poisoning, the earth from whereabouts the stomach was, should be carefully taken up and sent in.

(4) If a body, presumed to have been murdered, has been burned, any fragments of bones which may be found among the ashes should be collected and sent in.—*Reg. and Ord., N.-W. P., s.* 10, *page* 276; *Beng. Pol. Code, p.* 415.

F.—In cases of suspected cattle poisoning.

(*Addition in the Bengal Police Code, p.* 413.)

(1) The carcass should be first carefully examined, especially about the genitals and soft skin of the thighs and neck. If any puncture is found, it is possible that *Sutari*—poisoning [Chap. XXI, Rule 5, *Chamars* (*i*)] has occurred. The spike or *Sutari* should then be sought for, if anyone be found, it should be wrapped in paper, and be sealed and be labelled.

(2) The mouth should be examined, and anything found in it should be preserved and labelled.

G.—In rape or unnatural offences.

Send in the lower garments worn by the persons when assaulted.

16. **Punjab Rules regarding investigation into the case of death.**—The following rules relate to the investigation by the Police of the cause of unnatural or sudden death of a human being under circumstances creating a reasonable suspicion that an offence has been committed.

rent, injury or other noticeable fact in connexion with such thing, and enter in such inventory a counterpart of the mark and seal attached to such thing or to the parcel in which it has been enclosed such inventory shall form part of the report hereinafter prescribed.

(*d*) *Rules for disinterment of bodies*—If at the time of receiving information of an unnatural or sudden death, or if, at any time before or after he arrives at the place where the body of the deceased person is said to be, the officer in charge of a Police-station, or Police-officer concerned learns that such body has been buried such officer shall be guided by the following rules that is to say —

(1) an officer in charge of a Police station, and any superior officer of Police lawfully making an investigation into the unnatural or sudden death of any person, may cause the body of such person to be disinterred for the purposes of such investigation,

(2) no such disinterment shall be caused or effected until the respectable inhabitants required to take part in the investigation under the provisions of s 133 (now s 174) of the Code, are present, and unless and until the Police-officer, lawfully making the investigation, shall have recorded in writing the information which has reached him and the ground on which he considers it necessary to proceed to such investigation,

(3) when such investigations are made by an enrolled Police-officer and there is a Magistrate authorised to hold inquests in the immediate neighbourhood, either of the grave or the Police-station in which such grave is situate, it shall be the duty of such Police-officer to guard the grave and ascertain whether such Magistrate will attend at once at the disinterment The disinterment of the body shall be postponed pending such Magistrate's reply if such Magistrate is unable to attend the disinterment at once, such Police officer shall proceed, in manner hereinbefore prescribed, to disinter body,

(4) in all cases Police-officers shall examine witnesses to prove the identity of disinterred bodies with the persons supposed to have died unnatural or sudden death, before commencing their investigation on such bodies

(5) in every case in which a body has lain in the grave for a period exceeding three weeks, no disinterment shall be caused or effected by any Police officer until the opinion of the Civil Surgeon has been obtained, and then only with the concurrence of the District Magistrate,

(6) in cases in which the body has not been identified, a careful descriptive roll should be prepared for publication in the *Vernacular Police Gazette*

(*e*) *Procedure after disinterment*—When a competent Police-officer has disinterred a body under the last preceding paragraph, he shall proceed to hold the investigation in the manner provided in paragraph 8.

Opinion of Government Advocate regarding Exhumation of Bodies.

In my opinion no alteration has been made in the new Criminal Procedure Code (Act X of 1892) in reference to the power of the Police to exhume bodies when making investigations under s 174 I am not prepared to say that under the rule of *expressio unius est exclusio alterius*, the last paragraph of s. 176 would preclude the Police acting under s. 174 from disinterring a body, and the former section, it is to be observed, refers exclusively to cases where persons die *while in the custody of the Police* On the whole, I am of opinion that no amendment of the law was intended or has been made.—*Letter of Government Advocate, Punjab No* 1228, *dated 2nd July*, 1883

The Hon'ble the Lieutenant Governor concurs in the opinion expressed by the Government Advocate, *Circular No* 16 *of* 1883

(*f*) *Report of investigation*—(1) When the investigation has been completed, the Police-officer conducting it shall draw up a report stating the apparent cause of death of such deceased person, describing any marks of violence which may be found on the body and stating in what manner or by what weapon or instrument such mark appears to have been inflicted.

(*d*) *Deaths from railway accidents.*—(1) On occasion of an unnatural or sudden death, apparently caused by a railway accident other than an accident arising from an unavoidable mechanical failure, the Police investigation shall ordinarily be held, when the body is within railway limits, by the Assistant Inspector-General of Railway Police, and in his absence by the District Superintendent of Police or Assistant District Superintendent of Police in whose district such body is. Until the arrival of one of such officers, the officer in charge of the Railway Police-station concerned shall take all necessary measures to facilitate such investigation.

(2) If such body is beyond railway limits, such investigation shall be held by the District Superintendent of Police or Assistant District Superintendent of Police, and until one of such officers arrive, the officer in charge of the Police-station concerned shall take all necessary measures to facilitate such investigation.

(*B*)—*Investigation how to be made.*

(*a*) *Persons summoned to assist.*—In summoning the respectable inhabitants who are to take part in an investigation, the Police-officer concerned shall, if possible, select fit persons with reference to the nature of investigation.*

Illustrations.

(1) The question is what was the apparent cause of the death of *A*? *A* died of an injury caused by a carpenter's tool whilst working at the trade of carpenter. One of the persons summoned, shall, if possible, be a person acquainted with the use of such tools.

The question is what was the apparent cause of the death of *B*? *B* was found dead close to a broken railway gate which had apparently been broken open by the passage of a train. One of the persons summoned, shall, if possible, be a person acquainted with the working of the railway.

(*b*) *Invitation to Civil Surgeon.*—When an important investigation is held, or when an investigation is held at a place near the residence of a Civil Surgeon or other Medical Officer appointed by Government for examination of bodies, immediate intimation shall be given to such Surgeon or Officer with an invitation to examine the body at the place where it is lying. If possible, such intimation shall be sent by the officer in charge of the Police-station concerned through the District Superintendent of Police, who shall add a request in English.

(*c*) *Duty of officer making investigation.*—On arrival at the place where the body of the deceased is lying, the Police-officer making the investigation shall do the following things; that is to say:—

(1) he shall prevent the destruction of evidence as to the cause of death;

(2) he shall prevent the crowding round the body and the obliteration of footsteps;

(3) he shall prevent unnecessary access to the body until the investigation is concluded;

(4) he shall cover up foot-prints with suitable vessels so long as may be necessary;

(5) he shall draw a correct plan † of the scene of death, including all features necessary to a right understanding of the case;

(6) if the Surgeon or other officer or a superior Police-officer is expected to arrive, he shall leave the body for a reasonable time until such arrival; or, if the body is lying in a thoroughfare and cannot be left, he shall cause it to be moved to a suitable place, and the posture shall, as far as possible, not be altered until such arrival or until the investigation is completed;

(7) if no Surgeon or other officer or superior Police-officer arrives, he shall, together with the other persons conducting the investigation, carefully examine the body and note all abnormal appearances;

(8) he shall remove, mark with a seal, and seal up all clothing not adhering to or required as a covering for the body, all ornaments, anything which may have moved to and caused the death of the deceased, and make an inventory thereof, describing the position in which each thing was found, any blood stain, mark,

* *Cf* 34 and 39 *Vict.*, c. 78, s. 8

† The plan should be drawn by the Police-officer himself or by some person who is likely to be available as a witness in the event of future criminal proceedings If the plan is put in at a subsequent judicial proceeding, the maker must depose to its accuracy. 11 B. H. C. R. 242. *See* also *Beng. Pol. Code*, *p*. 384; *Oudh Cri. Dig.*, *p*. 11.

APPENDIX I

DEATH REPORT NO FORM NO 1 POLICE-STATION (*Name*)

Dated

(*When in Vernacular to be prepared on ¼ sheet of native paper*)

SUDDEN DEATH FROM *natural* CAUSES.

1 Name of the place where death occurred.	
2 Distance and direction from the Police station in whose jurisdiction it is	
3. Date and hour of discovery of the death	
4 Names, parentage and residence of two or more persons who identify the body as that of the deceased person named in this report. NOTE —*Relatives of deceased or two respectable witnesses to identification should be obtained if possible*	son of , resident of son of , resident of
5 Name of deceased Parentage Caste Residence Condition in life	
6. Age and sex.	{Age {Sex
7 Condition of the clothes, ornaments, etc., as not indicating an *unnatural* death.	
8 Position of the limbs, eyes and mouth	
9 Expression of the countenance.	
10 Injuries or marks of violence the body may have received. *Wounds and Bruises*—Position, length and breadth	
11 Blood liquid or clotted? where oozed from and to what amount?	
12 In what manner, or by what weapon or instrument such marks of injuries or of violence appear to have been inflicted?	
13. Is the body well nourished and vigorous or emaciated and weak?	
14 Apparent cause o death.	
15 Any signs of death having been caused by violence or poison or any rumours of such being the case?	

(2) Such report shall be drawn up in one of the forms given in Appendix I, *see* pp. 367 and 368, *infra* or to the like effect.

(3) The report shall be signed by such Police-officer and other persons making the investigation, or by so many of them as concur therein, and shall be forthwith forwarded to the Magistrate of the district, or, when the Magistrate of the district as so directed, to the Magistrate of the division of the district in which such investigation was made.

(4) The plan of the scene of death, the inventory of clothing, etc., and when bodies or articles are sent for *medical* examination, a list of the things on and with the body and the particulars as to things sent for medical examination shall form part of such report.

(5) In cases of death by hanging, the report shall state particulars as to the height of the support and the sufficiency of it, and the things used to bear the weight of the body.

(6) A copy of every such report shall be made in Police-station Book No. VI.

(*g*) *Reports how sent*—(1) Reports forwarded to the Magistrate of the district under the last preceding paragraph shall ordinarily, unless such Magistrate direct to the contrary, be forwarded through the District Superintendent of Police, who shall read and pass them on without delay.

(2) A District Superintendent of Police shall, when reading an investigation report, record on it any orders he may make in reference to further investigation.

(*h*) *Information in poisoning cases.*—(1) The ordinary symptoms caused by common poisons are described in Appendix II, *see* p. 371, *infra.*

(2) Police officers making investigations in cases where poison has been administered shall record in their reports all information likely to be of value in assisting Civil Surgeons or the Chemical Examiner to form an opinion as to the precise poison employed.

Explanation.—As the tests used for the discovery of different poisons vary with the poison and as the substance available for analysis is often very limited, it is very important that none should be destroyed by the use of wrong tests. For these reasons, full information shall be carefully sought for and supplied.

(*i*) *Making over of property.*—When the Police-officer has concluded the investigation, he shall make over to the proper persons all property which he may have taken into his charge in the course of the investigation and which is not required for the ends of justice. A receipt shall be taken for property so made over in Police-station Book No. VI (Miscellaneous).

(*j*) *Where cognisable offence disclosed.*—If the facts disclosed on the investigation disclose the commission of a cognisable offence, and the person who appears to be guilty of such offence is arrested, the Police-officer concerned shall, when he has completed the investigation of such offence, take recognisances from the witnesses as provided by law.

(*k*) *Correspondence with Chemical Examiner.*—Police-officer shall not correspond with the Chemical Examiner direct in matters relating to human bodies. Any necessary reference in relation to such subject shall be made to the Civil Surgeon.

(*l*) *Chemical Examiner not to be referred to on insufficient grounds.*—No case of human poisoning, with regard to which the Civil Surgeon does not recommend investigation by the Chemical Examiner, shall be referred to that officer without a special order from the Magistrate.

(*m*) *Language of reports—Copy to be sent to Assissant Inspector-General*—(1) Report submitted by Police-officers ignorant of English shall be in Vernacular, but, in all cases of death caused by a railway accident, an English translation shall be made.

(2) A copy of all report relating to deaths caused by railway accidents shall, when made by a Police-officer other than a railway Police-officer, be forwarded to the Assistant Inspector-General of Railway Police.

16 Is the body well nourished and vigorous or emaciated and feeble?
17 Is it stout, thin or decomposed?
18 Height by measuring from head to feet?
19 Distinguishing marks.—*Position and appearance of moles, scars, etc*
20 Apparent cause of death
21 Are there any circumstances or rumours tending to show that deceased killed himself?

(*Entries to be made on reverse of Form II*)

1. Description of each article found on or near the body

Found actually *on* the body Each article labelled, numbered and sealed		Found *near* the body Each article labelled, numbered and sealed.
Sent in attached to body	Sent in separate packet	

Description of superscription or device of the seal used on above

2 Sketch plan of the place where the body was found.

3 Description of surrounding ground, marks of footsteps or of a struggle. Marked peculiarity in the foot prints Marked peculiarity in the shoes found, or in feet of accused, or suspected parties; *corresponding* with the same noted peculiarities in the foot prints.

4 Brief history of the case.

Date——— 193	(*Signatures of two or more respectable inhabitants of the place present at the investigation*)	(*Signature of officer conducting the investigation.*)
	A———	*Name*
	B———	*Rank*

FORM NO 3.

(*When in Vernacular to be prepared on ½ sheet of native paper*)

UNNATURAL DEATH BY *poisoning*

Particulars relating to the case, in addition *to those given in Form II*

1 Was deceased in good health previous to the attack?
2 If not in good health, what was he suffering from?
3 What medicine was he taking?
4 What did the last meal consist of?
5 What was the interval between the last meal and the commencement of the symptoms?
6 What did the deceased *last* eat or drink before the commencement of the symptoms?
7 What was the interval between the very last time he ate or drank and the commencement of the symptoms?
8. What were the first symptoms?
9. Was he thirsty?
10 Did he become faint?

(*Entries to be made on reverse of Form I.*)

1. Description of each article of clothing, ornaments, covering weapons, etc, found on or near the body.

2 Sketch plan of the scene of death.

3. Brief history of the case.

Date ______________ 193 .	(*Signatures of two or more respectable inhabitants of the neighbourhood present at the investigation.*) A______________ B______________	*Signature of officer conducting the investigation.* *Name* *Rank*

FORM No. 2.

DEATH REPORT No. POLICE-STATION (*Name*)

(*When in Vernacular to be prepared on ½ sheet of native paper.*)

UNNATURAL DEATH BY VIOLENCE.

1 Name of place where the death occurred, or where body was found (state which).

2. Distance and direction from Police-station in whose jurisdiction it is.

3 Date and hour of discovery of the death.

4 Name, parentage and residence of two or more persons who identify the body as that of the deceased person named in the report.

(NOTE.—*Relations of the deceased or two respectable witnesses to identification should be obtained, if possible*)

5. Name, parentage, caste, residence and condition in life of the deceased.

6. Age and sex.

7. Condition of the clothes, ornaments, etc., and marks of either having been forcibly removed or of being stained with blood or other matter.

NOTE —*If the Civil Surgeon or other Medical Officer is expected to attend to examine the body, this information should be filled in so far as can be seen and without touching or removing any clothes, and, in such case, it should be completed after he has finished his examination of the body.*

8. Position of the limbs, eyes and mouth.

9. Expression of the countenance.

10. Injuries or marks of violence the body may have received.

Wounds and Bruises.—Show position, length and breadth.

NOTE.—*Note depth, be careful not to prove wounds. If the Civil Surgeon or other Medical Officer is expected to attend to examine the body, this information should be filled in after he has completed his examination.*

11. Blood, liquid or clotted? where oozed from and to what amount?

12. In what manner or by what weapon or instrument such marks of injuries or of violence appear to have been committed?

13 Was there any rope or other article round the neck, or any mark of ligature on it?

14. Had such rope or article apparently been used to produce strangulation? And if the body had been suspended by it, could it probably have supported the body?

In what mode was the other end of the rope attached to the support?

15. Were there any foreign matters, such as weeds, straw, etc, in the hair or clenched in the hands of the deceased, or attached to any part of the body?

ecomposi
a may be
n useless

3. Contents of the stomach how secured for transmission.—On making a *post-mortem* examination whenever there is any suspicion of poisoning, the stomach should be tied at both ends (a double ligature being applied at the pyloric extremity, so that the contents of the intestines may not escape) and removed from the body in such a manner that its contents may be retained, after removal it should be opened, the contents received into a perfectly clean bottle and the mucous surface of the stomach carefully examined, its appearance noted, and any suspicious particles found adherent thereto should be picked off with a pair of forceps and placed in a separate small phial for transmission. And the mucous membrane of the mouth, pharynx and œsophagus should be examined, and any unusual appearance of marks of corrosion thereon carefully noted

4. Articles to be forwarded in case of death from presumed poisoning.—In all cases of death from presumed poisoning, the following articles should be forwarded for analysis each in a separate bottle, unless otherwise indicated It will, however, be understood that other matters should be forwarded if, in the opinion of Medical Officer, the special circumstances of any case render such a proceeding advisable —

(*a*) Stomach

(*b*) Contents of the stomach, which may, if it be convenient be put in the same bottle with the stomach

(*c*) Suspicious particles (if any have been found) removed from the mucous membrane of the stomach

(*d*) A portion of the liver, not less than 16 oz in weight or the whole liver if it weigh less than 16 oz, and one kidney

(*e*) The vomited matter, if any The earlier and the later vomits should, when practicable, be sent up in different bottles And the labels should state at what period the matters were vomited Special directions are given in paragraph 6 for the disposal of vomited matters mixed with earth, etc.

(*f*) A specimen of the spirit used, 4 oz is sufficient

When it is suspected that a vegetable poison has been used the following matters should also be forwarded —

(*g*) The contents of the small intestines.

(*h*) Any urine which may have been separately collected after the commencement of symptoms, or found in the bladder after death.

5. Strong unmethylated spirit to be added.—Strong unmethylated spirit should in all cases be added, as laid down in the rules for the transmission of articles for analysis detailed in paragraph 11, to the contents of bottles *A*, *D*, *G*, *H* and also to the contents of bottles *B* and *E*, unless it be suspected that alcoholic poisoning has been the cause of death. No spirit need be added to the contents of bottle *C* Care should be taken that no vessel containing fluid matters is quite filled

6. Packing of vomited and purged matters in metallic poisoning.—Vomited and purged matters are frequently received by Medical Officers mixed with earth, etc. If the admixture of earth be sufficient to render the evacuated matters dry and inoffensive, they may be packed without spirit in any convenient manner, otherwise they must be packed with spirit. Vomited and purged matters if they have, as frequently happens, been allowed to fall on the ground, should be carefully scraped up, not taking more earth than is necessary The superficial scrapings should be packed separately It is rarely necessary to remove the earth to a depth greater than half inch, even in cases of suspected metallic poisoning, unless the soil be of a very loose character Except when a metallic poison is suspected, it is very rarely necessary to forward purged matters.

7. Poisonous food, medicine and fruits how preserved and sent up.—If articles of food, medicine, etc., suspected to have been the vehicle by which poison has been admitted, require examination, they should each be packed up separately and spirit invariably added, as in the case of viscera, to such as are liable to decomposition. Fruits, such as plantain and custard-apple, if suspected to contain poison, should be carefully inspected, and if it should appear that some reign substance has been inserted, this should be picked out and sent up for examination. If one suspicious substance can be discovered, the fruit should be forwarded.

(4) Convulsions or twitchings of the muscles.

(5) Delirium and clutching at imaginary object.

(*e*) Were any other symptoms noticed?

(*f*) Did any other persons partake of the suspected food or drink, and did they also suffer from similar or other symptoms of poisoning?

5. **Other available information.**—Any other information available, likely to prove serviceable as a guide to the class of poison administered, should at the same time be furnished.

6. **Certificate of chemical analysis by Medical Officers.**—Certificates of Chemical analysis are not to be accepted from Medical Officers, as these officers are not in a position to conduct analysis as they should be carried out for judicial purposes. But any Medical Officer who may be provided with a suitable microscope should be able to recognise *recent* blood stains and to conduct examinations of suspected seminal stains.

7. **Procedure in cases of suspected human or cattle poisoning.**—In every case of suspected human or cattle poisoning, it is desirable that all the substances requiring analysis should be packed and forwarded to the Chemical Examiner by the nearest Medecal Officer. If special circumstances should render it desirable to forward any articles directly to the Chemical Examiner, the instructions given in section 2, paragraphs 4—12, must be carefully attended to.

8. **Rules for forwarding suspected blood stains—Suspected blood stains.**—Articles requiring examination for the presence of blood stains may, if desirable (*vide* paragraph 6), be forwarded direct to the Chemical Examiner, the following rules being strictly attended to:—

(1) When clothes are sent up, any stains considered to be suspicious should be indicated by means of pencil marks or pins. Stains on walls, floors, the ground, or articles of furniture, etc., are not to be scraped off. But the stained area is to be carefully cut out; and when the material is brittle, as in the case of earth or chunam it should be carefuly wrapped in cotton wool and packed in a box, so that the surface may be preserved from injury.

(2) All articles requiring examination should be carefully labelled, and each label should bear the signature of the forwarding officer and the number and date of the letter of advice addressed to the Chemical Examiner. All parcels should be carefully sealed by the despatching officer and packed in such a manner that they cannot be opened without destroying the seal. The seal used should be the same throughout, and a private seal, or an official seal which is kept in safe custody. A letter of advice should be separately forwarded to the Chemical Examiner. This letter should contain—

(*a*) An impression of the seal used in closing the packets and description hereof.

(*b*) A list of the articles forwarded and a statement as to how the articles have been forwarded.

(*c*) Information as to whether any of the weapons, cloths, etc., are to be returned after examination.

9. **Miscellaneous examinations.**—Magistrates, on forwarding coins, documents, salines, liquors, etc., to the Chemical Examiner, should follow the instructions laid down in paragraph 8, clause 2, and in section 2, paragraph 11, so far as they may be applicable, and should be careful to include in their letter of advice to the Chemical Examiner's information as to the nature and object of the examination required, and to furnish any other information likely to assist the Chemical Examiner in making the required examination.

SECTION II.—INSTRUCTIONS FOR THE GUIDANCE OF MEDICAL OFFICERS.

Notes. 1.—Medical Officers to maintain supply of unmethylated spirit and suitable bottles.—Medical Officers in charge of Hospitals and Dispensaries are required to maintain a supply of unmethylated spirit and suitable bottles, etc., in readiness for the transmission of viscera and other matters to the Chemical Examiner when occasion may arise. In cases of suspected poisoning, it is exceedingly important that viscera and other suspected matters liable to rapid decomposition should be placed in spirit as soon as practicable. And every care should be taken lest doubt may be raised in Court as to the identity of articles likely to require examination, or as to the possibilty of their having been accidentally contaminated or improperly interfered with.

2. **Post-mortem examination to be made thoroughly.**—*Post-mortem* examinations are to be made as thoroughly as circumstances will permit whenever desired by Magisterial or Police-officers. Attendance upon midwifery cases or other similar excuses will not exempt Medical Officers from the performance of the too

SCHEME FOR POST-MORTEM EXAMINATION.

No DATED

Note of a Post-mortem Examination on the body of—

Name Female
Aged about Years, m, d. approximate
Colour of eyes Height ft. in
Residence *Colour of hair, length in*
Occupation Caste
Found/Died at A.M./P.M., on at
Sent by with letter No dated
in charge of grade Head Constable No

Received at A.M./P.M., on at

It is stated that the body was found

It is stated that there was an interval of
between the last
eating, drinking and the development of the symptoms which were—

Vomiting of	Purging of
Twitching of	Clutching at
Tingling of	Delirium
Convulsions	Deep sleep

other persons partook of the same food drink
and exhibited symptoms —

The following articles were also sent with the corpse —

Clothes	Ornaments—Jewellery
Excreta	Vomit
Weapons	

The examination was conducted by

and was begun at A.M./P.M., on

External Examination.

The body is corpulent stout, well nourished emaciated, not muscular, jaundiced, leprotic Rickety Has Addison s patches on eruption of

Is covered with down, scratches on blood and vernix caseosa.

Tattooing Old scars Ulcers.

Burns (purple red boundary),

Caste marks Condition of clothes

Internal Examination.

The features are calm contorted distorted pale, livid, congested swollen, bloated.

The eyes are open closed, lids not swollen, pupils not contracted, not dilated

The nose is not broken. *There is no discharge of blood*, mucous. No foreign body, polypus ulcer septum.

The mouth and lips give forth no characteristic odour of are not discoloured, stained, mucous lining is not softened, destroyed. There is no discharge of blood froth.

Tail of saliva running down to chest. No foreign body in

The teeth are complete are wholly absent are broken or decayed.

The jaws are not clenched. The gums are blue, red, spongy

(2) The entire alimentary canal should be opened and its contents inspected for suspicious-looking substances. If any suspicious-looking substance be detected in the alimentary canal, it should be packed in a separate vessel, and spirit should not be added unless necessary for its preservation.

(3) About two pounds of the contents of the stomach, with about a pound of the contents of the intestines, should be placed in a clean glass or well-glazed earthen vessel or vessels and strong unmethylated spirit added in the proportion of not less than one-fourth of the apparent bulk of the material, when the contents are nearly dry, but if much liquid be present spirit should be added in the proportion of one-third of the bulk of the material. Also about a pound of the liver and a similar weight of the stomach should be placed in a separate clean glass or well-glazed earthen vessel and unmethylated spirit should be added in the proportion of one-third of the bulk of the material. A sample of the spirit used in packing should also be sent, 4 ounces are sufficient.

(4) Dried cattle-dung may be sent without addition of spirit.

(5) Suspected cattle poisons rarely require the addition of spirit for their preservation, and spirit should not be used unless necessary.

(6) The instructions given as to the packing and transmission to the Chemical Examiner of substances requiring chemical examination in cases of suspected human poisoning are applicable to these cases and should be carefully attended to, and the same precautions must be adopted as to sealing and labelling the different vessels—*vide* paragraphs 9, 10 and 11.

(7) When under instructions received from a Magistrate or Superintendent or Assistant Superintendent of Police, a Medical Officer forwards articles to the Chemical Examiner for examination, he should at the same time address and forward separately a letter to the Chemical Examiner advising their despatch. This letter should contain—

(*a*) an impression of the seal used in closing the vessels, and a description thereof;

(*b*) a list of the articles forwarded and information as to how the articles have been forwarded;

(*c*) the name of the officer from whom the order has been received to forward the articles and the number and date of such order;

(*d*) information as to the number and kind of animals affected and number of deaths;

(*e*) any information obtainable as to *post-mortem* appearances, nature and duration of symptoms and which may be likely to indicate the probable nature of the poison.

16. Analysis of water.—(1) Before forwarding a sample of water to the Chemical Examiner for analysis, it is necessary to write to the Chemical Examiner and ascertain when it will be convenient to receive the sample or samples which may require to be examined, it being desirable that samples should be examined shortly after they are received at the laboratory.

(2) The duty of collecting the samples should always be undertaken by a responsible person. The employment of peons or servants for this pupose is strictly prohibited. The bottles used should be thoroughly cleansed, and then well washed out twice with water from the same source it is intended to fill them from, just before finally filling them.

(3) Glass-stoppered bottles are best, but if those are not procurable, new corks are to be used with the ordinary quart wine bottle of light-coloured glass. In filling the bottles, a little space should be left between the cork and the water.

(4) Not less than one gallon of each sample of water is to be forwarded.

(5) Each bottle to be labelled with the name of the well and date of collection.

(6) On forwarding water for analysis, the Medical Officer should, at the same time, forward separately a letter to the Chemical Examiner. This letter should contain—

(*a*) An impression and description of the seal used in closing the bottles.

(*b*) Information as to the number of samples sent, and a statement as to how the samples have been forwarded,

(*c*) An explanation as to the reason for which the examination is required and information as to by whom it is desired.

(*d*) A statement as to the source from which each sample was collected, and by whom and when each sample was collected.

Fatty infiltration, degeneration, abnormality, wound, rupture, turged

Rt. auricle contains Rt ventricle contains

Lt. auricle contains Lt. ventricle contains

Valves and encardium rigid, rough, contracted, thickened, adherent perforated, vegetations puckered, atheromatous.

Chordoe tendinoe shortened, broken Clots

Polypus Coronary vessels

General character dark, cherry coloured Coagulated. Firm, abnormally fluid Atheroma, aneurism, wound, rupture.

Distended not marked by ribs Do not collapse

Colour *Insular marbling* —Weight R L.

Feel dry, soft œdematous hard, friable, non-elastic, emphysematous, collapsed.

Do not section and exudation on pressure

amount of blood, water secretion, granular, bloody, tenacious, tubes reddened, thickened, dilations, grey yellow tubercle, certaceous mass, shrinking cavities. Pigment, fibroid change. Red grey hepatisation, purulent, infiltration, diffuse circumscribed abscess, atelectasis gangrene cancer, wounds, rupture.

Contains water, mud and

Injected, swollen, discoloured, œdematous, belled froth, corrugated leathery *new growth impacted mass, hyoid bone*

Outer surface vascular, injected, adherent, distended by food, gas. Contracted wound rupture

Interior surface contents ozs. looking with characteristic odour of colour

Appearance—colour vascular injected, dilated and tortuous vessels, punctuated œdematous, charred, extravasation effusion, seeds of

Particles of ulcer perforated. Character of edge.

Mucous membrane thick, soft, hard, eroded, corrugated, leathery

Mucous membrane partly detached, easily stripped, soft, brittle, sodden, white, brown stricture new growth, impacted mass, wound

Weight oz.

Relations adhesions rupture. Weight enlarged, diminished atrophied wound

Edges thick, thin, rounded

Surface smooth, shining, dull, nodulated, scarlike bands

Colour red, yellow mottled, pigmented

Consistence hard, soft, flabby, tough, fleshy, greasy, friable, waxy, diffuent

Section hyperæmic, nutmeg granular, distended, ducts, embolism, hydatid, abscess (reagent reaction)

Capsule adherent, thickened, loose, wrinkled

Gall bladder full, empty, stone.

Ducts thickened, constricted, obstructed by weight , large, small, wrinkled Rupture, wound, colour Capsule thick, adherent,

Consistence hard, soft, brittle, friable, abscess, infracts

Relations No hernia Fat, no adhesions, injected hypostasis.

Glands swollen, scrofulous ulcer, tubercle, caseous masses effusion of lymph Weight R. oz., L. oz. Larger, smaller, heavier, lighter

Colour red, yellow, white, mottled, hypostasis, smooth, rough lobulated. Section soft, hard, friable, anæmic, hyperæmic *colour*

Corticle increased, wasted, pelvis dilated pyramids malpigian bodies increase of connective tissue

Capsule very non-adherent, thick, thin, stellate veins new old, abscess cyst, calculus, rupture-wound (reagent reaction), enlarged, irregular, firm, adherent, section yellow, grey, white, cheesy, certified.

The tongue is not protruded between teeth, stained, mucous surface, swollen.

No ulcer, no new growth.

The ears have no discharge of pus, blood, fluid. No foreign body. Lobes not recently torn.

The neck is not marked by rope.

No wound dividing.

No old scar.

Glands not enlarged.

The chest is shaped formed.

No difference in trunk the two sides Mammary glands Auxiliary glands not enlarged.

Hair Fracture Hernia Cutis anserina Umbilous.
Line of demarcation Cord Mummification of cord
Generative organs—hair
penis (shortening of, in drawing),
No discharge. No venereal. Testicles
not descended. Hydrocele Labia Hymen
Vagina fistula No
discharge of blood, mucuous. Foreign body. No venereal, no marks of violence.

The hands are not clenched, empty, contain
have no extra digits. Show no signs of work. No mark of wedding ring on finger.
No stains, no fracture, dislocation nails not broken. Sand, mud
cutis ansernia on arms. Cholera fingers.

The feet are not oedematous. There are no nodes fractures.
dislocation Deformity stains soles.

Vide Sketch.

Character no foreign body
in wounds. Cuts on clothing do not correspond with wounds on body.
Injuries might have been self-inflicted
caused by accident by
caused by weapons produced which fit wounds.

Eye-balls flaccide. Flattening of points of support. *Post-mortem*
hypostasis (prove by incision). Rigor motis Discolouration of
Odour softening of eye-balls. Exudation from nose, mouth. Blebs on back of legs, neck, sides of chest.
Peeling of cuticle. Loosening of hair. Damage by wild animals.
Thorax, abdomen burst. Sutures of skull opened. Eyes gone.
Saponification. Mummification
Death would appear to have occurred about ago
The general appearances do not tally with the Police report.

Internal Examination.

Depth of fat in. Colour of Development of colour of muscles, no extravasation, no fluid, amount of
oz. Level of diaphragm R. L

Position of organs normal.

Position of organs normal. Fracture of ribs.
Pleura increased vascularity, roughening of surface, effusion of fluid
character of lymph. Old, recent adhesions. Wound

Pericardium reddened, distended. Fluid in ozs. Character
of inner surface dark, roughened. Wounded Spots of
hæmorrhage on

Weight oz. Hypertrophied. Dilated.

(*Note.*—Organs to be merely inspected and none removed.)

D.—Fee to Medical Officers

(i) *For conducting a Post-mortem or Medico-legal Examination.*—The fee to be paid to a *Medical Subordinate*, other than an officer of commissioned rank for conducting a Post mortem or Medico-legal Examination, when it does not fall within the ordinary scope of his duties, shall be Rs. 4 It is to be understood that Medical Subordinates lent by the Government to Municipalities or Dispensary Committees will be required to perform these examinations, as part of their regular duties, without further remuneration. In the case of Officers of Commissioned Rank the fee shall be Rs 16 for Post mortem Examination and Rs 10 for Medico-legal Examination—(G O No 694, Judicial, dated 15th March, 1884).

(ii) *For Attendance in Court*—A Medical Officer, not being a Civil Surgeon or an officer in Medical charge of a Civil Station, shall be entitled to a fee of Rs. 16 for conducting Post mortem Examination and to a fee of Rs. 10 for conducting a Medico-legal Examination other than a Post mortem Examination, in cases not falling within the ordinary discharge of his duties, whether or not he is required to give evidence in a Court of Justice in connection with such examination. When he is required to give such evidence in a Court of Justice he shall not be entitled to any remuneration in addition to the fee sanctioned above other than the usual expenses paid to a witness—(G O No 1367, Judicial, dated 21st September, 1882).

(iii) *For grant of certificate or Medical opinion*—Paragraph 381 of the Civil Medical Code shall be amended as follows —(*Vide* G O No 755, Public, dated 12th September, 1908) —(*a*) Medical Officers who are public servants shall in no case receive any fee from the public revenues for giving certificates, opinions or evidence regarding any proceeding of public interest, such as inquests or judicial inquiries. Certificates shall invariably be granted when required by the Police If, in any case, a Medical Officer considers that unnecessary or improper use is made of this rule by the Police, he should, after granting the certificate report the matter to the District Medical and Sanitary Officer, who will bring it to the notice of the District Magistrate If the officer is himself the District Medical and Sanitary Officer or a Civil Surgeon, he will similarly report the matter to the District Magistrate (*b*) A fee may be charged, subject to the provisions of clause (*d*) below for a certificate or opinion given by a Medical Officer in Government, Municipal or Local Fund service at the instance of a private person treated or examined by him in his official capacity for any purpose, whether it be in connection with a civil or criminal proceeding or not, and the fact such person was treated in a State Municipal or Local Fund Hospital shall not exempt him from the payment of such fee to the certifying officer When such a certificate or opinion is given by a Commissioned Medical Officer or a permanent Civil Surgeon, he shall be entitled to a fee at the usual rate of remuneration, admissible to him in the case of an ordinary certificate When it is given by a Subordinate Medical Officer, the fee shall not exceed two days' salary (*i e*, pay without allowances) of such officer, subject to maximum of Rs 5 Provided that where a private person pleads that from poverty he cannot pay the fee demanded, the Medical Officer shall not therefore refuse to treat or examine such person and shall record the results of the examination. He may, however, in such case refuse to grant a certificate without the payment of a fee, but if he does so, he shall record his reason for such refusal. * *Provided further that a Medical Officer shall not levy a second fee for giving evidence in a* Court to prove a certificate or opinion previously given by him to private person and for which he has already received a fee There is, however, no objection to a Medical Officer taking a fee from a private person for giving evidence in a Court in cases in which the officer has not obtained a fee beforehand for consultation or for a certificate in regard to the same matter, and in which he has been summoned to give evidence in Court by that person and not by the Court or another party

(*c*) *Treatment not to be postponed.*—A Medical Officer shall not be at liberty, by directing the applicant in the first instance to produce an order from the Police or otherwise, to postpone treatment or an examination he may be called on to make. If a Medical Officer in such case apprehends an improper use of his service or possible danger to himself, he should take precautions by the attendance of witnesses for his protection.

(*d*) *No fee for certificate under M S. Act.*—Notwithstanding anything contained in the above rules no fee shall be charged by Medical Officers for certificates granted with reference to section 36 of the Merchant Shipping Act, 1906, on the requisition of the port authorities.

N B —(*Vide G O No* 218, *Public dated* 21 2 1899, *No* 319, *Public, dated* 25-4-06, *No* 762, *Public, dated* 6-8-00, *No* 1302, *Judicial, dated* 17-8-05, *No* 2, *F, dated* 11 3-75 *and* 1-8-83, *No* 819, *Public, dated* 2-10-08, *No* 604 *F, dated* 15-3-84, *No* 1307, *F, dated* 21 9-82, *No* 755, *Public, dated* 12-9-08 *and No* 644, *Public, dated* 8-8-08.

* This para is G O No 644, Public, dated 8th August, 1908.

Small intestine *outer surface* hypostasis (especially pelvic) adherent. Injected, interior contents , colour membrane swollen, pulpy, sloughing, ulcerated (diffuse follicular), Peyer's glands impacted mass, twisting, new growth, thinning, wasting and contraction.

Large intestine *outer surface.*

5' *Ileo cæcal valve.*

3"—6" *Appendix* length.

Interior.

Rectum.

Contents oz. Calculus new growth
Menstruation, pregnancy, abortion, violence,
wound, rupture new growth.
Fracture of pelvis
The soft parts present.
The bones are
The Dura mater adherent, anæmic, vascular, hypostasis.
The Arachnoid dry, sticky, tubercle. The pia mater injected.
Convolutions flattened, Ventricles full, empty.
Substance softened (red yellow), hard, abscess.
Tumour. Hæmorrhage clot Basal fracture
Exostosis Caries Wound
Soft parts present
The bones are
The Dura mater adherent, anæmic, vascular hypostasis.
The Arachnoid dry, sticky, tubercle.
The Pia mater injected
The cord length weight oz. soft, hard, vascular injected.
Semi-translucent.

Colour

Columns.

Nerve roots.

The following numbered and sealed as under, and each labelled with a signed note of reference to this report, are, together with a sample of the spirit in which they are preserved, reserved for chemical analysis:—

1. Stomach and contents.
2. Intestine and contents.
3. Spleen.
4. Sample of liver.
5. Kidney.
6. Sample of muscle.
7. Sample of blood.
8. Sample of spirit.



Result of analysis.
Summary of opinion. The deceased would appear to have
Dated day of 19
at Sg.

C.—Quantitative Analysis by Chemical Examiner.

Quantitative analysis to be made only in mineral poisoning.—The Chemical Examiner's report is legal and important evidence in an investigation or trial. In the case of Vegetable Poisoning Quantitative Analysis of human viscera, etc., is likely to be fallacious in its results and as such worthless as legal evidence. Quantitative Analysis should therefore be made in addition to Qualitative Analysis only in the case of Mineral Poisoning for finding out the amount of poison found in each article.—*Vide* G.O. No. 1302, Judicial, dated 17th August, 1905.

13 Might not the appearances you mention have been the result of spontaneous changes in the stomach after death?

14 Was the state of the stomach and bowels compatible or incompatible with vomiting and purging?

15 What are the usual symptoms of poisoning by——?

16 What is the usual interval between the time of taking the poison and the commencement of the symptoms?

17 In what time does ——generally prove fatal?

18 Did you send the contents of the stomach and bowels (or other matters) to the Chemical Examiner?

19 Were the contents of the stomach (or other matters) sealed up in your presence, immediately on removal from the body?

20 Describe the vessel in which they were sealed up, and what impression did the seal bear?

21 Have you received a reply from the Chemical Examiner, if so, is the report now produced that which you received?

22 (If a female adult,) what was the state of the uterus?

No II

Questions that may be put to a non-professional witness in case of suspected poisoning

1 Did you know——, late a resident of ——? If so, did you see him during his last illness and previously?

2. What were the symptoms from which he suffered?

3 Was he in good health previous to the attack?

4 Did the symptoms appear suddenly?

5 What was the interval between the last time of eating or drinking and the commencement of the symptoms?

If death occurred

6 What was the interval between the commencement of the symptoms and death?

7 What did the last meal consist of?

8. Did anyone partake of this meal with— —?

9 Were any of them affected in the same way?

10 Had —— ever suffered from a similar attack before?

If any of the following symptoms have been omitted in answer to question I special questions may be asked regarding them as follows:

11 Did vomiting occur?

12. Was there any purging?

13. Was there any pain in the stomach?

14 Was ——very thirsty?

15 Did he become faint?

16 Did he complain of headache or giddiness?

17 Did he appear to have lost the use of his limbs?

18. Did he sleep heavily?

19 Had he any delirium?

20 Did convulsions occur?

21 Did he complain of any peculiar taste in the mouth?

22. Did he notice any peculiar taste in his food or water?

This is with reference to *Nux Vomica*

23. Was he sensible in the intervals between the convulsions?

This is with reference to *Aconite*

24 Did he complain of burning or tingling in the mouth and throat or of numbness and tingling in the limbs?

No III.

Questions which may be put to a medical witness in a case of supposed death by wounds or blows after post-mortem examination of the body

1 Did you examine the body of——late a resident of——, and, if so, what did you observe?

2. What do you consider to have been the cause of death? State your reasons.

3. Did you find any extenal marks of violence on the body? If so, describe them.

8.—Bengal Rules.—The following rules and orders under s. 174 are in force in Bengal:—

At every division of a district where there is a Sub-Assistant Surgeon or European Medical Officer, the *post-mortem* in all cases of violent or suspicious deaths occurring in that division should be held by such officer.

Where there is only a Native Doctor, where the state of the dead body, the distance, the weather, or the condition of the roads renders it improbable that the body will reach the Sudder Station in such condition as to enable the Civil Surgeon satisfactorily to hold a *post-mortem* examination on it, the body must be sent to the Sub-divisional Medical Officer. A copy of the report of such officer will, however, be submitted to the Civil Surgeon, who will make any remarks he thinks proper on the margin of the report, for the information of the Sub-divisional Officer. When the body has external marks of violence, as in the case of hanging, fractures or severe cuts, the Sub-divisional Magistrate should himself, if possible, view the body in the presence of the Native Doctor.

When, on the other hand, circumstances permit, the body should be sent to the Sudder Station for examination by the Civil Surgeon, and at such examination the Sub-Assistant Surgeon, or the Native Doctor of the Sudder Station, should be present, so that he may be able to attend. If required at the Sub-divisional Court, and, give evidence as to causes of death in cases in which the absence of Civil Surgeon on his duty would be attended with serious inconvenience to those under his medical charge.—*Resolution*, *Bengal Government*, *10th October*, 1863.

9. Evidentiary value of a post-mortem report.—A *post-mortem* report cannot be used as evidence at the trial, except by way of refreshing the memory of the person who made it or to contradict him, **6 C. W. N. 98**; **9 C. 455 = 11 C. L. R. 569.**

10. Disposal of the body.—The Police-officer sent in charge of a corpse need not be present throughout the details of the *post-mortem* examination. It will suffice if he stands sufficiently near to be able to testify that the body which has been in his charge was the one which was examined by the Medical Officer. In all cases where the Police bring a body for *post-mortem* examination, they should arrange for the subsequent disposal of the body. If the relations or friends of the deceased will arrange for the burial, the body should be given to them. If they decline, the Police should arrange for the burial of the body themselves.—*Mad. Pol. Man., Vol. I, p* 85.

11. Questions that may be put to medical and other witnesses in certain cases.—

No. 1.

Questions which may be put to a medical witness in a case of suspected poisoning after post-mortem examination of the body.

1. Did you examine the body———, late a resident of———, and, if so, what did you observe?
2. What do you consider to have been the cause of death? State your reasons.
3. Did you find any external marks of violence on the body? If so, describe them.
4. Did you observe any unusual appearance on further examination of the body? If so, describe them.
5. To what do you attribute these appearances; to disease, poison or other cause?
6. If to poison, then to what class of poisons?
7. Have you formed an opinion as to what particular poison was used?
8. Did you find any morbid appearances in the body besides those which are usually found in cases of poisoning by——? If so, describe them.
9. Do you know of any disease in which the *post-mortem* appearances resemble those which you observed in this case?
10. In what respect do the *post-mortem* appearances of that disease differ from those which you observed in the present case?
11. What are the symptoms of that disease in the living?
12. Are there any *post-mortem* appearances usual in cases of poisoning by———but which you did not discover in this instance?

11 Had the infant respired fully, partially, or not at all ?

12 Did you examine the person of——the alleged mother of the infant? If so, have you reason to suppose that she was recently delivered of a child? Can you state approximately, the date of her delivery? Give reasons

No V

Questions that may be put to a medical witness in a case of supposed death by hanging or strangulation

1 Did you examine the body of——, late a resident of——, and, if so, what did you observe?

2 What do you consider to have been the cause of death? State the reasons for your opinion

3 Did you observe any external mark of violence upon the body?

4 Did you observe any unnatural appearances on examination of the body internally?

5 Was there any rope or other such article round the neck when you saw the body?

6 Can you state whether the mark or marks you observed were caused before or after death?

7 By what sort of articles do you consider the deceased to have been hanged (or strangled)?

8 Could the mark you observed have been caused by the rope or other article now before you (No— of the Police charge sheet)?

9 Do you think that this rope could have supported the weight of the body?

If strangulation 10 Would great violence be necessary to produce the injuries you describe?

No VI

Questions that may be put to a medical witness in a case of supposed death by drowning after post mortem examination of the body

1 Did you examine the body of——, late a resident of——, and, if so, what did you observe?

2 What do you consider to have been the cause of death? State your reasons.

3 Were there any external marks of violence upon the body? If so, describe them.

4 Describe any unnatural appearances which you observed on further examination of the body

5 Did you find any foreign matters, such as weeds, straw, etc., in the hair, or clenched in the hands of the deceased, or in the air passages or attached to any other part of the body?

6 Did you find any water in the stomach?

No VII

Questions that may be put to a medical witness in a case of alleged rape

1 Did you examine the person of Mussammat——? If so, how many days after the alleged rape did you make the examination, and what did you observe?

2 Did you observe any marks of violence about the vulva or adjacent parts?

3 Are the injuries such as might have been occasioned by the commission of rape?

4 Was the hymen ruptured?

N B —*This question is only to be asked in the case of the rape of a girl of tender years*

5 Did you observe any further marks of violence upon the person of the woman?

6. Had she passed the age of puberty?

7 Can you state approximately what her age is?

8 Did you find her to be a strong, healthy woman, or so weakly as to be unable to resist an attempt at rape?

9 Did you examine the person of the accused?

10 Did you observe any marks of violence upon his body?

11 Was he suffering from any venereal disease?

12. Did you find the woman to be suffering from a similar or other venereal disease?

13 Had a sufficient time elapsed, when you examined the person of the woman for venereal disease to have made its appearance, in case of her having been infected?

4. Are you of opinion that these injuries were inflicted before or after death? Give your reasons.

5. Did you examine the body internally? Describe any unnatural appearance which you observed.

6. You say that in your opinion———was the cause of death; in what immediate way did it prove fatal?

7. Did you find any appearance of disease in the body?

8. If so, do you consider that if the deceased had been free from this disease, the injuries would still have proved fatal?

9. Do you believe that the fact of his suffering from this disease lessened his chance of recovery from the injuries sustained?

10. Are these injuries taken collectively, or is any one of them ordinarily and directly dangerous to life?

11. Have they been caused by manual force or with a weapon?

12. Did you find any foreign matter in the wound?

13. By what sort of weapon has the wound been inflicted?

14. Could the injuries have been inflicted by the weapon now before you (No——in the Police charge-sheet)?

15. Could the deceased have walked (so far), or spoken, etc., after the receipt of such an injury?

16. Have you chemically, or otherwise, examined the stains (or the weapon, clothes, etc.,) now before you (No——in the Police charge-sheet)?

17. Do you believe the stains to be those of blood?

18. What time do you think elapsed between the receipt of the injuries and death?

19. What was the direction of the wound and can you form an opinion as to the position of the person inflicting such a wound with respect to the person receiving it?

20. Is it possible for such a wound to have been inflicted by anyone on his own person? Give your reasons.

In gun-shot wounds.

21. Give precise direction of the wound.

22. Did the appearance of the wound indicate that the gun had been discharged close to the body at some distance from it?

23. Did you find any slug, bullet, wadding, etc., in the wound or had——made its exit?

24. Do you think it possible that you could have mistaken the aperture of entrance for that of exit?

No. IV.

Question that may be put to a medical witness in a case of supposed infanticide after post-mortem examination of the body.

1. Did you examine the body of a $\frac{\text{male}}{\text{female}}$ child sent to you by the District Superintendent of Police on the———of———19—? And, if so, what did you observe?

2. Can you state whether the child was completely born alive, or born dead? State the reasons for your opinion.

3. What do you consider to have been the cause of death? Give your reasons.

4. What do you believe to have been the uterine age of the child? State your reasons.

5. What do you believe to have been the extra-uterine age of the child? Give reasons.

6. Did you find any marks of violence or other unusual appearances externally? If so, describe them accurately.

7. Did you find any morbid or unusual appearances on examination of the body internally? If so, describe them accurately.

8. Did you believe the injuries you observed to have been inflicted before or after death? Give reasons.

9. Can you state how they were inflicted? Give reasons.

10. Do you consider that they were accidental or not? Give reasons.

Evidence as to symptoms in Europe—In Europe there is a class of qualified medical practitioners, diffused almost universally, who certify to the causes of death, the public registration of which is compulsory When a person is seized with sudden illness followed or not by death, there is almost always a medical attendant sufficiently skilled in diagnosis to recognise the symptoms as those of some known disease, or if not, he is able in one class of cases to give an opinion that those symptoms are not those of any known disease, but that they are those of certain injury, or poison or class of poisons, while in another class of cases he may only be able to say that they may possibly be those of a certain disease, but that they suspiciously resemble those of some poison or injury

Evidence as to symptoms in India.—In India, qualified practitioners not being generally diffused among the people, the causes of sudden illness or death are not recognised by the ignorant relatives and attendants. In this way many cases of disease may be attributed to poison, or injury, or witchcraft, and from ignorance, doubt or enmity, be reported to the Police. On the other hand, cases of real poisoning may be passed over as cases of disease This part of the investigation has generally to be conducted by the Police who cannot be supposed to be skilled in the observation and estimation of symptoms In addition, they have to get an account of the symptoms after they have occurred and from ignorant witnesses, and they have to contend with a difficulty, in getting them to speak the truth, unknown in Europe The evidence so far is therefore generally defective, and must be so till there be a class of practitioners spread among the people sufficiently skilled to certify to the causes of deaths In all possible cases the Police should have the assistance or advice of a Medical Officer, and the evidence of attendant *hakims*, who often show considerable acuteness in observation, should be taken down and signed by them

Post-mortem examination in Europe—The second part of the investigation, the *post mortem* examination, is generally made in Europe by the medical attendant along with another doctor In one class of cases an opinion can be affirmed that the *post-mortem* appearances are, or are not, those of the suspected disease, but that they are not, or are, those of the suspected injury, poison or class of poisons In another class in which the *post-mortem* appearances are not so diagnostic, an opinion can only be given, expressing probability or uncertainty

Post mortem examination in India—In India the evidence from *post mortem* examination is also generally less definite from various causes Not only is the evidence regarding symptoms, which ought to guide in distinguishing suspected and possible causes of death, more imperfect, but very often the autopsy has to be performed without any information at all. The number of possible causes of death being numerous, it is in such cases only possible to give an opinion of certainty or probability when marked and profound lesions are left by disease, injury and poison, and there is a chance of uncommon lesions or slight appearances which might prove important in evidence being overlooked Again, the body often reaches the Medical Officer advanced in decomposition, when the slighter appearances left by disease, injury or poison, may not be recognisable. But in all cases it is distinctly to be understood that the examination should be made, as even in such cases many causes of death may be established or negatived Also in all cases a complete and not a partial examination is more necessary in this country on account of the imperfectness of the preliminary evidence as to the possible causes of death. Different causes may afterwards be suggested in the evidence regarding which judicial enquiries may be made

In order to render this part of the evidence more definite and valuable, it is necessary that the Police, in handing over the body for examination, should at the same time hand over an account of all that is known as to the suspicious circumstances of death, and it should be noted by the Medical Officer whether he was in possession of this information or not when making the *post mortem* examination.

Chemical evidence in Europe—In Europe, the third part of the evidence—the chemical—is one of the most definite in its results. The symptoms and *post-mortem* appearances recorded by duly qualified and informed observers are laid before the Chemical Examiner, and the question asked is whether one poison, or at most one of a class of poisons, be present in the substances sent, and he certifies to the presence or absence of those poisons indicated which can be identified by chemistry

Chemical evidence in India.—In India, from the imperfectness of the preceding evidence, the problem proposed is more indeterminate and often insoluble. As a general rule, substances have hitherto been sent for analysis with no information as to what poisons might possibly have been used. This problem, which is seldom met with in a lifetime by an expert in Europe, resolves itself into a search for the poisons, commonly

It is, therefore, quite possible that the spleen should be ruptured by violence, and yet no evidence of the injury be seen on the skin or other parts of the body.

The condition of the spleen previous to rupture can generally be determined by its size and consistency after death. A healthy spleen measures about 5 or 5½ inches long, 3 or 4 inches wide and 1 to ½ inch thick and it weighs about 6 ounces—varying from 4 to 8. When the spleen is so diseased as to render a rupture from slight violence probable, it will often weigh from 10 to 30 ounces, and measure from 7 to 12 inches in length. The healthy spleen does not project beyond the ribs, but the diseased spleen does so,—often to a considerable, distance.

The consistency of the spleen, when healthy, is moderately firm, so that it may be cut with ease, leaving a sharp edge and smooth surface when divided, but in disease the spleen may become quite soft and pulpy or even diffluent, so as to fall away like a thick liquid when the capsule is divided. This condition, however, may also occur from putrefaction if the body is kept long after death, or if the weather is very warm and therefore these circumstances should also be ascertained.

The enlargement and softening of the spleen from disease is usually a result of previous attack of intermittent fever or ague; it may also occur in other diseases especially tpyhoid fever, scurvy and purpura.

The part of the spleen which is usually ruptured, is the concave or inner surface and the extent of the rupture varies greatly; but death usually occurs more rapidly in proportion as the rupture is larger and deeper. When the rupture is small, the patient may live several days, or may even recover entirely.

If the rupture is extensive, the person is usually incapable of moving from the place where the rupture occurred.

Lastly, in some instances, the spleen is covered with a layer of membrane caused by previous attacks of inflammation; this may delay or even prevent death by limiting the rupture or preventing excessive bleeding.

The questions, therefore, which appear necessary to ask in cases of death from rupture of the spleen are—

1st.—What appearances of external violence were perceptible on the body?

2nd.—What was the size and weight of the spleen after death?

3rd.—How far did it project beyond the ribs?

4th.—What was the consistency of the spleen—hard, firm, soft, pulpy or diffluent?

5th.—How long after death was the body examined and what was the temperature of the air?

6th.—Was the body much putrified?

7th.—What was the position of the rupture?

8th.—What was the length and depth of the rupture?

9th.—Is it your opinion that the rupture was caused by external violence or not? State your reasons for your opinion.

10th.—Were there any adhesions about the spleen; if so, were they older than the rupture or not?

12. Statement of the conditions of Medico-legal enquiry in India as compared with such enquiry in England.

Extract from the Report of the Chemical Examiner, Punjab, for 1873.

Conditions of the enquiry in India compared with Europe.—The investigation and proof of Medico-legal cases in India are generally conducted under very different conditions and by very different means from those in most countries of Europe, and it is very necessary for the officers engaged in this country, to understand the value and the significance of the various parts of the investigation that each has to perform, and especially for the Magistrate to know how its decision is to be modified by the way in which the investigation has been conducted.

The proof of poisoning, though it may be clear by other evidence, depends mainly on establishing the cause of certain symptoms, or of death, that is, it rests principally on scientific evidence. Of this evidence there are three parts,—the symptoms, the *post-mortem* appearances if death occurred, and the chemical evidence—from the proper investigation and correlation of which the unknown cause may be established.

III.—RULES FOR ENQUIRING INTO AND REPORTING ON SERIOUS ACCIDENTS ON INDIAN RAILWAYS.

The following rules regarding notices of accidents occurring in the course of working a railway and the duties of railway servants, Police-officers, Government Inspectors and Magistrates on the occurrence of such accidents, framed by the Governor General in Council in exercise of the powers conferred by s 84 of *the Indian Railways Act*, 1890, are to be closely observed —

Notes.—1. General.—(*a*) Serious accident or accidents attended with loss of human life, or serious injury to person or property, or accidents of a description usually attended with such loss or injury

(*b*) In the case of any railway passing through Native States, the Government of India will, from time to time, direct what official shall, for the purposes of these rules, be regarded as the Magistrate of the district in respect of the portion of the railway situate in each such State.

(*c*) Throughout these rules, the words ' *District Superintendent of Police* ' of the district in which the occurrence takes place shall be substituted for the words " Railway Police Superintendent in respect of railways where a Railway Police Superintendentship has not been established The word ' Manager shall include the Agent of a guaranteed or other Railway Company, or other officer in charge and the Chairman of the Corporation in the case of Calcutta Municipal Railway, and the Vice-Chairman of the Calcutta Port Commissioners in the case of railways belonging to that body, and also the Chief Engineer or Engineer in Chief or other officer in charge of any railway —

The officer authorised by Government to investigate and report on accidents is called the " *Government Inspector*," and his address and official designation will be notified to Managers from time to time by Local Governments or Administration or by the Government of India.

2. Notices—The notices mentioned in s 83 of *the Indian Railways Act* 1890 shall contain the following particulars, namely —

(*a*) mileage at which the accident occurred and the name of the station nearest to the spot (*b*) time and the date of the accident, and the number and description of the train or trains (*c*) nature of the accident and the number of people killed or injured, as far as known (*d*) cause of the accident as far as known, (*e*) probable detention to traffic.

In the case of the following accidents namely —

(*a*) accident attended with loss of human life, or with serious injury to persons or property, or (*b*) collisions between trains, of which one is a train carrying passengers, or (*c*) the derailment of any train carrying passengers, or of any part of such a train, such notices shall be sent by telegraph immediately after the accident has occurred.

N B—Notices of accidents described in s 38 of *the Indian Railways Act*, 1890 and not falling under this rule, must in accordance with that section be given without unnecessary delay, and may be sent by post

3. Duties of Railway Servants.—Every railway servant shall report, with as little delay as possible, every accident occurring in the course of working the railway on which he is employed which may come to his notice Such reports shall be made to the nearest station master, or where there is no station master, to the railway servant in charge of the section of the railway on which the accident has occurred

4. Departmental Inquiry.—(1) Whenever an accident such as is described in s. 83 of *the Indian Railways Act*, 1890, has occurred in the course of working a railway, the Agent or Manager shall cause a departmental enquiry to be promptly made by a railway servant for the thorough investigation of the causes which led to the accident

Provided that such inquiry may be dispensed with—(*a*) if the accident has not been attended with loss of human life or with serious injury to persons or property, (*b*) if there is no reasonable doubt as to the cause of the accident, and (*c*) if one department of the railway intimates that it accepts all responsibility in the matter

(2) Where a departmental inquiry is dispensed with, it shall be the duty of the Heads of Departments of the railway to make such inquiry as they may consider necessary if their staff or their system of working is concerned, and to adopt or suggest such measures as they may consider expedient for preventing a recurrence of similar accidents.

used in the country, unless some suspicious appearance or particles lead to a conjecture in another direction. The number of substances that may cause death being practically indefinite, it would be impossible with a limited amount of material and time to attempt anything else.

In order that the Chemical Examiner's evidence may be as definite as possible, if no poison is found, he should distinctly certify as to the poison he was led to examine for and whose absence he demonstrated.

Position of the Magistrate in England.—The position of the Magistrate as regards the scientific witness differs in India and England. In England the scientific witness are really cross-examined by the defence, both as to the facts they have observed and the opinions they bring forward; and similar witnesses may be brought forward to challenge their statements.

Position of the Magistrate in India.—In India this is very seldom possible. The Civil Medical Officer has practically functions rather resembling those entrusted to him in some countries of Europe. He is a Government official charged with the investigation of facts, regarding which he has to give evidence in the same way as the Police-officer. In addition he has to interpret to the Court the precise value, significance and limits of the scientific evidence; and it is his duty to bring forward with judicial carefulness any conclusions or opinions connected with the facts. In India, also, it is physically impossible for the Chemical Examiner to be cross-examined, and his evidence has, therefore, to be taken without any other proof of attestation than his signature. He should, therefore, restrict himself to a statement of observed or demonstrated facts, and should, on no account, make mention of probabilities or opinions, unless specially asked; but it is his duty to reply to any questions regarding the meaning or limits of the scientific evidence which the local Medical Officer may wish to be referred or which the Court may choose to propose.

Estimation of the value of the evidence.—If the cause of death be not satisfactorily proved by the scientific evidence, the Magistrate has to consider to what extent it proves, or disproves anything. It is purely negative in value in the case of poisons not detectable by chemistry which do not produce symptoms and *post-mortem* appearances distinguishable with certainty from those of disease or injury. It is also negative in the case of detectable poisons of which the symptoms and *post-mortem* appearances alone are not decisive, when the Chemical Examiner has not been led to examine for those poisons. In this class of cases the proof principally depends on whether the Medical Officer was in possession of the suspicious circumstances of death when making the *post-mortem* examination, and whether the Chemical Examiner knew both these when examining for poisons. If the latter had no information, he could only certify to the absence of common poison; and it is to be remarked that the large number of poisoning cases proved in this country is due to the ignorance of the natives, and that as intelligence spreads, uncommon poisons will be used more frequently.

Meaning of "no poison found."—If no *poison* has been found, it should be noted that it may have been administered in the following cases:—

1st.—If a poison has been given for which there are no chemical tests.

2nd.—If a detectable poison were used for which the Chemical Examiner was not led to examine.

3rd.—If a volatile poison has been used which has been placed in circumstances in which it might have volatilised.

4th.—If certain organic poisons have been used, and a sufficient time has elapsed for their decomposition.

5th.—In the case of most organic poisons it is only the part left in the stomach after death that can be discovered, that which is absorbed into the system becomes chemically changed; so that it is really the part that does not cause death that is detected. Consequently, if the stomach has been well cleared out by the stomach pump or vomiting, or if sufficient time has elapsed before death to allow the poison to be absorbed, none may be detected.

6th.—Even in the case of metallic poisons which can be detected after absorption, if sufficient time (three weeks to a month) elapse before death, the whole of the poison may be eliminated from the system by the kidneys, etc., and the patient may die from the lesions caused by the poison.

District Magistrate or the Magistrate appointed under Rule 16 has given a direction under cl. (*c*) of that rule Provided that no such investigation shall be made when a magesterial inquiry has been commenced or ordered under Rule 16, cl (*a*) or cl (*b*)

11. Who to conduct the Police Investigation.—(1) Whenever an investigation is to be made by the Railway Police—(*a*) in a case in which an accident is attended with loss of human life or with serious injury to persons or property, or (*b*) in pursuance of a direction given under Rule 16, cl. (*c*), the investigation shall be conducted by the officer in charge of the Railway Police, or, if that officer should be unable to conduct the *investigation himself, then by an officer to be deputed by him*

(2) An officer deputed under cl. (1) of this rule shall ordinarily be an Assistant Superintendent of Police, but if in any case it should be found impracticable to depute an officer of that grade, an Inspector of Police may be deputed

12. Mode of conducting the Police Investigation.*—The officer who is to conduct an investigation* in pursuance of Rule 11 shall proceed without delay to the scene of the accident and conduct the investigation there and shall at once advise the Agent or Manager of the railway and the Traffic officer of the district, by telegraph of the date and hour at which the investigation will commence, so that, if possible, the presence of a railway official may be arranged for to watch proceedings and to aid the officer making the investigation. *The absence of a railway official must not, however, be allowed to delay the investigation, which should be* made as soon as possible after the accident has taken place.

13. Railway Police to communicate with District Police.—(1) In every case to which Rule 11 applies immediate information shall be given by the Railway Police to the District Police, who, if so required shall afford all necessary assistance and shall, if occasion arise, carry the investigation beyond the limits of the railway premises But the Railway Police are primarily entrusted with the duty of carrying on the investigation within such limits

(2) Subject to any provisions elsewhere contained in these rules, the further prosecution of the case on the conclusion of the Police investigation, shall rest with the Railway Police

14 Communication of the report of investigation.—The result of every Police investigation shall be reported at once to the Magistrate of the district, or other officer appointed in this behalf by the Local Government, and to the Agent or Manager of the railway

15. District Police to act in the absence of Railway Police.—Where there are no Railway Police, the duties imposed by *Rules 10, 11, 12 and 13*, cl (2), *and Rule 14 on the Railway Police*, or on the officer in charge of the Railway Police, shall be discharged by the District Police or by the District Superintendent of Police, as the case may be.

16. Duties of Magistrates—Whenever an accident, such as is described in s 83 of *the Indian Railways Act*, 1890, has occurred in the course of working a railway, the District Magistrate, or any other Magistrate who may be appointed in this behalf by the Local Government, may either—(*a*) himself make an inquiry into the causes which led to the accident, or (*b*) depute a Subordinate Magistrate, who, if possible, should be a Magistrate of the first class, to make such an inquiry, or (*c*) direct an investigation into the causes which led to the accident to be made by the Police.

17. Notice of magisterial Inquiry.*—Whenever it is decided to make an inquiry under Rule 16* cl. (*a*) or cl. (*b*) the District Magistrate or other Magistrate appointed as aforesaid, or the Magistrate deputed under Rule 16, cl (*b*) as the case may be, shall proceed to the scene of the accident and conduct the inquiry there and shall at once advise the Agent or Manager of the railway and the Government Inspector, by telegraph, of the date and hour at which the inquiry will commence, so as to enable the Railway Administration to summon *the requisite expert evidence.*

18. Power to summon witnesses.—A Magistrate making an inquiry under Rule 16 may summon any railway servant, and any other person whose presence he may think necessary, and after taking the evidence and completing the inquiry, shall, if he considers there are sufficient grounds for a judicial inquiry, take the requisite steps for bringing to trial any person whom he may consider to be criminally liable for the accident. Whenever technical points are involved, the Magistrate should be careful to call for and take the opinion of the Government Inspector or other professional persons.

5. **Notice of departmental inquiry.**—(1) Whenever a departmental inquiry is to be made, the Agent or Manager shall cause notice of the date and hour at which the inquiry will commence to be given to the following officers, namely:—(*a*) the Magistrate of the district in which the accident occurred, or such other officer as the Local Government may appoint in this behalf; (*b*) the Government Inspector appointed under s. 4, sub-sec. (1) of *the Indian Railways Act*, 1890, for the section of the railway on which the accident occurred; (*c*) the Consulting Engineer in administrative charge of the railway, when that officer is not the Government Inspector referred to; in clause (*b*) of this rule for the section of the railway on which the accident occurred, and (*d*) the officer in charge of the Railway Police, or if there are no Railway Police, the officer in charge of the Police-station in the jurisdiction of which the accident occurred.

(2) The date and hour at which the inquiry will commence shall be fixed so as to give the officers mentioned or referred to in clauses (*a*), (*b*), (*c*) and (*d*) of this rule sufficient time to reach the place where the inquiry is to be held.

6. **Report of departmental inquiry.**—(1) As soon as any departmental inquiry has been completed, the railway servant who made the inquiry shall submit to the Agent or Manager a report in the form prescribed by Rule 25.

(2) The Agent or Manager shall forward a copy of such report—(*a*) to the Government Inspector mentioned in Rule 5, cl. (*b*) and (*b*) if no inquiry has been made under Rule 16, or if the departmental inquiry has been held first to the Magistrate or officer mentioned in Rule 5, cl. (*a*) and (*c*) if any judicial inquiry is being made to the Magistrate making such inquiry.

3) Such copy shall be accompanied—in case (*b*) a statement of the persons, if any, whom the Agent or Manager desires to prosecute, and in case (*c*), by a copy of the evidence taken at the departmental inquiry.

(4) Whenever an Agent or Manager receives a copy of the Government Inspector's report as contemplated in Rule 24, he shall submit his remarks thereon through the authority in administrative control of the railway for the Government of India, and shall forward a copy of such remarks to the Government Inspector concerned.

7. **Assistance in holding the inquiry.**—(1) Whenever any accident has occurred in the course of working a railway, the Agent or Manager shall give all reasonable aid to the District Magistrate or the Magistrate appointed or deputed under Rule 16, and to the Government Inspector, Medical Officer, the Police and others concerned, enable them promptly to reach the scene of the accident, and shall assist those authorities in making inquiries and in obtaining evidence as to the cause of the accident.

(2) When any enquiry under Rule 16 or any judicial inquiry is being made, the Agent or Manager shall arrange for the attendance, as long as may be necessary, at the office or place of inquiry, of all railway servants whose evidence is likely to be required.

8. **Arrest of offender.**—Whenever any accident has occurred in the course of working a railway, and any offence referred to in s. 131 of *the Indian Railways Act*, 1890, has been committed, the Agent or Manager or some officer of the railway nominated by him, or if there be no such officer, the railway officer of highest rank present may direct the senior Police-officer or Policeman present, or if there be no member of the Police Force present, a railway servant, at once to arrest the offender, and no railway servant shall arrest any person under the authority of the said section without such direction except for the purpose of preventing him from making his escape: provided that, when such offender is a railway servant whose arrest is considered for any reason undesirable, proper precautions shall be taken to prevent his escape.

9. **Medical aid to sufferers.**—Whenever any accident occurring in the course of working a railway has been attended with serious personal injury, it shall be the duty of the Agent or Manager to afford medical aid to the sufferers, and to see that they are properly and carefully attended to till removed to their home or handed over to the care of their relatives or friends. In such case, or in any case in which any loss of human life has occurred, the local Medical Officer should be communicated with if he is nearer than any Railway Medical Officer.

10. **Duties of Police-officers.**—The Railway Police may make an investigation into the causes which led to any accident occurring in the course of working a railway, and shall do so—(*a*) whenever any such accident is attended with loss of human life or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property, or has *prima facie* been due to any criminal act or omission, or (*b*) whenever the

District Magistrate or the Magistrate appointed under Rule 16 has given a direction under cl. (*c*) of that rule Provided that no such investigation shall be made when a magesterial inquiry has been commenced or ordered under Rule 16, cl (*a*) or cl. (*b*)

11. Who to conduct the Police Investigation.—(1) Whenever an investigation is to be made by the Railway Police—(*a*) in a case in which an accident is attended with loss of human life or with serious injury to persons or property, or (*b*) in pursuance of a direction given under Rule 16, cl. (*c*), the investigation shall be conducted by the officer in charge of the Railway Police, or, if that officer should be unable to conduct the investigation himself, then by an officer to be deputed by him

(2) An officer deputed under cl (1) of this rule shall ordinarily be an Assistant Superintendent of Police, but if in any case it should be found impracticable to depute an officer of that grade, an Inspector of Police may be deputed

12 Mode of conducting the Police Investigation.—The officer who is to conduct an investigation in pursuance of Rule 11 shall proceed without delay to the scene of the accident and conduct the investigation there and shall at once advise the Agent or Manager of the railway and the Traffic officer of the district, by telegraph, of the date and hour at which the investigation will commence, so that, if possible, the presence of a railway official may be arranged for to watch proceedings and to aid the officer making the investigation. The absence of a railway official must not, however, be allowed to delay the investigation which should be made as soon as possible after the accident has taken place

13. Railway Police to communicate with District Police.—(1) In every case to which Rule 11 applies immediate information shall be given by the Railway Police to the District Police, who, if so required shall afford all necessary assistance, and shall, if occasion arise, carry the investigation beyond the limits of the railway premises But the Railway Police are primarily entrusted with the duty of carrying on the investigation within such limits

(2) Subject to any provisions elsewhere contained in these rules, the further prosecution of the case on the conclusion of the Police investigation, shall rest with the Railway Police.

14. Communication of the report of investigation.—The result of every Police investigation shall be reported at once to the Magistrate of the district, or other officer appointed in this behalf by the Local Government, and to the Agent or Manager of the railway

15. District Police to act in the absence of Railway Police.—Where there are no Railway Police, the duties imposed by Rules 10 11, 12 and 13, cl. (2), and Rule 14 on the Railway Police, or on the officer in charge of the Railway Police, shall be discharged by the District Police or by the District Superintendent of Police, as the case may be.

16 Duties of Magistrates.—Whenever an accident, such as is described in s 83 of *the Indian Railways Act*, 1890 has occurred in the course of working a railway, the District Magistrate, or any other Magistrate who may be appointed in this behalf by the Local Government, may either—(*a*) himself make an inquiry into the causes which led to the accident, or (*b*) depute a Subordinate Magistrate, who, if possible, should be a Magistrate of the first class, to make such an inquiry, or (*c*) direct an investigation into the causes which led to the accident to be made by the Police.

[illegible]
or cl. [illegible]
Rule [illegible]
and shall at once advise the Agent or Manager of the railway and the Government Inspector, by telegraph, of the date and hour at which the inquiry will commence, so as to enable the Railway Administration to summon the requisite expert evidence.

18. Power to summon witnesses.—A Magistrate making an inquiry under Rule 16 may summon any railway servant, and any other person whose presence he may think necessary, and after taking the evidence and completing the inquiry, shall, if he considers there are sufficient grounds for a judicial inquiry, take the requisite steps for bringing to trial any person whom he may consider to be criminally liable for the accident. Whenever technical points are involved, the Magistrate should be careful to call for and take the opinion of the Government Inspector or other professional persons.

5. **Notice of departmental inquiry.**—(1) Whenever a departmental inquiry is to be made, the Agent or Manager shall cause notice of the date and hour at which the inquiry will commence to be given to the following officers, namely:—(*a*) the Magistrate of the district in which the accident occurred, or such other officer as the Local Government may appoint in this behalf; (*b*) the Government Inspector appointed under s. 4, sub-sec. (1) of *the Indian Railways Act*, 1890, for the section of the railway on which the accident occurred; (*c*) the Consulting Engineer in administrative charge of the railway, when that officer is not the Government Inspector referred to; in clause (*b*) of this rule for the section of the railway on which the accident occurred, and (*d*) the officer in charge of the Railway Police, or if there are no Railway Police, the officer in charge of the Police-station in the jurisdiction of which the accident occurred.

(2) The date and hour at which the inquiry will commence shall be fixed so as to give the officers mentioned or referred to in clauses (*a*), (*b*), (*c*) and (*d*) of this rule sufficient time to reach the place where the inquiry is to be held.

6. **Report of departmental inquiry.**—(1) As soon as any departmental inquiry has been completed, the railway servant who made the inquiry shall submit to the Agent or Manager a report in the form prescribed by Rule 25.

(2) The Agent or Manager shall forward a copy of such report—(*a*) to the Government Inspector mentioned in Rule 5, cl. (*b*) and (*b*) if no inquiry has been made under Rule 16, or if the departmental inquiry has been held first to the Magistrate or officer mentioned in Rule 5, cl. (*a*) and (*c*) if any judicial inquiry is being made to the Magistrate making such inquiry.

3) Such copy shall be accompanied—in case (*b*) a statement of the persons, if any, whom the Agent or Manager desires to prosecute, and in case (*c*), by a copy of the evidence taken at the departmental inquiry.

(4) Whenever an Agent or Manager receives a copy of the Government Inspector's report as contemplated in Rule 24, he shall submit his remarks thereon through the authority in administrative control of the railway for the Government of India, and shall forward a copy of such remarks to the Government Inspector concerned.

7. **Assistance in holding the inquiry.**—(1) Whenever any accident has occurred in the course of working a railway, the Agent or Manager shall give all reasonable aid to the District Magistrate or the Magistrate appointed or deputed under Rule 16, and to the Government Inspector, Medical Officer, the Police and others concerned, enable them promptly to reach the scene of the accident, and shall assist those authorities in making inquiries and in obtaining evidence as to the cause of the accident.

(2) When any enquiry under Rule 16 or any judicial inquiry is being made, the Agent or Manager shall arrange for the attendance, as long as may be necessary, at the office or place of inquiry, of all railway servants whose evidence is likely to be required.

8. **Arrest of offender.**—Whenever any accident has occurred in the course of working a railway, and any offence referred to in s. 131 of *the Indian Railways Act*, 1890, has been committed, the Agent or Manager or some officer of the railway nominated by him, or if there be no such officer, the railway officer of highest rank present may direct the senior Police-officer or Policeman present, or if there be no member of the Police Force present, a railway servant, at once to arrest the offender, and no railway servant shall arrest any person under the authority of the said section without such direction except for the purpose of preventing him from making his escape: provided that, when such offender is a railway servant whose arrest is considered for any reason undesirable, proper precautions shall be taken to prevent his escape.

9. **Medical aid to sufferers.**—Whenever any accident occurring in the course of working a railway has been attended with serious personal injury, it shall be the duty of the Agent or Manager to afford medical aid to the sufferers, and to see that they are properly and carefully attended to till removed to their home or handed over to the care of their relatives or friends. In such case, or in any case in which any loss of human life has occurred, the local Medical Officer should be communicated with if he is nearer than any Railway Medical Officer.

10. **Duties of Police-officers.**—The Railway Police may make an investigation into the causes which led to any accident occurring in the course of working a railway, and shall do so—(*a*) whenever any such accident is attended with loss of human life or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property, or has *prima facie* been due to any criminal act or omission, or (*b*) whenever the

Power to summon persons.

175. (1) A Police-officer proceeding under section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answer to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture.

(2) If the facts do not disclose a cognisable offence to which section 170 applies, such persons shall not be required by the Police-officer to attend a Magistrate's Court.

Notes.—1. Witness bound to answer truly—scope of section.—In this section the word 'truly' is still kept probably through an oversight, though it is now omitted in s. 161, *see* Notes to that section. Investigations in the nature of inquest consist of the investigation of the apparent cause of death. Such an investigation ceases when the cause of death is ascertained, *i.e.* when it is determined whether the death is natural, suicidal or accidental or due to homicide. Once it is established that the death was due to homicide, the inquiry became one under s. 161 and there was no obligation on the witness to speak the truth. As soon as the *panchnama* and report are made and the death is determined to be homicidal, then the investigation becomes one under s. 161, and the witness is not bound to speak the truth, **15 K. L. R. 148 = 2 Cr. L. J. 590.** *See* Notes to s. 161. *See* also **6 M. L. T. 356** where sanction to prosecute in respect of a statement made by a Police-officer under s. 174 contradicting statement before a Magistrate was upheld.

2. Section not applicable to Madras City.—So far as regards the area comprised within the ordinary original civil jurisdiction of the High Court of Judicature at Madras is concerned, this section is replaced by s. 4 of Act V of 1889. It is also notified that—

I. When from the information received by an officer in charge of a Police-station he has reason to believe—

(*a*) that the deceased person is an European or East Indian, or

(*b*) that any person has been killed by the act or neglect of another, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, such officer after giving written information to the Commissioner of Police as required by s. 174 and stating therein his belief that the event is one falling under cl. (*a*) or cl. (*b*) of this rule, and the grounds of such belief, shall not proceed to discharge any of his further functions under that section.

II. If the Commissioner on receiving intimation as aforesaid, considers that there are sufficient grounds for believing that the event therein reported falls under cl. (*a*) or cl. (*b*) of Rule 1 he shall either himself discharge the further functions imposed on the officer in charge of a station under s. 174 or shall depute some Police-officer of not lower rank than Inspector, to discharge such functions.

Provided that when the deceased is an European or East Indian, such further functions shall be discharged by a Police-officer who is himself an European or East Indian—*Notification No.* 187, *Fort St. George Gazette*, 1889, *Pt. I, p.* 336.

3. Statements of witnesses may be recorded.—There is nothing in this Code which prevents the statements of the witness examined at an inquest being recorded *verbatim* in the report, **(1911) M. W. N. 138 = 12 Cr. L. J. 124.**

4. Reports to be submitted by the Police-officer.—When a person is accused and arrested upon an inquest, the Police will send in three reports, possibly to three different Magistrates, *viz.* (i) the intimation under s. 174 (1) to the nearest Magistrate empowered to hold inquests, (ii) the report under s. 174 (2) to the District or Sub-divisional Magistrate, and (iii) the report under s. 170 (1) to the Magistrate empowered to take cognisance of the offence.

Inquiry by Magistrate into cause of death.

176. (1) When any person dies while in the custody of the Police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (*a*), (*b*) and (*c*) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the Police-officer, and, if he does so,

19. Communication of the result of magisterial inquiry.—The result of every inquiry made under Rule 16 shall be communicated by the Magistrate to the Agent or Manager of the railway and to the Government Inspector.

20. Summoning railway employees.—If in the course of any judicial inquiry into an accident occurring in the course of working a railway, the Magistrate desires the assistance of the Government Inspector or of the Agent or Manager of the railway, or the attendance of any officer of the railway, to explain any matter relating to railway supervision, management or working, he will issue a requisition to such officer to attend the Court, stating at the same time the nature of the assistance required. In summoning railway servants, the Magistrate will take care not to summon so large a number of the employees, specially of one class, on the same day, as to cause inconvenience to the working of the railway. In the case of very serious accidents, it will generally be advisable for the Magistrate to receive either the evidence of, or a report from, both the Government Inspector and the Agent or Manager of the railway in regard to the accident before finally concluding the judicial inquiry.

21. Report of magisterial inquiry.—On the conclusion of any such judicial inquiry, the Magistrate shall send a copy of his decision to the Agent or Manager of the railway, and shall unless in any case he thinks it unnecessary to do so, report the result of the inquiry to the Local Government.

22. Duties of the Government Inspector appointed under s. 4 (1) of the Indian Railways Act, 1890.—Whenever the Government Inspector receives notice under s. 83 of *the Indian Railways Act*, 1890, of the occurrence of an accident which he considers of a sufficiently serious nature to justify such a course, he shall report the occurrence direct to the Government of India by telegraph.

Every such report shall contain the particulars prescribed by Rule 2.

23. (1) The Government Inspector shall proceed to the scene of the accident to note the facts and to inquire generally into the causes which led to the accident whenever he receives notice as aforesaid of an accident which he considers serious enough to warrant an inquiry or investigation being made under any of these rules.

If the Government Inspector, after reporting to the Government of India the occurrence of an accident in accordance with Rule 22, decides that an inquiry or investigation is not necessary, he shall in every such case advise the Government of India accordingly.

(2) Whenever an inquiry under cl. (1) of this rule is made by the Government Inspector, he shall, if practicable, be present at the departmental inquiry (if any) made under Rule 4.

24. Report of Government Inspector.—Whenever the Government Inspector has made an inquiry under Rule 23, cl. (1), he shall submit a report, in writing, through the Senior Government Inspector, to the Local Government or Administration controlling the railway, and to the Government of India, or in the case of a railway which is directly administered by the State to the Government of India only; and shall forward a copy of such report to the Agent or Manager of the railway concerned, and if a magisterial inquiry has been made to the Magistrate who made such inquiry.

25. Form and contents of Government Inspector's report.—In the case of all serious accidents, such reports shall be submitted in the form adopted by the Inspecting Officers of the Board of Trade, in order to admit of their reproduction in a uniform shape in the Quarterly Accidents Returns; and shall contain—

(1) A brief description of the accident; (2) a description of the locality of the accident; (3) a detailed statement of the evidence taken; (4) the conclusion arrived at by the Government Inspector; (5) an appendix stating the damage done, and (6) (when necessary) a sketch illustrative of the accident.

26. In important cases, where the occurrence of an accident appears to show that a change in the system of working is necessary, the Government Inspector shall inform the Government of India, or the Local Government or Administration controlling the railway, of the steps which have been or are proposed to be taken by the Railway Administration to prevent a recurrence of similar accidents, and whether, in his opinion, further action in the matter is desirable.

27. The Government Inspector shall, as far as possible, assist any Magistrate making an inquiry under Rule 16, or a judicial inquiry, whenever he may be called upon to do so.

N.B.—These rules do not limit the exercise of any of the powers conferred on Government Inspectors by s. 5 of *the Indian Railways Act*, 1890

purely local, *i e*, depends on the law of the place in which it is committed, and not on the nationality of the person who commits it, *Sirdar Gurdyal Singh* v *Rajah of Faridkote* (1894) A. C. 670. On this principle aliens are amenable to the English Criminal Law, in respect of crimes committed in England, *Barronets case* 1 E and B. 1, and British subjects are not amenable to that law in respect of offences committed outside England unless committed within the Admiralty jurisdiction or unless specially provided for by statute *Russell on Crimes, Vol I, p* 19 Apart from statute, existing English Courts cannot take cognisance of any crime committed on land outside England, whether by a British subject or an alien, *Archbold*, p 25 Extra territorial jurisdiction is, however, vested in the Governor-General in Council in his executive capacity and also in the Indian Legislature. *See* Notes 4 and 5 to s 188.

(*a*) *National or territorial jurisdiction must be distinguished from local venue* —Venue or local jurisdiction is quite distinct from national or territorial jurisdiction, *Mozambique Co* v *British South Africa Co* (1893) A. C. 602, *R* v *Ellis* (1899) 1 Q B. 230; 24 P. R. 1901 (F.B.) Whether an accused is to be tried in one or other local area is a question of procedure (*cf* s 531), while the question whether a local Court can try a person for an offence committed outside the realm is a question of jurisdiction *See* 35 P. R. 1888, 24 P. R. 1901. According to the English Common Law, the Courts of common law had apart from statute no power to try any offence not committed within the body of the realm *i e*, their criminal jurisdiction was territorial and not personal, *McLeod* v *Attorney General of N S Wales* (1891) A. C. 455, *Sirdar Gurdyal Singh* v *Rajah of Faridkote* (1894) A. C. 670. But the liability of a subject to be made answerable for crimes committed out of the jurisdiction has been affirmed by statutes for more than three centuries and a half in England, see *Hall Foreign Power and Jurisdiction of the British Crown* (1894), Pt. I, Chapter—p 12 As to the powers of the Indian Legislature and the Governor-General in Council. *See* Note 5 to s 188

3. Jurisdiction of British Indian Courts when offences committed outside British India —(*a*) *No jurisdiction over foreigners for offences committed in foreign territory* —No proposition of law can be more incontestible or more universally admitted than that according to the general law of nations a foreigner cannot be held criminally responsible to the law of a nation not his own, for acts done beyond the laws of its territory *Franconia case* (1876) 2 Ex. D. 63, *Jameson* (1896) 2 Q. B. 430. An act will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting That is a rule based on International Law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory, 1 P. R. 1901. S 181 is intended to regulate the jurisdiction of Courts in British India and cannot vary or abrogate the ordinary rule that no foreign subject shall be tried in British India for an offence committed outside British India, 28 A. 372. Where the offence of theft is committed by a subject of a Native State within its limits, a British Indian Magistrate has no jurisdiction to try such a person, 2 Bom. L. R. 337; 6 M. H. C. R. Appx. 3. *See* also 20 P. R 1878; 30 P. R. 1889, 7 P. R. 1894, 28 A 372, but if there is a special treaty, the British Courts have jurisdiction, *see* 3 M. H. C. R. 354, as to jurisdiction of British Courts over residents of Ramandrug in the Sandur State Where the instigation of an offence by a foreigner is complete in a Foreign State, the British Courts have no jurisdiction, 10 Bom. H. C. R. 356; but if the offence is completed in British territory, the foreigner if found in British India may be tried, 36 B. 524. Non British subjects found in a Native State in possession of property stolen in British India cannot be tried in British India for an offence under s 412, I P C, 9 A. 523; 22 P. R. 1888; 16 P. R. 1880 *Ill* (*b*) to s. 180 has no application to such a case, 18 C. W. N. 1178 = 15 Cr. L. J. 537. It must, however, be noted that a foreigner may while residing in British India initiate acts which may take effect outside British India and the foreigner will be amenable to the jurisdiction of the local Courts if the acts committed by him amount to an offence. *See* ss. 125 and 126, I P C. *See* also 20 C. W. N. 62 = 17 Cr. L. J. 128 = 33 In. Ca. 304; 8 C. 985 and 18 C. W. N. 1178 = 15 Cr. L. J. 537.

(*b*) *British Indian Courts have jurisdiction over such offences when committed* —(1) *By Native Indian subjects wherever the offence may have been committed,* (2) *by British subjects and servants of the King within the territories of any Native Prince or Chief in India* —*See* ss. 3 and 4, I.P C, and the definition of an 'offence,' s. 40, I.P C. Having regard to the provisions of s 5 it seems to be clear that the Code is applicable to all such offences Then the question arises as to which local Courts have jurisdiction to try such offences and the relation of s. 188 to ss. 177 to 184 has to be considered.

(*c*) *Is the venue of such offences governed by ss.* 177 *to* 184 *or is it dealt with by s* 188 *exclusively ?*— In a large number of cases it has been *held* that ss 177 to 184 are applicable only to local areas in British India and they have no application when the offence is committed outside British India. *See* 10 Bom. H. C. 356; 1 M. 171, 5 M. 23, 16 C. 667, 7 S. L. R. 17 = 14 Cr. L. J. 433. Therefore it has been

he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

Power to disinter corpses.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

Notes.—1. A similar power is entrusted to the Coroners of Calcutta and Bombay.—See *the Coroners' Act* IV of 1871, as amended by Act V of 1899, printed in the *Appendix*.

2. Concurrent jurisdiction of the Coroner and Presidency Magistrate in Bombay and Calcutta.—A Presidency Magistrate is not ousted of his jurisdiction in the case of an offence by which death has been caused, because the Coroner has held an inquiry into the cause of death and drawn up an inquisition under *the Coroners' Act* IV of 1871. He has jurisdiction to deal with the case according to law and is in no way bound by the Coroner's proceedings. He may hold an inquiry notwithstanding a commitment for trial has been made to the High Court by the Coroner, **Ratanlal 540; 16 B. 159.**

3. Section not applicable to Madras City.—So far as regards the area comprised within the ordinary original civil jurisdiction of the High Court of Judicature at Madras is concerned, this section is replaced by s. 4, Act V of 1889.

4. Proceedings not void.—If any Magistrate not empowered holds an inquest under this section erroneously in good faith, his proceedings are not on that account to be set aside. *See* s. 529 (*c*).

5. Report by Magistrate is not judicial proceeding.—There is nothing in the language of this section which requires a Magistrate holding an inquiry under it either to make a report or to come to a *finding*. The report, sent by him to the District Magistrate, could not be considered as part of a judicial proceeding, and, that, therefore, the High Court has no power to send for it under s. 435. No analogy exists between a Coroner's inquest and an inquiry into the cause of death under this section, **3 C. 742 = 3 C. L. R. 59,** *followed in* **Rantanlal 843.** But *see* **30 Bom. L. R. 1050 = A. I. R. 1928 Bom. 390** wherein it was held that proceedings under this section are judicial proceedings and are subject to the revisional powers of the High Court under sections 435 and 439 of the Code.

PART VI.

PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

Notes.—1. Illegality of arrest does not affect the jurisdiction of Courts to try the offender.—The irregularity of an arrest will not render invalid the subsequent trial and conviction of the accused in British India, **6 P. R. 1899; 26 M. 124; 1 P. R. 1911 = 4 P. W. R. 1911 = 12 Cr. L. J. 113.** If the Magistrate before whom an accused has been charged has jurisdiction to try the offence, his jurisdiction to inquire into or try, cannot be affected by any illegality in connection with his arrest, **35 B. 225.** *See* also **17 B. 369; 31 C. 557; 17 P. R. 1906** and Note 15 at p. 84. In **35 B. 225,** the case of *Mahomed Yusufuddin* (1897) **24 I. A. 137** was *distinguished* as follows: "The judgment does not purport to deal with the question whether an illegal arrest in foreign territory vitiates an inquiry by a Magistrate into an offence against the Indian Penal Code charged against the person arrested when brought before the Court, nor does it appear from the report that the question was argued." The Chief Court of Burma, however, in **7 Bur. L. R. 83** *relying on* **24 I. A. 137** *held* that when a person is illegally arrested and brought before a Magistrate, and the warrant is found to be illegal, the Court is bound to stay further proceedings against the accused in respect of charges of offences for which the warrant was issued. The accused had the right of being replaced in the same position and place as he would have been in, had no illegality been done.

2. General Rule.—National or territorial jurisdiction depends upon the locality of the crime.—All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, *McLeod* v. *Attorney-General*, **L. R. (1891) A. C.** at **p. 458**; *see* also **17 B. 369; 5 B. 338.** In the view of English Law, crime is

for the purpose of the trial was holden to be satisfied by an overt act done by some of them in prosecution of the conspiracy in the county where the trial was held ' In the case of conspiracies, s. 34, I.P.C., provides not only for liability to punishment but also for the subjection to British jurisdiction of a conspirator who resides in foreign territory, **14 Bom. L. R. 147 = 13 Cr. L. J. 426.** *See* also *R* v *Burdett*, **4 B.** and **Ald. 95.** In the above Bombay case it was held citing *R* v *Oliphant*, **(1905) 2 K. B. 67** and *R* v *Rogers*, **(1877) 3 Q. B. D. 28**, that even where the instigation is committed by a person in a foreign territory of an offence in British India through human agency, the instigator may be tried in British India. The above English cases only lay down that there is no difference between sending informantion by post (or telephone) and giving the same information by direct personal communication It is a matter of some doubt where an intelligent active agent is interposed between the foreigner initiating the crime and its commission in England, whether the Courts of the place where the offence was committed have jurisdiction over the foreigner, *Badische Anilin and Soda Fabrik* v *Basce Criminal Works*, **(1898) A. C. 200.** *A*, a member of a conspiracy sent money by post from Calcutta to other conspirators at Patna who also did acts at Patna in furtherance of the conspiracy, *held*, *A* could be tried at Patna, **17 W. R. 15 = 9 B. L. R. 36.**

But it should be observed that if a conspiracy is entered into in district *A* and acts are committed in pursuance of the conspiracy in district *B*, the Magistrate of district *A* can try the offence of conspiracy but cannot try the accused in the same trial for offences committed outside his district.

S 239 of the Code cannot give jurisdiction to a Magistrate who has no jurisdiction to try the offence under the provisions of Chapter XV of the Code, **28 C. W. N. 975.**

11. Falsification of accounts—S. 477-A, I.P C.—A person accused of an offence under s 477 A, I P C falsification of accounts, made in one place cannot be tried in another place by reason of any consequence which has ensued, as the offence is complete under s. 477 A, I P C, where the accounts are falsified with intent to defraud The *venue* of an offence under s 409, *I P C*, is now governed by *181 (2)*, **4 M. L. T. 481 = 9 Cr. L. J. 92.**

Place of trial where act is an offence by reason of its relation to other offence.

180. Where an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence, if the doer were capable of committing an offence, a charge of the first mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done

Illustrations

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

[illegible]

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing or by the Court within the local limits of whose jurisdiction the kidnapping took place.

Notes.—1. S. 180 must be construed subject to s. 188.—The general provisions of this section are controlled by s. 188 *See* **26 M. L. J. 311 = 1910 M. W. N. 143 = 8 M. L. T. 54 = 11 Cr. L. J. 305.** This case was doubted in **38 M. 779.** *See* Note 6 at p. 411

2 Place of trial for abetment by letter sent through post.—Where one person instigates another to the commission of an offence by means of a letter sent through the post, the offence of abetment by instigation is completed so soon as the contents of such letter become known to the addressee, and such offence is triable at the place where such letter is received, **18 A. 359.** For the purpose of giving jurisdiction, a letter speaks continuously from the moment of its being posted until its receipt of the addressees, *R* v *Rogers*, **(1877) 3 Q. B. D. 28.** *See* **14 Bom. L. R. 147 = 13 Cr. L. J. 426.** Note 8 to s 179, and also **8 B. 312** and **18 A. 350.**

3. Where abetment and offence are in different territories.

(a) *Abetment in British India of an offence committed in foreign territory*—The accused, a Native Indian subject of Her Majesty, abetted the commission of murder, or of rioting under ss. 302 and 147, I.P.C.

publication in any paper in the State against a person residing in the State, the jurisdiction is in either the county where the paper is published, or in the county where the party libelled resides. But the defendant may have the place of trial changed to the county where the libel is printed, on executing a bond to the complainant in the penal sum of not more than 250 dollars nor less than 100 dollars, conditioned, in case the defendant is convicted for the payment of the complainant's reasonable and necessary travelling expenses in going to and from his place of residence and the place of trial, and his necessary expenses in attendance thereon, which bond must be signed by two sufficient sureties, to be approved of by a Judge of a Court of Record exercising criminal jurisdiction." *N. Y. Cr. Pro. Code*, s. 133. *See* 44 M. L. J. 643.

9. **Offence of Cheating—ss. 417—420, I.P.C.**—(i) *May be tried at the place where the accused was bound to account.*—Where it is proved that the accused, the complainant's agent at Shalimar (outside the Presidency town of Calcutta), received money from complainant's firm at Calcutta and rendered false accounts to them at Calcutta, *held*, that the Presidency Magistrate had jurisdiction to take cognisance of complaint of the offence of cheating under ss. 417, 418 and 420, and of using a forged document under s. 471, I.P.C., 26 C. 746; 2 P. R. 1902. In 1908 A. W. N. 115 = 5 A. L. J. 333 = 7 Cr. L. J. 334, however, it was *held*, that the words embrace only such consequences as modify or complete the act alleged to be an offence, therefore, where *G* at Aligarh purchases certain *hundies* at *Hathras* and sent them to the accused at Calcutta for realisation and the accused was charged with the offence of cheating for having realised the *hundies* after becoming insolvent. *Held*, that the Court at Aligarh had no jurisdiction to try the offence which should be tried at Calcutta. *See* also 5 L. B. R. 57 = 10 Cr. L. J. 83 and 13 A. L. J. 1067. (ii) *May be tried at the place where the head office of the firm cheated is and where the loss ensued.*—At the instance of *G*, of Lahore, *A* sent goods from Karachi under false description. *A* was brought from Karachi to Lahore to stand his trial there with *G* for offences under *the Indian Railways Act*, 1890, and for cheating and abetment thereof. *Held*, that as regards the offence of cheating, this section conferred on the Courts at Lahore jurisdiction by reason of the loss in freight being caused to the Railway Administration at Lahore, where its headquarters were, 7 P. R. 1900. Where *D* residing at Lahore was charged with an offence under s. 420, I.P.C., for having recovered money from a Bank at Bombay on a forged draft of the Amritsar Branch of the P. N. Bank at Lahore and was also charged under ss. 420 and 109, I.P.C., for having abetted *I*, residing at Amritsar, in recovering money on a similar draft from the Multan Branch of the P. N. Bank. *Held*, that under this section the Lahore Court had jurisdiction inasmuch as the consequence, namely, loss to the Bank, whose drafts were forged contemplated in his section, ensued at Lahore, where the Head Office of P. N. Bank was situate. The loss occurred at the place where the accounts of the Bank are made up and its business as a Company is situate, 13 P. W. R. 1903 = 8 Cr. L. J. 75; 24 P. R. 1901 at p. 17; 26 C. 746. Where the accused at *M* induced certain persons to part with money on certain representations which were subsequently discovered at *A* to be fraudulent, *held* the offence of cheating was complete at *M* and the discovery of the fraud at *A* was not a consequence. 13 A. L. J. 1067 = 16 Cr. L. J. 825. The complainant at *M* ordered and received goods from a firm at *C* which were found to be not in accordance with the order, but the complainant had already sent in advance the money by post, *held* the offence of cheating was committed if at all at *M*, 12 A. L. J. 1022 = 15 Cr. L. J. 719; 17 Bom. L. R. 239 = 3 Bom. Cr. Ca. 52 = 16 Cr. L. J. 433. *See* Note 2 and s. 18.

10. **Criminal conspiracy.**—*See* s. 120-A of the I.P.C. added by the amending Act VIII of 1913. "Conspiracy may be tried in the place where the conspirators agreed to do the wrongful act which is the object of the conspiracy, but as the place of agreement is often unknown, conspiracy is generally a matter of inference deduced from the criminal acts of the accused persons which are done in pursuance of a common criminal purpose, and are often not confined to one place; a charge of conspiracy may consequently be laid in any county, where one of these criminal acts is committed; although no act may have been done by some of the accused in that county, yet if all the accused had a common criminal purpose and jointly co-operated in forwarding in different counties, the *venue* may be laid in any county in which overt acts are done by some one of them in prosecution of the conspiracy."—*Halsbury's Laws of England*, *Vol. IX*, *p.* 283.

Conspiracies.—In indictments of conspiracies, the *venue* may be laid in any county in which it can be proved that an act was done by anyone of the offenders in furtherance of their common design, *Rex v. Brisac*, (1803) 4 East 164 = 7 R. R. 557. This was a case of fabricating false vouchers on board a man-of-war and it was *held* that the offence was triable in Middlesex where some of the false vouchers transmitted by one of the conspirators had been received, citing *R. v. Bowes*, 1 Term Rep. 696 = 1 R. R. 383, as an authority for the principle that "the conspiracy as against all having been proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is

Being a thug or belonging to a gang of dacoits, escape from custody, etc.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received *or retained* by the accused person, or the offence was committed

Criminal misappropriation and criminal breach of trust

*"(3) The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen."

Theft.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained

Kidnapping and abduction

Note.—With regard to this section the Select Committee say " we accept the clauses but would enlarge the enumeration of offences to include the possession of stolen property This will also cover the case of extortion *See* the definition in s 410, I P C"

The only important change in this sub-section is the addition of " or any offence which includes theft or possession of stolen property *See* **24 A. L. J. 148.**

Notes.—1. No jurisdiction over foreigners for offences committed in foreign State.—There is nothing in this section which contravenes the general rule of international law, that no Court has jurisdiction over foreigners in respect of an offences committed in foreign State, **1 P. R. 1901; 20 P. R. 1878, 2 Bom. L R. 337.** *See* also **28 A. 372, 7 P. R. 1894, 1 P. R. 1901, 20 P. R. 1878.** *See* Notes 2 and 3 at p. 392

2 Section applies only to British Courts of different local areas.—The section only applies as between Courts of different local areas whose jurisdiction has been limited under s. 12 and to which this section applies It has no application to an offence committed in a Native State, and of such offence the Magistrate cannot take cognisance except on the certificate of the Political Agent given under s. 188. A British Indian Magistrate cannot take cognisance of criminal breach of trust committed in a Native State merely because part of the property was retained by the accused within his jurisdiction, **5 S. L. R. 268 = 13 Cr. L. J. 530.** So also where the offence of kidnapping was completed in a Native State and the minor was brought subsequently to British India, *held* the British Court had no jurisdiction, **14 Cr. L. J. 439 (Sindh), 1 P. R. 1901.**

3. Escape from lawful custody in a foreign State—British Courts have no jurisdiction—The accused was arrested in the Mysore State by the State Police on suspicion of having committed theft in British India. While in the State lock up he effected his escape, for which a Magistrate in British India tried and convicted him under s 224, I P C. *Held* that as the offence of escape from lawful custody was committed out of British India, the Magistrate had no jurisdiction to try the accused for it **Ratanlal, 870.** Even if the person in custody be afterwards declared to be innocent, the offence of escape from custody will be complete, provided only the custody be lawful, **24 W. R. 45.** *See*, however, **12 C. 190** and **5 M 22.**

4. No jurisdiction to try offence of theft or dacoity committed in foreign territory by foreign dacoits even if property retained by them in British territory.—Where a dacoity was committed at Velanpur in an allied territory, and a part of the stolen property found where it had been concealed by the accused in British territory, it was *held*, that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpur, although, had Velanpur been in British territory, the subsequent acts in the process of taking away the property might, in legal sense, have coalesced with the first and principal one, so as to give jurisdiction under this section in each district into which the property was

* Sub-section (3) was substituted for the original sub-section (3) by the Cr. P C Amendment Act XVIII of 1923, s. 42.

The alleged abetment consisted of words spoken in British territory by the accused, inciting certain Portuguese subjects to kill one Bhama, if he attempted to remove the produce of certain lands situate in the Portuguese territory of Damaun. A disturbance afterwards occurred at Damaun in connection with this matter, in which one man was killed and another wounded. *Held*, that s. 188 had no application to the present case, the alleged offence of abetment not having been committed outside British India, **19 B. 105.** *See* also **5 B. 338** and **7 Bom. H. C. R. Cr. Ca. 59.**

This difficulty is now removed by the addition of s. 108-A to *the Indian Penal Code* which is as follows:—

"S. 108-A. A person abets an offence in British India within the meaning of this Code, who in British India abets the commission of any act without and beyond British India, which would constitute an offence if committed in British India."

Illustrations.

"*A* in British India instigates *B*, a foreigner in Goa, to commit a murder in Goa. *A* is guilty of abetting murder."

(*b*) *Abetment in foreign territory of offence committed in British India.*—A subject of a Native State who by acts done in that State, and not in British territory abets the commission of an offence in British territory is not liable to be tried in British India, **20 P. R. 1878,** but if he is a Native Indian subject, he may be tried in British India if a certificate is obtained, *Madras C. M. P. No.* 97 *of* 1911, but *see* Note 6 to s. 179.

Where a foreign subject, resident in foreign territory, instigated the commission of an offence which in consequence was committed in British territory, *held*, that the instigation not having taken place in any district created by this Code, the instigator was not amenable to the jurisdiction of a British Court established under the Code, **10 B. H. C. R. 356; 20 P. R. 1878; 35 P. R. 1880.** Now, see however, the new illustration (*d*) to s. 179.

4. Venue for the trial of the offence of receiving stolen property—ss. 411, 412, I.P.C., if theft in one territory and receiving in another.—(i) *Theft in British India, possession of stolen property in Foreign State by British Indian subject.*—Where a Native Indian British subject was found in a Native State in possession of property alleged to have been stolen at a dacoity in British India, *held*, he could under s. 180 be tried in British India for an offence under s. 412, I.P.C., but a certificate of the Political Agent under s. 188 would be necessary, **21 M. L. J. 441 = 1910 M. W. N. 153 = 8 M. L. T. 54 = 11 Cr. L. J. 306.**

(ii) *Theft in British territory, possession of stolen property in Foreign State by non-British subject.*—Certain Non-British subjects were found in a Native State in possession of stolen property, the subject of a dacoity committed in British India. It was not proved that they had taken any part in the dacoity, or received stolen property in British India, *held*, that they could not be convicted of offence under s. 412, I.P.C., as no offence was committed within the jurisdiction of a British Court, **9 A. 523.** A foreigner residing in foreign territory if arrested therein is not triable by a British Indian Court for the offence of being in possession of stolen property in such territory as the Magistrate has no jurisdiction, **22 P. R. 1888; 16 P. R. 1880; 4 Bom. H. C. R. Cr. Ca. 28.** The operation of the Code cannot be extended beyond British territory, so as to give jurisdiction to a British Court to try a person residing outside British India for the offence of retaining stolen property outside British India though the properties may have been stolen in British India. Illustration (*b*) of this section has no application to such a case, **18 C. W. N. 1178 = 15 Cr. L. J. 537.**

(iii) *Theft in Foreign State, retention of stolen property in British India.*—Where the offence of theft or dacoity takes place in a Foreign State, a conviction under s. 411, I.P.C., may be sustained if the stolen property is brought or retained in British India. *See* s. 410, I.P.C., as amended by Act VIII of 1882 **1 B. 50** and **6 C. 307 = 7 C. L. R. 411.** The opinion of the majority in **5 B. 338** is no longer law. If the person who commits theft or dacoity outside British India brings the proceeds of the offence into British India, he may be convicted of the offence of retaining stolen property under s. 411, I.P.C., though he cannot be tried in British India for the offence of theft or dacoity which was completed outside British territory, **10 B. 186; 23 A. 372.** *See* also **1 M. 171; 4 Bom. H. C. R. Cr. Ca. 38** and **Weir II, 148,** where conviction of the offence of mischief in respect of an animal stolen in foreign territory was upheld.

5. Venue in English law for the offence of receiving goods stolen abroad.—The *Larceny Act*, 1896 (59 and 60 *Vict., c.* 52), s. 1, sub-sec. (1) enacts that "if any person without lawful excuse, receives or has in possession, any property stolen outside the United Kingdom, knowing such property to have been stolen, he may be indicted in any county or place in which he has, or has had, the property."

have been caused Our conclusion is in fact that the loss ensues immediately on the conversion, because by it the property of the principal entrusted to the agent, is diminished in the latter's hands. A firm at Madras employed the accused at *N* to sell the oil sent to him and remit the sale proceeds to Madras. The accused was charged under ss 406 and 409, I P C, with having misappropriated the cash realised *held* that the Magistrate at Madras had no jurisdiction. The origin of the oil was immaterial as the offence charged was the misappropriation of the money and not of the oil. The primary loss occurred at *N* immediately the proceeds were converted It was further contended in the last case that although the firm s loss at *N* may have been a primary consequence, the loss at Madras, the firm s headquarters where its funds were kept and where the firm ordinarily received the accused s accounts and remittances was a secondary loss and the Court at Madras had jurisdiction, *held*, however, that such a secondary loss was not contemplated by s 179, and could not give the Madras Court jurisdiction, **34 A. 487, 35 A. 29** and **8 Bom. L R 513** were referred to **29 M. L J. 178 = 16 Cr. L. J. 491**

Both these cases *dissented* from **38 M. 779,** where it was *held* that failure to account for the property misappropriated was a part of the offence, acts including illegal omissions The facts of the case were that complainant at *V* in British India entrusted the accused with certain jewels for sale on commission and he was alleged to have dishonestly converted two jewels to his own use by pledging them at *B* in a Native State and misappropriated a third jewel at *V* in British India and that it was part of the arrangement that the accused should account for the jewels or their price at *V*, *held* that as the loss which ensued occurred at *V* this was sufficient under s 179 for the Magistrate at *V* to have jurisdiction, **19 A. 111** and **35 A. 29** were *followed* *See* also **4 M. L. T. 481 = 9 Cr. L J 92** and **51 Bom. 101.**

Allahabad—(*a*) *When it is difficult to say where the actual offence of breach of trust was committed s 179 may be resorted to and the offence may be tried at the place where the loss, the consequence of the breach of trust occurred*—A company at Cawnpore complained that its servant *B* being in charge on behalf of the Company at a place in Bengal of certain goods belonging to the Company failed to account for them or return them to Cawnpore or pay their price He was charged with criminal breach of trust under s 408 I P C *held* that the Courts at Cawnpore had jurisdiction to inquire into the charge inasmuch as the consequence of *B s* acts *namely, loss to the Company, occurred in Cawnpore* **19 A. 111.** Accused was an agent of a firm at *M* Goods were entrusted to him for sale in various places in Bengal and from time to time he sold some of the goods and remitted money, but finally failed to account for some of the goods or money he had received for them, he was tried and convicted at *M* The conviction was upheld following **19 A. 111,** as it was impossible to state exactly where the act or acts of embezzlement took place, **32 A. 397** In **35 A. 29** the cases in **19 A. 111** and **32 A. 397** were followed and it was *held* that the loss resulting from criminal breach of trust is a consequence which completes the offence and the Court within whose jurisdiction such loss occurs may try the offence In this case also it was difficult to state where actually the offence was committed The complainant alleged that the accused was an agent in charge of the machine in question, permitted to exhibit it at various places in India for her and her husband s benefit and was bound to return it and account for its profits to her at Cawnpore The entrustment and criminal breach of trust were both outside Cawnpore. *Held* the Cawnpore Court where the accused had to account had jurisdiction. *See* also **A I R. 1928 Sindh 166.** In this case **4 O C. 376** was *dissented from*

(*b*) *When, however, the place where the offence is committed is known the Courts of that place ought to be resorted to, as that is the place where the primary loss occurs*—In **34 A 487,** KARAMAT HUSSAIN J was of opinion that consequence' means a consequence which forms a part and parcel of the offence and does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence and held *distinguishing* **28 C. 746** and **19 A. 111** and *following* **8 A. L J 333 = 7 Cr L. J 394,** *held* that where the offence of misappropriation is completely committed in a branch of a firm by an agent the Courts at the head office of the firm have no jurisdiction. Accused *A* was employed at *G* as the gumasta of a branch firm whose head office was at *C*, the accused was charged with having misappropriated the money of the firm at *G* which he had to send to *C*, *held* that the Court at *C* had no jurisdiction since the loss to the principal firm at *C*, is not a consequence of the act of the accused committed at the branch of the firm within the meaning of s. 179 *See* also **5 A. L. J. 333 = 1908 A. W. N. 115,** when the charge was one of cheating

Calcutta.—*See* the cases of **26 C. 746** and **41 C. 305** and **44 C. 912** and **26 C. W. N. 175.**

Where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust, the Court within the local limits of whose jurisdiction that place is situate, may inquire into and try the offence under s. 181, sub-sec. (2), **29 C. W. N. 432.**

conveyed. But on a conviction of retaining stolen property, the sentence awarded could, it was *held*, be sustained, the retaining having taken place in British territory, **1 B. 50; 6 C. 307 = 7 C. L. R. 411; 10 B. 186; 28 A. 372.**

This decision is now superseded by Act VIII of 1882, which amends s. 410 of the I.P.C. by adding the words "whether the transfer has been made, or the misappropriation or breach of trust has been committed within or without British India." *See* also **6 B. 338; 10 B. H. C. R. 356; 4 B. H. C. R. 38.**

In the case reported in **1 M. 171**, the accused stole property in foreign territory, and was apprehended with it in his possession in a district in British territory. It was *held*, that s. 67, Act X of 1872, did not give the Courts of such district jurisdiction to try him for the theft. Illustration (*f*) to that section apparently treated a theft completed in one district as continuing in three others to which the stolen property is carried. If this is the meaning, the Magistrate would have had jurisdiction if the theft had been committed in a district within British India and consequently subject to this legislative provision. In such a case one of the Municipal Courts would have had jurisdiction, and the effect of this rule of procedure would be to give it also to another. The rule, however, is applicable only to the scope of the relative jurisdictions of Courts in British India, and cannot be applied to an offence not committed within the jurisdiction of either of them. Then the general rule applies that a Court trying an offender must have jurisdiction over the place of the delict.

5. Venue for the offence of belonging to a gang of dacoits.—A resident of a Native Indian State was arrested in that State and brought before a Magistrate of the *G* District in British India and charged with the offence of belonging to a gang of dacoits along with others who had committed certain dacoities within his jurisdiction and, it was not alleged that the prisoner had participated in any dacoity or associated with dacoits in the *G* District and the Magistrate committed the accused to the Sessions. On its being argued that the commitment should be quashed, it was *held*, that the Magistrate had jurisdiction over the accused as he was in *G* District at the time of the charge, **1 P. R. 1911 = 4 P. W. R. 1911 = 12 Cr. L. J. 113.**

6. Meaning of "may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is."—The word 'is' does not mean 'is of his own accord.' The word 'is' after the word 'charged' gives the Magistrate jurisdiction equally whether the accused has come within the local limits of his jurisdiction of his own accord or has been brought there by force; **6 B. 622** and *Punjab Cr. A.* No. 2089 of 1907 referred to, **1 P. R. 1911 = 4 P. W. R. 1911 = 12 Cr. L. J. 113.**

7. Criminal Breach of Trust and Criminal Misappropriation—ss. 403—409, I.P.C.—

(*i*) *Is s. 179 applicable?*—In accordance with the ordinary rules of construction the special provision in s. 181 (2) should ordinarily receive effect unqualified by the general provisions of s. 179. Unless, therefore clear reason is shown in the particular facts of the case, s. 179 does not seem to be applicable. *See* **29 M. L. J. 178 = 16 Cr. L. J. 491.**

(*ii*) *Is loss a necessary consequence?*—As to whether loss resulting from a criminal breach of trust is a necessary consequence as to attract the provisions of s. 179, there is a difference of opinion. The trend of the decisions seems to be that the Courts in which the wrongful conversion takes place and the primary loss occurs must be usually resorted to and that whenever there is uncertainty as to where the property was received or the offence was committed, recourse may be had to the place where the complainant, who is entitled to the property misappropriated and where it is to be accounted for resides. *See* Notes 2, 3 and 9 to s. 179.

(*iii*) *Have the courts where the complainant who suffers loss occasioned by the offence resides jurisdiction by reason of the consequence-loss? See Note 1 to s.* 179.

Madras.—The offence of *criminal breach of trust* is completed (assuming a preliminary trust) by the misappropriation or conversion of the property dishonestly, *i.e.*, with the intention of causing wrongful gain or wrongful loss. It is only the intention which is essential. Whether wrongful gain or loss actually resulted is immaterial; it is a consequence, but no essential part of the offence, and a person is not accused by reason of it. The offence of *criminal breach of trust* by reason of dishonest use or disposal of property in violation of a contract is committed where the dishonest use or disposal takes place—not where the contract was made or should have been performed; **34 A. 487** *followed*, **38 M. 639.** In this case, a merchant at *D* in the Madras Presidency sent hundies to the accused at Bombay for encashment, the accused was charged under s. 405, I.P.C., with having cashed the hundies and misappropriated the proceeds: *held*, that the Magistrate at *D* had no jurisdiction. The Court in **29 M. L. J. 178 = 16 Cr. L. J. 491**, *dissented* from **38 M. 639** in so far as it laid down that the existence of dishonest intention, not the ensuing of loss, was the esssential element in the offence of criminal breach of trust. For we are unable to conceive any case in which more than mere preparation or attempt could be *held* established but no loss whatever, it may be only a temporary or highly insignificant one, could be found to

as to when kidnapping from lawful guardianship is complete *See* also **20 C. W. N. 62 = 17 Cr. L. J 123 = 33 In. Ca. 304, 8 C. 985** and **18 C. W. N. 1177 = 15 Cr. L. J. 537.**

(*b*) *Native Indian subject of His Majesty*—A Magistrate would have jurisdiction to try Native Indian subjects of His Majesty accused of the offences of kidnapping, abduction, etc, committed outside British India if the conditions required by s 188 are observed **7 S. L. R 17 = 14 Cr. L. J. 439.** A subject of a Native State cannot be tried in British India for the offence of the abduction of a woman (ss 362, 366, I P C) committed in a Native State, but if the woman brought to British India is removed from there by the same deceitful means employed to induce her to leave her native place, an independent offence of abduction is committed in British India over which the British Courts have jurisdiction, **7 S. L. R. 128 = 15 Cr. L. J. 811.**

11. Detention.—Offence of detaining a married woman enticed away for purpose of illicit intercourse is to be enquired into in the district where detention occurs, **51 P. L. R. 1918.**

Place of inquiry or trial where scene of offence is uncertain,	**182.** When it is uncertain in which of several local areas an offence was committed, or
or not in one district only,	where an offence is committed partly in one local area and partly in another, or
or where offence is continuing,	where an offence is a continuing one, and continues to be committed in more local areas than one, or
or consists of several acts	where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas

Notes.—1. S 135 of N Y Cr P C provides that when a crime has been committed on the boundaries of two or more counties, or within 500 yards thereof, the jurisdiction is in either county *See* also 7 Geo 4, c 54 s. 12 where if felony or misdemeanour is committed on the boundary of two or more counties or within 500 yards of the boundary or is begun in one county and completed in another, the *venue* may be laid in either county.

2. Section applies only to offences—This section only relates to cases of offences *i e*, acts which are punishable by law, and a case under s. 145 is not a case relating to an offence, **3 C. W. N. 143.**

3. "Local area" does not include foreign territory—The words, "local area" used in this section only apply to a "local area" over which the Criminal Procedure Code applies, and not to a "local area" in a foreign country or in other portions of the British Empire to which the Code has no application, **16 B. 667.** They include and were intended to include 'District, Province, Sub-division and Sessions Division,' **25 C. 858.**

4. Scope of section—Conflict of areas—*This section in reality intends to provide for the difficulty* which would arise where there is a conflict between different areas in order to prevent an accused person getting off entirely because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. Each portion of the section refers to this conflict, **16 C. 667 at p. 676.** In **25 C. 858,** this section was applied to a case where it was known where the offence took place, but it was uncertain to which sessions division the place belonged Where the accused who was employed by a firm at *M* as a travelling agent to sell goods, sold the goods, remitted some money and misappropriated the balance and failed to account to his principals, and it was impossible to state exactly where the act of embezzlement or the various acts of embezzlement took place, but they must have taken place either at *M* or at one of the various districts where the accused travelled, *held*, applying s. 179 and this section, the Court at *M* had jurisdiction, **32 A. 397.** *See* also **23 C. 53** and **2 C. W. N. 450.** The Director of a Company is liable under s 32, cl. 4 of the Indian Companies Act VII of 1913, for default in filing a copy of the annual list of members and the summary prescribed therein, in the Office of the Registrar of Joint Stock Companies, Calcutta. A Presidency Magistrate has jurisdiction to try such offence under s. 182 of the Criminal Procedure Code, and if not s. 531 cures the defect.

5 The offence of adultery is not a continuing offence. Where a person has once been convicted or acquitted of that offence and subsequently he is again guilty of such a conduct he may be prosecuted once again in relation to such act, section 182 does not apply **32 Bom. L. R. 1431.**

Punjab.—A firm having its head office at Karachi had a branch office in the district of *F* in the Punjab. The branch office appointed the accused as their purchasing agents in the district of *J* and they were accountable to the branch office and had no dealings direct with the head office. A general deficiency on settlement of accounts being found, the accused were tried and convicted at *F* of the offence of criminal breach of trust. It was argued that the loss was to the Karachi head office and the offence was committed in *J*. *Held*, that the accused were rightly tried at *F* as the general balance was payable at *F* where the accounts had to be rendered and it might be said to have been *retained* at *F* within the meaning of sub-sec. (2), **2 P. R. 1902.** Where, however, certain specific items have been misappropriated and the accused is not tried for a deficient balance, the Court at *F* may have no jurisdiction, **Cr. Mis. 38 of 1903 (Punjab); 22 P. R. 1915.** In **7 P. R. 1910 = 7 P. W. R. 1910 = 11 Cr. L. J. 253,** also, it was *held* that where the complainant despatched goods from Delhi to the accused at Calcutta for sale on commission, and the accused mortgaged the goods and misappropriated the money to their own use, the offence of misappropriation was complete as soon as the money had been misappropriated and that the Calcutta Court alone had jurisdiction. The words "*any consequence that has ensued*" mean some consequence modifying or completing the acts constituting the offence and do not include the loss resulting to an employer from criminal breach of trust by his servant, *following* **5 A. L. J. 333 = 7 Cr. L. J. 394; 67 P. L. R. 1901** and *dissenting from* **19 A. 111.** In **223 P. L. R. 1913** a servant was employed by a master in a district different from the one in which he lived. The servant then committed a criminal breach of trust whereby the master suffered a pecuniary loss, *held* the servant cannot be tried under s. 179 where the master lived. In **22 P. R. 1915 = 16 Cr. L. J. 775,** the complainant at *R*, filed a complaint wherein he stated that the accused who was engaged at *R* to manage a branch business at *P* had made false entries in respect of various items and had committed the offence of criminal breach of trust, *held* the case was triable at *P*, and not at *R*.

Oudh.—The complainant in his complaint under s. 409 alleged that he consigned goods from *F*, where he lived, to the address of the accused in the Central Provinces who misappropriated the goods there; *held* that the accused could not be tried at *F* by virtue of s. 179. S. 179 was inapplicable as the accused was not charged with the commission of an offence by reason of any consequence which ensued at *F* or elsewhere, but solely by reason of what they were alleged to have done in the Central Provinces, **4 O. C. 376.**

Rangoon.—Where the accused, an agent at Kobe (in Japan) of the complainant at Rangoon misappropriated certain moneys entrusted by the complainant, *held* that the accused committed criminal breach of trust in Kobe and that s. 179 of the Code has no application. **1 R. 56** (**25 A. 29** *dissented from*, **33 A. 487** and **44 C. 912** *followed*). But *see* **6 Rang. 280.**

8. Entrustment in British India and breach in foreign territory.—Where *B* who was entrusted with rice at Mangalore for conveyance to Calicut took the cargo to Goa, in foreign territory, and there sold it. *Held*, that the Sessions Court at Mangalore had no jurisdiction to try the offence and that no offence was committed on the High Seas so as to give the Court jurisdiction under 12 and 13 *Vict.*, *c.* 96, extended by 23 and 24 *Vict.*, *c.* 88, **5 M. 23.** But now *see* s. 188; **7 M. 354** and **38 M. 779.**

9. Venue for trial of embezzlement under English law.—The locality of a crime varies with the nature of the crime. If the crime is an act of omission, the place where the crime is committed is the place where the act which is omitted ought to have been done, *R.* v. *Milner*, **(1848) 2 Car. and Kir. 310.** So in the case of an act of commission such as embezzlement, when there is no evidence of embezzlement except non-accounting, the *venue* may be laid in the place where the non-accounting occurred; but this does not apply where there is distinct evidence of misappropriation elsewhere, for then the offence is triable in either place, *R.* v *Davison and Gordon*, **(1855) 7 Cox. C. C. 185.** *Halsbury's Laws of England, Vol. IX*, p. 280.

10. Kidnapping or abduction in foreign territory and conveying through British India.—(*a*) *Foreigner.* This section has no application to a *foreigner* committing an offence out of British India, the intention of the section being evidently to provide for the case of an offender proceeding from one local jurisdiction in British India to another. Where, therefore, a foreigner kidnapped a girl in a foreign State and while conveying the girl by rail from that State through British India, he was arrested, tried and convicted of the offence of kidnapping, it was *held*, that the British Court had no jurisdiction, as the offence was complete out of British India and no consequence ensued in British India so as to bring the case within s. 179. Nor was the offence a continuous one to bring it under s. 182. The words '*was conveyed*' do not import any separate or distinct offence, where the offence of kidnapping was complete previous to such *conveying*, **1 P. R. 1901; 7 S. L. R. 17 = 14 Cr. L. J. 439.** *See* also **4 P. R. 1883; 2 C. W. N. 81; 19 A. 109; 4 C. W. N. 645; 8 P. R. 1894.** *See* **27 C. 1041 (F.B.); 6 Bom. L. R. 785 = 1 Cr. L. J. 931; 1 S. L. R. 104 = 8 Cr. L. J. 361; 1 M. 173; 18 A. 350,**

Offences against Railway Telegraph Post Office and Arms Acts

184. All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post Office or Arms and Ammunition may be inquired into or tried in a Presidency town, whether the offence is stated to have been committed within such town or not

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town

Notes.—1. *Railway*—Act IX of 1890, *Telegraph*—Act XIII of 1885, amended by Act XI of 1888, *Post Office*—Act VI of 1898, Repealing Act IV of 1866, *Arms and Ammunition*—Act XI of 1878

2. This section corresponds with the *Presidency Magistrate's Act* IV of 1877, ss 238 and 239.

High Court to decide in case of doubt, district where inquiry or trial shall take place

***185.** (1) Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court

(2) Where two or more Courts not subordinate to the same High Court have taken cognisance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it and if it so decides all other proceedings against such person in respect of such offence shall be discontinued If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued

Note.—" In view of the conflicting decisions in the Indian Law Reports, **44 C. 595** and **I. L. R. 40 M. 835**, it is proposed to make it clear that one High Court has no power whether by implication or otherwise to transfer a case to itself from another High Court or *vice versa*, or to decide which of two other High Courts should try a particular case" *Statements of Objects and Reasons*, 1921

The procedure laid down in this sub-section will relieve the High Court of following the round about way of reference to the Governor General under s. 527

Notes.—1. Place of trial where offence is alleged to have taken place in another district.—On a reference by a District Magistrate for the transfer of a case pending before a Cantonment Magistrate within whose jurisdiction the accused were alleged to have committed an offence under s 498, I P C, to another district in which the offence was alleged to have occurred, the High Court declined to pass any order holding that if the fact relevant to s. 498 occurred in the other districts, and if the Cantonment Magistrate is empowered under s. 186 of the Code, he can deal with the matter under that section, **Ratanlal 849.**

2. Courts subordinate to two High Courts.—Where Court of two Magistrates subordinate to two different High Courts have jurisdiction to try an offence, the High Court within the local limits of whose jurisdiction the offender actually is, may decide by which Court the offence shall be tried, **5 L. B. R. 17 = 9 Cr. L. J. 581.** In **17 C. W. N 761 = 14 Cr. L J. 398,** two charges were laid, one at Gujranwalla in Punjab and another at Chittagong in respect of the same matter, the accused in one case being the complainant in another; the Calcutta High Court *held* that it could pass an order under this section that the case should be inquired into at Chittagong and transfer the case from the Court of the District Magistrate at Gujranwalla to the Court of the District Magistrate at Chittagong Proceedings in the case were, however, stayed for two months to enable the accused to take civil proceedings

3. Nature of the doubt—Scope of section.—The doubt contemplated by this section is only as to the Court by which the offence is to be inquired into or tried—not, *e g*, a doubt as to the competency of a committing Magistrate to commit an accused for trial, **13 P. R. 1887; 3 A. 251.** In **5 L. B. R. 17 = 9 Cr. L. J. 581,** it was *held* that s 185 is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction, but is applicable also to a case in which the doubt is on the point whether the choice between two Courts both of which have jurisdiction, should be decided on the ground of public convenience. But in **41 C. 305** it was *held* that s. 185 does not warrant interference by the High Court merely on the ground of

* This section was substituted for the original section by Act XVIII of 1923, s. 43

Offence committed on a journey.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

Notes.—1. Compare s. 136 of the N. Y. Cr. P. C. Under it when crime is committed on board a vessel navigating a river, lake, canal, etc., or lying there in the course of a voyage, the jurisdiction is in any county where such voyage terminates, or would terminate if completed. *See* also *the Criminal Law Act*, 1836 (7 Geo. 4, C. 64), s. 13, and the *Fugitive Offenders Act*, 1881 (44 and 45 *Vict.*, *c.* 69).

2. The journey must be a continuous journey from one terminus to another.—The section gives jurisdiction to the local tribunal at the place where the offender, etc., first stops or breaks his journey or voyage. Where an offence was alleged to have been committed during a journey from Bombay to Calcutta, and was in fact committed between Bombay and Allahabad, at which latter place the complainant and the accused halted and separated, and proceeded to Calautta by different trains. *Held*, that the Magistrate at Howrah had no jurisdiction to try the case. In order to give jurisdiction to the Magistrate, the journey must be a continuous journey from one *terminus* to another *terminus*, regard being had, for the purpose of estimating the continuity, to all the ordinary incidents affecting journeys of the particular kind which may be under consideration, **21 W. R. 66 = 13 B. L. R. Appx. 4.** In **1 M. H. C. R. 193** the Madras High Court construing s. 35 of Act XVIII of 1862, *held*, that if a person be accused of an offence committed whilst a journey or voyage is going on he may be tried if any part of that journey or voyage during which the offence is alleged to have been committed lies within the local limits of the Court's jurisdiction. In that case a Railway guard was charged under s. 27 of the Railway Act with drunkenness whilst in charge of a train and he was removed from that train and detained at Arkonam a place beyond the local limits of the High Court, but he broke away and continued the journey to Madras. It was *held* that the High Court had no jurisdiction as the journey on which the offence was alleged to have been committed ended, so far as regarded the person accused of the offence, at a place beyond the local limits of the High Court's jurisdiction. *See* also **1 C. L. J. 334 = 2 Cr. L. J. 411.**

3. Journey not broken by halt.—A box containing money having been missed during a halt at *S*, in the district *T*, from a boat, which was on the way to *C*. *Held*, that the journey was not broken by the halt at *S* and the case could be tried at *C*, **25 W. R. 45.** The stoppage was due to the nature of the journey itself.

4. Committed in the course of journey or voyage.—The *journey* referred to in the first part of this section is the journey which the offender is in the course of performing; and the words *that journey* at the end of the section refer to the same journey. Where, therefore, a *Sarang* was charged under s. 280, I.P.C., with rashly navigating a vessel, so as to endanger human life, *held* that the only Courts which have jurisdiction to try the offender are the Courts through or into the local limits of whose jurisdiction, the offender in the course of that journey passed, **1 C. L. J. 334 = 2 Cr. L. J. 411.**

5. Section not applicable to journey or voyage beyond British India.—This section is part of the Code of Procedure for the trial of offences committed in British India. The words 'journey or voyage' spoken of in it do not include a voyage on the High Seas or in foreign territory, but are confined in their meaning to a journey or voyage within the territories in British India. The section has relation only to a trial of an offence committed in British India in which the only defect is that some Court in British India, other than the Court which actually tried the charge, had local jurisdiction over the offence, **5 M. 23**; *see*, however, next Note.

6. Offence committed during a voyage on the High Seas.—The complainant and the accused left in a vessel from Bombay to Honawar. During the voyage, within nine miles off the Janjira State, the accused threw overboard a box belonging to the complainant, for which on arrival at Honawar, he was charged with mischief. *Held*, that the Magistrate at Honawar, through whose jurisdiction the accused passed on the voyage had jurisdiction to try the accused, **Ratanlal 181.**

7. What particulars should be given in the charge.—In order to confer jurisdiction over an offence committed on board a boat upon a canal in respect to the cargo thereof, it must be averred in the indictment and proved that the crime was committed on board the boat or vessel, and on that trip or voyage she had passed through some part of the country where the indictment was found.—*Larkin* v. *People*, **61 Barb. 226.**

5 Proceedings of Magistrates not empowered.—If any Magistrate not specially empowered, acts under this section, his proceedings will not be set aside merely on the ground of his not being so empowered, *see* s 529 (*d*)

6 Object of the inquiry under this section.—The object of the inquiry under this section is only to satisfy himself that there are *prima facie* grounds for sending the person believed to have committed the offence to a Magistrate having jurisdiction over it. Such inquiry should be conducted as prescribed by Chapter XVIII of this Code

Procedure where warrant issued by Subordinate Magistrate

187. (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate such Magistrate shall send the person arrested to the District *or Sub-divisional Magistrate* to whom he is subordinate unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person in which case the person arrested shall be delivered to the Police-officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

Note.—It is unnecessary for a first-class Magistrate to send the accused to the District Magistrate where certificate has been obtained.—Where an offence was suspected to have been committed by a Native British subject in a place without and beyond the Indian territories under the dominion of Her Majesty and the offender is arrested in British territory under the authority of a warrant from a Magistrate of the first class there *Held*, that the Magistrate was authorised to complete the inquiry himself, and s. 174 of Act X of 1872 (now s 186) made it unnecessary for him to send the accused to the District Magistrate as the certificate required by s 188 had been duly furnished by the Political Agent, **Ratanlal 97.**

Liability of British subjects for offences committed out of British India.

188. When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India or

when any British subject commits an offence in the territories of any Native Prince or Chief in India or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found

Political Agents to certify fitness of inquiry into charge

Provided that * notwithstanding anything in any of the preceding sections of this Chapter ' no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one for the territory in which the offence is alleged to have been committed, certifies that, in his opinion the charge ought to be inquired into in British India , and, where there is no Political Agent, the sanction of the Local Government shall be required

Provided, also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879, in respect of the same offence in any territory beyond the limits of British India

Note.—The recent amendment to the first proviso makes it clear that ss. 177 to 184 are controlled by the provisions of section 188. This amendment was necessitated by a contrary view held in **38 M. 779.** The Select Committee observe Certain decisions of the Madras High Court seem to make it doubtful whether

* The words notwithstanding ... Chapter were inserted by Act XVIII of 1923.

convenience. The decision of the High Court within the local limits of whose appellate jurisdiction the offender actually is, can only be sought where a doubt arises as to the Court by which an offence should be inquired into or tried. In this case a prosecution was instituted at Lahore by a Company against persons residing at Chittagong for offences under ss. 409, 420, 467, 477, I.P.C. The High Court *held* that there was no doubt that on the allegation of the prosecution that the Courts at Chittagong and Lahore were equally competent to exercise jurisdiction. *See* also **44 C. 595 (F.B.)**. *See* also **40 M. 835**, which has been adopted by the amending Act XVIII of 1923. **21 A. L. J. 621** following **44 C. 595.**

4. **When place of offence uncertain.**—*B*, resident of Almora, in the *Kumaon District*, was travelling in the plains, accompanied by *H*, who had charge of his money and other personal property. On arriving at Shahabad, in the *Bulandshar District*, *B* demanded an account from *H* and found a considerable sum unaccounted for and certain movable property missing. After *B's* return to Almora, *H* was arrested in the Kumaon District and his house searched, but none of the property was found there. The property was given at different places, and it was not very clear where it was given, while the discovery of the breach of trust was made at Shahabad. *Held*, that the Magistrate or *Bulandshar* had jurisdiction to try the case, **1883 A. W. N. 88 ; 1908 A. W. N. 115 ; 5 A. L. J. 333 = 7 Cr. L. J. 394.**

5. **Section not applicable to proceedings under s. 145.**—This section has reference only to cases where some offence is being inquired into or tried. It has no application to proceeding under s. 145, **12 A. L. J. 390 = 15 Cr. L. J. 520.**

6. Section not applicable to a Magistrate outside the jurisdiction of the High Court, **40 M. 835.**

Power to issue summons or warrant for offence committed beyond local jurisdiction.

186. (1) When a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate, or, if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

Magistrates' procedure on arrest.

(2) When there are more Magistrates than one having such jurisdiction, and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent, or bound to appear, the case shall be reported for the orders of the High Court.

Notes.—1. Validity of warrant issued from foreign territory.—It is not essential to the validity of a warrant issued under this section that the Magistrate issuing it should be, at the time he issues it, within the local limits of his jurisdiction. He may issue a warrant from a place in foreign territory, **1 B. 340.** *See* also **23 P. R. 1910 ; 17 A. 36.**

2. **When Magistrate can decline jurisdiction.**—If a Magistrate not empowered under this section finds that he is without jurisdiction under Chapter XV, he can decline to exercise jurisdiction, **Ratanlal 849.**

3. **Powers of the High Court.**—It was *held* in **Weir II, 146,** that the High Court has jurisdiction under s. 29 of *the Letters Patent* to make an order directing a Magistrate to hold a preliminary investigation and in the event of a *prima facie* case being made out to commit for trial to the Sessions a case which falls within this section. But where the circumstances of a case fall exactly within the terms of this section, the procedure must be governed by such special provision and the High Court will not exercise the general powers conferred upon it by *the Letters Patent*, unless the case is of an extremely exceptional character.

4. **Magistrates specially empowered.**—All Magistrates of the first class have been specially empowered to act under this section. For *Madras*, see *Gazette*, 1873, p. 717 ; *N.-W. Provinces Gazette*, 24th December, 1873 ; *Oudh Gazette*, 1873, p. 3 ; *Punjab Gazette*, 1873, p. 75 ; and *Gazette*, 1833, Pt. I, p. 52 ; *Bombay Gazette*, 1872, p. 1325.

This clause supersedes the decision in **16 B. 178**, where it was *held* that a British Court had no jurisdiction to try a servant of the Queen not a British subject for an offence in foreign territory But the Governor-Generel in Council has directed that for offences committed in some of the Native States (including Jhind) the persons accused should except under certain circumstances, be handed over for trial to the Courts of the State *Gazette of India, 16th August*, 1876 *No* 87 *J*

5. **Object and scope of the section.**—Extra territorial jurisdiction is vested in the Governor General in Council in his executive capacity and also in the Indian Legislature The Legislative powers are derived from three Acts of Parliament. These are—(*i*) The *Indian Councils Act*, 1861 (24 and 25 *Vict.*, *c* 67). "For all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty" (*ii*) The *Government of India Act* 1865 (28 and 29 *Vict*, *c* 15). 'For all British subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty whether in the service of the Government or otherwise" (*iii*) The *Indian Councils Act*, 1869 (32 and 33 *Vict.*, *c* 98) 'For all persons being Native Indian subjects of Her Majesty without and beyond as well as within the Indian territories under the dominion of Her Majesty '

The jurisdiction of the Governor-General in Council in his executive capacity is much wider and is now declared in the Indian (Foreign Jurisdiction) Order in Council, 1902, see *Gazette of India*, Part I, p 667 This Foreign Jurisdiction is delegated to the Governor General in Council by His Majesty the King, and the Foreign Jurisdiction of His Majesty is declared in similar terms in the preamble to the *Foreign Jurisdiction Act*, 1890 (53 and 54 *Vict.*, *c* xxxvii) S 188 has been amended so as to conform exactly with the above statutes and is intended to prevent a conflict of jurisdiction between the Courts in British India and the Courts of Foreign Sovereigns and Courts established by His Majesty the King by Order in Council under the Foreign Jurisdiction Act, 1890 or by the Governor General in Council either under ss. 4 and 5 of Act XXI of 1879, or under the Foreign Jurisdiction Order in Council, 1902. The first paragraph of s. 188 corresponds to the Indian Councils Act, 1869, the second with the Government of India Act, 1865, and the third with the Indian Councils Act, 1861

For the application of s. 188 the Act committed in a Native State must be an offence under the I.P.C.—Where false information was given to a Native State Police and perjury was committed in the Court of a Native State, *held* that a complaint could not be entertained by a Magistrate in British India inasmuch as the acts charged against the accused having been committed in relations to Courts and authorities outside British India, did not constitute offences under the I P C, **47 B. 907.**

6. **Does this section restrict the scope of sections 177 to 184 when offences committed outside British India ?—Is a certificate necessary when a Court may get jurisdiction by virtue of ss. 179 to 184 ?**—It was all along held (*see* Note 9) that in every case where an offence committed outside British India was tried in British India a certificate would be necessary to give jurisdiction, and such an interpretation could be justified only on the footing that s 188 is the only section which deals with offences committed outside British India, as the proviso deals only with 'such' offences as are referred to in the section. If a person could be tried in British India by virtue of ss. 177 to 184 for an offence outside British India, it is difficult to see why a certificate or sanction under s. 188 should be obtained In the cases noted in Note 9 it was consistently held that ss. 179 to 184 had no application where the offence was committed outside British India.

In **38 M. 779**, SADASIVIER, J, was of opinion, that s. 188 did not limit the scope of ss. 177 to 184 'The scheme of Chapter XV, sub-chapter (A) in which ss. 177 to 189 appear, seems to me to be intended to enlarge as much as possible the ambit of the sites in which the trial of the offence might be held and to minimise as much as possible the inconvenience which would be caused to the prosecution by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying Court. Ss. 178 to 184 all confer more extended powers and larger jurisdiction to Courts than would belong to them if the ordinary rule found in s. 177 were carried to its strict logical conclusions. S. 188 comes in almost at the end of the sub-chapter to make their further encroachments on the general rule of 177,' and he further held that the proviso to s. 188 will come into operation only when the British Indian Court cannot get jurisdiction under ss 179 to 184 and has to depend on the first part of s. 188 to get such jurisdiction and he dissented from **21 M. L J. 441 = (1910) M. W. N. 143; 5 S. L. R. 266 = 13 Cr. L J. 550** and Madras **Cr. M. P. 97 of 1911.** This decision is it is submitted wrong *See* also Note 3 at p. 392, and also the introductory note to the section above.

7. **Scope of the proviso—Is it restricted only to territories of Native Princes and Chiefs in India ?**—In **4 Bur. L T. 53 = 5 L. B. R. 221 = 12 Cr. L. J. 193**, it was laid down that the word 'territory' in the proviso is used in reference only to territories of any Native Prince or Chief in India and that the word cannot include

s. 188 is subject to the provisions of ss. 177 to 184, and we think it desirable to clear this up. We are not satisfied that this was the intention of s. 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State to require the Political Agent's certificate in every case" *See* Note 6 below.

Notes.—1. The provisions of this section shall not apply to any offence referred to in s. 57 of Act VI of 1898 (*Post-office*).

2. Definitions.—*India*—" *India* shall mean British India together with any territories of any Native Prince or Chief under the Suzerainty of Her (His) Majesty exercised through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India." S. 3 (27) of *General Clauses Act* X of 1897.

British India.—See Note 1 to s. 1 at p. 11.

British subject.—See Notes to s. 4 (i) at p. 19.

" *Political Agent*, shall include (*a*) the principal officer representing the Government in any territory or place beyond the limits of British India, and (*b*) any officer of the Government of India, or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction or extradition." S. 3 (40) of *General Clauses Act* X of 1897.

Servant of the Queen.—The words "Servant of the Queen" denote all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 and 22 *Vict.*, *c.* 106, entitled "An Act for the better Government of India," or by or under the authority of the Government of India or any Government. S. 14 of *the Indian Penal Code* (XLV of 1860). For the Legislative authority of the Government of India, *see* s. 22 of 24 and 25 *Vict.*, *c.* 67.

Native Indian subject of Her Majesty.—The term does not include "Servants of His Majesty." **16 B. 178.** The Legislative authority of the Government of India is expressly declared to extend to all Native Indian subjects. S. 1 of the Indian Councils' Act, 1865 (32 and 33 *Vict.*, *c.* 98). A son of an alien born in British territory, who did not become a naturalised subject at the time of the annexation of the Punjab is, notwithstanding his father's non-naturalisation, a natural-born subject of the British Crown, **9 P. R. 1893.** Merely owning land in British India and occasionally residing in British India does not make one 'a Native Indian subject.' That term means only native subjects *de jure* and not *de facto* and occasional residence in British territory cannot be taken to render a person who is not *de jure* a subject, a subject for the purpose of criminal jurisdiction being exercised over him for an act committed by him in foreign territory which, if committed within British territory, would have been an offence cognisable by Municipal Courts, **1 P. R. 1885.** *See* also **6 B. 622.**

Nor does the mere fact of non-residence divest a person of his *nationality.* Subject to certain modifications of the Governor-General in Council, the whole Criminal Law of British India follows only (*a*) all Indian Native subjects of His Majesty in any place beyond British India, and (*b*) all European British subjects in the territories of any Native Prince or Chief in India, **2 A. 218 (F.B.).**

Offence.—The term offence used in this section means an offence under the Indian Penal Code, and where offences under ss. 182, 193 and 211, I.P.C., were committed against the Police or the Courts of a Native Indian State and Certificate of the British Resident was obtained under s. 188 of the Code; *held*, that the complaint could not be entertained by the City Magistrate of Surat in India, inasmuch as the acts charged having been committed in relation to Courts and authorities outside British India did not constitute offences under the Indian Penal Code, **47 B. 907.**

3. Section does not confer jurisdiction over foreigners committing offences in foreign territory.—A foreigner is not liable to be dealt with in British India for an offence committed and completed outside British territory, **7 P. R. 1894; 2 Bom. L. R. 337.** Where two persons, one a British subject and the other a foreigner, were committed on a charge of robbery (perpetrated in a Native State) to the Sessions Court at Jhansi, it was *held* that neither of the accused could be tried *for the robbery*, for the reason that one of the accused was not a British subject and as to the other the certificate required by this section was wanting. But both of them might be tried on a charge under s. 411, I.P.C., in spite of the fact that the accused themselves were the actual robbers in the Native State, **28 A. 372,** where **10 B. 186** *is followed. See* also **30 P. R. 1894** and *see* Notes 2 and 3 at pp. 391-392.

4. Foreigner—servant of the Queen amenable to the jurisdiction of the British Courts.—A foreigner in the service of the Punjab Government who commits a murder in Jhind (a Native State) may be tried and convicted of murder at any place in British India in which he may be found. *See* III (*c*) to s. 4, I.P.C.

This clause supersedes the decision in **16 B. 178**, where it was *held* that a British Court had no jurisdiction to try a servant of the Queen not a British subject for an offence in foreign territory But the Governor-General in Council has directed that for offences committed in some of the Native States (including Jhind) the persons accused should except under certain circumstances, be handed over for trial to the Courts of the State *Gazette of India*, *16th August*, 1876 *No* 87 *J*

5. Object and scope of the section.—Extra territorial jurisdiction is vested in the Governor General in Council in his executive capacity and also in the Indian Legislature. The Legislative powers are derived from three Acts of Parliament These are—(*i*) The *Indian Councils Act*, 1861 (24 and 25 *Vict*, *c* 67). "For all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty" (*ii*) The *Government of India Act*, 1865 (28 and 29 *Vict*, *c* 15). 'For all British subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty whether in the service of the Government or otherwise." (*iii*) The *Indian Councils Act*, 1869 (32 and 33 *Vict*, *c* 98) "For all persons being Native Indian subjects of Her Majesty without and beyond as well as within the Indian territories under the dominion of Her Majesty '

The jurisdiction of the Governor General in Council in his executive capacity is much wider and is now declared in the Indian (Foreign Jurisdiction) Order in Council, 1902, see *Gazette of India*, Part I, p 667 This Foreign Jurisdiction is delegated to the Governor General in Council by His Majesty the King, and the Foreign Jurisdiction of His Majesty is declared in similar terms in the preamble to the *Foreign Jurisdiction Act*, 1890 (53 and 54 *Vict*, *c* xxxvii). S 188 has been amended so as to conform exactly with the above statutes and is intended to prevent a conflict of jurisdiction between the Courts in British India and the Courts of Foreign Sovereigns and Courts established by His Majesty the King by Order in Council under the Foreign Jurisdiction Act, 1890 or by the Governor General in Council either under ss. 4 and 5 of Act XXI of *1879*, or under the Foreign Jurisdiction Order in Council, 1902. The first paragraph of s. 188 corresponds to the Indian Councils Act, 1869, the second with the Government of India Act, 1865, and the third with the Indian Councils Act, 1861

For the application of s. 188 the Act committed in a Native State must be an offence under the I.P.C.—Where false information was given to a Native State Police and perjury was committed in the Court of a Native State, *held* that a complaint could not be entertained by a Magistrate in British India inasmuch as the acts charged against the accused having been committed in relations to Courts and authorities outside British India, did not constitute offences under the I P C, **47 B. 807.**

6. Does this section restrict the scope of sections 177 to 184 when offences committed outside British India ?—Is a certificate necessary when a Court may get jurisdiction by virtue of ss. 179 to 184 ?—It was all along held (*see* Note 9) that in every case where an offence committed outside British India was tried in British India a certificate would be necessary to give jurisdiction, and such an interpretation could be justified only on the footing that s 188 is the only section which deals with offences committed outside British India, as the proviso deals only with 'such' offences as are referred to in the section. If a person could be tried in British India by virtue of ss. 177 to 184 for an offence outside British India, it is difficult to see why a certificate or sanction under s 188 should be obtained In the cases noted in Note 9 it was consistently held that ss. 179 to 184 had no application where the offence was committed outside British India.

In **38 M. 779**, SADASIVIER, J, was of opinion, that s. 188 did not limit the scope of ss. 177 to 184 "The scheme of Chapter XV, sub-chapter (A) in which ss. 177 to 189 appear, seems to me to be intended to enlarge as much as possible the ambit of the sites in which the trial of the offence might be held and to minimise as much as possible the inconvenience which would be caused to the prosecution by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying Court. Ss. 178 to 184 all confer more extended powers and larger jurisdiction to Courts than would be ong to them if the ordinary rule found in s. 177 were carried to its strict logical conclusions. S. 188 comes in almost at the end of the sub-chapter to make their further encroachments on the general rule of 177,' and he further held that the proviso to s. 188 will come into operation only when the British Indian Court cannot get jurisdiction under ss 179 to 184 and has to depend on the first part of s. 188 to get such jurisdiction and he dissented from **21 M. L. J. 411 = (1910) M. W. N. 143; 5 S. L. R. 266 = 13 Cr. L. J. 530** and Madras **Cr. M. P. 97** of **1911**. This decision is, it is submitted wrong *See* also Note 3 at p. 392, and also the introductory note to the section above.

7. Scope of the proviso—Is it restricted only to territories of Native Princes and Chiefs in India ?—In **4 Bur. L. T. 58 = 5 L. B. R. 221 = 12 Cr. L. J. 193**, it was laid down that the word 'territory' in the proviso is used in reference only to territories of any Native Prince or Chief in India and that the word cannot include

s. 188 is subject to the provisions of ss. 177 to 184, and we think it desirable to clear this up. We are not satisfied that this was the intention of s. 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State to require the Political Agent's certificate in every case." *See* Note 6 below.

Notes.—1. The provisions of this section shall not apply to any offence referred to in s. 57 of Act VI of 1898 (*Post-office*).

2. Definitions.—*India*—" *India* shall mean British India together with any territories of any Native Prince or Chief under the Suzerainty of Her (His) Majesty exercised through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India." S. 3 (27) of *General Clauses Act* X of 1897.

British India.—See Note 1 to s. 1 at p. 11.

British subject.—See Notes to s. 4 (i) at p. 19.

" *Political Agent*, shall include (*a*) the principal officer representing the Government in any territory or place beyond the limits of British India, and (*b*) any officer of the Government of India, or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to foreign jurisdiction or extradition." S. 3 (40) of *General Clauses Act* X of 1897.

Servant of the Queen.—The words "Servant of the Queen" denote all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 and 22 *Vict.*, *c.* 106, entitled " An Act for the better Government of India," or by or under the authority of the Government of India or any Government. S. 14 of *the Indian Penal Code* (XLV of 1860). For the Legislative authority of the Government of India, *see* s. 22 of 24 and 25 *Vict.*, *c.* 67.

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Nor does the mere fact of non-residence divest a person of his *nationality*. Subject to certain modifications of the Governor-General in Council, the whole Criminal Law of British India follows only (*a*) all Indian Native subjects of His Majesty in any place beyond British India, and (*b*) all European British subjects in the territories of any Native Prince or Chief in India, **2 A. 218 (F.B.).**

Offence.—The term offence used in this section means an offence under the Indian Penal Code, and where offences under ss. 182, 193 and 211, I.P.C., were committed against the Police or the Courts of a Native Indian State and Certificate of the British Resident was obtained under s. 188 of the Code; *held*, that the complaint could not be entertained by the City Magistrate of Surat in India, inasmuch as the acts charged having been committed in relation to Courts and authorities outside British India did not constitute offences under the Indian Penal Code, **47 B. 907.**

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4. Foreigner—servant of the Queen amenable to the jurisdiction of the British Courts.—A foreigner in the service of the Punjab Government who commits a murder in Jhind (a Native State) may be tried and convicted of murder at any place in British India in which he may be found. *See* III (*c*) to s. 4, I.P.C.

was bad in law as it contravened Rule 3 framed by the Governor General in Council under s 22 of the *Extradition Act* (p 1831 of Vol III of the General Statutory Rules), *viz*, 'if the accused person is a British subject the Political Agent shall before issuing a warrant consider whether he ought not to certify the case as one suitable for trial in British India *Held*, that the direction or admonition in Rule 3 did not control or purport to control s 188, and therefore the certificate was good, **14 Bom. L. R. 377 = 13 Cr. L. J. 537.**

14. Extradition of criminals from Native States.—The following procedure should be followed to obtain delivery from a Native State of a subject of such State charged with an offence committed in British territory Such cases are not governed by the *Extradition Act* XV of 1903, which relates only to the surrender to Native States of their criminals taking refuge in British territory That Act in no way affects the demand of the British Government on Native States whether extradition treaties exist with them or not. Magistrates should act promptly in the manner prescribed below

The offences for which the surrender of the subjects of Native Feudatory States is demanded should be limited to those for which authority may be given to British Officers to surrender the subject of Native States In the case of British subjects a larger catalogue should be allowed, but in every case in which a demand is made, it should be made by British Magistrates not to the State direct, but to the Political Officer, where there is one, and the demand should invariably be accompanied by a copy of any depositions made or where no evidence has yet been taken by a statement of the information on which the arrest of the offender is deemed necessary It should rest with the Political Agent, if necessary, to call on the Magistrate for further evidence, but if the Political Agent possesses the influence and weight he ought to have, he should seldom fail to obtain compliance with any reasonable demand made to the *Durbar* to which he is accredited for the surrender of an absconded criminal.—*Reg and Ord N W P., s* 10, *p* 538

N B —See Appendix II for *the Extradition Act* XV of 1903 and various orders and rules relating to the subject of extradition of fugitives from justice

Power to direct copies of depositions and exhibits to be received in evidence

189. Whenever any such offence as is referred to in section 188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a Judicial Officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate

Note.—As to the issue of commissions of inquiry, and the Courts by which commissions may be issued, *see* s. 503

B.—Conditions requisite for initiation of Proceeding.

Cognisance of offences by Magistrates

190. (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognisance of any offence—

(*a*) upon receiving a complaint of facts which constitute such offence,

(*b*) *upon a report in writing of such facts made by any Police-officer,

(*c*) upon information received from any person other than a Police-officer or upon his own knowledge or suspicion that such offence has been committed

(2) The Local Government, as the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognisance under *sub-section* (1), clause (*a*) or clause (*b*), of offences for which he may try or commit for trial

(3) The Local Government may empower any Magistrate of the first or second class to take cognisance under *sub-section* (1), clause (*c*), of offences for which he may try or commit for trial

Note.—Clause (*b*) of section (1) is amended by substituting the words ' upon a report in writing" for the words a Police report." For the probable effect of this amendment, *see* Note 19, *infra.*

*Substituted by Act XVIII of 1923

the High Seas since they are not part of the territories of any State and that for offences on the High Seas no sanction of the Local Government is necessary. It is submitted that the generality of the words used and the history of the section do not warrant such a narrow interpretation. In **6 S. L. R. 260 = 14 Cr. L. J. 298** it was *held* that the proviso was universal in its application and was not restricted to Native States in India and therefore a Native Indian subject cannot without the sanction of the Local Government be tried in British India for the offence of criminal breach of trust committed in Spain. But *see* **41 B. 667,** which decides that the first proviso to s. 188 is limited to territorial jurisdiction and had no bearing upon the question of jurisdiction to try an offence committed on the High Seas. Consequently it was *held* that the Magistrate had jurisdiction to try a case without the sanction of the Local Government under s. 188 even though the offence was committed on the High Seas.

8. **"May be found."**—This expression must be taken to mean not where a person is discovered, but where he is actually present, **6 B. 622; 13 B. 147; 2 A. 218; 1 P. R. 1911 = 4 P. W. R. 1911 = 12 Cr. L. J. 113; 38 B. 225** and Note 1 at p. 391.

9. **Want of a certificate invalidates trial.**—Want of a certificate by the Political Agent will invalidate any inquiry, trial or commitment, **24 B. 287; 8 Bom. L. R. 513 = 4 Cr. L. J. 54.** The defect cannot be cured by s. 532 or by the subsequent production of the certificate, **13 M. 423.** *See* also **10 B. 190; 24 A. 256; Ratanlal 870; 1884 A. W. N. 88; 5 M. 23; Weir II, 148; 1910 M. W. N. 143 = 8 M. L. T. 54 = 11 Cr. L. J. 306; 6 S. L. R. 260 = 14 Cr. L. J. 298; 1 Bur. S. R. 334; 12 Bom. L. R. 667.** In **13 M. 423; 5 M. 23; 19 A. 109,** a certificate was *held* to be necessary, even when the District Magistrate who tried the case was himself the Political Agent. In **24 A. 256,** it was *held,* that the actual existence of a certificate at the date of commitment, but which, at the time of committal, had not come into the hands of the committing Magistrate would not make the commitment valid. The want of a certificate is an absolute bar to the trial of a case. *See* **17 A. L. J. 450.** But *see* **7 Lah. 468** where **24 A. 256** is *distinguished.* The proviso to this section is prohibitive. **19 A. 109.** Also *see* **1 Bur. S. R. 334; 24 B. 287.** In **8 Bom. L. R. 507 = 4 Cr. L. J. 49,** the commitment was *held* good where the certificate of the Political Agent had been received after the examination of the witnesses for the prosecution, but before the committal order was made; though it would have been more regular, had the Magistrate recalled the witnesses already examined. *See* also next note. But in Punjab it has been *held,* that the trial of a Native Indian subject in the absence of such certificate is an error or omission in the proceedings before trial and not a defect of jurisdiction and it is therefore curable under s. 537 if the objection is not taken at the trial of the case, but a late stage of the appeal, **35 P. R. 1888** *approved* in **30 P. R. 1889** and *followed in* **4 P. R. 1902 (F.B.)**; but in **11 P. R. 1889,** it was *held* that as the defect arising from want of a certificate had been noticed and objection thereon raised before the trial of the accused, the commitment was bad and must be quashed. *See* **41 A. 462** *following* **19 A. 109.** *See* also **5 L. 416.**

10. **Preliminary steps to inquiry not prohibited.**—The section still leaves a Court competent to issue process, such as a summons or warrant or to take any other steps which are merely preliminary to an inquiry.—*Punj. Ch. C. C., Vol. II,* s. 31. All that the proviso requires is that the offence should not be inquired into without a certificate. There is nothing in the language of the proviso making illegal the obtaining of the certificate after the complaint has been filed and the inquiry has begun or been completed as far as the framing of the charge, **12 Bom. L. R. 667 = 11 Cr. L. J. 543.** This decision is open to doubt.

11. **Trial on a charge not mentioned in certificate valid.**—Where the Political Agent has certified that the offence ought to be inquired into in British India, an order of commitment or a charge which is not mentioned in the certificate is good, **8 M. L. T. 203 = 11 Cr. L. J. 331.** The certificate granted under this section in respect of certain offences will cover every charge which the facts declared in the certificate, will suffice to sustain. The Magistrate is not restricted to the sections mentioned in the certificate, **33 A. 514.**

12. **Political Agent cannot recall certificate.**—When a District Magistrate, as Political Agent, had once granted his certificate for the trial of the case against the applicant by a second-class Magistrate in the district, the latter was legally seized of the case, and the Political Agent had no authority, thereafter, to recall his certificate, or issue as District Magistrate a warrant for the arrest of the applicant. **Ratanlal 253; 14 Bom. L. R. 377 = 13 Cr. L. J. 537.**

13. **Certificate may be granted after issue of a warrant under s. 7 of the Extradition Act.**—A Political Agent at the instance of the authorities of a Native State issued a warrant for the arrest of an accused in British India under s. 7 of the *Extradition Act,* 1903, and subsequently at the instance of the accused issued a certificate under this section. It was contended that the issue of the certificate after the issue of the warrant

6. Under which class does a Magistrate act when after taking cognisance on complaint or Police report or on transfer, he takes proceedings against persons, or for offences not mentioned therein?— Generally when a Magistrate has taken cognisance of an offence and proceeds with the trial of the case, it is his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence. But when he takes proceedings against other persons or in respect of offences not mentioned in the report if he is to be deemed as taking cognisance under cl. (*c*), then he must comply with the provisions of s. 191, and failure to do so would invalidate the conviction. It is to be noted that the expression '*cognisance of an offence*' in this section *is not equivalent to the cognisance of an offender, for the definition of complaint includes* a complaint that some person unknown has committed an offence, **4 S. L. R. 258 = 12 Cr. L. J. 399,** nor is it necessary that the person aggrieved should be the complainant, **41 C. 1013.**

(*a*) *Where the Magistrate takes the initiative on a complaint and issues processes against other persons whose names transpired in the prosecution evidence during the trial, he does so under cl (a).*—A complaint under ss 342 and 363, I P C, was made against four persons by the husband of a girl against whom the offences were said to have been committed, whereupon the Magistrate ordered the complainant to prove his case, but before the date fixed he filed a petition withdrawing the complaint The Magistrate however examined witnesses on the date fixed and proved that there was no satisfactory evidence against the four accused but holding that there was sufficient evidence against two other persons, he issued processes against them under ss 342, 352 and 363 I P C, though he was not empowered to take cognisance under cl (*c*), *held*, following **4 C. W. N. 367** and **3 C. W. N. 279** and not following **1 C. W. N. 105** that where the Magistrate who had taken the initiative on a complaint, took cognisance of the case against the others on the evidence adduced on behalf of the prosecution, he did so under cl (*a*) and not under cl (*c*), **41 C. 1013.** Where a person complained to a Magistrate by a petition in which he charged three persons with certain offences and the Magistrate thereafter examined the complainant and certain witnesses on his behalf and issued summonses against the three persons *as well as against a fourth person not named in the complaint for an offence other than those mentioned in the complaint petition. Held,* that the Magistrate took cognisance of the offence as against the fourth person also under cl (*a*) and not under cl (*c*), the Magistrate in effect having received a complaint of facts stated in the deposition of the complainant constituting the offence, and that consequently the Magistrate was not debarred from trying the case, **26 C. 786** *followed,* **32 P. R. 1904** *See* also **4 C. W. N. 367** and **1907 A. W N. 93 = 5 Cr. L. J. 275.** Where, however, after the institution of a complaint and before any proceedings were instituted the names of some more accused persons which were not in the original complaint, were added by the Public Prosecutor under instructions from the District Magistrate *Held,* that the case against the newly added accused was taken cognisance of by the District Magistrate under s. 190 (1), (*c*) and that s 191 applied to the case, **14 Bur. L. R. 327 = 9 Cr. L J. 64.**

(*b*) *Police Report—Where a Magistrate takes the initiative on a Police report and he issues processes against other persons concerned in the offence, he does so under cl (b) and not under cl (c)*—*See* Note 23 A complaint was lodged before a Police-officer against four persons One accused was sent up for trial and was convicted and sentenced At the trial it appeared upon the evidence of one of the witnesses for the prosecution that two others were concerned in the crime. The Magistrate issued summonses against the two *held* that the Magistrate did not act without jurisdiction The case having been duly referred to him and having cognisance of the offence, it was his duty to proceed to deal with the evidence and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence, **4 C. W. N. 367, 41 C. 1013, 32 P. R. 1904, 9 N. L. R 65 = 14 Cr L. J. 290, 26 C. 786** A Magistrate not empowered under sub-sec. (*c*) while acquitting *A* sent up by the Police stated that *B* had in his opinion committed the offence and that the Police should take action against *B*, *B* was accordingly sent up and convicted *held* that the Magistrate had acted within his powers, **4 L. B. R. 137 = 7 Cr L. J. 414.** The Police sent in one *S* for trial on a charge of stealing The Magistrate began his proceedings by examining the Inspector and on his evidence the Magistrate directed the applicant who was present in custody on another charge to be put in the dock along with *S*, tried and convicted them, *held* following **U. B. R. 1897 = 10 156** that the Magistrate took cognisance under cl. (*b*) and not cl. (*c*), **U. B. R. 1910 Cr. P. C. 2 = 11 Cr. L. J. 489.** But where three persons were sent up for trial by the Police with a remark added to the Police report that it had been elicited from the accused that one *A* had instigated the offence and that Court was at liberty to take proceedings against *A* on legal evidence being tendered, and the Magistrate at the conclusion of the trial of the accused sent up, issued a non-bailable warrant against *A* for abetment of the offences of which the accused

Notes.—1. The section was s. 191 of Act X of 1882. Section 190 of that Act contained the definition of the term Political Agent, and as that term is defined in s. 3, sub-sec. (40) of *the General Clauses Act* X of 1897, it is omitted from the Code. The old s. 191 is now split up into two sections, *viz.*, 190 and 191.

2. Object of the section.—The object appears to be, that before proceedings are taken against an accused person, such as would bring him to a Court of Justice, Magistrate must have before him knowledge based either upon a complaint or upon a Police report. If he chooses to take action without such independent report, he is bound to inform an accused that he is entitled to have the case tried by some Court other than the Court of such Magistrate. *Per* KNOX, J., **11 A. L. J. 331 = 14 Cr. L. J. 218.**

3. Meaning of 'taking cognisance'—cognisance of an offence must be in one of three ways specified in clauses (a), (b) or (c).—The expression 'to take cognisance' has not been defined in the Code and it is difficult to ascertain at what precise stage of a case cognisance is said to be taken, **17 C. W. N. 795 = 14 Cr. L. J. 425.** Taking cognisance does not involve any formal action, or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence, **37 C. 412.** Where an officer who was also a Magistrate holds a departmental inquiry and charges are made before him, he cannot be said to have takan cognisance, **19 B. 51.** Where there was only an oral complaint to a Magistrate, which was not recorded under s. 200, and there was no Police report, nor did the Magistrate take cognisance of the offence *suo motu*, it was *held*, that the Magistrate had not duly taken cognisance of the case under this section and that the arrest of the accused in the presence of the Magistrate, and the warrant remanding the accused to custody were illegal, **Weir II, 149** and **241.** *See*, however, **17 C. W. N. 795 = 14 Cr. L. J. 425.** A Magistrate who issues a warrant under the peculiar powers conferred on him by s. 6 of the *Bombay Gambling Act* IV of 1887, cannot be said to take cognisance of the case at all, **8 S. L. R. 66 = 15 Cr. L. J. 657.** *See* also **14 C. 707** and **39 C. 119.**

A Magistrate is not debarred by any provision in the Criminal Procedure Code from taking cognisance of an offence only because another Magistrate has taken cognisance of the same and is in session of the case, and a multiplicity of trials can be avoided by a transfer of the cases to one of them. **50 C. 482.**

4. No power to take cognisance of an offence where sanction, etc., wanting.—In cases provided for by ss. 132, 188, 195—199, 480, 485, etc., the Magistrate is not competent to take cognisance of an offence upon a mere complaint unaccompanied by the requisite sanction or certificate, etc., properly given, **27 C. 820; 16 Cr. L. J. 761 (B.).** A complaint was made before a Magistrate of an offence under s. 399, I.P.C., and he was informed that an application for sanction under the *Explosive Substances Act*, had been made as the same facts constituted an offence under that Act also and it was not known at the time the complaint was made that the bombs in possession of the accused were of the kind mentioned in s. 4 (*b*) of that Act; *held*, that the Magistrate had not taken cognisance of the offence under the *Explosive Substances Act*, **39 C. 119.**

When sanction is not availed of Magistrate may himself proceed under cl. (c).—Where a sanction given by a Magistrate is not proceeded under, it is opened to the District Magistrate to take up the case without complaint under cl. (*c*) of this section, **4 C. 712.** *See* also **27 P. R. 1902; 12 M. 47; 8 W. R. 9; 22 C. 131; 1 S. L. R. 119** and Note 73 to s. 195.

5. Proceedings against a witness—is s. 351 independent of s. 190?—A Magistrate taking cognisance of an offence against a witness in a case which is pending before him, upon the facts disclosed by the evidence of another witness, does so under cl. (*c*) of this section, and not under s. 351, **1 C. W. N. 105.** But in **5 N. L. R. 113 = 10 Cr. L. J. 303,** it was held following **3 C. W. N. 379,** that s. 351 was self-contained and complete in itself and quite independent of s. 190 and necessarily of s. 191. One *J* was arrested by the Police and sent up for trial on Police report to a second-class Magistrate. In the course of the trial the Magistrate saw reason for believing that the offence had been committed not by *J*, but by one *L*, who had given evidence before him. The Magistrate professing to act under s. 351, took cognisance of the case against *J*, arrested him and reported the case for transfer to another Magistrate. The Sessions Judge reported the proceedings on the ground that, under s. 190 (*c*) the Magistrate's proceeding was *ultra vires*. *Held*, that the Magistrate was empowered to take cognisance of the offence against *L*. In **4 S. L. R. 258 = 12 Cr. L. J. 399,** it was also *held* that a Magistrate acting under s. 351, if he has already taken cognisance of the offence on a complaint or a Police report is not proceeding under s. 190 (*c*), and may join as a co-accused any person attending Court who seems to him to be implicated in the case under trial. The expression 'cognisance of any offence' in this section is not equivalent to cognisance of any offender, for the definition of complaint includes a complaint that some person unknown has committed an offence.

a complaint of a cognisable offence, the Police sent up only some of the accused persons who were tried and convicted, and the District Magistrate, later, while inspecting the Police outpost made a note that the remaining accused should be sent and thereupon the remaining accused were sent up before the same Deputy Magistrate. *Held*, that nothing was made over to the Deputy Magistrate at first, except the case of, the accused previously convicted and that the proceedings taken against the remaining accused, without anyone formally taking cognisance of the case, were irregularly instituted and should be set aside, **3 C. L. J. 87 = 3 Cr. L. J. 290.**

(*b*) *On transfer, Magistrate is completely seized of the case as regards all persons in any manner connected with it.*—Where cognisance had been taken of an offence on a Police report and the case made over to a Subordinate Magistrate so long as the case connected with the offence remains with the Subordinate Magistrate, no other Magistrate is competent to deal with it and application for warrants against other persons concerned in that offence should be made to the Magistrate before whom the case is, and to no other Magistrate, **27 C. 979.** *See* also **27 C. 798; 30 C. 449** and **7 C. L. J. 249 = 7 Cr. L. J. 318; 3 C. W. N. 490, 32 C. 783, 4 C. W. N. 367; 55 Cal. 1274.** *See* Note 7 (*b*).

(*c*) *Power of District Magistrate to take cognisance of offence against accused mentioned in Police report made to a Sub-divisional Magistrate*—A complaint was laid against *M* and ten others that they committed rioting and looted complainant's crops from his land Warrants of arrest were issued against all of them upon Police report, but proceedings were commenced against five of them only and they were convicted Thereupon the complainant again moved the same Magistrate to issue warrant against the remaining five persons and to try them but the application was rejected on the ground that conviction of some of the accused previously tried was sufficient to meet the justice of the case, and it was not necessary to proceed against the remaining accused The complainant then moved the District Magistrate who made an *ex parte* order to the effect that the case should be proceeded against the remaining accused upon the original complaint. *Held*, that it was not proper for the District Magistrate to direct proceedings to be taken on the Police report unless he had withdrawn the whole matter from the Court of such Subordinate Magistrate **4 C. W. N. 242.** *See* **5 C. W. N. 488**, where in similar circumstances the District Magistrate was *held* to have acted under sub-sec. (1) cl. (*c*).

I.—MAGISTRATES EMPOWERED TO TAKE COGNISANCE.

8. **Magistrate competent to act.**—In **Madras** all Magistrates of the first class are empowered to act under this section (*Fort St George Gazette*, 1873, p 717) Further, under sub sec (2) the District Magistrate may empower *any* Magistrate to take cognisance under clauses (*a*) and (*b*) of sub-sec. (1) while the Local Government alone can empower a Magistrate (not being a third-class Magistrate) to act under clause (*c*). Tahsildars who are *ex-officio* second-class Magistrates cannot act under this section in those taluks in which there are Stationary Sub-Magistrates. In those taluks, where there are Stationary Sub-Magistrates Tahsildars are invested with all the ordinary and extraordinary powers of Magistrates of the second class except the powers of taking cognisance of offences under this section and of committing for trial under s 206 *Fort St. George Gazette*, 1893, *Pt I*, *p* 579

In **Bengal and Bombay**, Magistrates are empowered under this section only on special applications, but in Bombay they should not be Honorary Magistrates.—*Calcutta Gazette*, 1873 *p* 63 and *Bombay Gazette*, 1873, *p* 16.

In the **Punjab** all Magistrates of the first and second class are invested (see *Punjab Gazette*, 1883, *p* 52) with power to take cognisance of offences upon complaint and upon information, *but not on their own knowledge or suspicion*, **20 P. R. 1901.** Magistrates of the first class have also power, subject to the control, of the District Magistrate, to entertain cases without complaint.—*Punjab Gazette*, 1878, *Pt. I*, *p* 361

In the **United Provinces** all Magistrates of the first class have been empowered to act under this section.—*Allahabad Gazette*, 1873, *p* 903

As to additional powers conferrable on Magistrates, *see* s. 37 and Schedule IV

9 **Effect of action by Magistrate not empowered.**—If a Magistrate acts in good faith under clause (*a*) or (*b*) of sub sec. (1) his proceedings shall not be set aside merely on the ground of his not being so empowered *See* s. 529 (*e*). But as to cl. (*c*), *see* s. 530 (*k*) which makes his proceedings void. *See* **Ratanlal 534.**

10. **Successor of Magistrate taking cognisance competent to issue process.**—In a case begun by one Magistrate and continued by his successor, the latter has power under clauses (*a*) and (*b*) of this section to issue process for the arrest of an accused against whom the process was not issued by the [illegible], in the trial, **Ratanlal 652.**

were convicted; *held*, that the Magistrate who was not empowered to act under (*c*) had no jurisdiction to take cognisance of the offence under s. 190 (*c*) and as the Police report was defective, he could not act under s. 190 (*b*), and the order of the Magistrate was set aside, **5 S. L. R. 1 = 12 Cr. L. J. 92.** He could not proceed under s. 351 either, as *A* was not in attendance at his Court. Where the trial of the second accused is not on the same evidence on which the first accused was tried, but on other evidence adduced on behalf of the defence of the first accused, such proceedings cannot be regarded as proceedings upon complaint or any other foundation upon which the case originally proceeded, and must be regarded as being within the terms of cl. (*c*) of this section, **3 C. W. N. 279.** In **Ratanlal 951**; it was also held that where under s. 170 *A* was sent up by the Police before a first-class Magistrate charged with the offence of robbery and in the inquiry that ensued the Magistrate after reading certain statements which appeared in the diary of the chief constable and examining two witnesses, issued warrants for the arrest of *B*, *C*, *D* and *E*. *Held*, that the Magistrate was bound to commit all the five accused to the Court of Session on a charge of dacoity; as under the circumstances the Magistrate must be held to have taken congnisance of the offence against *B*, *C*, *D* and *E*, in the manner mentioned in cl. (*c*) of this section. Where a Magistrate directs the Police to send up a prosecution witness for trial before him, *held*, that the Magistrate took cognisance of the offence under sub-clause (*b*) and not (*c*), **23 Bom. L. R. 842.**

(*c*) *On transfer.*—As to jurisdiction of a Magistrate to deal with the person who appears to be implicated in a case which has been transferred to him, *see* Note 7 (*b*). Where the accused was charged with the offence of assaulting a public servant (s. 353, I.P.C.), but the evidence disclosed that he had assaulted a witness (s. 352, I.P.C.) and he was convicted therefor, and the conviction attempted to be justified on the ground that the Magistrate acted under cl. (*c*). *Held*, that the conviction was wrong as there was no complaint by the private person, and if the Magistrate acted under clause (*c*), he was bound to take further proceedings under s. 191, **6 C. W. N. 202.**

(*d*) *Where, however, the Magistrate institutes proceedings against other persons and for an offence disclosed in evidence adduced on behalf of the defence, the Magistrate must be deemed to act under cl.* (*c*).—In the trial of one *B* it appeared from the evidence given by the witnesses for the defence that another person *R* was concerned in the same transaction or offence. The Magistrate proceeded against *R* and examined witnesses who had been already examined in the trial of *B* as witnesses for the prosecution against *R*. It was *held* "although, as it has been held, the Magistrate is competent at the trial against one person to proceed against another who may appear upon the evidence taken to be concerned in that offence, and in doing so it cannot be properly regarded that he is acting within the terms of cl. (*c*) so as to enable the accused person to object to that Magistrate proceeding further in the case, still in laying down this view of the law it was contemplated that the two persons should be on trial together in the same case or for the same offence. It was never intended that this rule should be applied to a case when the trial of the second accused was not for the same offence for which the first accused was tried but on other evidence adduced on behalf of the defence of the first accused." It was further held that such proceeding, cannot be regarded as a proceeding upon a complaint or any other foundation upon which the case originally proceeded, but must be regarded as being within cl. (*c*), **3 C. W. N. 279.** In **41 C. 1013** this case was distinguished on the ground that it was there held that the Magistrate had taken cognisance under cl. (1), (*c*) not because *R* was not mentioned in the complaint, but because his name did not transpire in the evidence for the prosecution.

(*e*) *When a Magistrate institutes proceedings for a different offence against the same accused.*—*See* **3 C. W. N. 279.**

7. When Magistrate is properly seized of a case, he alone is competent to proceed against all persons connected.—(*a*) *Absence of power to take cognisance does not render the Magistrate incompetent to proceed against others implicated in the same case.*—A Magistrate not having jurisdiction to take cognisance of an offence tried and convicted some persons, but refused to proceed against others who had absconded, and against whom warrants had been issued. *Held*, that having taken cognisance of the offence, he had jurisdiction to hold judicial proceedings in regard to all persons who, the evidence showed, were the offenders. His action is in no way limited in regard to proceedings against persons concerned in an offence by his powers in regard to taking cognisance of an offence as it may be originally disclosed; **4 C. W. N. 560.** When a case is referred to by a superior Magistrate to a Subordinate Magistrate, the latter has power, though not specially empowered, under cl. (*c*), sub-sec. (1), to take cognisance of the case against persons not before the Court, but whose connection with the offence is disclosed by evidence in the case referred, **4 C. W. N. 367.** But where on

See also 25 A. 209. A complainant, after stating the manner in which he was defamed, concluded with the prayer, "your petitioner therefore charges the said accused person under Chap. XXI, I P C., and prays that they may be dealt with according to law" In his examination before the Magistrate he charged the accused under s 500 and said "the matters stated in my written complaint are to the best of my belief true" *Held*, that though the complaint was defective in not stating all the facts necessary to constitute an offence under s. 502, I P C, as required by s 190, there was in the petition, a complaint before the Magistrate of offences falling under ss 500, 501 and 502, I P C, 8 P. R. 1891. In 10 A. 39 *following* 5 A. 233, it was, however, *held* that a charge of defamation could not, subsequent to the presentation of the complaint be added by the Magistrate on the statements made by the complainant in his evidence, whether of his own accord or with reference to suggestions made by the Magistrate *See* also 14 Bom. L. R. 141 = 13 Cr. L. J. 287 and 14 Bom. L. R. 1166 = 14 Cr. L. J. 1. *Cf* 6 C. W. N. 202; 3 C. W. N. 279.

14. Who may complain.—*See* Note 3 at p 7 As a general rule it is the right and, in some cases, also the duty of any person having knowledge of the commission of an offence to set the law in motion by a complaint, even though he is not personally interested or affected by the offence. To this rule there are exceptions created by Statute, *e g*, ss 195 and 198, offences about the Stamp laws, about Lotteries etc. There is nothing in the Code showing an intention to confine prosecution to the persons directly injured, 13 B. 600 *followed in* 18 A. 465, 10 Cr. L. J. 18 (A.), 14 Cr. L. J. 409 (Oudh), 7 S. L. R. 77 = 15 Cr. L. J. 369. *See* also 20 C. 481; 21 B. 536.

(*a*) *Complaint by Magistrate s servant.*—The fact that the complainant is a servant of the Magistrate does not deprive the latter of his jurisdiction, though in such a case it would generally be expedient for him to refer the complainant to another Magistrate, 9 B. 172.

(*b*) *Complaints by Court or public servants of offences mentioned in s.* 195 —This section applies to offences mentioned in s 195 as well as to others, *i e*, a Magistrate can only take cognisance of an offence mentioned in s 195 in one of the three ways specified in this section and s. 195 further declares that except where the Court or public servant concerned is the complainant its or his sanction is necessary The Code does not contemplate a Court or public servant giving sanction where no application for sanction has been made. If a Court or public servant thinks it necessary to initiate a prosecution, the proper course is to make a complaint. As far as Civil, Criminal and Revenue Courts acting in the course of a judicial proceeding are concerned, the procedure to be followed is prescribed in s. 476 Other Courts or public servants are not specially provided for They are in the category of ordinary complainants Where it is the Court or public servant that wishes to prosecute, sanction is not required. All that is wanted is the complaint of the Court or public servant, 1907 U. B. R. Cr. P. C. 1 = 6 Cr. L. J. 25. Where an Assistant Collector trying a rent suit came to the conclusion that the plaintiff had committed perjury and submitted the records to the Collector and District Magistrate for starting a case under s 193, I P C. *Held*, that the Assistant Collector's order cannot be regarded as one under s. 476 and it fell within the definition of complaint, so that the Collector and District Magistrate had power to act upon it under this section, 26 A. 514 where 23 A. 249 is *followed*.

15. Where there is a complaint, Magistrate must be presumed to act under cl. (*a*).—Where a complaint is made to a Magistrate, the Magistrate takes cognisance under sub-sec. (*a*) and not sub-sec. (*c*) even though he may record on the complaint that he acts under sub-sec. (*c*), 14 Bur. L. R. 250 = 4 L. B. R. 300 = 8 Cr L. J. 505; 9 Bom. L. R. 212; 11 P. R. 1911 = 32 P. W. R. 1911 = 146 P. L. R. 1911 = 12 Cr. L. J. 217; 7 S. L. R. 77 = 15 Cr. L. J. 369.

15-A. Stamp on complaint and process fee.—A petition of complaint in a non-cognisable case presented to Criminal Court must bear a stamp of ½ rupee. *See* the Court Fees Act VII of 1870, Sch. II, Art I (*b*). Where a complainant being liable, under Rule 11 of the H C. Cr Cir, p 7, to pay process-fee, neglects or refuses to pay the same, the Magistrate should dismiss the complaint unless he considers that there should be a prosecution in the interests of the public under this section, Ratanlal 491. *See* s. 204.

16. Magistrate bound to take cognisance upon a proper complaint.—(*i*) *Magistrate has no option.*—The use of the term "may take cognisance of any offence" in this section does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognisance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant, and then can either issue summons to the accused or order an inquiry under s. 202, or dismiss the complaint under s. 203, 13 C. 334; also Ratanlal 358, 29 C. 410. *See* also Notes under ss. 200, 203 (*ii*) *Complainant not going to Police is no ground for not taking cognisance*—A Magistrate cannot refuse, when properly called on to do so, to exercise jurisdiction merely on the

11. Competency of Magistrates not curtailed by the Bombay District Municipal Act, 1878.—S. 82 of the *Bombay District Municipal Act* (VI of 1878) does not deprive a Magistrate of the power conferred by this section of taking cognisance of an offence upon a complaint or upon information, etc., or a Police-officer of the power conferred by s. 23 of Bom. Act VII of 1867, of laying information of such an offence before a Magistrate, **Ratanlal 355.**

II.—CLAUSE (*a*)—COGNISANCE UPON COMPLAINT.

12. Complaint.—For definition, *see* s. 4 (*h*) and Notes thereunder.—(*a*) *No complaint where no offence alleged.*—*See* Note 4 at p. 16. Where a petition supported by an affidavit was presented to a Magistrate under s. 82 of *the Indian Companies Act* (VI of 1882) but did not contain any allegation of any specific offence as defined in s. 4 (*o*), having been committed, nor did the Magistrate profess to act under cl. (*c*) on any information, knowledge or suspicion that any such offence had been committed. *Held*, that the proceedings of the Magistrate were *ultra vires*, as he had not sufficient materials before him to take cognisance of any offence under this section, **Weir I, 729; II, 149.**

(*b*) *Complaint must be with a view to set the criminal law in motion.*—Complaint being an allegation made to a Magistrate with a view to his taking action under the Code, a petition to a Magistrate alleging that an offence has been committed against the petitioner, but that the petitioner did not wish the Magistrate to take any action, is not a complaint and under cl. (*a*) the Magistrate cannot act on such a petition on his own responsibility as there is neither a complaint nor the examination of a complaint taken before himself. But under cl. (*c*) the Magistrate can take cognisance of the offence as upon his own knowledge, **5 C. W. N. 825.**

(*c*) *Proceeding on informal complaint or demi-official note illegal.*—Magistrates in the mofussil are very apt to commence criminal proceedings against accused when they are moved by informal or demi-official notes and when there is no formal complaint before them. A letter commenced: "My dear *D*, and concluded after making certain suggestions, what say you? Yours truly, *J. H. O.*" and was addressed to *R. D.*, Esq. On the strength of this letter the accused was prosecuted and convicted. On revision the Chief Court remarked a Magistrate who is prepared to receive a document such as this as a complaint must have some peculiar notions of the dignity of his Court and of the office of Magistrate. The document might be regarded, notwithstanding its objectionable form, as being "information received from a person, other than a Police-officer," but this is carefully distinguished in s. 190 from a complaint, and a complaint was essential under s. 188 of the Municipal (Punjab) Act, **2 P. R. 1882** and *cf.* **8 P. R. 1882.** A document was addressed to the Commissioner of *R* by the Municipal Committee of *B*, requesting that in accordance with the Committee's proceedings of a certain day a second prosecution might be instituted against *A* under s. 168, Punjab Municipal Act. The Deputy Commissioner thereon endorsed that a case be instituted and be made over to a Tahsildar of *S*. *Held*, that this was not a proper complaint which a Magistrate could take cognisance of, **1 P. R. 1882.** A memorandum under the signature of the Collector sanctioning a prosecution is not a complaint, **5 Bom. H. C. R. Cr. Ca. 48; 15 P. R. 1880.** A petition having been presented to the Collector (who was also the District Magistrate), complaining of the conduct of one of the Collector's subordinates and requesting the Collector to redress the petitioner's grievances; the Collector got the petitioner to repeat the statements in the petition and proceeded to deal with the case as though it was a complaint. *Held*, that the petition was not a complaint and the Magistrate was not justified in arbitrarily turning departmental complaint into a criminal complaint, **30 C. 415.**

(*d*) *Police Report, when a 'complaint.'*—*See* Note 11 at page 20 and also **31 Bom. 488.**

13. Does complaint include deposition of complainant?—*Complaint* includes not only the written complaint, but also the examination of the complainant, at any rate prior to the issue of process, **Ratanlal 584.** In this case the Magistrate was *held* justified on the allegations made in the complainant's examination prior to issue of process, to add a charge under s. 498, I.P.C., to those mentioned in the written complaint. A complainant in her petition, charged the accused with committing the offences mentioned in ss. 882 and 884, I.P.C., but in her examination on oath alleged facts which in the opinion of the Magistrate, constituted an offence under s. 188 read with s. 109, I.P.C., *held*, that the Magistrate took cognisance of the offence under cl. (*a*) and not cl. (*c*), and that he was not debarred from trying the case under s. 191, **25 C. 783; 14 Bom. L. R. 141 = 18 Cr. L. J. 237.** In a complaint of criminal trespass, the complainant in his written petition made no mention of the offence which the alleged trespasser intended to commit, but on his being examined by the Magistrate stated that the offence intended was that of criminal intrigue with his wife, *held*, that there were sufficient materials before the Magistrate to enable him to take cognisance of the offence against the accused, **1899 A. W. N. 216.**

Act VI of 1898 (*Indian Post Offices*), s 72—No Court shall take cognisance of an offence punishable under any of the provisions of ss. 51, 53 54, cl (*a*) and (*b*), 55, 56, 58, 59, 61, 64, 65 and 67 of the Post Office Act (VI of 1898), unless upon complaint made by order of, or under authority from the Director General of Post Offices or a Postmaster General

Act VII of 1884 (*Indian Steam Ship Act*), s 9—No Magistrate shall try any offence under the Indian Steam Ship Act unless he is a Presidency Magistrate or Magistrate whose powers are not less than those of a Magistrate of the first class

Act VIII of 1899 (*Petroleum Act*), s 91—In Presidency towns.—Presidency Magistrates and elsewhere first class Magistrates where specially empowered are competent to try cases under the Petroleum Act, 1899

Act VI of 1882 (*Companies Act*), ss. 48-50—Under the Punjab Government Notification No 3 the Registrar of Joint Stock Companies is empowered to authorise any person to institute complaints of offences under the Companies Act, **14 P. R. 1916—17 Cr. L. J. 243 = 34 In. Ca. 962.**

Act XVI of 1908 (*Registration Act*), ss 82 and 83—By or with the permission of the Inspector General, the Registrar or Sub-Registrar within whose local jurisdiction the offence is committed *see* also **38 A. 354.**

18-A. As regards offences under s 20 of Cattle Trespass Act, a Magistrate can take cognisance upon receiving complaint, **21 Bom. L. R. 1084 = 44 B. 42**

III.—CLAUSE (*b*)—COGNISANCE UPON POLICE REPORT.

19. What amounts to a Police report.—Police reports include all kinds of Police reports and not merely *Charge sheets* or formal reports under Chapter XIV in cognisable cases (1904-06) **U. B. R. Cr. P. C. 25 = 1 Cr. L. J. 1047; 29 C. 417.** A Police report in a non-cognisable case is a Police report within the meaning of cl (1), (*b*) and there is no authority in the Code for examining the Police-officer submitting the report as if he were a complainant, **1914 U. B. R. 19 = 16 Cr. L. J. 97.** There is no reason or authority for limiting the 'Police report' for the report mentioned in s. 170 and the preceding sections of the Code S. 155 shows that Police-officers are empowered to investigate a non-cognisable case, provided that they act under the orders of a Magistrate having power to try such a case and as a natural consequence, they can send in a report under s. 173, **11 A. L. J. 331 = 14 Cr. L. J. 218.** Police report includes also a report under s 62, **3 P. R. 1910 = 35 P. W. R. 1909 = 11 Cr. L. J. 150.** *See* Note 11 under s 4(1), (*h*) at p 9 and s. 173 Where a Police-officer carrying out the orders of the Magistrate under ss 87 and 88 on being obstructed, sent a private person to inform the Magistrate of what had taken place, and the Magistrate thereupon sent the Senior Inspector to take up the case, instructing him at the same time that he should take the statement of the attaching Police officer as the first information of the occurrence and forward the same to him (the Magistrate) for cognisance to be taken under this section, *held*, that the proceedings thus instituted were proper and legal, **29 C. 417.** But in **26 B. 150 (F.B.)** it is held that there is no *section in the Criminal Procedure Code, 1898 which empowers a Police-officer to make, of his own motion, any* report to a Magistrate in a non cognisable case, hence where he files a formal complaint in such a case, he cannot be said to make a report" and his complaint falls within the definition of 'complaint in s 4 So the Magistrate will be taking cognisance in such a case under sub-cl. (*a*) of sub-sec. (1) of s 190 and not under sub-cl. (*b*) of the same sub-section It is doubtful whether by the present amendment by doing away with the word "Police report' and substituting the words "upon a report in writing by any Police-officer the Legislature intended to do away with the technical sense in which the word "Police report' is understood by the Bombay High Court and thereby to overrule the Bombay decision in **26 B. 150.** If this be so then the report of a Police-officer in a non cognisable case will have to be regarded as a report under cl. (*b*) and not a complaint under cl. (*a*) and the Magistrate will not have to follow the procedure under s 200, the word "report' as used in amended clause of section 190 should be interpreted as meaning not only Police report but also a report in a non-cognisable case, **29 Cr. L. J. 65 = 106 I. C. 577,** but *see* **46 C. 807** and **828 C. W. N. 490** which holds that a Magistrate by section 190 (1), (*b*) can take cognisance both in cognisable and non-cognisable offences upon a report such as is mentioned in section 190 (1), (*b*).

The effect of the present amendment was directly in question in **49 Mad. 525 (F.B.)** and it is *held*, that by virtue of ss. 190 (1), (*b*) and 200 (*aa*) Magistrates mentioned in s. 190 are entitled to take cognisance of even non-cognisable offences upon a report made in writing by a Police-officer without examining the officer on oath, **26 Bom. 150 and 46 C. 807** referred to and discussed.

ground that the complainant might reasonably have had recourse to the Police instead of the Magistrate, **12 B. 161; 14 W. R. 36.** (*iii*) *District Magistrate not acting.*—A Subordinate Magistrate is not precluded from taking cognisance of a formal complaint when the Magistrate of the district has refused to act upon communication received through post regarding the same subject matter. Such refusal does not amount to dismissal of complaint, **1899 A. W. N. 201;** *cf.* **Weir II, 119.** (*iv*) *Offence requiring severer punishment.*—A Magistrate duly empowered under *the Opium Act* of 1878, cannot refuse to take up a case on the ground that the gravity of the offence required a severer punishment than the Magistrate could inflict, **Ratanlal 375.** (*v*) *Magistrate cannot decline jurisdiction because number of others jointly concerned in the offence have been convicted.*—A Magistrate cannot decline jurisdiction and refuse to issue process in a case where there has been a legal complaint against persons concerning whom there is *prima facie* evidence. It may sometimes be expedient for the authorities to stay their hands after a certain number of people have been convicted, but if the persons offended against claim to have tried the persons against whom there is evidence, there is no provision of the law which can prevent the case from proceeding, **13 C. W. N. 103.** *See* also Notes under s. 200. (*vi*) *Must not merely accept the conclusion of the Police.*—When a person appears before a Magistrate and states that an offence has been committed, and requests that it might be investigated by calling and examining his witnesses, this is tantamount to a complaint which the Magistrate is bound to inquire into. He could not avoid the responsibility of making the inquiry himself merely by accepting the conclusion of the Police on the subject, **14 C. 707.** *See* also **40 C. 71; 1 C. W. N. 221.** (*vii*) *Illegality of arrest.*—Where a Magistrate refused to take cognisance of a case on the ground that the accused had been improperly arrested and brought before him, it was *held*, that the Magistrate was bound to take cognisance of the offence as the question whether the officer who effected the arrest was acting within or beyond his powers does not effect the question whether the accused were guilty or not of the offence with which they were charged, **26 M. 124.** *See* also Note 15 to s. 54 at p. 84 and Notes to s. 200.

17. Receiving complaint is a judicial act.—A Magistrate taking cognisance of a complaint and issuing a summons thereon acts *not ministerially but judicially*, **5 B. H. C. R. Cr. Ca. 29.**

18. Complaints under other Acts.—Prosecutions under miscellaneous Acts and persons by whom they must be instituted. (*The list is not exhaustive.*)

Act XXI of 1857 (*Cultivation of poppy in Bengal*), s. 26.—By Deputy Agent, Sub-Deputy Agent, Collector or Abkhari Officer.

Act III of 1877 (*Registration*), s. 83.—By or with the permission of the Inspector-General, Branch Inspector-General in Sindh, the Registrar or Sub-Registrar within whose district the offence is committed.

Act XV of 1879 (*Rangoon Port Commissioners*), s. 75.—Commissioners or any person authorised by them in this behalf.

Act II of 1880 (*Burma District Cess and Rural Police*), s. 18.—By order of or under authority from the Deputy Commissioner.

Act VII of 1880 (*Merchant Shipping*), s. 5.—By or with the consent of the Local Government.

Act XV of 1881 (*Factory*), s. 15.—By or with the previous sanction of the local Inspector.

Act VI of 1882 (*Indian Companies*), s. 216.—By the official Liquidator.

Act XII of 1882 (*Salt*), s. 11.—On the complaint of an Assistant Commissioner or other Salt Revenue Officer not inferior to Sub-Inspector.

Act XX of 1882 (*Paper Currency*), s. 26.—By the Head Commissioner Commissioner or Deputy Commissioner of Paper Currency.

Act XXI of 1883 (*Indian Emigration*), s. 96.—The officers mentioned in s. 96.

Act X of 1887 (*Native Passenger Ships*), s 48.—At the instance of the officer appointed to grant certificates or Chief Customs Officer.

Act XV of 1889 (*Official Secrets*), s. 5.—Consent of Local Government or of the Governor-General in Council.

Act XIV of 1895 (*Pilgrim Ships*), s. 53.—Penalties under this Act shall be enforced, only on information laid at the instance of officers appointed to grant certificates or at any port or place where there is no such officer, at the instance of the Chief Customs Officer.

Act XII of 1896 (*Excise*), s. 57.—A Court shall not take cognisance of an offence under any one of the following sections of the Act, *viz.*, 45, 46, 47, 48, 49, 51, 52 and 53 except on the complaint or report of the Collector or an Excise Officer, and unless the prosecution is instituted before the expiry of six months next after the commission of such offence.

Police for inquiry, who sent a report suggesting the prosecution of the accused and thereupon the Magistrate took proceedings under s. 204, *held*, that it must be presumed that the Magistrate acted upon the Police report, **11 A. L. J. 331 = 14 Cr. L. J. 218.**

24. Magistrate taking cognisance of case on Police report directed by himself acts under cl. (b).—Where on a complaint against certain persons to a Magistrate an investigation is made by the Police and a report made to the Magistrate implicating several other persons not mentioned in the complaint, and if the Magistrate thereupon takes cognisance of the offence against the persons not mentioned in the original complaint, he does so under cl (*b*) and not under cl (*c*) of this section, so that s 191 does not apply to such a case, **8 C. W. N. 864**

25. Appellate Court re trying a case itself, acts under this sub-section.—Where a Magistrate acting under s 423 (1) (6) sets aside on appeal the sentence of the original Magistrate and tries the offender himself, the Magistrate acts under sub-sec (*b*) and not (*c*) as he has before him the Police charge-sheet stating all the facts, **30 M. 228.**

25-A. A letter written to the Superintendent of Police to his superior charging a Police-officer with extortion was placed before a Magistrate who issued a warrant on the strength of it. Without examining the Superintendent *held* the letter was not a Police report but a complaint, **20 Cr. L. J. 675.**

IV.—CLAUSE (*c*)—INFORMATION, KNOWLEDGE OR SUSPICION.

26. Application of clause (c) is for vindication of public justice.—Clause (*c*) of this section applies only to cases in which a private individual, who is injured or aggrieved or someone on his part does not come forward to make a formal complaint It is a provision of law for enabling a public official to take care that justice may be vindicated notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute, **5 B. L. R. 274 = 13 W. R. 27.**

27. Sources of information.—(*a*) *Communication through post*—A communication received by a District Magistrate through post is not a complaint, but it is an information coming under cl (*c*) of sub-sec. (1), and may be acted upon by such Magistrate if he choose, but he is not bound to deal with it judicially, **1899 A. W. N. 201; 11 W. R. 1.** It is competent to a Magistrate to receive and take action on petition relating to criminal charges when transmitted to him by post, whether the Magistrate should do so or not is a matter within the Magistrate's discretion in each particular case The language of cl. (*c*) would clearly cover such a case—even an anonymous letter being information received from any person other than a Police officer, **Weir II, 149.** *See* also **4 M. L. T. 481.** The opinion was expressed *obiter* that a Magistrate not specially empowered under s 190 (*c*) cannot issue a warrant for the arrest of a person in the absence of a complaint and on the information contained in a telegram to him from a would-be complainant.

(*b*) *Anonymous petition.*—Where a Magistrate takes cognisance of a case on anonymous communication, he does so under cl (*c*) of the section, and the accused is entitled to ask for its transfer to some other Magistrate, **3 C. W. N. 65.**

(*c*) *Cognisance of a case upon inquiry held by Sub Magistrate*—When a District Magistrate takes cognisance of offences under ss 161 and 116, I P C, on an inquiry held by a Subordinate Magistrate, which was directed to consider an altogether different question, *held*, that the case was instituted in the manner described in cl (*c*), and that the Magistrate was on the objection of the accused, debarred from holding the trial himself, **3 C. W. N. 262.**

(*d*) *Information received from another Magistrate*—A Magistrate taking cognisance of an offence on information received from another Magistrate acts under cl. (*c*) and the accused is entitled to have the case transferred to another Magistrate, **10 P. W. R. 1914 = 15 Cr. L. J. 261.**

(*e*) *Meaning of information received from person other than a Police-officer*—Section 190 (*c*) cannot possibly include a case of information derived from the Police and does not oblige a Magistrate acting on such information to adopt the procedure under s 191, **3 P. R. 1910 = 35 P. W. R. 1909 = 11 Cr. L. J. 150.** The expression "information received from any person other than a Police-officer" in s. 190 (1), (*c*) clearly means only such information as does not constitute a complaint or a Police report. *Per* IRWIN, O C.J, in **14 Bur. L. R. 250 = 4 L. B R. 3.0.** *See* Note 23

28. Illegal order of District Judge directing the prosecution of a person is not information.—The order of a District Judge as a civil officer directing the prosecution of a minor under the *Guardian and Wards*

20. **Police Challan in the Punjab.**—A Police *challan* is a Police report of the fact constituting an offence, with the further incident that the accused and the witnesses accompany the report. Therefore a Magistrate is competent to take cognisance of the offence of working an illicit still, under Act XII of 1896 on the *challan* of a Deputy Inspector of Police who is also an Excise Officer in the Punjab. *See* **22 P. R. 1900** and **8 P. R. 1901**; *see* also **9 P. R. 1903**; **15 P. R. 1887** and **4 P. R. 1893.**

21. **Magistrate not bound to take cognisance on Police report.**—A Magistrate having before him a Police report submitted under s. 157(*b*) may determine as he thinks expedient either to take no further steps or to take cognisance of the offence under cl. (*b*) to this section or to proceed under s. 203, **Weir II, 119** and **150.** A Magistrate is competent to refuse to initiate proceedings on a Police report in a case in which there is no complaint, but only a report to the Police; and if he wrongly makes an order for the discharge of the accused under s. 253, his order is to be taken as one refusing to initiate proceedings under this section and the High Court will not revise such an order, **1 A. L. J. 609.** But where the Police have reported the case as true and the Magistrate believes in its truth, he cannot decline to order a judicial inquiry, merely because in his opinion there is no chance of a conviction and no useful purpose would be served by the inquiry. He is bound to examine the complainant and issue process, **29 C. 410.**

21-A. **Report of a Police-officer in Bombay arresting a woman under s. 10 (1) of the Bombay Prevention of Prostitution Act, 1923.**—An arrest by a Police-officer, who is not specially authorised in this behalf by the Commissioner of Police in Bombay, under s. 10(1) of the Bombay Prevention of Prostitution Act, without a complaint for an offence under s. 3 of the Act, is illegal; and the Presidency Magistrate has no jurisdiction under s. 190 of the Code to try the woman for the offence unless a complaint within the meaning of s. 4(1),(*h*) is before him because in the City of Bombay a valid report by a Police-officer of the kind contemplated by cl. (*c*) of s. 190 can only be made (1) in the case of cognisable offence and (2) when it contains information of a cognisable offence which he has been authorised by the Presidency Magistrate to investigate, **26 Bom. L. R. 1225.** *See* Notes on s. 4 (*h*).

22. **Duty of Magistrate when Police report defective.**—Section 173 indicates what a Police report should set forth and provides that it should among other things set forth the nature of the information. Where the Police report was absolutely silent on the point, the prosecution instituted on such a Police report was set aside, **37 C. 49.** In this case no cause was shown against the rule. The Police report referred to is the report under s. 173, *i.e.*, one made by the Police after they have investigated the case and ascertained the fact and come to the conclusion that there were sufficient materials to justify forwarding the person reported to the Magistrate. When a Magistrate took cognisance on a report which fulfils none of these conditions, his order may be set aside, **5 S. L. R. 1 = 12 Cr. L. J. 92.** If the Police report is defective, the Magistrate may treat the report as a complaint, in which case he would have to call upon the Police-officer to appear and substantiate the report on oath, **16 C. W. N. 1049 = 13 Cr. L. J. 691.**

23. **Magistrate taking cognisance of case on information derived from the Police report acts under cl. (b).**—The Police report need not set out the name of the accused person to give the Magistrate jurisdiction to deal with him under cl. (*a*) or (*b*), **1905 U. B. R. Cr. P. C. 1.** A Magistrate after perusing a Police report which set out that proceedings should not be instituted against two persons, directed the prosecution of a third person, *held*, that the Magistrate had not acted under cl. (*c*) and no transfer was necessary, **1907 A. W. N. 93 = 5 Cr. L. J. 275.** Where during the investigation on a Police report of an offence against *L*, the Magistrate considering that one *S* also should be joined as an accused person, issued process to him and tried and convicted both. *Held*, that the Magistrate took cognisance of *S's* offence under cl. (*b*) and not under cl. (*c*) of sub-sec. (1) of this section and was therefore not bound first to take action under s. 191, **9 N. L. R. 65 = 14 Cr. L. J. 290.** Although a Magistrate not empowered under cl. (*c*) of this section cannot take cognisance of an offence on his own motion, he has the powers on receipt of information from the Police to order the prosecution of any person, who, in his opinion, ought to be put on the trial; *a fortiori* he can after taking evidence, know whom the Police ought to put up before him and order such person to be put up before him, **4 L. B. R. 137 = 7 Cr. L. J. 414.** A Magistrate may take cognisance under this section of an offence brought to his notice by a Police report which affords ground for suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a Police report on the subject based on an investigation, directed to the offence to be tried, **14 C. 707 (F.B.).** When a Magistrate received a paper by post to the effect that certain Chowkidars had committed an offence and the Magistrate then and there sent the paper to the

him to disclose the sources of his information But where the Magistrate is himself directly interested in the case as the Agent to the Court of Wards, he was *held* not competent to act on the information which has reached him as such agent and to issue warrants, as by so doing he was practically making himself a Judge in his own case, **10 C. W. N. 778 = 3 Cr. L. J. 473,** where **5 B. L. R. 274** and **13 W. R. 1** are *followed*

(*b*) *So much of the information should be recorded as to make out a prima facie case*—What allegations or how much of the information should be recorded by the Magistrate in such a case, it is difficult to lay down in general terms, but when it is found that the recorded information is sufficient to justify the Magistrate in considering that a *prima facie* case has been made out, the High Court will not interfere with the Magistrate's action in taking cognisance under s. 190 (*c*), **35 C. 1076.**

(*c*) *No power to administer oath to a person from whom Magistrate seeks information*—A Magistrate wishing to ascertain whether there were sufficient grounds for his taking action under cl (*c*) of this section against some person not before the Court has no authority to administer an oath to a person from whom he seeks information, and the person so examined is not bound by any provision of law to speak the truth, **27 C. 455; 7 N. L. R. 65 = 12 Cr. L. J. 326.**

(*d*) *Magistrate must inform the accused that he is entitled to have the case transferred*—*See* s 191 and Notes thereto

34. 'Knowledge.'—A gratuitous suspicion or belief founded on private information contained in an anonymous petition is not 'knowledge' A Magistrate is bound to disclose the information, private or otherwise, on which he has issued a warrant for the arrest of the accused, **4 B. L. R. Appx. 1 = 13 W. R. 1.**

35. Taking cognisance under cl. (c) does not deprive Magistrate of jurisdiction to try—This section very clearly shows that the mere fact that a Magistrate who is authorised under cl. (*c*) to take cognisance of offences, has directed the institution of proceedings upon his own knowledge or upon his own suspicion does not preclude such Magistrate from jurisdiction to hear and determine the case, which may in fact have been instituted upon his own peculiar knowlege of the fact In such cases, s. 191 enables the accused to apply for a transfer of the case to some other Magistrate, but, unless the accused exercises that privilege the jurisdiction of the Magistrate to institute, hear and determine the particular case is unquestionable A merely pre-conceived opinion as to the guilt of an accused, does not necessarily deprive a Magistrate of jurisdiction to adjudicate on the charge, **1893 A. W. N. at p. 79.**

36. Provisions of cl. (c) do not extend to proceedings under Chapter VIII.—The provisions of cl (*c*) of this section and of s 191 do not as a rule apply to proceedings under Chapter VIII, **27 A. 172** But where a Magistrate had initiated proceedings under s. 110 in some measure, though not mainly on his own knowledge, it was thought undesirable that he should proceed with the inquiry, **29 C. 392.** *See* Note 15 at p 182.

V.—MISCELLANEOUS.

37. Fresh proceedings against person discharged—Where a Subordinate Magistrate has discharged an accused, the District Magistrate is not competent, acting under sub-sec (1), cl (*c*), of this section to direct another Magistrate to re-hear the case, **2 B. 534.** But *see* **6 B. L. R. Appx. 67 = 14 W. R. 65** and **8 W. R. 61.** *See* **also 28 C. 652 (F.B.), 29 C. 726 (F.B.).**

38. The three alternatives are not mutually exclusive.—While considering this section it cannot be treated that the three alternatives upon which a Magistrate may take proceedings, are mutually exclusive It is not correct to say that a Magistrate while taking cognisance must do so under some one of the alternatives to the exclusion of the others, **119 I. C. 413 = A. I. R. 1929; Pat. 473 (F.B.).**

39. As a general rule, no limitation for lodging a complaint.—It is only by express statutory provisions that rules of limitation can be made applicable to criminal proceedings, **20 B. 543.**

All offences under the Penal Code may be prosecuted after any lapse of time, the only exception expressly provided being in respect of offences requiring previous sanction and for which sanction has been granted. But the maxim *Nullumt empus Occurrtregi* is becoming more and more obsolete and sundry special and local laws have been from time to time passed which prescribe periods within which offences against their provisions must be prosecuted.

Act, cannot be regarded as information within the meaning of cl. (*c*) as his order was illegal and there was no authority for the prosecution, **87 P. L. R. 1910 = 11 Cr. L. J. 602.** *See*, however, **11 Cr. L. J. 736 (Burma).**

29. Has Magistrate no power to take cognisance on information derived by himself in another public capacity ?—In **37 C. 221**, it was *held* following **10 C. W. N. 775** that a Magistrate who has received information of an offence in another public capacity, *e.g.*, as manager of an encumbered estate, cannot act on it in his capacity of a Magistrate and take cognisance under s. 190 (1), (*c*). If the Magistrate desires to institute proceedings he should follow the ordinary procedure and have a proper complaint lodged. But CARNDUFF, J., was of opinion that the ruling in **10 C. W. N. 775** went too far. Where a Magistrate is personally interested in a case, he cannot under s. 556 try it or commit it for trial without special permission, but the line is drawn at trial or commitment and does not go the length of impeding mere cognisance of crime. *See* **12 C. W. N. 438.** But **43 M. 709** agrees with the opinion of CARNDUFF, J., and holds that the fact that a Magistrate, who happens to be also the President of the District Board, receives in the latter capacity information as to the commission of an offence by a servant of the Board does not debar him from taking cognisance of the offence under s. 190, cl. (*c*) of the Code. **10 C. W. N. 775,** *dissented from.*

And in **2 p. 459** it was *held* that where the District Registrar was also the District Magistrate and found that a document, in an appeal before him, was a forgery and ordered the prosecution of the appellant under s. 471, I.P.C , *held* that although the District Registrar was not a Court within the meaning of s. 476, he could, as District Magistrate, take cognisance of the offence under s. 190 (1), (*c*).

30. Cognisance of case put up before him by the order of another Magistrate is under cl. (*c*).—A Magistrate passing orders for the issue of summons against the accused in a case placed before him by an order of the Collector to the effect that the case should be put up before the Magistrate for the issue of necessary orders takes cognisance of the case under sub-sec. (*c*), **12 C. W. N. 438 = 7 Cr. L. J. 224.** *See* also **14 Bur. L. R. 327 = 9 Cr. L. J. 64.** The Police reported an information of theft lodged against the petitioners by *S* to be false and recommended the prosecution of *S*; the Deputy Magistrate in charge on receipt of the Police report ordered a judicial inquiry although there was no complaint by *S* and made over the case for disposal to another Magistrate *B* who issued summonses against the petitioners; *held*, that the first Magistrate who really contemplated taking proceedings against the accused was the Magistrate *B* and that it was clear that he did not act either upon a complaint or a Police report and although (*c*) did not strictly apply it was desirable that the case should be tried by another Magistrate, **15 C. W. N. 795 = 14 Cr. L. J. 425.** Where a District Magistrate holding an inquiry under the Land Revenue Code, comes to the conclusion that a case had been made out against the accused under ss. 161 and 162, I.P.C., and after obtaining the sanction of the Government transfers case to a Subordinate Magistrate. *Held*, that it was the District Magistrate who took cognisance of the offence and not the Subordinate Magistrate, **7 Bom. L. R. 637 = 2 Cr. L. J. 582.**

31. What the information must contain.—To justify a Magistrate in taking cognisance of an offence under s. 190 (*c*), upon information received from any person other than a Police-officer, the information need not contain all the allegations necessary to be proved to establish the offence ; it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter, **35 C. 1076.**

32. If a Magistrate acts on insufficient information, High Court may stay proceedings in the absence of evidence.—Where prosecution against one *P* under *the Opium Act*, having failed, the District Magistrate without any further information on that subject directed proceedings to be taken against *S* and his servants, the consignors of the (opium) parcel, and that they should be held by a Sub-Magistrate, and that " when the case was disposed of, the record will be put up before the District Magistrate for executive action." *Held*, that the District Magistrate having himself instituted the proceedings took cognisance of the offence under cl. (*c*), and by the fact of his having directed that the trial should be held by a Sub-Magistrate, his action cannot be regarded other than that of a Magistrate acting judicially, and that the proceedings having been taken without any evidence at all should be stayed, **4 C. W. N. 825.** Where a Revenue Officer who is also a Magistrate, himself institutes proceedings under cl. (*c*), and directs one of his Subordinate Magistrates to proceed with the trial, the action of the Revenue Officer certainly cannot be regarded, as other than that of a Magistrate acting judicially, **4 C. W. N. 825.** *See* also **9 Bom. L. R. 212 = 5 Cr. L. J. 202.**

33. Procedure on getting information.—(*a*) *Magistrate bound to record the information on which he acts.*—Where a Magistrate takes cognisance of an offence on information from any person, other than a Police-officer, he should at least record the information on which he has acted, though it may not be obligatory upon

V—ACTS OF THE LIEUTENANT-GOVERNOR OF BENGAL IN COUNCIL.

Six months	1864	VII	37	Salt	*See* Amendments.
Do	1873	VII	72	Excise	Do
Do	1879	III	12	Steam Boilers	
Three months	1866	IV	99	Calcutta Police	*See* Amendments.
Do.	1884	III	353	District Municipalities	*See* Act IV, 1894, s. 95
Do	1888	II	419	Calcutta Municipality	
Do	1890	III	142	Calcutta Port	*See* Amendments
Do	1891	II	56	Calcutta Hackney Carriages	
Two months	1880	VIII	12	Contagious Disease, Animals	

Transfer or commitment on application of accused

191. When Magistrate takes cognisance of an offence under sub-section (1) clause (*c*) of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused, if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate

Notes.—1. What amounts to taking cognisance under cl. (c) of s. 190, *see* Notes 3 and 27—33 to s. 190

2. Accused must be informed of his right to claim transfer—His silence is no waiver—These words '*shall* *is entitled*' are mandatory, and a Magistrate cannot refuse to comply with them, **13 A. 345.** Silence on the part of the accused to take any objection as to the trial by a Magistrate taking cognisance of the case against him under cl. (*c*) in the face of the obligation imposed on the Magistrate by law to inform the accused of his right to object to the trial by such Magistrate cannot prejudice him and there cannot be any waiver of his right in such a case, **3 C. W. N. 279.** *See* also **6 C. W. N. 202.** The accused, if he elects to be tried by another Court, must signify his election before any evidence is taken **29 P. R. 1894** at p 82

3. Omission to inform the accused of his rights under the section, not mere irregularity.—This section is a modification of the same section of Act X of 1882 as amended by Act III of 1884 and it is now made clear that the accused shall be informed of his right to be tried by another Court and that an opportunity must be given him of making his choice before any evidence is taken. Such an omission cannot be held to fall within the provisions of s. 537 especially when the Magistrate had interested himself very considerably in preparing the case against the accused, **13 P. R. 1893.** When cognisance has been taken under cl. (*c*), the accused is entitled to have the case transferred and the Magistrate has no option him for trial. A Magistrate who not r the case, acts without jurisdiction and Magistrate is not competent to try the case until he has informed the accused Omission to inform will invalidate the conviction **6 P. L. R. 333 (1905); 28 A. 212; 5 N. L. R. 113; 4 Bur. L. T. 259 = 13 Cr. L. J. 82.** The fact that the Magistrate did not inform the accused that he was entitled to have the case transferred, is a ground for having the proceedings set aside, but not for making an order for transfer, **Weir II, 151.** Where a Cantonment Magistrate warned the accused that he must not tie his buffaloes in a certain spot, but the accused persisted and the Magistrate on a local inspection finding the place filthy, charged and convicted the owner on his own personal knowledge *Held*, the mere fact that the Magistrate had made a local inspection did not debar him from trying the charge provided he acted on independent evidence before convicting the accused But if the Magistrate intends to proceed on his own knowledge without taking any independent evidence, he must conform to the provisions of this section and hence the conviction and sentence were set aside as illegal, **8 P. R. 1905 = 2 Cr. L. J. 45** *See* also **3 A. L. J. 624 = 1906 A. W. N. 303 = 4 Cr. L. J. 374** In **31 P. L. R. 1905 = 2 Cr. L. J. 187,** the Punjab Chief Court in quashing a similar conviction observed "that the brevity permitted in a summary trial does not mean that there shall be no trial at all or that an accused can be heavily fined at a Magistrate's discretion on a personal knowledge, notwithstanding that the law gives the accused the right of demanding that his case should be tried by another Court *See* also **34 P. L. R. 1905 = 2 Cr. L. J. 365, 10 C. W. N. 775; 21 A. L. J. 59, 41 A. 164, 22 Cr. L. J. 319.**

4. 'Trial' of a case does not include preliminary inquiry and Magistrate may commit to Sessions on objection.—When a Magistrate is empowered to make a commitment of a case within his cognisance, he

[illegible]

Six months	[illegible]	VI	[illegible]	[illegible]	See Amendments
Do	[illegible]	III	[illegible]	[illegible]	[illegible]
Do	[illegible]	II	[illegible]	[illegible]	See Amendments
Do	[illegible]	IV	[illegible]	[illegible]	
Do	[illegible]	II	[illegible]	[illegible]	
Four months	[illegible]	V	[illegible]	[illegible]	See Amendments
Three months	[illegible]	VII	42	[illegible]	
Do	1873	VI	[illegible]	[illegible]	See Amendments
Do	1869	III	[illegible]	[illegible]	See Under [illegible] above.
Eight days	1867	VIII	14	Village Police	See Amendments.

cases or cases relating to offences, **28 C. 709 at pp. 716, 717.** But in **35 C. 243,** it was *held* that under this section a District Magistrate is competent to transfer any case cognisable by a Criminal Court and his power of transfer is not restricted to criminal cases only.

(*a*) *Cases under s* 107 —A District Magistrate may, under the provisions of this section transfer to the file of a first-class Magistrate subordinate to himself, proceedings which he had himself initiated under s 107 though such Magistrate of the first class by want of local jurisdiction would be incompetent to initiate such proceedings, **24 A. 151**; *see* also **31 C. 350**, **29 C. 389**; **28 C. 709**; **22 C. 898** and Notes under s 107

(*b*) *Cases under s 110*—A District Magistrate is competent under this section to transfer a case under s 110, **35 C 243.** But not where the Magistrate to whom the case has been transferred is not empowered to decide cases under s 110, **Ratanlal 838**, **1 S. L. R. 2 = 9 Cr. L. J. 216**, and Notes under Heading XVI at p 212

(*c*) *Cases under s* 145 —The words of sub-sec (1) of this section are wide enough to include cases under Chapter XII The general power conferred by this section and s. 528 upon District and Sub-divisional Magistrates is not taken away or cut down by anything in s. 145 **22 C. 898**; **26 M. 188**, **10 C. W. N. 1093** and **2 C. L. J. 614 = 3 Cr. L. J. 83.** But a Magistrate of the first class empowered to transfer cases under sub-sec 2 is so empowered only to transfer an inquiry or trial relating to an accusation or charge of an offence. He is not competent to transfer cases under s 145 **4 C. W. N. 821,** *followed in* **36 C. 370,** *see*, however, s 529 (*f*) and **5 C. W. N. 686,** where a District Magistrate transferred a case under s. 145 to a senior Deputy Magistrate to be disposed of by him or by any other Magistrate whom the latter may direct, and subsequently the Deputy Magistrate transferred the case to another Magistrate who finally disposed of it. *Held*, that the transfer under this section was irregular, not being to a specified Magistrate, but by reason of s 529 (*f*), the irregularity did not vitiate the proceedings *See* Note 163 at p 306, **20 A. L. J. 215.**

(*d*) *Cases under ss* 487 *and* 556—*e g*, cases falling under s 487 or s. 556, or cases initiated by the Magistrate himself or in which he is a material witness *see* **4 B L. R. A. Cr. 15**; **8 B. L. R. 422 (F.B)**, **2 C. 23 = 25 W. R. 57**, **29 C. 392**; **19 M. 263**; **24 C. 499,** and **25 C. 727.**

3. When cases may be transferred.—The section empowers the transfer of cases of which cognisance has been taken for inquiry or trial

(*a*) *Complaint may be transferred even before issue of process*—The term 'case has not been defined in the Code, but reading together s. 192 (1) cl (*a*) of s 190 (1) and proviso (*g*) to s 200 it is clear that it includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognisance of the offence complained of Therefore a District Magistrate may, under s 528 on the application of an accused person, withdraw a complaint from one Subordinate Magistrate and refer it to another Magistrate even before the first Magistrate has decided to issue any process against the accused, **7 N. L. R. 97 = 12 Cr. L. J. 437.** *See*, however, **27 C. 798.**

(*b*) *Part heard case cannot be transferred*—Where a Magistrate who has taken cognisance of a case and partly tried it, finds that only an offence which a Subordinate Magistrate is competent to try has been committed, he has no power to transfer the case to the Subordinate Magistrate, but must dispose of it himself, **Weir II, 152.** *See* also **12 A. 66.**

(*c*) *Transferred cases cannot be transferred.*—This section has reference only to cases of which the transferring Magistrate has taken cognisance, *i e*, acted under s. 190 It has no reference to cases which have been transferred, **12 A. L. J. 277 = 15 Cr. L. J. 357**; **36 A. 166.** This section confers no authority on one Subordinate Magistrate to refer to another Subordinate Magistrate a case referred to him for disposal, **7 M. H. C. R. Appx. XXXIII = Weir II, 151.** But having regard to s. 529 (*f*), proceedings would not be void, if the Magistrate acts in good faith, **Weir II, 152**; **4 C. W. N. 821.**

(*d*) S 192 (1) of the Code empowers a Magistrate to transfer a case or inquiry or trial but it does not empower him to transfer a case simply for the purpose of considering a report of an investigation under s 202 of the Code which he has himself ordered The provisions of s. 193 or 202 do not entitle a Magistrate, after he has proceeded under the latter section to make an order under the provisions of s. 192, transferring the case for being dealt with under s. *203 or 204 without a fresh investigation as contemplated by s. 202* **29 C. W. N. 508.**

4. Power to transfer cases which the Subordinate Magistrate is not competent to try.—Though a complaint under s. 20 of *the Cattle Trespass Act* must be entertained either by a District Magistrate or a Magistrate specially authorised, such Magistrate has now power under sub-sec (1) of this section to transfer the case after taking cognisance of it, to any Subordinate Magistrate, **34 C. 928** *overruling* **23 C. 300**; **23 C. 442,** where it

cannot do so without holding a preliminary inquiry, a *fortiori*, when the case is triable by the Court of Session exclusively, **21 A. 109.** The right view appears to be that the accused are only entitled to object to a trial by the Magistrate taking cognisance under cl. (*c*) of s. 190, but the Magistrate is not bound to transfer the case; he may elect to commit it to the Court of Session, **22 M. 148; 26 C. 786.**

5. **Accused not entitled to choose his own Court.**—All that the accused is entitled to under this section is to have the case tried by another Court. The section gives the accused no right to select or determine for himself by what other Court the case is to be tried, **7 Bom. L. R. 637 = 2 Cr. L. J. 582.** *See* **22 M. 148.** Note above.

6. **Applicability of the section to proceedings under Chapters VII and XIII.**—If a Magistrate proceeding under s. 110 has received information other than under cl. (*a*) and (*b*) of s. 190, he is not bound to inform the accused that he is entitled to have the matter heard by another Court, **27 A. 172.** But the principle that no man ought to be a Judge in his own case would apply, if a Magistrate instituting proceedings acts or relies on his knowledge of the character of the party proceeded against, **29 C. 392.** *See* Note 15 at p. 182, and also **24 A. 151** and **1901 A. W. N. 208.**

7. **Appellate Magistrate taking cognisance of case and re-trying need not transfer.**—*See* **30 M. 228.** Note 25 at p. 478.

8. **Magistrate taking cognisance cannot hear appeal.**—A Subordinate Magistrate who took cognisance of a case under sub-sec. (1), (*c*) of s. 190 could not after becoming District Magistrate hear an appeal from a conviction in the case which was tried by another Subordinate Magistrate without following the procedure laid down by this section, an appeal being part of the trial for an offence, **12 C. W. N. 438 = 7 Cr. L. J. 224.** But a Magistrate who did not take cognisance or directed a local investigation but merely directed the issue of summons holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint is not incompetent to hear the appeal on conviction, **36 C. 869.** *See* also **1899 A. W. N. 74**; and compare **16 C. 121; 12 M. 451; 23 C. 41; 1893 A. W. N. 225; 23 C. 975.**

Transfer of cases by Magistrates.

192. (1) Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may transfer any case, of which he has taken cognisance, for inquiry or trial, to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognisance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

Notes.—1. Scope of section.—(*i*) *Note the difference between sub-secs.* (1) *and* (2).—(*a*) Under sub-sec. (1) the transfer may be made to any Magistrate subordinate to the transferring Magistrate while under sub-sec. (2) the transfer must be made to a specified Magistrate competent to try the accused or commit him for trial. (*b*) Under sub-sec. (2) any case may be transferred while sub-sec. (2) seems to contemplate such cases only where there is an accused and he is to be tried or committed excluding cases under ss. 144, 145, etc. *See* **4 C. W. N. 821** and **36 C. 370.**

(*ii*) *District and Sub-divisional Magistrates have co-ordinate jurisdiction as regards cases pending before Magistrates subordinate to latter.*—Under this section the District Magistrate and the Sub-divisional Magistrate have co-ordinate jurisdiction as regards cases pending before Magistrates subordinate to the latter; and whatever the Magistrate of the district might do with regard to offences committed in the district, the Divisional Magistrate is competent to do with regard to offences within his local jurisdiction, **4 A. 366.** *See* also **12 A. 66.**

(*iii*) *Orders not within the scope of the section.*—It is not competent to a District Magistrate to direct a Subordinate Magistrate to dispose of a case, pending in the Court of the latter in a particular manner, *e.g.*, by commitment, **Weir II, 152** and **Weir I, 289.**

2. **What 'cases' may be transferred.**—Though the words '*any case*' are very wide, it is doubtful having regard to the position of this section in the Code, whether they do not apply exclusively to criminal

Court. If no such intention is expressed, it will be understood that in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court is expected to try the case itself, but, when the transfer is from the Court of one District Magistrate to that of another, it will be understood that, unless the contrary is directly expressed the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply this section and to transfer the case to the Court of any Magistrate subordinate to him, who may be competent to try it, **19 A. 249.**

Cognisance of offences by Courts of Session.

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session* shall take cognisance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or, as the Sessions Judge of the division, by general or special order, may make over to them for trial.†

Notes.—1. Generally Sessions Court has no authority to take cognisance of any offence or hold a trial without commitment.—Except in cases in which a Court of Session is expressly empowered to take cognisance of an offence as a Court of original jurisdiction it has no power to do so, unless a commitment has been made by a Magistrate duly empowered in that behalf, **1907 A. W. N. 178 = 6 Cr. L. J. 7.** *See* Notes to ss. 226 and 227 as to the powers of a Sessions Court to add new charges.

The trial of persons who are not committed to the Sessions is invalid, **15 M. 352; 22 C. 50.** The absence of any commitment is a defect in substance not in form, and therefore not covered by s. 537, **42 P. R. 1884** at **p. 92.** *See* also **25 M. 61 (P.C.)** and Note 9.

Exceptions to this general provision.—In the following cases a Court of Session can take cognisance of cases without commitment by Magistrates. **S. 436.**—Power to order commitment on examining records. **S. 477.**—Power of a Court of Session to take cognisance of offences committed before itself and triable by the Court of Session exclusively. **S. 478.**—Power of Civil or Revenue Courts to complete investigation and commit to High Court or Court of Session. **S. 480.**—Procedure in certain cases of contempt. **S. 485.**—Proceedings against a person refusing to answer or produce documents. **S. 351.**—Would seem to empower a Court of Session to proceed against any person attending the Court and appearing to be an offender. *See* ss. 195 and 476 for power to sanction and for sending for inquiry cases mentioned in s. 195.

2. *Object of the restriction is to secure to the accused a preliminary inquiry.*—The object of restricting a Sessions Court from taking cognisance of any offence unless the accused person has been committed by a Magistrate, is to secure to the prisoner a preliminary inquiry which affords him an opportunity of becoming acquainted with the circumstances of the offence imputed to him and enables him to make his defence, **3 M. 351** and *see* Notes to s. 208. In another case the same High Court remarked, "the law contemplates that in serious cases of which a Court of Session may take cognisance, the accused should have some information of the case he has to answer," **4 M. 227.**

3. ***Effect of informal commitment.***—A Court of Session cannot treat as a nullity a commitment by a Magistrate of the first class on the ground that he investigated the case, and committed the prisoner without a formal complaint being made to him, but should proceed with the case in the usual way. **4 B. H. C. R. Cr. Ca. 35.** The *onus* is on the party impugning the correctness of the proceedings to show that there was no jurisdiction, **13 W. R. 17.** See *Evidence Act*, s. 114, cl. (*e*). *See* s. 532 and Notes thereunder as to when irregular commitments may be validated. *See* **3 R. 55.**

4. Amended charge to be in the name of committing Magistrate.—The charge though amended or altered by the Sessions Court, under s. 226 must still be drawn in the name of the committing Magistrate.—*M H C Pro*, *30th August*, 1862.

5. Assistant Judge in charge of the duties of the Sessions Judge may try only the cases made over to him.—An Assistant Sessions Judge, who had been directed by Government *to take over charge* of the duties of

* As to procedure of Courts of Session in (1) Upper Burma *see* the *Upper Burma Criminal Justice Regulation* V of 1892, Sch. s. 11 (3) (*b*), and in (2) the British Baluchistan *see British Baluchistan Criminal Justice Regulation* VIII of 1896. This procedure, however, does not affect the Code in its application to European British subjects in both these provinces, *see* the Regulations referred to, Sch., ss. 16 and 21, respectively.

† The words "in the case of Assistant Sessions Judges" have been omitted by Act XVIII of 1923.

was held that the section does not authorise a District Magistrate to tranfer for trial to a Subordinate Magistrate cases which are not in the power of that Magistrate to try.

5. **Notice of transfer should be given to parties.**—Before transferring a case under s. 528 from one Subordinate Magistrate to another, a notice of such intended transfer should be served upon the parties to come forward and show cause why such transfer should not be made, **2 Bom. L. R. 342; 8 C. 393 = 10 C. L. R. 239.** *See* also **3 A. 749; Ratanlal 460; 22 B. 549.** But where a case is transferred under this section as soon as complaint is received, no notice would seem to be necessary. So also notice is not necessary where a District Magistrate *suo motu* withdraws the case to his own file or transfers or re-transfers it from one Court to another under his control, **3 P. R. 1910 = 35 P. W. R. 1909 = 11 Cr. L. J. 150,** where **24 M. 317** *is referred to.*

(*a*) *Transfer how made in the Punjab.*—"Complaints referred to Subordinate Magistrates under this section must always be sent by post or by a messenger of the Court, after being endorsed with the date of presentation and an order of reference, specifying the number of days within which the complainant must appear to prosecute; and, at the same time, a memorandum must be given to the person presenting the complaint, informing him what Magistrate the complaint has been referred to, and of the time within which he must appear before such Magistrate to prosecute."—*Punjab Gazette*, 1879, *Pt. III*, *p.* 527.

6. **Effect of transfer.**—(*a*) *When no reservatian is made, the whole case is transferred.*—"Where a complaint or Police report deals with several persons, it is not necessary that the entire case, *i.e.*, the case regarding the offences committed according to the complaint or report should be transferred. Whether such a transfer has been made is a question of fact depending on the intention of the officer marking the order, which intention must be gathered from the order itself. Where no reservation is made, it may be concluded that the entire case has been transferred."—*Per* HENDERSON, J., **32 C. 783** at **p. 789.**

(*b*) *After transfer no other Magistrate can deal with that case.*—Where a case has been transferred to a Deputy Magistrate, it is that officer alone who has jurisdiction to deal with any application or summons until the case is withdrawn from his cognisance. The case is entirly out of the hands of the transferring Magistrate, so long as it is not withdrawn from the file of the Deputy Magistrate. Until such withdrawal, the District Magistrate has no power to make any order, save an order, for further inquiry under s. 437, **32 C. 783.** *See* also **3 B. L. R. Appx. 151 = 12 W. R. 53; 27 C. 979; 27 C. 798; 5 C. W. N. 488; 4 C. W. N. 242** and **30 C. 449.** It is the case that is transferred, *i.e.*, *offence*, not the *offenders*, of which cognisance has been taken under s. 190. and he can proceed even against parties not mentioned in original the complaint, **4 C. W. N. 560; 27 C. 979; 41 C. 1013.** He may while discharging the accused sent to him institute proceedings against persons concerned in the case whom the transferring Magistrate had not summoned even on complaint, **7 C. L. J. 249 = 7 Cr. L. J. 318.**

7. **After transfer prosecution witnesses must be examined afresh.**—When a case is transferred after the evidence for the prosecution has been recorded, the procedure to be followed is that the prosecution witnesses must be examined afresh. The Magistrate cannot act upon the evidence recorded already by another Magistrate, **14 A. 346; Weir II, 152.** But *see* **35 C. 457** and Notes to s. 350.

8. **Sworn statement need not be taken afresh if already taken before transfer.**—The power conferred by this section to transfer cases to Subordinate Magistrates after taking cognisance thereof, may be exercised before the examination of the complainant [s. 200 (*a*)]; but where the transferring Magistrate has already examined the complainant, the Magistrate to whom the case is transferred, is not bound to re-examine the complaint. *See* also 200 (*c*) and **4 N. W. P. H. C. R. 88;** *contra* **18 W. R. 18.**

9. **Chief Presidency Magistrate.**—The Subordination of the Presidency Magistrates (stipendiary as well as honorary) to the Chief Presidency Magistrate, is of the same kind and extent, as the subordination of Magistrates and Benches to the District Magistrate under s. 17 (1). The Chief Presidency Magistrate can therefore act under s. 528, **1 Bom. L. R. 347.**

10. **Powers of first-class Magistrates in Madras and Punjab.**—In Madras and in the Punjab, all Magistrates of the first class have been invested with powers to transfer cases to their Subordinate Magistrates under sub-sec. (2)—*Fort St. George Gazette*, 1873, *p.* 717; *Punjab Gazette*, 1879, *Pt. I*, *p.* 680.

11. **Transfer by Magistrate not authorised.**—If a Magistrate not empowered under this section transfers a case, the irregularities cured by s. 529 (*f*), **36 C. 869.**

12. **Rules as to proper construction of transfer orders of the High Court directed to the District Magistrate.**—When a criminal case is transferred by an order of the High Court from a Court subordinate to a District Magistrate to the Court of a District Magistrate, if it is intended that the District Magistrate shall have power to transfer the case to a subordinate Court, that intention will be expressed in the order of the High

3. Sub-sec. (2), clauses (*a*), (*b*), (*c*), correspond with s 144 of Act X of 1875, which is now repealed S 146 is now to some extent covered by s 338

195. *(1) No Court shall take cognisance—

Prosecution for contempt of lawful authority of public servants

(*a*) of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate,

Prosecution for certain offences against public justice

(*b*) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate,

Prosecution for certain offences relating to documents given in evidence.

(*c*) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate

†(2) in clauses (*b*) and (*c*) of sub section (1) the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.

‡"(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate

Provided that—

(*a*) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate, and

(*b*) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed"

(4) The provisions of sub-section (1), with reference to the offences named therein apply also to § "criminal conspiracies to commit such offences and to" the abetment of such offences, and attempts to commit them

‖"(5) Where a complaint has been made under sub-section (1), clause (*a*), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of

* Sub-sec (1) has been substituted in the place of the old sub-sec. (1) by Act XVIII of 1923

† The word "includes" has been substituted in the place of "means" by Act XVIII of 1923

‡ Cl (3) was inserted by Act XVIII of 1923.

§ The words "criminal conspiracies . . . and to" were inserted by s. 4 of the Criminal Law Amendment Act 1923 (XVIII of 1923).

‖ Inserted by Act XVIII of 1923.

the District and Sessions Judge, during a temporary vacancy in the office, is not an officer appointed to act as Sessions Judge, and has no jurisdiction to try any case even as an Assistant Sessions Judge, unless it was made over to him by general or special order under the last paragraph of this section, **Ratanlal 500.** *See* also s. 17 (3) and (4) and s. 7.

6. Additional Sessions Judge—His powers.—(*a*) *Applications for revision can be referred to him.*—**9 B. 352** is now superseded by sub-sec. (2), s. 438. *See* also s. 17 (4) and (9).

(*b*) *To direct commitment.*—**9 B. 164** is now superseded by s. 438 (2).

(*c*) *Reference under* s. 123.—Such a reference is not a case committed for trial, and the Court of Session disposing of such reference does not "try a case" within the meaning of this section. Therefore an Additional Sessions Judge empowered to try all cases which may be committed for trial by the Magistrates of the District has no jurisdiction to pass orders under s. 123, **Ratanlal 830.** *See* Note 10 under section 123.

The word "cases" in sub-sec. (2) does not include appeals, **37 A. 286,** and *see* Note to s. 409.

Where under s. 123 a Magistrate referred the case to the Sessions Judge and the latter transferred the reference to the first Additional Sessions Judge for disposal, *held,* that the Sessions Judge had jurisdiction to transfer such a case to the Additional Sessions Judge for disposal, **27 C. W. N. 996** (*Bengal Government Notification, dated* 19*th June*, 1916, *referred to*).

7. Power of Government to make over a particular case to an Additional Sessions Judge.—In *Kunjan Menon's* case (**Weir II, 215**) the Government directed that the trial of a person governed by s. 197 and of another not governed by that section, shall be by a particular Court. On objection being taken, that under s. 197 the Local Government had no power to specify the Court that should try the second accused, *held* that this section justified the order of the Government, as the trial was held by an Additional Sessions Judge and the Local Government could direct the case of a particular accused person to be tried by such Judge.

8. Jurisdiction of Sessions Court in cases of offences committed before it.—*See* Notes under s. 477.

9. Power of Sessions Judge to try approver forfeiting conditional pardon.—A Sessions Judge who has *held* that a witness giving evidence under conditional pardon has not complied with the conditions, is not competent at once to try him. He can hold a trial only after commitment by a competent Court. He should, therefore, in such a case order it to be laid before a competent Magistrate with his own opinion, or that the Magistrate may act in accordance with law, **19 W. R. 43; 15 M. 382; 22 C. 50; 23 B. 493.** *See* also **1907 A. W. N. 178** in Note 1 and *see* Note under s. 339.

Cognisance of offences by High Court Act X of 1875, s. 145.

194. (1) The High Court may take cognisance of any offence upon a commitment made to it in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act 1861, or any other provisions of this Code.

Information by Advocate-General.

(2) (*a*) Notwithstanding anything in this Code contained, the Advocate-General may, with the previous sanction of the Governor-General in Council or the Local Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(*b*) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(*c*) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India.

(*d*) The High Court may make rules for carrying into effect the provision of this section.

Notes.—1. The *Indian High Courts Act* of 1861 is the 24 and 25 *Vict., c.* 104.

2. *See* ss. 22 to 29, both inclusive, of the Letters Patent of the High Courts to Bengal, Madras and Bombay, and ss. 15 to 22, both inclusive, of N.-W.P. High Court as to ordinary and extraordinary criminal jurisdiction of the several High Courts, Appx. I.

ere were contrary decisions which *held* that it was open to a Court to grant a sanction without an applicant *see*, *for instance*, **18 Bom. L. R. 947**). But now under the present amendment sanction to prosecute is absolutely one away with and therefore there is no possibility of an application under s. 195 Now s 195 only lays down he conditions necessary for the cognisance of certain offences by a Court. And the complaint which is a condition precedent to cognisance of an offence under s 195 can only be lodged by a Court, under the circumstances mentioned in s 476 which requires that a Court may proceed by lodging a complaint for offences mentioned in clauses (*b*) and (*c*) of sub-section (1) of s 195 either on its own motion or on the application of a private person. So, under the present law, a private person can prefer an application only under s. 476 requesting a Court to file complaint and consequently there is no room for any application under s 195

Effect of amendments on the rights of parties to criminal proceedings.—(1) Where the petition was under s *195, cl. (6)* of the old Code, to set aside an order of a District Magistrate revoking the sanction granted by a Subordinate Magistrate, *held* by the High Court that the right conferred by s 195, cl (6) of the old Code was not a right in the nature of a right of appeal that the amendments made by the new Code did not take away any substantive right and merely affected procedure and that the petition was therefore unsustainable **46 M. L. J. 274.**

(2) A sanction to prosecute granted after September 1st, 1923, when the new amendments were introduced by Act *XVIII* of *1923*, is illegal. **26 Bom. L. R. 1233.** *See* also **51 C. 652.**

(3) **Whether power under old s. 195 (6) to the superior Court to revoke or grant sanction was in the nature of a right of appeal.**—The right conferred by s 195 (6) of the old Code was not a right in the nature of a right of appeal, but the amendments made by the new Code did not take away any substantive right and merely ... procedure, and so the petition of the petitioner who contended that the right for sanction under s. 195 ... the nature of a substantive right, is not sustainable **46 M. L. J. 274 = 47 M. 384.**

or Criminal

Act, 1877 ...ther **prosecution for perjury by a private person is valid after the 1st of September, 1923, on** ...ding **Act XVIII of 1923 came into force, after having obtained sanction under the old section** ...**oduction of the new amendment.**—It is now held that such a prosecution would be illegal as to the Court to wh... *...nended s 195 can take cognisance of an offence of perjury except on the complaint of a* Court, or in the case of ...d in writing on the date of the prosecution **23 A. L. J. 33**, because nobody has a Court having ordinary original ... *see* also **6 Lah. 41.**

Civil Court is situate ... *authorities to revoke a sanction against a person is a mere* ... Sub-Magistrate granted sanction under s. 195 of the ... rosecution was instituted before the amend...

Provided that—

(*a*) where appeals lie to more than one Court, the ... jurisdiction under s. 195 (6) of the ...tion shall be the Court to which such Court shall be deemed to be subo... to force before the date of the ... higher authorities to revoke

(*b*) where appeals lie to a Civil and also to a Revenue Co... vested in the party to invoke ... deemed to be subordinate to the Civil or Revenue Court according t... absence of express words to proceeding in connection with which the offence is alleged to have been co...

(4) The provisions of sub-section (1), with reference to ...**ing Act XVIII of 1923.**—*Held*, apply als... such offences and t... ...uted prior to the 1st September, ...ough the case for hearing did not come on ... g into force of the Amending Act, the restriction as to the jurisdiction of the Court, did not apply and the old Code governed the case **7 Lah. 99** *See*, also **49 M. L. J. 278** where in a similar case it was *held* that an alteration in the law of procedure relating to the grant of sanction cannot invalidate proceedings validly begun under the old procedure.

Notes.—**1. Offences.**—[Ss. 172 to 188, I. P C., relate to contempts of the lawful authority of public servants, **S. 193.**—Giving or fabricating false evidence in a judicial proceeding or in any other case, **S. 194.**—Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence if an innocent person be thereby convicted and executed, **S. 195.**—Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation, or imprisonment for more than seven years, **S. 196.**—Using

the complaint and, if it does so, it shall forward a copy of such order to the Court and, upon receipt thereof by the Court, no further proceedings shall be taken on the complaint."

Preliminary Note.—The principal amendments made in this section by Act XVIII of 1923 are—

(*a*) The words "with the previous sanction" have been omitted from clauses (*a*), (*b*) and (*c*) of sub-section (1).

(*b*) Sub-sections (4), (5) and (6) which dealt with sanction have also been omitted.

(*c*) The words "in writing" are added after the word "complaint" in clauses (*a*), (*b*) and (*c*).

(*d*) In sub-section (2) the word "includes" has been substituted for the word "means."

(*e*) Sub-section (5) is entirely new.

"The provisions of s. 195 cause constant and great difficulty, and various amendments have been suggested which we have considered at length. We have no doubt that it will not be possible to remedy the evils which are connected with this section so long as private individuals are allowed to prosecute for offences connected with the administration of justice. In our opinion the only effective way of dealing with this section is to allow prosecutions to be launched only by the public servant or by the Court.

"We see no reason why the public servant or the Court should not file a complaint exactly in the same way as a private individual would do in other cases, and our proposals in this connection with this section and the enlargement of s. 476 involve the adoption of this principle. In our view s. 185 should bar the cognisance by any Court of offences of this nature except upon such complaint, while the procedure to be followed when the Court desires to prosecute should be prescribed by s. 176.

"The adoption of this principle will at all events get rid of the objectionable practice of ke- sanction, which has been granted to a private individual, hanging over the head of the accused ... period of six months, which is frequently utilised for the various purposes of blackmail. In the c... is not plaint by a Court or the public servant we do not think that it will be necessary to prescribe any should,

It will also, in our opinion, be a distinct advantage to get rid altogether of the term "... that the nection with these prosecutions, a result which will be effected by the amendments we pro... A. W. N.

"We recognise that clause (*a*) of sub-section (1) stands on a somewhat di... (*b*) and (*c*), but we think there is no reason to retain even in it any reference ... of any offence upon clause (*a*) can reasonably be launched in all cases on the direct com... provided.

Select Committee of 1916.

... affect the provisions of any Letters Patent

The principal changes effected by the ... or any other provisions of this Code.

necessity of a sanction for the cognisa... ...ything in this Code contained, the Advocate-General may, obligatory upon a Court taking ... ...evious sanction of the Governor-General in Council or the Local writing of either the Court ... ...ent, exhibit to the High Court, against persons subject to the

In short, s 195 now d... ... of the High Court, informations for all purposes for which Her if a Court before whom an off... exhibit informations on behalf of the Crown in the High Court of it can only proceed under s... the prosecution of offences ... accused. (See *Report of the* ... ...ay be taken upon every such information as may lawfully be ...s filed by Her Majesty's Attorney-General so far as the

The object of requiring a co... ...nd proced... ...the public officer or Court, instead of a— previously, is to protect private persons fr... ...prosecuted by baseless prosecutions at the instance of private individuals for the offences mentioned above. Under the old law any sanction given or refused could be revoked or granted by any authority to which the authority giving or refusing it was subordinate. Now under sub-clause (5) which is newly added power to withdraw a complaint made by a subordinate public servant is given to the authority which is superior to it. For revocation or grant of complaint by Appellate Court, *see* sections **476 A.** and **476 B.**

It will also be seen that under the old law an application for sanction to prosecute was made to a Court under s. 195, as it was generally supposed that a Court had no business, of its own motion, to grant sanction to a private individual without an application from him (*see*, for instance, **18 A. 213; 27 C. 820**). Of course

4. Complaint must be by the public servant concerned.—A complaint regarding any of the offences mentioned in cl. (*a*) must be made by the public servant concerned or by his superior It cannot be made by the person who may have been injured by the act complained of, *e g*, in a case of unlawful resistance to execution, **2 B. 633.** *See*, also, **11 C. L. J. 111 = 11 Cr. L. J. 212, 48 C. 1086, 17 A. L. J. 1054.**

The power to make a complaint cannot be delegated—*See* the referring judgments in **38 B. 642 (F.B.)**- **8 Bom. L. R. 477 = 4 Cr. L. J. 34** must be considered to be overruled, **16 Cr. L. J. 251 (Pun.).**

5. Responsibility for prosecution rests with complaining Judge in a case started on complaint.— Where a Court makes a complaint or proceeds under s 476 or s. 478, the responsibility for the prosecution rests upon the Judge entirely, such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and merely sanctioned by the Court, **1 C. 430, 13 B. 384; 7 C. 208.**

6. Orders that were considered as 'complaints.'—Where a Magistrate sanctions a prosecution when there is no application for the same before him, his order must be considered as a complaint made of his own motion, **7 M. 189.** Where a Revenue Court being satisfied from the perusal of certain documents tendered in evidence that they were forgeries, sent the case to the District Magistrate for action, *held* that such a communication was a complaint within the meaning of this section, but did not constitute a proceeding under s 476, **30 P. R. 1905 = 105 P. L. R. 1905; 23 A. 249.** Where an Assistant Collector trying a rent suit, being of opinion that the plaintiff had committed perjury sent the record to the Collector of the district for "starting a case under s 193, I P C," and that officer 'ordered" that a case under that section should be instituted and made it over to a Magistrate of the first class, *held* that although the order of the Assistant Collector was not one under s. 476, it was a sufficient complaint within this section and the Collector who was also the District Magistrate had jurisdiction to take cognisance of it, **26 A. 514.** Where a Munsiff being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge who thereupon wrote to the District Magistrate requesting him to take action in the matter, *held* the letter of the District Judge amounted to a complaint, **35 A. 8.** *See* **11 M. 443.** Where a District Judge passed an order to the following effect, 'I hereby complain against *R* that he filed two false and forged bonds in the Court of Small Causes, *M*, and thereby committed an offence under ss. 471 and 467, I P C The papers will be sent to the District Magistrate with the request that they be made over to a competent Court for disposal it was *held* that the order amounted to a *complaint* within the meaning of s. 4 (*h*) as the Judge was a Court to whom the Court of Small Causes was subordinate and had jurisdiction to make a complaint, **12 A. L. J. 881 = 15 Cr. L. J. 700.**

II.—WHEN SANCTION NOT NECESSARY.

N B—Though 'sanction' is done away with under the recent amendment and complaint is required in all cases under the new s 195 Still it is thought desirable to retain the rulings dealing with sanction as the same considerations will apply in the case of complaint as did previously apply in the case of sanction and we may generally say that under the new amendments a complaint will not be necessary where previously sanction was not necessary

7. It is submitted that the alleged conflict of decisions noted below has been set at rest by the Legislature by altering the wording of s. 195, sub-sec. (1) (*c*). The Legislature have thought fit to adopt the very words of PIGGOTT, J, in **38 A. 169** so now it is no matter whether an offence has been committed prior to the Court proceedings, if the disputed document was produced in that Court, then after its production no criminal case could be started without the sanction of the Court in which it was produced, **23 A. L. J. 956.** So the effect of the amendment of s. 195, sub-sec. (1), (*c*) is to uphold the decision in **38 A. 169,** and the cases in **4 Bom. L. R. 268; 34 A. 654** have become of mere academic interest and are no longer good law *See*, also, **43 A. 60.**

7-A. Is sanction necessary for offences committed prior to proceedings in Court?—TYABJI, J., in distinguishing **4 Bom. L. R. 268** and **34 A. 654** points out the difference between cl. (*b*) and cl. (*c*) of sub-sec. (1). Clauses (*b*) and (*c*) agree in some respects, but differ in this that the offence is identified in cl. (*b*) by reference to the fact that it has a direct connection with some proceeding in Court, *viz*, having been (*i*) committed in, or (*ii*) in relation to the proceeding, whereas in cl (*c*) the offence has to be connected not with the proceeding but (*i*) with the document produced or given in evidence in the proceeding, and (*ii*) by the fact that the document has been given or produced in evidence by a party to the proceeding Cl. (*b*) runs ien the

in a judicial proceeding evidence known to be false or fabricated, S. 199.—False statement made in any declaration which is by law received as evidence, S. 200.—Using as true any such declaration known to be false, S. 205.—False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security, S. 206.—Fradulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree, S. 207.—Claiming property without right, or practising or deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in the execution of a decree, S. 208.—Fradulently suffering a decree to be passed for a sum not due, S. 209.—False claim in a Court of Justice, S. 210.—Fradulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied, S. 211.—False charge of offence made with intent to injure, S. 228.—Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding, S. 463.—Forgery, S. 471.—Using as genuine a forged document, S. 475.—Counterfeiting a device or mark used for authenticating documents, S. 476.—Counterfeiting a device or mark used for authenticating documents other than those described in s. 476, I.P.C.].

1-A.—The word "Court" in s. 195, sub-sec. (1), (*c*) of the Code does not include a Court in the Native States of India. Therefore no complaint is necessary for the prosecution of a person for producing a fabricated receipt in the Savli Court (Baroda State) when the prosecution is launched in the Court of the Resident First-class Magistrate at Nadiad in British Indian territories. **27 Bom. L. R. 1063.**

ANALYSIS OF NOTES.

2. Although a sanction for prosecution is done away with under the new amendments, all those considerations that weighed with Courts in granting a sanction would, it is submitted, now weigh with Courts granting an application under s. 476 for lodging a complaint. So, it is thought desirable to retain all those cases laying down rules of prudence which a Court should follow in granting or refusing a sanction, as similar principles would apply in granting or refusing an application under s. 476 for lodging a complaint. *See* **20 M. L. T. 557.**

I. Complaint.
II. When sanction not necessary.
III. What is a Court?
IV. Subordination of public servants.
V. Application for sanction, what it should contain.
VI. Who can apply for sanction and to whom sanction may be granted.
VII. Who can grant sanction.
VIII. Who can act on sanction granted.
IX. Points to be considered in dealing with sanction applications.
X. Court's power to hold preliminary inquiry and go beyond the record in granting sanction.
XI. Notice to the accused.
XII. Sanction in respect of perjury.
XIII. Sanction for instituting false charges, etc.
XIV. Sanction in respect of forged documents.

I.—COMPLAINT.

3. The word "complaint" to be interpreted according to the definition in the Code.—*See* s. 4 (*h*).—The present amendment necessitates a complaint under s. 476 of the Code by a Court for offences mentioned in clauses (*b*) and (*c*) of s. 195. But for offences mentioned in clause (*a*) of sub-section (1) of s. 195, it is submitted, the complaint will have to be filed by the public servant concerned or some other public servant to whom he is subordinate.

Information to Police not a complaint.—Under the Bengal *Tenancy Act*, a Civil Court directed a peon to cut crops distrained. On being obstructed he lodged information of the occurrence at the Police *thana* and the accused were eventually convicted under s. 186, I.P.C.; *held*, that under this section, there should be a complaint by the public servant concerned and there being no such complaint within the meaning of s. 4 (*h*), the conviction was bad in law, **30 C. 285.**

s. 211, I.P.C. with having made a false report in respect of himself to the Police. The Magistrate took cognisance of the complaint without sanction holding that no sanction was necessary, *held*, that the offence committed in respect of *S* if it was one under s. 211, I.P.C., was committed in relation to the proceeding in Court as it was the report which led to the proceedings in Court, and that the sanction of that Court was therefore necessary, **34 A. 522.** *See* Notes 5 and 6 to s. 524. The test for the necessity of the grant of sanction is not the character of the offender, but the character of the offence. Sanction is necessary when an offence punishable under s. 211 is committed in or in relation to any proceeding in Court. Where therefore *K* a policeman took part in preparing a *panchnama* in regard to an offence said to have been committed by a talukdar but took no further part in the subsequent proceedings, and the case started by *K* was then investigated by others in the usual way and then sent up and the accused was acquitted. *K* was directed to be prosecuted for an offence under s. 211, I.P.C., it was contended that no sanction was necessary as he had not given evidence at the trial and the offence was committed before any judicial proceedings were begun, *held*, that sanction was necessary. The offence imputed to *K* was the instigation of the false charge against the *talukdar* the charge which, in the ordinary course of criminal procedure, took the form of a trial. It may be that the instigation was committed before the proceeding in Court was begun but none the less the investigation was an act committed in relation to the proceeding held by the Magistrate against the talukdar, **14 Bom. L. R. 362 = 13 Cr. L. J. 527.** But in **36 A. 212** it was *held* that where a District Judge forwarded a petition presented to him in certain proceedings to a Magistrate who instituted proceedings thereon and discharged the person proceeded against, the District Judge was competent to sanction, the prosecution of the petitioner for an offence under s. 182, I.P.C., being the public servant to whom the false information was given, but it was doubtful if he could sanction the prosecution for an offence under s. 211, I.P.C. as the District Court was not the Court in which the criminal proceedings were instituted. *See* also **20 C. W. N. 1347 = 25 C. L. J. 59.** *See* also **43 A. 906; 4 P. 323.**

(iii) *Forgery, etc., s. 463, etc., I.P.C.*—Where in respect of a document produced in Court an offence under s. 471, I.P.C., has been committed outside the Court no sanction is necessary, the use complained of being prior in date to the production of the document in Court, **4 Bom. L. R. 268; 16 Cr. L. J. 617 (C.); 18 P. R. 1915; 26 B. 785,** but *see* **14 C. W. N. 479 = 11 Cr. L. J. 230; 11 M. L. T. 391 = 1912 M. W. N. 536 = 13 Cr. L. J. 241.** Where the accused made an application to the Excise Collector saying that two persons who held licenses for selling ganja etc. had executed a sub-lease in his favour of certain ganja and opium shops and long before that application had executed a *Zaminama* in which he made certain false statements implying that the said two persons had executed a sub-lease in his favour which, if they had done, would render their licenses liable to be cancelled, *held* (i) that no sanction under this section was necessary for prosecuting the accused for fabricating the *Zaminama* as the offence was completed when the document was executed which was long before the application to the Excise Collector, and (ii) that the *Zaminama* was intended to be used before the Collector who was not a Court within the meaning of cl. (*c*) of this section, **10 C. W. N. 220 = 3 Cr. L. J. 196; 10 W. R. 5, 3 C. W. N. 491** which *distinguishes* **26 C. 359.** So long as the prosecution is confined to offences connected with a document prior to its production in Court, no sanction is required. All that s. 195 (*c*) prohibits is taking cognisance of an offence described in s. 463 when such offence has been committed by a party to any proceeding in any Court in respect to a document produced or given in evidence in such proceeding, **34 A. 654.** Where an offence under s. 471 is made out in a complaint, the use complained of being prior in date to the use of the document in question in evidence in a Civil Court, the sanction of such Court is not necessary, **18 P. R. 1915 = 16 Cr. L. J. 617.** It was *held* in **8 O. C. 313 = 2 Cr. L. J. 653,** that no previous sanction is necessary for a prosecution under ss. 465 and 467, I.P.C., in respect of a document, a registration copy of which had been produced in a suit and a finding come to that the original document was forged since the original document in respect of which the prosecution was instituted was not produced or given in evidence in the Civil Court. *See* also **12 C. W. N. 822 = 8 Cr. L. J. 51.** In **17 Cr. L. J. 289 (A.)** it was *held* that the Legislature employed the words "offence committed by a party to any proceeding" with reference not to the date of the commission of the alleged offence, but with reference to the date on which the cognisance of the Criminal Court was invited and **34 A. 654** was distinguished and **4 Bom. L. R. 268** discussed, **17 A. L. J. 1030 = 42 A. 130.**

Contra.—The word "offence" occurring as the third word in cl. (*c*) of s. 195 (1) is designedly used in a somewhat abstract manner. It is the offence in itself, not any particular offender's offence which the section aims at and that is in accordance with s. 40, I.P.C., where 'offence' is defined as the *thing* made punishable by the Code. In other words, the clause deals with the case where there is a substantive offence committed by a party to a suit. If that condition is realised, then the clause enacts that no Court can take

offence *is* committed, cl. (*c*) 'when the offence *has been* committed.' Having regard to the object of the section, when the offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind, and prior to his being charged with the commission of the offence, legal proceedings of the same nature have already commenced in any Court, it seems to be most in consonance with the intention of the Legislature to require that sanction of the Court should be obtained, **18 M. L. T. 322 = 16 Cr. L. J. 721; 18 M. L. T. 322 = 39 M. 677.**

(*i*) *Fabricating false evidence prior to magisterial proceedings, s. 193, I.P.C.*—Where offences under ss. 193 and 211, I.P.C., were alleged to have been committed at a time when the proceedings were pending before the Police, and anterior to the commencement of any inquiry by the Magistrate, it was *held* the offences were not committed *in relation to* any proceeding in a Court within the meaning of sub-sec. (1), (*b*), and therefore no sanction of Court was necessary for the prosecution of the offender, **Weir II, 162.** No sanction is required under cl (*b*) of this section to prosecute a person for having fabricated false evidence during a Police investigation and when there was no proceeding pending in any Court in relation to which the alleged false evidence was said to have been fabricated, **26 C. 786** where **26 C. 359** is *distinguished in*, **52 Bom. 385 = 30 Bom. L. R. 330.** *See* also **24 W. R. 41; 25 W. R. 33.** But *see* below **24 Bom. L. R. 1153.**

Contra.—*M* and others were charged with having made false statements and abetted the making of them during the Police investigation in a theft case. The theft case was subsequently tried by the Magistrate and the evidence collected during the Police investigation was again laid out before the Magistrate, after the close of that trial. *M* was charged with an offence under s. 193, in respect of the statements before the Police without any sanction having been obtained; *held*, that he could not be tried in the absence of a sanction from the Court which tried the theft case and before which the evidence alleged to be fabricated was used, **14 Bom. L. R. 715 = 13 Cr. L. J. 751.** So also when after fabricating a document, the accused got it registered and subsequently instituted a suit and filed along with the plaint a certified copy of the forged document. Subsequently the accused was charged with an offence under s. 193, I.P.C., without any sanction and it was considered that no sanction was necessary as the offence was completed prior to the institution of the suit, *held* that sanction was necessary the offence having been committed in relation to a proceeding in Court, **17 C. W. N. 937 = 14 Cr. L. J. 289.** The object of s. 195 (1), (*b*) is to save the time of Criminal Courts being wasted, and accused persons being needlessly harassed by erecting a safeguard against rash, baseless or vexatious prosecutions for the offences specified. This safeguard is not limited to cases where the offence is committed *pendentelite*, but it extends to cases of fabrication of false evidence in advance. In this case the accused fabricated false evidence with the intention of using it in a subsequent civil suit. After the suit was disposed of, and an appeal was pending therefrom, a complaint was preferred to a Magistrate against the accused for offence under 93, I.P.C., without sanction; *held*, the sanction of the Civil Court was necessary and the Magistrate could take cognisance of the offence without such sanction, **18 M. L. T. 322 = 16 Cr. L. J. 721.** Where the pplicant was the pleader of an accused against whom a case of dacoity was sent up to a Magistrate on 10th April, 1922, and it was alleged that the applicant suborned three of the witnesses for the prosecution on 10th April, 1922; and proceedings were immediately started against the applicant under s. 193, I.P.C., without obtaining sanction under s. 195 and before even the dacoity case was dicided, *held* that the want of sanction was fatal to the proceedings against the applicant; *per* Crump, J., the words, "in relation to in s. 195 (*b*) are very general and are wide enough to cover a proceeding in contemplation before a criminal Court, though it may not have begun at the date when the offence was committed," **24 Bom. L. R. 1153.** *See* Note 7 above and **23 A. L. J. 956.**

(*ii*) *False charge.*—There is a difference of opinion as to whether sanction is necessary or not when in pursuance of a charge made to the Police, proceedings have subsequently taken place in Court. *See* Notes 144 and 145, but the better opinion is that when once proceedings are taken to a Court, sanction is necessary. *See* **18 M. L. T. 322 = 16 Cr. L. J. 721.** *H* made a report to the Police against several persons including one *S*, accusing them of the offences of rioting and voluntarily causing hurt. The Police made inquiry and sent up all the persons excepting *S* for trial. The Magistrate convicted some of them, but the Sessions Judge acquitted them on appeal. Thereupon *S* made a complaint to the Magistrate charging *H* under

not a party to the proceedings before the Court, no sanction is necessary, **32 A. 74**, but *see* **12 Bom. L. R. 333 = 11 Cr. L. J. 368.** *See*, also **32 M. 3.**

12. For disobeying order promulgated by the Local Government.—No sanction is required for prosecution for disobedience to an order of Government issued under *the Epidemic Disease Act* III of 1897 Where the Chairman of a Municipality re-published *the Plague Rules* in his Municipality, it was *held*, his sanction was not necessary, **24 M. 70.**

13. Where forged document has not been produced in Court.—Clause (*c*) of this section refers only to cases where a forged document has been put in evidence in a Civil or Criminal Court in other cases, a Magistrate is competent *proprio motu* to inquire into allegations of forgery without sanction under this section, **10 W. R. 5.**

14 False statement in a departmental inquiry.—No sanction is necessary for prosecution on account of a false statement made in a dapartmental inquiry, **22 B 936** or in a preliminary inquiry made on a Police report, **23 M. 223.**

15. Forged documents presented to a Registration Officer.—No sanction is necessary, **11 M. 500** and *see* sub sec. (2) and Note 44

16. No sanction required against a Police-officer for making a false report.—A Police-officer making a false or coloured report cannot properly be said to institute or cause to be instituted any criminal proceeding against any person Therefore sanction for his prosecution under s 211 I P C, is bad in law, **4. C. W N. 347.**

17. Sanction not necessary when proceedings initiated as if under s. 476.—Where a Munsiff on the report of a peon that he had been unlawfully resisted by judgment-debtors and assaulted by them took action and sent the case to the District Magistrate, *held* that the District Magistrate was not justified in refusing to take cognisance for want of sanction, but should have proceeded under s 476 (2), **8 C.W. N. 536.** Where an Assistant Judge before whom a witness gave false evidence took cognisance of the case as a District Magistrate under s 190 (*c*) and it was objected that sanction was required and that action taken by the officer as a District Magistrate, was not tantamount to a sanction by him as Civil Judge, *held*, that as the action taken by the officer was in effect under s. 478, no sanction was necessary, **9 Bom. L. R. 212 = 5 Cr. L. J. 202** and Notes under s. 478

18. Procedure where in the same transaction offences are committed, some requiring sanction and others not requiring previous sanction.—The complainant alleging that he was assaulted, when trying under the orders of an Amin, to open the door of a judgment-debtor s house, charged the accused with offences under ss 183, 186, 356 and 323, I P C., *held*, that the sanction of the Court was not necessary in respect of offences under ss. 355 and 323, I P C, and the sanction of the Amin would be sufficient in respect of the other offences, **31 M. 43.** *See* also **12 C. W. N. 822, 15 C. W. N. 565, 25 B. 90.**

III.—WHAT IS A COURT?

19. Meaning of the word "Court."—The word ' Court ' is not defined in the Code, but as used in this section has a wider meaning than the words 'Courts of Justice' as defined in s. 20 of the *Penal Code*. Having regard to the obvious purpose for which s. 195 was enacted we think the widest possible meaning should be given to the word and that it would include a tribunal empowered to deal with a particular matter, and authorised to receive evidence bearing on that matter, in order to enable it to arrive at a determination, **17 C. 872** *followed in* **15 Bom. L. R. 45 = 14 Cr. L. J. 72.** There must be power to receive evidence and to come to a judicial determination on the evidence so recorded, **24 M. 121, 28 M. L. J. 123 = 16 Cr. L. J. 241; 36 M. 72.** The mere fact that a judicial officer is specially vested with certain *quasi*-judicial functions does not make him a Court while exercising those functions, **38 M. 531** *referring to* **11 M. 26 (P C), 30 M. 326** and to Vol IX, Halsbury's Laws of England, p. 9, where it is said "many bodies are not Courts, although they have to decide questions, and in so doing have to act judicially in the sense that the proceedings must be conducted with fairness and impartiality ' The definition of 'Court given in *the Evidence Act* (I of 1872) is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope. **12 B. 36**, ss. 195 and 476 of this Code make reference to the 'Court" and not to the "Judge" or even the 'Presiding officer' of the Court. It is clear that whether the Judge or the Presiding officer is the same or a different person, the Court remains the same and it is the Court that is competent to make the complaint, **A. I. R. 1928; Lah. 759.** *See* Note 16 to s. 435 and Notes 6 to 9 to s. 476 *See* also **45 C. 535.**

cognisance of "such offence." It is not likely that while the prosecution of the main offender could not be instituted without a sanction, any minor aiders or abettors or accessories of his could be prosecuted without a sanction. A will having been found to be a forgery in a civil suit, sanction was obtained to prosecute *L*, a party to the suit under ss. 193 and 467, I.P.C., and to prosecute the attesting witnesses and the writer not parties to the suit, under ss. 193 and 467, I.P.C. The High Court set aside the sanction on the merits. Then an application was made to the Court that the complaint under s. 467 alone as against the persons not parties to the suit should be proceeded with as no sanction was necessary as they were not parties to the original proceedings in the Civil Court; *held*, that the revocation of the sanction by the High Court carried with it as a necessary consequence the termination of the prosecution of all the parties for the offence of forgery generally, **12 Bom. L. R. 383 = 11 Cr. L. J. 368.** In a suit in the Court of Small Causes, the Court made a reference to an arbitrator. The accused, a party to the suit, who was alleged to have fabricated evidence and to have committed forgery and used a forged document produced before the arbitrator was prosecuted in respect of those offences without the sanction of the Court of Small Causes; *held*, the Magistrate could not take cognisance of the case without the sanction of the Court of Small Causes, where the document alleged to be forged was filed with the award and formed a part of the record of the suit, **17 M. L. J. 420 = 2 M. L. T. 496; 3 P. R. 1914 = 15 Cr. L. J. 358.** On the institution of a complaint under s. 467, I.P.C., in respect of forgery of a document produced in a suit in a Civil Court, objection was taken for want of sanction. It was contended that no sanction was necessary as the forgery was alleged to have been committed before the production of the document in the suit; *held*, sanction was necessary as s. 195 provides that no Court shall take cognisance without sanction of any offence described in s. 463, I.P.C., etc., when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, **14 C. W. N. 479 = 11 Cr. L. J. 280.** *See* **44 C. 1002.** *See* **Note 7 above** and **28 A. L. J. 956.**

8. **Forging a Vakalatnama.**—No sanction is necessary for prosecution as the person forging, was not a party to the proceedings in which the Vakalatnama was filed, **18 Cr. L. J. 563.**

9. **No sanction necessary for offence under s. 186, I.P.C., where public officer is complainant.**—Where a person was charged with an offence under s. 185, I.P.C., for obstructing a bailiff of a Court in the execution of a warrant; *held*, it was open to the bailiff to file a complaint without any sanction. It would no doubt be open to his superior Judge to direct a complaint to be filed, **15 Cr. L. J. 649.**

10. **Whether sanction necessary against persons not parties to proceedings.** (i) *Witness.*—Under cl. (*c*) of sub-sec. (1) no sanction is required in respect of any document produced by a *witness*, a witness not being a party to the proceeding, **3 M. 400; 25 M. 671; 30 M. 226; 32 A. 74; 22 C. 1004; 26 M. L. J. 220 = 15 Cr. L. J. 242.** (ii) *Abettor.*—Or for abetment of offences mentioned in cl. (*c*), **32 A. 74; 15 C. W. N. 565 = 12 Cr. L. J. 101.** It may be that if there are other charges requiring sanction intimately connected with the charges which do not require sanction, the Court may be induced to exercise its powers of supervision by directing the stay of proceedings till the whole case is complete, **12 C. W. N. 822 = 8 Cr. L. J. 51,** explained in **15 C. W. N. 565 = 12 Cr. L. J. 101.** *See*, however, **12 Bom. L. R. 383 = 11 Cr. L. J. 368;** *see* also **5 Pat. L. J. 135; 49 B. 608 = 27 Bom. L. R. 607.**

10-A. But distinction should be observed with regard to cl. (*b*) of sub-sec. 1 of 195 and cl. (*c*) of the same; cl. (*b*) mentions offences committed in or in relation to any proceeding in any Court and makes no mention of any parties; while cl. (*c*) specially mentions offences committed by *parties* to any proceedings. So far as cl. (*c*) is concerned the Court's power to lodge a complaint under s. 476 is restricted to *parties* in the proceeding; but as far as cl. (*b*) is concerned the Court's power to complain under s. 476 is not limited to parties to the suit or proceeding. So it is *held* in **3 Rang. 303** that in respect of offences enumerated in s. 195 (1), (*b*) of the Code, the powers of the Court to complain are not confined only to the parties before it.

10-B. **Whether ss. 476 and 476-A apply to a forged document produced in Court, the person forging the document neither being a party to the proceeding nor producing the document in Court.**—A person who possibly forged the document which was produced in Court cannot be proceeded against under s. 476-A of the Code if there be *no ground* for supposing that he did so for the purpose of using it in Court and there is nothing to show that it was he who used the document in Court. **28 C. W. N. 880.**

11. **Whether sanction necessary for abetment.**—*See* now sub-section (4) of 195; **20 M. 8** which lays down that no sanction is required previous to the prosecution of a person charged with the abetment of offences mentioned in the sanction is now overruled by sub-section (4). But where the person charged with abetment is

sanction is required for prosecution of the complainant under s 195, cl. (*b*), **22 B. 938.** (ii) *Quære* whether a Sub-Deputy Collector holding proceedings under ss. 52 and 84 of *the Land Registration Act* VII of 1876 (B C.) is a Court within the meaning of this section so as to require his sanction to prosecute a person giving false evidence in such proceedings and whether such proceedings are judicial proceedings? **9 C. W. N. 127.** (iii) Similarly, a Collector whom to an application is made to replace a damaged stamp is not a Court, **3 B. L. R. Cr. 6 = 11 W. R. 45.** *See* also **1891 A. W. N. 82.**

(*vii*) *Excise Collector not a Court.*—No sanction is necessary for prosecuting for the offence of fabricating false evidence (s. 193 I P C) by means of a document intended to be used before an Excise Collector who is not a Court, **10 C. W. N. 210 = 3 Cr. L. J. 196.**

22 Persons exercising quasi-judicial functions are not Courts within the meaning of s. 195.—

(*i*) *Commissioner to take evidence not a Court.*—A Commissioner appointed to take evidence is not a Court. The word "Court" in s. 195 must mean the Court whose duty it is to consider the evidence and decide whether it is true or false, **11 C. W. N. 909 = 6 Cr. L. J. 160.**

(*ii*) '*Official Assignee*" *is not a Court*—An Official Assignee is not a Court even though he has a wide discretion in deciding on the claims of persons alleging themselves to be creditors of the insolvent or because at persons aggrieved by decisions of his case appeal to the Insolvency Court from those decisions **37 M. 107.**

(*iii*) *Arbitrator appointed by Court not a Court*—In respect of an offence before an arbitrator appointed by the Court, it is the Court that can grant sanction, **17 M. L. J. 420 = 6 Cr. L. J. 331, 6 A. 101.** A complaint cannot be entertained for offences under ss. 193 and 471, I P C., alleged to have been committed before the arbitrator without the sanction of the Court, **3 P. R. 1914 = 15 Cr. L. J. 358.**

23 Judicial Officers vested with quasi-judicial functions.—(1) Under Rule 5 of the rules framed by the Madras Government under s 413 of Madras City Municipal Act III of 1904, a Presidency Magistrate is authorised to hold an inquiry and decide whether a particular candidate is fit or not to stand for election to a Municipal Council, *held*, he was not a Court, **33 M. 581.** (2) *See* **21 B. 279** and **30 M. 328.** The question in **33 M. 581** was whether the Presidency Magistrate when exercising the special function was subject to the superintendence of the High Court under s. 15 of the Charter Act. It may be that the Magistrate may be considered to be a Court for the purposes of s. 195 *See* **37 B. 365,** where the case in (1895) **P. J. 544** was *distinguished.*

24. District Judge acting under Bombay District Municipalities Act is a Court.—A District Judge when acting under s 22 of the *Bombay District Municipalities Act* III of 1901 is a Court within the meaning of cl (*b*) **37 B. 365.**

25. Registrar of Presidency Small Cause Court.—Under the Calcutta rules of the Presidency Small Cause Courts, the Registrar of that Court is the officer who is entitled to decide the question of service of summons and in so doing he is entitled to take evidence, and these proceedings are in the nature of judicial proceedings and he has jurisdiction to grant sanction in respect of false evidence given before him. **18 C. W. N. 1323 = 16 Cr. L. J. 151.**

26. Village Munsiff is a Court.—A Village Munsiff trying a suit is a Court, and as such can give sanction under this section where false evidence is given before him, **11 M. 375.** But in **15 M. 131,** the accused intentionally insulted a Village Munsiff in the discharge of his magisterial duties The Village Munsiff did not prefer complaint or sanction prosecution, but a second-class Magistrate charged the accused under s 228, I P C on Police report and convicted him, *held,* that the second-class Magistrate was competent to try the complaint and the conviction was right, want of complaint being cured by s. 537

27. Police-officer not a Court.—A Police constable taking down a statement under s. 161 is not a Judge, nor is the place where he officiates a Court. His sanction is therefore not necessary, under this section to a prosecution for a false statement made to him, whether the charge be framed singly or alternatively, **11 B. 659.** The prosecution of a person for giving false evidence before a Police *patel* requires no sanction, as a Police *patel* is not a Criminal Court within the meaning of the Code (Act X of 1872), and s. 468 of that Code renders sanction necessary only when one of the offences specified therein is committed before or against a Civil or Criminal Court, **4 B. 479.**

...ction **Commissioners are deemed to be a Court under the wider sense of the term.**—Election ...ners are not a Civil Court within the meaning of s. 476, but they must be deemed to be a Court in the ...e of the term under s. 195 of the Code and any complaint made by them of an offence may be regarded ...der s. 195 (1), (6) of the Code, **23 A. L. J. 846 = 47 A. 934.** *See* also **23 A. L. J. 956** (for the definition ...").

...t was further held that an order made by Election Commissioners under s. 476 of the Code could not be ...s they are neither civil nor criminal, nor revenue Court within the meaning of that section. But as the ...nt was purported to have been instituted under s. 476, the High Court entertained an appeal therefrom ...aside the order, but maintained it as a complaint under s. 190, sub-sec. (1), (*a*) of the Code, **47 A. 934.** ...e **46 A. 611.**

20. Revenue Officers held to be Courts.—

(*i*) *Tahsildar holding an inquiry as to mutation of names under Madras Act* III of 1869.—A Tahsil-...holding an inquiry under Madras Act III of 1869 as to whether a transfer of names in the Land Register ...ld be made or not is a Revenue Court and before a party to any proceeding in such a Court can be prose-...d for an offence referred to in cl. (*c*) of sub-sec. (1), sanction should be obtained, **24 M. 121.** *See* also **12 Cr.** ... **109 (A.).** In **19 P. R. 1915 = 16 Cr. L. J. 785,** it was however held distinguishing **24 M. 121,** that a ...*ib Tahsildar* dealing under the Punjab Land Revenue Act with mutation proceedings does so in his ...ministrative capacity as a Revenue Officer and not in his judicial capacity as a Revenue Court.

(*ii*) *Certificate Officer acting under Bengal Act* I of 1895.—Sanction must be obtained before a person ...an be charged under s. 206, I.P.C., for having cut and carried away crops under attachment under Bengal Act I of 1895, as the Certificate Officer is a Court, **28 C. 217.**

(*iii*) *Income-tax Collector hearing objections.*—A Collector hearing objections under s. 25 of *the Income-tax Act* II of 1886, is a Revenue Court, **44 P. R. 1905.** An Income-tax Collector is a Court within the meaning of cls. (*b*) and (*c*) of s. 195, **38 B. 342 (F.B.); 36 M. 72.**

(*iv*) *Mamlatdar holding inquiry under Chapter XII of Bombay Land Revenue Code.*—A Mamlatdar holding an inquiry under Chapter XII of the Bombay Land Revenue Code is a Revenue Court within the meaning of s. 195, sub-sec. (1), cl. (*c*), as he has power to summon witnesses, to take evidence although he may not have power to administer an oath, to consider the evidence and make a final order, **39 B. 310.** *See*, however, **28 M. L. J. 123 = 1915 M. W. N. 177 = 16 Cr. L. J. 241.**

21. Revenue Officers held to be not Courts.—

(*i*) *Officer recording tenant's rights under Chapter XI of the Madras Estates Land Act* I of 1908 *is not a Court.*—A Revenue Officer preparing a record of rights under ss. 164 to 187 of the *Madras Estates Land Act* is only discharging an executive function of the Court and is not a Court within the meaning of s. 476. He is not invested with powers to record evidence nor with the powers of a Survey Officer under *Madras Act* IV of 1897, **28 M. L. J. 123 = 16 Cr. L. J. 241.** *See*, however, **39 B. 310.**

(*ii*) *Settlement Officer preparing a record of rights.*—*See* **26 A. 382.**

(*iii*) *Revenue Officer disposing of objection petition under s.* 103-*A of the Bengal Tenancy Act.*—*See* **3 C. L. J. 133; 28 C. 471.**

(*iv*) *Land Acquisition Collector.*—A Land Acquisition Collector acts merely as the agent of th... Government for purposes of acquisition and is not a Court. *See* **7 C. W. N. 249; 27 C. 820.**

(*v*) *Assistant Collector in the United Provinces to whom the execution of a decree by sale of immova... property is transferred under ss.* 68 *and* 70, *Civil Procedure Code.*—Under the rules framed by the Lo... Government by virtue of s. 70 of the Civil Procedure Code, 1908, certain functions may be delegated to... Assistant Collector in order to effect a sale of immovable property in execution of the decree of a Civil Co... but such an Assistant Collector is not a Court within the meaning of this section as he has not the power, e... to sell the property as a Court or to confirm the sale or to set it aside and he cannot give a sanction in re... of an application to set aside a sale on application which he could not deal with, **37 A. 334.**

(*vi*) *Assistant Collector holding a departmental inquiry under the Bombay Land Revenue C... not a Court.*—(1) An Assistant Collector holding a departmental inquiry under the *Bombay Land Revenu...* ...the alleged misconduct of a subordinate, is not a Court, within the meaning of this section,

28. **Registration Officer not a Court.**—*See* cl. (2). A Registrar or a Sub-Registrar is not a Court within the meaning of this section, but offences committed before such officers are specially made punishable under ss. 81, 82 and 83 of the *Registration Act* III of 1877. Hence no sanction is required for prosecution in respect of an offence committed before such an officer and falling within clauses (*b*) and (*c*) of sub-sec. (1) though previous sanction or complaint is necessary in respect of offences within cl. (*a*) of sub-sec. (1), **11 C. 566.** A District Registrar dealing with a complaint against a Sub-Registrar is not a Court, **10 C. W. N. 222 = 2 C. L. J. 619 = 3 Cr. L. J. 112.** *See* **10 C. 604; 12 B. 36** and **12 M. 201,** where **10 M. 154** and **11 M. 3** are explained and also **15 M. 138; 2 C. W. N. 244; 11 O. C. 358; 11 C. L. J. 111 = 11 Cr. L. J. 212; 16 Bom. L. R. 946 = 16 Cr. L. J. 106.**

IV.—SUBORDINATION OF PUBLIC SERVANTS.

29. **Subordination of Police to District Magistrate.**—A person gave false information to the Police and his prosecution was sanctioned by the District Magistrate, and he was convicted and sentenced to pay a fine. On appeal the conviction was affirmed by the District Magistrate. *Held*, that although Police-officers are generally subordinate to the District Magistrate, the subordination contemplated by this section is not such subordination, but subordination of some superior officer of Police, **27 C. 452.** But if the District Magistrate gives the sanction at the request of the Police who it was contended ought to have given it, the sanction is proper, **32 C. 180.** *Contra* in **27 A. 292; 6 P. R. 1910 = 10 P. W. R. 1910 = 11 Cr. L. J. 252,** it was *held* that the District Magistrate is the head of the Police (*see* s. 4 of Act V of 1861) and is a public servant to whom the Police is subordinate within the meaning of sub-sec. (1), (*a*) and is competent to grant sanction for prosecution under s. 182, I.P.C., in respect of a false report to the Police. *See* also **47 P. R. 1867; 9 P. R. 1868; 4 Lah. 130.**

30. **Sessions Judge cannot grant sanction in relation to a proceeding before the Police.**—A Sessions Judge cannot grant sanction to prosecute a person for an offence under s. 182, I.P.C., committed in relation to a proceeding before a Police-officer or a Sub-Magistrate to whom the reports were sent by the former, as neither of them was a subordinate of the Sessions Judge within the meaning of cl. (7), **27 M. L. J. 586 = 1914 M. W. N. 798 = 15 Cr. L. J. 612.**

31. **Taluk second-class Magistrate not official superior of Police Station-house officer.**—A second-class Magistrate of a *taluk*, not being the official superior of a Police Station-house Officer, cannot sanction a prosecution under s. 182, I.P.C., for giving false information to the Station-house Officer, **6 M. 146.** *See* also **2 N. W. P. H. C. R. 287; 7 B. H. C. R. Cr. Ca. 64; 11 W. R. 22.**

32. **Honorary Magistrate not official superior of Police-officer.**—A sanction given by a Bench of Honorary Magistrates for the prosecution under s. 182, I.P.C., of a person alleged to have made a false report to the Police was an illegal sanction inasmuch as the Police-officer to whom the report was made was not subordinate to the Bench of Honorary Magistrates within the meaning of this section, **1895 A. W. N. 152; 19 W. R. 33.**

33. **Village Munsiff is not subordinate to a Sub-Magistrate.**—Under s. 195, the subordination of one public servant to another may arise either from express enactment or from the fact that both the public servants belong to the same department, one being superior in rank to another. There is no enactment which makes Village Munsiffs subordinate to Sub-Magistrates, nor do they belong to the same department, **18 M. L. J. 584 = 4 M. L. T. 214** *dissenting from* **4 M. 241.** *See* Note 26.

34. **Registrar of the Small Cause Court subordinate only to the Chief Judge.**—Where the Registrar of a Presidency Small Cause Court grants sanction under cl. (*a*) of sub-sec. (1) it was only the Chief Judge of the Court to whom the Registrar acting as a public servant is subordinate, who can revoke the sanction, **27 B. 130.** Had he been acting judicially, only the High Court as the principal Court of original jurisdiction could have interfered. In no event can a Bench of one or more Judges of the Small Cause Court interfere with the sanction accorded by the Registrar of the Court.

35. **Secretary of Municipal Board subordinate to Chairman.**—The Chairman of a Municipal Board has power, apart from and independently of the Board to grant sanction for prosecution of an offence under s. 182, I.P.C., committed in respect of the Secretary of the Board, **1892 A. W. N. 31.**

V.—APPLICATION FOR SANCTION, WHAT IT SHOULD CONTAIN.

36. **Generally an application is indispensable for granting sanction.**—A sanction to prosecute pre-supposes an application for sanction and where no such application is made, a Court ought not to take upon itself

Registration Officer not a Court.—*See* cl. (2). A Registrar or a Sub-Registrar is not a Court eaning of this section, but offences committed before such officers are specially made punishable 82 and 83 of the *Registration Act* III of 1877. Hence no sanction is required for prosecution in an offence committed before such an officer and falling within clauses (*b*) and (*c*) of sub-sec. (1) vious sanction or complaint is necessary in respect of offences within cl. (*a*) of sub-sec. (1), **11 C. 566.** Registrar dealing with a complaint against a Sub-Registrar is not a Court, **10 C. W. N. 222 = 2 C. L. J.** **. L. J. 112.** *See* **10 C. 604; 12 B. 36** and **12 M. 201,** where **10 M. 154** and **11 M. 3** are explained and also **15 C. W. N. 244; 11 O. C. 358; 11 C. L. J. 111 = 11 Cr. L. J. 212; 16 Bom. L. R. 946 = 16 Cr. L. J. 106.**

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31. Taluk second-class Magistrate not official superior of Police Station-house officer.—A second-class Magistrate of a *taluk*, not being the official superior of a Police Station-house Officer, cannot sanction a prosecution under s. 182, I.P.C., for giving false information to the Station-house Officer, **6 M. 146.** *See* also **2 N. W. P. H. C. R. 287; 7 B. H. C. R. Cr. Ca. 64; 11 W. R. 22.**

32. Honorary Magistrate not official superior of Police-officer.—A sanction given by a Bench of Honorary Magistrates for the prosecution under s. 182, I.P.C., of a person alleged to have made a false report to the Police was an illegal sanction inasmuch as the Police-officer to whom the report was made was ot subordinate to the Bench of Honorary Magistrates within the meaning of this section, **1895 A. W. N. 152; 9 W. R. 33.**

33. Village Munsiff is not subordinate to a Sub-Magistrate.—Under s. 195, the subordination of one public servant to another may arise either from express enactment or from the fact that both the public servants belong to the same department, one being superior in rank to another. There is no enactment which makes Village Munsiffs subordinate to Sub-Magistrates, nor do they belong to the same department, **18 M. L. J. 584 = 4 M. L. T. 214** *dissenting from* **4 M. 241.** *See* Note 26.

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35. Secretary of Municipal Board subordinate to Chairman.—The Chairman of a Municipal Boar power, apart from and independently of the Board to grant sanction for prosecution of an offence under s I.P.C., committed in respect of the Secretary of the Board, **1892 A. W. N. 31.**

V.—APPLICATION FOR SANCTION, WHAT IT SHOULD CONTAIN.

36. Generally an application is indispensable for granting sanction.—A sanction to prosecute an application for sanction and where no such application is made, a Court ought not to take up

(*iii*) *Application must specify time and place of offence.*—An application for sanction must specify the time when and the place where the offence was committed and sanction should not be granted except upon evidence before it of such matters, **5 A. L. J. 247.**

(*iv*) *Application for sanction for perjury must contain the assignment of perjury.*—An application to prosecute for perjury must indicate precisely the statements alleged to be false showing the place where and the occasion on which such alleged false statements were made, **18 A. 203; 36 C. 808; U. B. R. (1913) 1st (quarter) 166 = 14 Cr. L. J. 422.** Mere omission to specify the statements in the application is not a ground for revoking the sanction, s. 537, **3 Bur. L. T. 151 = 11 Cr. L. J. 749; 36 C. 808.**

(*v*) *Application for sanction for forgery must specify the document.*—Application to prosecute for perjury or forgery must indicate precisely the document in respect of which forgery is said to have been committed, or must set forth in detail the statements alleged to be false, showing the place where and the occasion on which such alleged false statements were made. It should not be left to the Court which is asked to grant the sanction, or to the Court which is to act on that sanction, to find out by reference to another record what the document is in respect of which sanction is sought or given, **18 A. 203; 7 M. 560; 8 P. R. 1898.** It is not competent to a Magistrate to sanction the prosecution of a person in respect of a document in regard to which the application for sanction is silent and does not complain, **2 C. L. J. 612 = 3 Cr. L. J. 81.**

VI.—WHO CAN APPLY FOR SANCTION AND TO WHOM SANCTION MAY BE GRANTED.

40. Anyone may apply for sanction.—This section does not enact that application shall be made by any particular person. It merely provides that no Court shall take cognisance of certain offences without a sanction, **18 M. 487.** *See* Note 90.

(*i*) *Agent.*—In **39 C. 463** it was *held* that a landlord is entitled to authorise his agent to obtain sanction to prosecute an accused in respect of an offence committed against him.

(*ii*) *Minor cannot apply for sanction.*—A Civil Court ought not to entertain an application for sanction under s. 195, presented by a minor unless it is presented on his behalf by some responsible person acting as the next friend, 11 [illegible] (C.).

Whether sanction [illegible] to [illegible] **representative of a deceased applicant.**—Criminal proceedings started by a private perso[illegible] so a petition for sanction for perjury filed by a party cannot on his death be allowed t[illegible] representative, though the latter may himself present new application for the same [illegible]

41. Court may [illegible] **private or official.**—"There is nothing to prevent [illegible] officer from obt[illegible] and then filing a complaint or submitting a report [illegible]gistrate for hi[illegible] under section 190. Similarly if a Magistrate wishes [illegible] a fit case upon [illegible] own k[illegible] or suspicion, he has only to apply [illegible]ion. Nor is [illegible] Pros[illegible] obtaining the necessary sanction for [illegible] to file a co[illegible] **82** [illegible] and *see* also **Weir II, 596.** A Court [illegible] sanction at [illegible]y on the prosecution. The section [illegible]dy wi[illegible] *party.* A sanction may as easily be [illegible] Public [illegible] Magistrate to obtain it and the [illegible]trate [illegible] one deserving of his attention. *Per* [illegible] **M. 49** [illegible]

[illegible]ctions from the District Magistrate [illegible] been committed in connection with [illegible] to grant sanction to a private [illegible] sanction to a Public Prosecutor, [illegible] Pleader to apply for the extension [illegible] has allowed the time to expire, [illegible] Court holding an inquiry under s. 10[illegible] [illegible] matters in the case which called [illegible] papers were placed before the Public [illegible] s. 195 for offences under ss. 193 and

to grant sanction but should take action under s. 476, 18 A. 213; 3 A. 62. In 1913 N. L. R. 111; 91 = 17 Cr. L J. 59 = 32 In. Ca. 651, the case in 18 A. 213, was followed. The Code does not contemplate a Court or public servant giving sanction where no application has been made, 1907 U. B R. Cr. P. C. 1 = 6 Cr. L. J. 25. Sanction should not be accorded without an application made for it by some person who may desire to complain of the offence 27 C. 820, 20 C. 474, 6 C. W. N 37; 10 C. W. N. 222 = 2 C. L. J. 619 = 3 Cr. L. J. 112; 11 C. L. J. 111 = 11 Cr. L J. 212; 23 P. R. 1901; 30 P. R. 1905 = 2 Cr. L. J. 687; 16 Cr. L. J. 251 (Pun.), M. 189; 20 C. 349; 6 A. L. J. 796 = 10 Cr. L. J. 437; 8 S L. R. 21 = 15 Cr. L. J. 662. Where a Sub-divisional Magistrate after merely perusing the calendar of a case tried by a Magistrate subordinate to him sent for the record and without any application for sanction passed an order under this section sanctioning the prosecution of a witness in the case for perjury, *held* that the order was illegal as the Magistrate had no jurisdiction to take cognisance of the offence, though he be a Court superior to the Court in which the offence was committed, 7 M. 560 Where a Magistrate directed a Police investigation in a case pending before him and as the result thereof passed an order against the complainant purporting to be under this section, *held* that the order was irregular inasmuch as this section pre supposes an application by some person for sanction to prosecute 1902 A. W. N. 195 *following* 1896 A. W. N. 32 A Police report setting forth the facts and containing a request that the petitioner should be prosecuted under s 188 I P C is a sufficient application to justify the Magistrate in giving sanction 17 C. W. N. 976 = 14 Cr L. J 292

Contra—There is nothing in law which requires that sanction to prosecute shall only be granted upon application by a private prosecutor, 10 C. L. R. 4. Where it was contended that the proceedings for grant of sanction were irregular because no application had been made for that purpose by the party to whom sanction had been granted, *held* that s 195 does not expressly provide that an application has to be made for the grant of the sanction. No doubt the cases in 27 C. 820, 18 A. 213, 20 C. 474; 10 C. W. N. 222 = 2 C. L. J 619 = 3 Cr L J. 112, recognise the proposition that ordinarily a sanction should be given only on an application made for it by some person who may desire to complain of the particular offence but whose complaint cannot be entertained without such sanction. The rule recognised in the cases mentioned may be justified to this extent that before a sanction is granted the Court must be satisfied that there is some person who is willing to avail himself of the sanction and to carry on the prosecution for the purpose whereof the sanction is granted, 13 Cr. L J. 4 (C) In 17 C. W. N. 976 = 14 Cr. L. J 292. CHAPMAN J was of opinion that there was no necessity for any application in cases which come under sub-sec. (1) (*a*), *see* also 7 Mad. H C R 53. In 16 Bom. L. R. 947 = 16 Cr. L. J. 107, it was *held* that to require an application in all cases was to depart outside the terms of s. 195 and it is open to a Court to grant a sanction without an applicant. The sanction contemplated by this section is not a sanction to any particular person to prosecute, but a sanction to the Criminal Courts concerned to take cognisance of certain offences specified in this section of which the Criminal Courts cannot take cognisance except with the previous sanction or on the complaint of the authority described in this section. The sanction whilst it is in force restores to the Criminal Courts a jurisdiction of which the same section deprives them in respect of specified offences and need not even name the accused person 8 Bom L. R. 32 = 3 Cr. L. J. 227, where 27 C. 820 is not *followed*. In 16 Cr. L. J. 740 (M.) the High Court granted sanction in respect of an offence before a District Munsiff without an application and ordered the District Munsiff to direct the process-server to act upon the said sanction. *See* also 17 Cr. L. J. 305 (B.) *See* also Notes 57 and 90

37. Is a written application necessary?—It is the established practice on the Original Side of the Calcutta High Court to grant a sanction only on a formal petition being put in upon which an order could be passed. Where therefore, on an oral application, the Judge then sitting on the Original Side said 'very well' but the office refused to draw up the order as there was no application in writing, and subsequently a written application was made to another judge sitting on the Original Side, *held* the latter had jurisdiction to make the order since the previous order was not in form and infructuous, 40 C. 423.

38. No particular form necessary.—This section does not make any particular form of application or sanction necessary, 18 M. 487. No particular form of application is necessary, 3 C. W. N. 3.

39 What should application generally contain —

[illegible] nger to the proceedings that [illegible] on which sanction should [illegible]

(*ii*) *Application must specify the offence.*—Sanction for prosecution under a section other than that under which sanction was asked for by the applicant cannot be granted, 1898 A. W. N. 203.

passed by him, a District Magistrate has no power to grant sanction unless he withdraws the case to his own Court, 3 C. W. N. 490.

44. Where practicable Judge who tried the case to be resorted to.—No doubt, ordinarily as a matter of convenience and expediency, an application for sanction should be made to the Judge who tried the case if he be present in Court. If he is not present, either by death, absence on leave or transfer, it is open to the Court, *i.e.*, any other Judge of the Court to grant sanction. The words *such Court* does not mean *such Judge*, 33 C. 193; 7 A. L. J. 50 = 11 Cr. L. J. 140.

45. Change of incumbent is no change of Court.—The Court before which the perjury is alleged to have been committed is to give the sanction. The change of incumbent leaves it still the same Court, 7 M. H. C. R. Ap. 12; 5 C. L. J. 176, where 33 C. 193 is *followed* 34 C. 551 (F.B.); 29 P. R. 1879. Thus in 11 C. W. N. 119 it was *held* that a Munsiff has jurisdiction to grant sanction in respect of an offence committed before his predecessor in office, 9 C. W. N. 859 *distinguished and doubted.* The term Court in cl. 1 (*b*) is not confined to the Judge who tried the case on the appeal, but also means and includes the successor in office of such Judge who can therefore grant sanction, 5 C. L. J. 176 = 5 Cr. L. J. 186. But it is always desirable that sanction should be granted by the Judge who tried the case, 7 A. L. J. 50 = 11 Cr. L. J. 40. A succeeding third-class Magistrate may dispose of a sanction petition, even though he is incompetent to conduct the trial conducted by his predecessor, in which the offence for which sanction is applied for was committed, 19 M. L. J. Sh. Note 55, but *see* next Note and also 39 C. 463.

46. But when change of presiding officer make a change in the Court, sanction cannot be granted.—Court trying the case and granting sanction must be the same.

(*i*) *Succession of Deputy Magistrates.*—Where there are many Deputy Magistrates and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the Deputy Magistrate who has been transferred, 35 C. 457 at p. 460. The incoming Magistrate is not, therefore, competent to grant sanction in respect of an offence committed before the outgoing Magistrate, 42 C. 667.

(*ii*) *Can District Magistrate grant sanction for offences before Subordinate Magistrate who is transferred?*—After acquittal by a first-class Magistrate who was transferred outside the district, an application for sanction to prosecute the complainant under s. 211 was made to the District Magistrate and granted. It was contended that inasmuch as on the departure of the Deputy Magistrate all cases then pending in his Court were placed before the District Magistrate, the District Magistrate for the time being became the presiding Judge in the Deputy Magistrate's Court and the sanction was good. The sanction was set aside; *held*, it may well be that in so far as he proceeded to dispose of such part-heard cases, the District Magistrate within the meaning of s. 350 succeeded to and exercised the jurisdiction which the Deputy Magistrate had ceased to exercise; but in the present instance neither the original case nor the application for sanction were among the cases so left part-heard, 16 Cr. L. J. 640 (C.). *See*, however, 20 Bom. L. R. 117 = 42 Bom. 190.

(*iii*) *Court trying case and granting sanction must be the same.*—A case was heard and decided by an Assistant Magistrate with second class powers. On his transfer from the district, all his work was transferred to the Joint Magistrate who granted sanction in respect of a case disposed of by the Assistant Magistrate and the sanction was upheld on appeal by the Sessions Judge; *held*, that the Joint Magistrate had no jurisdiction to accord sanction, and though the Sessions Judge had power on a proper original application made to him to accord sanction, his appellate order cannot cure the defect, inasmuch as the Sessions Judge was not dealing with the matter as an Original Court, but as a Court of Appeal, 1902 A. W. N. 9.

(*iv*) *Court of Subordinate Judge not a permanent Court.*—In 7 P. R. 1913 = 14 Cr. L. J. 178 it was *held* following 25 P. R. 1889 that though there is a class of Courts called Courts of Subordinate Judges, there is no Court of a Subordinate Judge as a permanent Court with a perpetual succession of Judges, and on transfer of a Subordinate Judge from a district, the Court of the Subordinate Judge, who takes over the pending work is not identical with the Court of the Subordinate Judge who has been transferred. *See* Note 190.

47. Court trying the case must be resorted to and not Court taking cognisance merely or transferring.—It is the Court which tries the case on the merits, that is the proper authority to grant sanction; and not the Court before which proceedings are instituted and by which process is issued, 6 C. W. N. 35; 3 C. W. N. 33. A complaint was made before a District Magistrate against a Police-officer. He allowed the complainant to make his complaint before a Deputy Magistrate at the headquarters. That Deputy Magistrate improperly transferred the investigation to the Sub-divisional Officer at B, who after investigation found the case to be

(ii) *Sheristadar*—In **12 Cr. L. J. 320 (Sindh)** sanction was given to the Sheristadar of the Court without any application by him and it was *held* that it virtually amounted to a complaint.

(iii) *District Magistrate*—*See* also **37 C. 13,** where it was *held* distinguishing **3 C. W. N. 3** that there is nothing in the Code to limit the grant to a party to the proceeding in which the offence was committed and sanction was granted to a District Magistrate *See* **10 C. L. R. 4; 39 C. 463.**

(iv) *Strangers, but not if application is not bona fide and made out of spite*—In **3 C. W. N. 3,** it was *held* that no Court should entertain an application for sanction by a person not a party to the suit out of which proceedings for sanction arose. In this case an application for sanction unsigned and unverified was filed before a Munsiff, purporting to be on behalf of the defendant in a Civil Suit, who deposed that he was not aware of the application or its contents, and was not desirous of prosecuting, and the Munsiff found that it was filed by one *R* who was not a party to the suit, out of ill feeling, *held* that no Court should entertain an application for sanction to prosecute, made by persons who are not parties to the suit out of which the proceeding arose So also in **13 Cr. L. J. 1 (C.)** and in **13 P. W. R 1913 = 63 P. L. R. 1913 = 14 Cr. L. J. 107,** it was *held* that a Judge acted properly in not giving a sanction to a stranger to the suit. *See* also **11 A. L. J. 313 = 14 Cr. L. J. 389.**

VII.—WHO CAN GRANT SANCTION?

42. Application for sanction should be made first to the Court before which the offence was committed.—As a general rule, application for sanction should be made in the first instance to the Court before which the alleged offence was committed, **6 M. H C. R. 92, 7 M. H. C. R Appx. 12; 22 W R. 11, 29 P. R. 1879,** and unless there are exceptional circumstances the superior Court will not interfere in the first instance **17 W. R. 46; 1905 P. R. 56** and *see* **32 B. 203,** where it was *held* that the appellate tribunal had no jurisdiction to grant a sanction when the first Court had dismissed the application for default of appearance. "Where sanction is asked for the prosecution of an offence alleged to have been committed before any Court, it is in every way expedient that the application for sanction should in the first place, be made to the Court in which, or in relation to any proceeding in which the offence was committed **16 A. 80 at p. 82.** *See* Notes 214 and 230

43. Sanction may be granted by the Superior Court in the first instance.—Under clauses (*b*) and (*c*) of sub-sec. (1), such superior Court is competent to accord sanction in the first instance, even though no [illegible]

the latter, **27 M. 223 at p. 225; Ratanlal 937; 6 C. 440 = 7 C. L. R. 330.** Under cls (*b*) and (*c*), it is competent to the Appellate Court, in the first instance to sanction the prosecution of appellants for forgery of a document not produced in his Court, but given in evidence in the appeal pending in that Court, an appeal being certainly a proceeding within the meaning of this section, **11 A. L. J. 11 = 14 Cr. L. J. 47.** On a petition to set aside for want of notice an *ex-parte* decree in a second appeal, the High Court called for a report from the District Munsiff and finding from the report that the petitioner had committed perjury before the District Munsiff gave sanction for his prosecution, **16 Cr. L. J. 740 (M).** The power of an appellate tribunal in sanctioning prosecutions for perjury, etc, is not restricted to cases in which an appeal is heard but vests in the superior Court as a Court exercising supervision and control over the subordinate Court, as for instance it might be exercised on a perusal of the records. It is immaterial how the superior Court is put in motion, **Weir II, 150.** But it would be very undesirable for the High Court except under very peculiar circumstances, to entertain in the first instance an application for sanction to prosecute for perjury, **17 W. R. 46** *See* also **11 N. L. R. 35 = 16 Cr. L. J. 289; 67 P. L. R. 1916 = 17 Cr. L. J. 238**

(i) *High Court acting in revision under s 439 may grant sanction*—The High Court while exercising its powers of revision has power to grant sanction, **25 M. L. J. 593 = 14 M. L. T. 512 = 14 Cr. L. J. 624.**

(ii) *Sessions Judge not competent to grant sanction*—A Sessions Judge is not competent to grant sanction for an offence under s 193 committed before a Subordinate Magistrate, **27 M. L. J. 586 = 15 Cr. L. J. 612,** But a Sessions Judge is competent to grant a sanction for the prosecution of a witness for statements made by him before the committing Magistrate and brought to the notice of the Sessions Judge **(1917) M. W. N. 141.**

(iii) *Superior Court not competent to grant sanction with regard to case pending on the file of a Subordinate Court.*—When a case is pending on the file of a Subordinate Magistrate and no "

63. Court should consider whether prosecution necessary in the interests of justice.—Courts should not merely see that there is good prospect of conviction, but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests, **37 M. 564.** Apart from the existence of a *prima facie* case, in cases where sanction to prosecute is applied for, the Court should see if there are good grounds for thinking that a prosecution is necessary in the interests of justice. *See* **20 M. L. T. 557 = 32 M. L. J. 54.** Where the view of NAPIER, J., in **17 M. L. T. 15** is dissented from. A case where the character of a public officer has been attacked by accusing him of having committed a cruel and barbarous offence apparently with the object of making it appear that he was not a fit person to proceed with a trial of a case pending before him at that time, is eminently one which ought to be heard and determined **(1911) 2 M. W. N. 172 = 10 M. L. T. 117 = 12 Cr. L. J. 446.** In **40 C. 444** the High Court declined to grant a sanction as the accused had been illegally and unnecessarily harassed by previous illegal proceedings. *See* also **33 M. L. J. 545.**

64. Application for sanction should not be dealt with as though it were a trial—Nature of discretion exercised in according sanction.—In dealing with applications, for sanction, the Court is not trying the guilt or innocence of the accused; but is merely considering whether the statutory bar imposed by this section should be removed and the law allowed to take its ordinary course. The section is expressed in the widest terms and vests in the Court an absolute and unqualified discretion. Not one jot or tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court, nor can this discretion vested by the section be crystallised or restricted by any series of cases; it remains free and untrammelled to be fairly exercised according to the exigencies of each case. When a tribunal is invested by Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicate the particular grooves in which the discretion should run, for if the Act or rules did not filter the discretion of the Judge, why should the Court do so. There are, however, certain rules of procedure to which any Court exercising its discretion would pay regard, and pre-eminent among them, possibly a compendious statement of all, would be the rule that the Court will be astute to see that there should be no abuse of administration of criminal justice. No one therefore, would be permitted to use a penal law merely to satisfy his own private ends or personal spite, **41 C. 446.** *See* also **13 A. L. J. 1111.**

65. Question of guilt or innocence need not be decided.—The question whether the person, sanction for whose prosecution is sought is guilty or not cannot be decided in sanction proceedings. The sole question is whether there are *prima facie* grounds for removing the bar to the institution of criminal proceedings by which alone the question of guilt or innocence can be determined, **7 Bom. L. R. 732 = 2 Cr. L. J. 611; 11 Bom. L. R. 1164 = 10 Cr. L. J. 539; 10 C. L. J. 564 = 11 Cr. L. J. 37; 14 Bom. L. R. 581 = 13 Cr. L. J. 689; 41 C. 446.** It is not the function of the Court giving the sanction for a prosecution to require the same strictness of proof that Courts are wont to demand before they pronounce an accused person to be guilty. It is too much to expect the prosecution to prove at the time the sanction is applied for that there was no particle of truth in the complaint, **(1911) 2 M. W. N. 172 = 10 M. L. T. 117 = 12 Cr. L. J. 446.**

66. Sanction not to be given before termination of the original proceedings in respect of which the offence was committed.—The proceedings in respect of which the alleged offence has been committed must have judicially terminated before the Court to which an application for sanction has been made can grant it, **16 B. 729.** By a judicial determination it is not meant a trial of the persons against whom the original complaint is made, but the officer holding the inquiry must have finally disposed it of, **5 C. W. N. 254; 5 C. W. N. 106; 3 C. W. N. 490, 758 and 3; 16 W. R. 37; 5 A. 387; 4 C. L. J. 88; 1 M. H. C. R. 30; 1882 P. R. 50; 1 A. 497; 14 C. 707 (F.B.); 4 C. W. N. 305; 13 C. W. N. 298 = 11 Cr. L. J. 4.** Proceeding with a view to the prosecution of a witness for giving false evidence should not be taken until a conclusion has been come to by the Magistrate or Judge conducting the trial in which the false evidence is supposed to be given upon the evidence given therein, **1913 U. B. R. (1st quarter) 166 = 14 Cr. L. J. 422; 21 C. W. N. 753.** *See* Note 95.

67. Duty of Court when there are a number of accused.—Before granting a sanction to prosecute, a Court is bound to satisfy itself by some inquiry that an offence has been committed, but it is not bound to hold any inquiry as to all the persons who may be implicated in such offence, **7 M. 224; 19 B. 362.** Nor to go into the defence or to scrutinise evidence against each individual accused. **Weir II, 179.** *See* Note 111.

68. Point to be noted in granting sanction for disobedience of order under s. 144.—A Magistrate should not sanction a prosecution under s. 188, I.P.C., for disobedience of an order under s. 144 unless there is some evidence that the disobedience of the order tends to cause annoyance, etc., **14 C. W. N. 234 = 11 Cr. L. J. 49.**

false Then the Deputy Magistrate recalled the case and passed an order deciding the trial of the complainant under s. 211 I P C, *held* the order for prosecution was without jurisdiction, as the Deputy Magistrate had after transfer no jurisdiction to recall the case or pass any orders under s. 476 **16 C. W. N. 885 = 13 Cr. L. J. 434.** An order for prosecution for bringing a false case should be given by the officer investigating and not by the officer who transfers the case, **40 C. 41.**

48. Magistrate making an investigation under s. 202 has no power to grant sanction.—A Deputy Commissioner upon receiving a petition of complaint against a public servant referred it for inquiry and report to a Sub-divisional Magistrate, who in consequence of an opinion formed by him during the inquiry proceeded to try the petitioner who was one of the complainants to the Deputy Commissioner, and convicted him under s. 182 I P C, *held* that the Sub-divisional Magistrate has no jurisdiction to institute proceedings or to grant sanction inasmuch as the complaint which led to the trial of the petitioner was not made to him but to the Deputy Commissioner, **4 C. W. N. 366; 22 M. L. J. 419 = (1912) 1 M. W. N. 499 = 13 Cr. L. J. 209**

49. Second-class Magistrate cannot grant sanction in respect of an offence before a Village Magistrate.—*See* **18 M. L. J. 584** (Notes 49 and 42) where **4 M. 241** was not followed A sanction to a prosecution for an offence under s 182, I P C., accorded by a second-class Magistrate, when the false information was supplied to a Village Magistrate is a sufficient sanction if the Village Magistrate is subordinate for the purpose *at all events of transmitting information to the Magistrate granting sanction,* **4 M. 241.** *Quære* whether a Village Magistrate in Madras is a Magistrate within the meaning of this section and of s 197 having regard to the definition in s 3 (31) of *the General Clauses Act,* X of 1897?

50. False evidence before Village Munsiff's Court.—A Village *Munsiff* trying a suit is a Court and as such can give sanction under this section when false evidence is given before him, **11 M. 375.**

51. Sanction for perjury by an offender under conditional pardon.—Under s 339 (3), the High Court alone is competent to accord sanction for the prosecution for perjury by an offender to whom a conditional pardon had been tendered

52. Officer of Court may grant sanction for offences against him—Where the complainant alleging that he was assaulted when trying under the orders of the Amin to open the doors of the judgment-debtors house, charged the accused with offences under ss 183, 186, 355 and 323 I P C, it was held that sanction of *the Court was not necessary in respect of ss 355 and 323, I P C., and the sanction of the Amin would be sufficient* in respect of the other offences, **31 M. 43.** *See* also **8 A. 332.**

53. Persons not acting as a Court cannot grant sanction.—

(i) *Commissioner examining witnesses cannot grant sanction*—Where perjury is alleged to have been committed before a Commissioner appointed under s. 503, the proper authority to accord sanction is not the Commissioner, but the Court that tries the case **11 C. W. N. 909 = 6 Cr. L. J. 160.**

(ii) *Arbitrator appointed by Court cannot sanction*—Where it was alleged that a party to the suit had committed before an arbitrator appointed by the Court the offences of fabricating evidence etc *held* the sanction of the Court was necessary for prosecuting the party **17 M. L. J. 420 = 6 Cr. L. J. 33**

(iii) *Official Assignee cannot grant sanction*—*See* Note 38

(iv) *Collectors and Assistant Collectors acting departmentally*—*See* Notes 36 and 37

(v) *Registration Officers.*—*See* Note 44

54. Dual capacity of grantor.—When an order which would have been a valid sanction if made by the Sessions Judge was in fact passed by the same person as District Judge, the High Court set aside the sanction, as in the absence of notice to the accused in that case it could not be said he had not been prejudiced In **26 A. 514; 26 M. 139,** the misdescription was held to be immaterial. *See* also **13 C. W. N. 1062; 17 W. R. 54** and Note 124

55. Contradictory statements in two Courts.—*See* Notes 132 and 133

IX.—POINTS TO BE CONSIDERED IN DEALING WITH SANCTION APPLICATIONS.

56. Only upon an application.—*See* Note 36 at p 449

57. Application should not be dismissed for default of appearance of applicant.—Where a Public Prosecutor applied for sanction, but failed to appear at the hour appointed for return of notice and the Court dismissed the application for default of prosecution *held,* there was no provision of the Code which warranted

79. **When notice may be dispensed with.**—No notice is necessary to the person against whom it is intended to proceed before the Court in which the alleged offence has been committed can grant sanction, a complaint being made to a Magistrate regarding one of the offences specified in this section, when the offence is committed before the Court whose sanction is applied for, **12 C. 58 (F.B.)** *overruling* **10 C. 1100.** *See* **18 A. 359; 7 M. 224; 10 M. 232 (F.B.); 26 M. 592; 41 C. 456; 11 N. L. R. 36 = 16 Cr. L. J. 289.**—But where a party hearing that sanction has been applied for against him requests to be heard before sanction was given, *held* that this opportunity should have been given him, **16 C. 661.**

80. **Notice necessary on appeal.**—Where the Magistrate who tried the case refused sanction, the Sessions Judge should not on appeal grant sanction without calling upon the accused to show cause. A sanction thus granted by the Appellate Court was set aside, as not having been made in the exercise of a sound discretion, **8 C. W. N. 643 = 1 Cr. L. J. 632; 37 P. R. 1885; 17 M. L. C. 15 = 16 Cr. L. J. 115.** Again, where a trying Magistrate refused an application for sanction made four months after the decision of the case on the ground that 'the case was at best a mere suspicious one;" but the Sessions Judge granted it, without giving notice to the accused and without calling for and examining the record of the case, the High Court set aside the Judge's order, **1 C. W. N. 529.**

81. **Before granting sanction for offences committed before the Police, notice should be given.**—It is very desirable that in offences under s. 182, I.P.C., especially when they are said to have been committed before a Police-officer, notice should be given to the accused in order that he may have an opportunity to clear himself before sanction for his prosecution is given; but the absence of notice does not vitiate the whole proceedings, so that the sanction awarded ought not on that ground alone be summarily reversed, **1890 A. W. N. 168; 10 M. 232 (F.B.); 7 M. 292.** But *see* **15 A. 336.**

XII.—SANCTION IN RESPECT OF PERJURY AND FABRICATING FALSE EVIDENCE.

82. **Facts to be taken into account in according sanction for perjury.**—In sanctioning a prosecution for perjury against a witness, the Magistrate should remember that the statement must be *intentionally* false in order to justify a prosecution. When the question is neither material to the issue in the case nor goes to the credit of the witness sanction ought not to be accorded. Some allowance ought to be made to a witness seeking to evade some matter relating to, for instance, his past history, **2 A. L. J. 836 = 3 Cr. L. J. 45,** where **26 A. 509** is *distinguished.* The materiality of the evidence to the matter in issue is not the only point to be considered, **Weir II, 166** and **652**; *see* also **15 C. W. N. 169 = 12 Cr. L. J. 11.** When a witness on cross-examination stated he had not applied for insolvency while, as a matter of fact, he had applied and the application had been dismissed, *held,* that without knowing the form in which the question was put, it is unreasonable to assume that the reply was intentionally false and give sanction for his prosecution under s. 193, I.P.C., **12 P. R. 1908 = 8 Cr. L. J. 243.** Sanction for perjury ought not to be granted against a witness based on records which were not produced before or at the time of the deposition and in respect of which the witness was not given any opportunity for an explanation, **17 M. L. T. 15 = 1915 M. W. N. 140 = 16 Cr. L. J. 115.** *See* also **72 P. L. R. 1911 = 14 P. W. R. 1911 = 12 Cr. L. J. 265.**

83. **Before granting sanction, a locus penitentiæ ought to be given to the witness.**—Where the question is whether sanction for perjury shall or shall not be granted, the safest rule is to give the witness as far as possible a *locus penitentiæ* and if the witness avails himself thereof, a prosecution for perjury is inexpedient, **1903 A. W. N. 68.** In dealing with an application for sanction to prosecute for perjury, Courts are entitled in doubtful cases to consider the grounds on which the Government may suggest that a prosecution is inexpedient. Although the scheme of procedure adopted in this country recognises the right of a private person to institute criminal proceedings, it also recognises the right of the Crown which is a party to all criminal trials as representing the public, to intervene and procure a stay of proceedings, **Weir II, 193.** *See* Note 17 under s. 236.

84. **Contradictory statements in the course of the same deposition.**—Prosecution for perjury for contradictory statements in one and the same deposition ought not to be sanctioned without considering the deposition as a whole and without having record to the circumstances in which the contradictory answers were made, **Weir II, 168; 3 C. W. N. 81.** Nor should sanction be accorded upon a charge in the alternative of having made two contradictory statements when one of the statements has been made in the circumstances in which the person making it is not bound by law to speak the truth. Sanction cannot be accorded merely because a statement made on oath is opposed to the other statement made not under an obligation to state the truth,

69. Reasons for the order should be clearly set forth and proceedings must be so conducted as to satisfy the Superior Court.—A Court should give reasons for granting or refusing sanction, **14 Cr. L J. 195 (C.)** A Court sanctioning a prosecution under this section should state the reasons for doing so and not confine itself merely to saying that it sanctions the prosecution. Otherwise a Superior Court is not in a position to decide whether it should exercise the powers conferred on it under sub-sec. (6) **1901 A. W. N. 171.** But it must at the same time be remembered that s 367 does not apply to orders under this section as it refers only to judgments on trials **6 Bom. L R. 897.** When Subordinate Courts grant sanction to prosecute under this section, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record, whether the application for sanction has been properly granted or not. A Magistrate in disposing of a charge of theft, delivered the following judgment — 'The charge of theft of doors and windows is not proved at all against the accused They are acquitted" There was no further record of the proceedings, *held*, that the mere fact of the charge laid by the complainant not having been proved, was not in itself sufficient ground for granting sanction to prosecute him under ss 182 and 211 of the Penal Code and as beyond the judgment of the Magistrate, there was nothing on the record, to show that there were sufficient grounds for granting the sanction it should be revoked **16 C. 661,** *concurred* in **23 M 210,** where it was further *held* that the Lower Court did not exercise a proper discretion in not giving the party against whom sanction was sought notice of the application especially where the predecessor of the Judge granting sanction had refused it. *Sanction should not be indefinite* **8 C. W. N. 37.**

(i) *That there would be numerous similar applications is no ground for rejection*—A Judge ought not to dismiss the application for sanction on the ground that there would be numerous similar applications every day **14 C. W. N. 806 = 11 Cr. L. J 357;** nor for the reason that there is nothing in the record to show that the case is false

(ii) *Sanction by trying Judge's successor good, though based on predecessor's opinion*—A Sub-Judge after duly hearing both parties and examining a witness on behalf of opponents and relying on the opinions recorded by his predecessor in office who heard and decided the suit, and by the Joint Judge who confirmed it on appeal gave sanction for the prosecution of some of the plaintiffs the opponents for the forgery of a document produced by them in a civil suit in his Court in which his predecessor, holding the document relied upon by the plaintiffs not to be genuine dismissed their claim and in which on appeal to the Joint Judge declaring the document to be a forgery, confirmed the Sub-Judge's decision The District Judge set aside the sanction stating that the Sub-Judge ought to have held independent inquiry, instead of relying on the opinion expressed by the trying Sub-Judge *held,* that the Sub-Judge adopted the proper procedure, and had material whereon to base his order, **Ratanlal 705.** *See* also **40 C 423**

(iii) *Giving sanction on mere assurance of pleader is illegal*—Where the evidence on record being insufficient in the opinion of the Judge to sustain a charge under s 211, I P C., the pleader of the petitioner obtained sanction to prosecute under s 211, on the assurance that further evidence would be adduced at the hearing, *held* the sanction was bad, **14 C. W. N 122.** But it was open to the Judge to proceed in the matter of the sanction should he see it fit on further evidence which may be produced before him.

70. Can a second sanction be granted when the first was infructuous.—*See* Notes 167 and 228.

71. Costs should not be awarded.—In proceedings under this section costs cannot be awarded **Weir II, 196.** The powers of the Civil Procedure Code as to costs cannot be imported into a criminal proceeding, even though the Court called on to exercise the powers under this section be a Civil Court A proceeding under this section ought not to be treated as a proceeding between private parties and costs ought not to be awarded The person who applies for sanction presumably does so in the interests of the administration of public justice and if that was his real point of view he cannot very well claim costs **13 Cr. L. J. 6 (C) 5 P. R. 1915 = 16 Cr. L. J. 281.** *See* also **(1913) U. B R. (1st quarter) 166 = 14 Cr. L. J. 422; 18 C. W. N. 1323 = 16 Cr. L. J. 151.** The practice in the Madras High Court is to award costs, **17 Cr. L. J. 184 = 33 In. Ca. 824 (M)** It was held however, that proceedings of a Civil Court under s 195 must be treated as of a criminal nature and costs should not be awarded **25 C. W. N 661.**

72 Person against whom sanction is applied for ought not to be put on oath—*See* Note 77

X—COURT'S POWER TO HOLD PRELIMINARY INQUIRY AND GO BEYOND THE RECORD IN GRANTING SANCTION.

73. Court competent to hold preliminary inquiry and let in fresh evidence.—On an application for sanction to prosecute, it was originally *held* that it is not competent to the Court to go beyond the record in

97. No sanction necessary when charge laid before the Police only.—The words "in or in relation to any proceeding in any Court" are applicable only to offences mentioned in cl. (*b*) and this clause does not refer to a false charge made to the Police, **12 P. R. 1905 = 74 P. L. R. 1905 = 2 Cr. L. J. 66; 10 M. 232 (F.B.); 5 Bur. L. T. 129 = 13 Cr. L. J. 578 (F.B.); 13 Cr. L. J. 480 (Mad.)**. Where, therefore, a false complaint has been made to the Police, but no further steps are taken, sanction of the Magistrate is not necessary for a prosecution. Under s. 211, I.P.C., **3 C. W. N. 33; 24 W. R. 41 25; W. R. 33; 16 W. R. 44; 4 C. 869 = 4 C. L. R. 413; 1 A. 497; 6 C. 582 = 8 C. L. R. 255; 5 C. 281 = 6 C. W. N. 295; 14 C. 707; 3 A. 322; 26 C. 786; 7 M. 292; 20 C. W. N. 1347 = 25 C. L. J. 59** nor is it necessary when the Magistrate has merely ordered the Police to remove the case from their file, **13 Cr. L. J. 480 (M.); 14 Bom. L. R. 1160 = 13 Cr. L. J. 904.** In **34 A. 522** the correctness of this view is doubted as this leads to the absurdity while sanction is necessary for the lesser offence under s. 182, I.P.C., it is not necessary in the case of the more serious offence under s. 211, I.P.C. But a sanction is necessary if the false complaint is made to the Inspector-General of Police who is a Magistrate under s. 5 of Act V of 1861, **26 P. R. 1908 = 7 Cr. L. J. 291**; and a Sessions Judge has no jurisdiction to sanction the prosecution under s. 211, I.P.C., of two persons on the allegation that they instigated a *chowkidar* to lodge false information at a *thana*, and the sanction was revoked as one made without jurisdiction, **7 C. L. J. 373 = 12 C. W. N. 575 = 7 Cr. L. J. 340.** Before a Court can grant sanction, the record must show that it has exercised its own judgment on the facts proved before it. *See* also **24 C. L. J. 134 = 20 C. W. N. 1265 and 20 C. W. N. 1347.**

98. Sanction is necessary if the charge before the Police is judicially dealt with.—Though no sanction is necessary when charge is laid only before the Police, yet if the complainant should, when the Police report the complaint to be false, insist upon a judicial investigation, he must be taken to have preferred a complaint to the Magistrate and the Magistrate has *seizin of the case*, **14 C. 707; 10 M. 232; 33 C. 1; 10 C. L. J. 564 = 11 Cr. L. J. 37; 29 Cr. L. J. 660 = 110 I. C. 212**; so a sanction would be necessary when after the rejection of the complaint by the Police as false, the complainant makes a complaint to a Magistrate who after full inquiry discharges the accused, **6 L. B. R. 50 = 5 Bur. L. T. 111 = 13 Cr. L. J. 565**, but *see* **111 I. C. 858 = A. I. R. 1928 All. 765.** Where a matter does fairly come under s. 211 and where a sanction is needed in order that the prosecution may proceed under that section, to proceed without any magisterial sanction under s. 182 is to evade the salutary provisions of the law, *per* HEATON, J., in **15 Bom. L. R. 574 = 2 Bom. Cr. Ca. 86 = 14 Cr. L. J. 491.** *See* Note 24, **4 P. 323; 5 P. 33.**

Exceptions.—(i) If a prosecution has been instituted in respect of a false charge under s. 211 laid before the Police before any complaint is made to a Magistrate, no sanction of the Magistrate in respect of the subsequent complaint would be necessary to enable the Magistrate who has already taken cognisance of the offence under s. 211 to finish trying the offence, **6 L. B. R. 50 = 5 Bur. L. T. 111 = 13 Cr. L. J. 565.**

(ii) A complaint made to Police by *G*, accusing some persons of robbery, was reported to the Magistrate to be false on investigation. *G*, was thereupon charged by the Police under s. 211, I.P.C., with having made a false charge to the Police, on which the Magistrate issued process. On the application of *G*, who appeared before the Magistrate in consequence of the process, the Magistrate inquired judicially into his complaint of robbery and discharged the accused; *held*, that no sanction was necessary for the prosecution of *G*, under s. 211, I.P.C., as at the time the Police made the complaint against *G* there was not in existence any proceeding in any Court, **Ratanlal 704.**

(iii) Similarly, in **30 A. 52** it was *held* that cl. (*b*) of this section does not apply to a case where a person makes a report to a *thana*, but does not follow it up by a complaint to any Court. By making a report no offence is committed in or in relation to any proceeding.

(iv) Where the applicant after filing a complaint of dacoity before a Magistrate repeated the charges before the Police and the Police found the complaint to be false and at the instance of the Police, the applicant was put on his trial under s. 211, I.P.C., *held* that the offence, if any was committed in relation to proceedings in Court and a complaint in writing of such Court was necessary, **24 A. L. J. 816**; *see* also **53 Cal. 824.**

Contra.—In **U. B. R. (1912) I. 134 = 13 Cr. L. J. 576** it has, however, been *held* that when a complaint to the Police was held to be false and subsequently the same complaint is made to a Magistrate and held to be false no sanction is necessary to prosecute the complainant under s. 211, I.P.C., in respect of the false charge to the Police. A man may make a false charge on more than one occasion and if he does so, he is responsible for what he did on each occasion. *See* also **36 A. 212. In 1915 U. B. R. IV. 95 = 17 Cr. L. J. 177,** however, **5 Bur. L. T. 111 = 6 L. B. R. 50** was followed. *See* also Note 24, *supra.*

Weir II, 169; 23 M. 223. Sanction should not be granted merely on a discrepancy between the statement made before a Court on oath and that recorded on mutation proceedings which was not on oath and to which the attention of the witness was not called in the course of his examination in Court **7 A. L. J. 647 = 11 Cr. L. J. 445.** It is not proper to hold a contradiction in the statements made in the course of a single deposition and at one and the same time to be an offence simply by reason of the fact that there is a contradiction **Weir II, 169; 4 C. W. N. 249.** When one of the two contradictory statements is made by a person examined as a complainant under s 200 but does not bear his signature as required by that section, the record, not being made as directed by law cannot be used as evidence of the statement made **6 C. W. N 840** It would be most undesirable that a witness should be afraid to correct a mistake made in his deposition for fear of rendering himself liable to prosecution for perjury Prosecution for contradiction in the same deposition is maintainable if the contradiction was made not to correct a *bona fide* error but with a dishonest intention (**10 C. 937** and **26 M. 55** *referred to*) **9 S L. R. 202 = 17 Cr. L. J. 250**

85. Sanction must not be given as a matter of course where witness has made contradictory statements —It would be a dangerous doctrine to hold that the fact of a witness having made contradictory statements before the committing Magistrate and in Court at the trial would alone justify the granting of sanction to prosecute him for perjury The Court should consider how it has come about that there are contradictions and why the witness has resiled from his statements before the Magistrate. The High Court refused to grant a sanction though it found that the witness had made false statements before the committing Magistrate, but had deposed truly in Court, **37 C. 618.** When a witness made two contradictory statements one before the committing Magistrate and the other in the Sessions Court and the Sessions Judge believed the latter statement to be true, *held*, that he was right in not sanctioning the prosecution for having made statements, one or the other of which must necessarily be false *Held* also that the Sessions Judge might sanction the prosecution of the witness if he believed that the evidence given before the Magistrate was false, provided there was such proof forthcoming as to justify a reasonable expectation that the prosecution would be successful, **Weir II, 166**, *see* **6 W. R. 11** Whether sanction should be granted for giving false evidence on the mere fact that the witness made contradictory statements depends on circumstances **37 C. 618** *approved* **4 Bur. L. T. 262 = 13 Cr. L J. 56**; *see* also **7 A. 44; 1910 M. W. N. 397 = 8 M L. T. 86 = 11 Cr. L. J. 353.** The practice of charging a man with making two mutually contradictory statements should be adopted only where the two statements are necessarily and irreconcilably contradictory **1915 M. W. N. 34 = 16 Cr. L. J. 14** Every possible presumption must be made in favour of the reconciliation of the two statements **7 A. 44, 7 B. L. R. 96 = 15 Cr. L. J. 379; 10 B 124, 7 S L R. 108 = 15 Cr. L. J. 488** No sanction should be granted when a witness has corrected his false statement in his cross-examination, **29 Cr. L. J 679 = 110 I C. 231**

86. Contradictory statements in different depositions—sanction should be on each branch of the alternative by the proper Court.—Where it is intended to charge a person with having made a false statement in the Court of a Magistrate or alternatively a false statement in a Subordinate Judge s Court it is necessary that there should be a proper sanction for prosecution on each branch of the alternative *i e*, one sanction from the Magistrate or his superior and another from the Sub-Judge or his superior Sub-sec. (5) will not cure the want of sanction on each separate head The Court to which both Courts are subordinate might properly grant the sanction where one of the Courts is not subordinate to the other, **31 P. R. 1870.** In the course of two departmental inquiries the petitioner made two contradictory statements before two different officers. He was charged under s. 182 I P C, with giving false information to a public servant in that he made contradictory statements one of which he must have known to be false The sanction of both of the officers had not been obtained, but of only one *Held*, that the Magistrate had no jurisdiction to entertain the charge as laid, in the absence of sanction of both of the officers before whom the statements were made **Weir II, 157.** Where the accused makes contradictory statements in two Courts of which one is not subordinate to the other then neither Court can give sanction in the alternative but the application for sanction must be made to that Court to which the said Courts are subordinate, **30 P. R. 1901.** *See* also **17 W. R. 64; 11 B H. C. R. 34; Ratanlal 224; 10 B. 190; 27 M. L. J. 686 = 16 M. L. J. 612** But where the statement made to the Police in an investigation under s. 174 contradicts the statement in the inquiry before a Magistrate a sanction by the Magistrate is valid, **8 M. L. T. 355.** But perhaps these rulings will not apply when proceedings are instituted under s 476. But in **45 B. 834**, it is *held*, that where an alternative charge of giving false evidence is based on contradictory statements made before different Courts, it is necessary that the sanction of each of these Courts must be obtained under s. 195 If however, want of sanction has not occasioned a failure of justice it cannot be made the basis of interference in revision.

himself as District Magistrate and as such sanctioned the prosecution of the complainant under ss. 182 and 211, I.P.C., *held* that it was not clear from the record whether the District Magistrate purported to act under s. 195 or s. 476, but in either case the order was bad. If he purported to act under s. 195, then the sanction would be without jurisdiction as he was not the public officer concerned or the public officer to whom he was subordinate, and so far as the sanction related to s. 211 it was equally without jurisdiction as there was no offence committed in or in relation to any proceedings in Court, **11 C. L. J. 111 = 11 Cr. L. J. 212.** A complaint to a Village Magistrate may amount to an offence under s. 211, **32 M. 258.**

103. **On reversal of conviction, Appellate Court not to grant sanction ordinarily.**—Where on an appeal from a conviction, the District Magistrate set aside the conviction and granted sanction to prosecute the complainant under s 211, I.P.C., *held*, that an Appellate Court in overruling a reasoned and strongly expressed opinion of the original Court should not order the prosecution of the complainant except under very unusual circumstances, **56 P. R. 1905 = 1905 P. L. R. 180 = 3 Cr. L. J. 121.**

104. Where sanction for offence under s. 211, I.P.C., is rejected, no proceeding can be taken under s. 500, I.P.C., on the same facts, **44 C. 970.**

XIV.—SANCTION IN RESPECT OF FORGED DOCUMENTS.

105. **Document produced or given in evidence.**—Since the addition of the words '*produced or*' in cl. (*c*), sub-sec. (1), sanction can be given in respect of documents which are only tendered in evidence, but not exhibited and marked and considered by the Court. The words '*produced or*' have to be read apart from the words 'given in evidence' which follow **(1911) 2 M. W. N. 526.** In **29 C. 887,** defendants produced two bonds, alleging that the plaintiff who had sued on an alleged debt, was indebted to them. The Court dismissed the suit without considering the case put forward by the defendants. On an application by the plaintiff for sanction to prosecute the defendants in respect of the two bonds alleged to be forgeries; *held*, that though the Court had power to grant sanction, yet inasmuch as before sanction could be given it would be necessary for the Court to see whether there are *prima facie* grounds for holding the bonds to be forgeries, and as there were no grounds on the evidence already taken to believe the bonds were not genuine, sanction ought not to be given. But *see* **14 C. W. N. 806 = 11 Cr. L. J. 357** and Note 99. A document is given in evidence within the meaning of this section when it is handed over by the person tendering it to the Court, even though on inspection the Court may reject it as evidence for insufficiency of stamp or want of registration, **Ratanlal 242; 27 Bom. L. R. 1039 = 49 B. 799.**

106. **The word 'produced' in sub-sec. 1 (c) is wider than the terms 'filed' or 'put in' and gives more latitude to the Court's discretion.**—In **22 C. 1004** certain documents were filed annexed to a petition in a suit pending before a Munsiff, but were not given in evidence. The Munsiff, on suspicion that they had been tampered with, held an inquiry and committed the petitioners for trial by the Court of Sessions, *held*, it was a proper commitment under s. 478; *contra see* **15 M. 224;** where certain documents were put into Court in a suit pending before District Munsiff, but not given in evidence. The District Munsiff made an order for the prosecution of the parties who so put them in on the ground that they were forgeries; *held*, that the Munsiff was not competent to go beyond the record, therefore his order was bad in law. This and the rulings in **1895 A. W. N. 145** and **7 C. W. N. 112** are no longer law, *see* also **12 P. R. 1897; 10 W. R. 5; 3 M. 400.** In **29 C. 887** it was *held* that sanction cannot be refused on the ground that a document alleged to be forged, was only *tendered* and not judicially considered, *see* also **7 C. W. N. 795.** In **9 Bom. L. R. 735 = 6 Cr. L. J. 78,** it was also *held* that the production of a document is not the same thing as giving it in evidence; a document 'produced' in a Court means one which is produced for the purpose of being tendered in evidence or for some other purpose. Similarly, where a suit was decided on oath and there was no finding whether certain documents produced were genuine or not, it would be wrong to give sanction for prosecuting a party for forgery in respect of the documents, **16 M. L. J. S. N. 37; (1911) 2 M. W. N. 526.** *See*, however, Note 99 and **18 Cr. L. J. 1001.** *See* also **45 M. 928** where it is held that actual production in suit is necessary for requiring a sanction under s. 195, **27 Bom. L. R. 1039 = 49 B. 799.**

107. **The mere filing of a document may constitute a user within the meaning of s. 471, I.P.C.**—At least in certain circumstances the filing of a document may constitute a user, *see* **39 C. 463; 17 C. W. N. 94 = 13 Cr. L. J. 449.** The mere filing of a docu[illegible] Court without tenderi[illegible] the same in evidence may constitute user of it under s. 471, I.P.C. It car[illegible] as an infle[illegible] such an act does not constitute an attempt to use it as evidence, [illegible]; **35 C. 820** [illegible]ere a plaintiff produced and filed

99. When sanction should be for offence under s. 182, I.P.C., and when for offence under s. 211, I.P.C.—There is a difference of opinion between the High Courts The Bombay High Court holds that false information to the Police comes under s. 182 I P C., and a false charge in a Court under s. 211, **19 B. 717; 9 Bom L. R. 33; Ratanlal 72; 7 B 184;** section 182 I P C, is to be interpreted not in isolation, but in association with s 211, I P C Where the information conveyed to the Police amounts to the institution of criminal proceedings against a defined person or amounts to the falsely charging of a defined person with an offence, then the person giving such information has committed an offence under s 211 In such a case, s. 211 is not and s 182 is the appropriate section under which to frame the charge **15 Bom. L R. 574 = 2 Bom Cr. Ca 86 = 14 Cr. L J. 491** The Calcutta High Court has held that prosecution for a false charge may be under s. 182 or s 211, but if the charge is serious, s 211 should be applied **32 C 180; 4 C L J. 88** and a false charge made to the Police of a cognisable offence false under s 211 and not under s 182 **8 C. W. N. 727.** The Madras High Court is of the same opinion **Weir I, 120.** It is for the Court to determine under what section the prosecution should be *held* **15 A. 336.** The Punjab Chief Court seems to favour the Bombay view **14 P. R. 1882** When the false charge amounts to an offence under s 211, I P C, also, proceedings should be taken with respect to the more serious offence s 211, I P C **U. B. R. (1912) I. 134 = 13 Cr. L. J. 576.** The main test whether a person makes a charge within the meaning of s. 211 is 'does the person who makes the statement which is alleged to constitute the 'charge' do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed,' **26 M. 640; 8 S. L. R 179 = 16 Cr. L. J. 104.**

100. Sanction to prosecute under s. 182 I.P.C., sufficient when false accusation not of a serious nature—Where the offence in respect of which a false charge is preferred is not of a serious nature it is not necessary to accord sanction under s 211, I P C., but it is sufficient if sanction is accorded to proceed under s. 182 I P C, **32 C. 180.** Here a Magistrate at the request of the Police to whom a false complaint had been made sanctioned prosecution under s 182, I P C *Held* that the sanction of the Magistrate was sufficient and the prosecution did not require the sanction of the S H O or of his official superior Also the Magistrate would not be disqualified from trying the case himself merely because he had sanctioned the prosecution thereof **12 P. R. 1905 = 74 P. L. R 1905 = 2 Cr L. J. 66.** A prosecution under s 182 of the Penal Code may be instituted by a private person provided he first obtains the sanction of the public officer to whom the false information was given or of his official superior Where a specific false charge is made, especially where the false charge is a serious one the proper section for proceedings to be adopted is s. 211 of the Penal Code **8 A 332** *overruling* **5 A 36** *See* also **37 A 110**

101. Guiding principles in sanctioning prosecution for making false charge—A prosecution of a charge under s 211, I P C. should not be sanctioned as a matter of course under this section but only when the complainant can satisfy the Court that the interests of justice require a prosecution and there is a strong *prima facie* case against the accused **6 A. 114; Weir II, 178; Ratanlal 374; 35 P. R. 1882; 16 C. 661, 33 P. R. 1883; 1 C W. N. 400 and 529; 4 L B R. 234 = 7 Cr. L. J. 493; 137 P. L R. 1909.** Where the case brought, is not false in substance but is bolstered up by false evidence, the proper section to give sanction to prosecute is under s 196 I P C., **7 C. L. J. 169 = 7 Cr. L. J. 198.** To bring a vexatious charge against any person is not an offence under s 211, I P C., therefore a Magistrate has no jurisdiction to summon the applicant (complainant) to show cause why sanction should not be granted for his prosecution under that section for such an act, **1 Bom. L. R 11.** *See* also **34 C. 42** Sanction for prosecution under s. 182, I P C., should not be granted where there is nothing to show that the information given by the accused was false to his knowledge or that he believed it to be false

102. False charge must have been made with the intention of setting the criminal law in motion.—The charge must be one made with the intention and object of setting the criminal law in motion **26 M. 640; 8 S L R. 179 = 16 Cr. L. J. 104.** Where a complaint was presented to the Collector as Agent to the Court of Wards containing allegations against one of his subordinate employees and he granted sanction to prosecute the complainant under s. 211 I P C. *Held*, that the Collector was not justified in arbitrarily turning a departmental complaint into a criminal complaint and at any rate before granting sanction he should have afforded the com [illegible]

Cr. L. J. 152 The false charge must be made to a Court or to an officer who has power to investigate or send it for trial, **6 C. 620; 13 C. W. N. 338; 16 Cr. L. J. 252 (M.).** Where a District Registrar on a complaint against a Sub-Registrar made a departmental inquiry and concluding that the complaint was false forwarded a report to

Prosecution for offences against the State

196. No Court shall take cognizance of any offence punishable under Chapter VI or IX A of the Indian Penal Code (except section 127), or punishable under section 108 A, or section 153-A, or section 294-A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from the Governor General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf.

Notes.—1. Chap VI—Of offences against the State. S. 127.—*Receiving property knowing the same to have been taken by war or depredation against any Asiatic power in alliance or at peace with the Queen, or committing depredation on the territories of such power.* S. 294-A.—Keeping lottery office, or publishing proposals regarding lotteries. S. 108-A.—Abetment in British India of offences outside British India. S. 153-A.—Promoting enmity between classes. S. 505.—Statements conducing to public mischief.

"We have added to the list of offences which can only be proceeded against under the order of the Government offences under ss. 108-A, 153-A and 505. The two latter offences resemble in substance offences against the State and offences under s. 108-A involve questions affecting Foreign States."—*Sel. Com. Rep.* Offences under Ch. IX-A relating to election *from s. 171-E to 171-I* were added to this list by Act XXIX of 1920.

2. Difference between sanction under the old s. 195 and that under this and the following sections.—There is a marked distinction between the classes of offences dealt with in old s. 195 and those dealt with in this section and s. 197. A Court granting sanction under clauses (*b*) and (*c*) of sub-sec. (1) of s. 195 does so in connection with offences committed in or in relation to any proceeding in such Court and the Court therefore acts in its judicial capacity in granting the sanction upon legal evidence. But the Government in according or withholding sanction under this and the following sections acts purely in its executive capacity and the sanction need not be based on legal evidence. The Government certainly does not act in a judicial capacity nor exercise a judicial function in sanctioning a prosecution under this or the next section. **27 M. 43.**

certain documents as, coming from the custody of certain witnesses who were summoned to produce the documents, *held* that such production constituted a user within the meaning of s. 471, and sanction was necessary **19 C. W. N. 125 = 16 Cr. L. J. 309.**

108 The term 'forgery' isused as a generic term.—The word 'forgery' is used as a general term in *s 463 of the I P C, and that section is referred to in a comprehensive sense in this section, so as to embrace* all species of forgery, and thus includes a case falling under s 467, I P C, **12 B. 36; 14 C. W. N 479 = 11 Cr. L. J. 280; 16 Cr. L. J. 203 (A.)** So also an offence under s. 468, I P C, **36 M 337.** A complaint of an offence under s 466 I P C., *viz*, forging a register kept by a public servant, which forged document was given in evidence, cannot be entertained without sanction as the offence falls within the wider description of offences prescribed under s. 463 to which this section applies **Ratanlal 83; 16 Cr. L. J. 617;** *contra* **(1913) U. B. R. (1st quarter) 166 = 14 Cr. L. J. 422** No sanction is necessary for the prosecution of an offence under s. 474 I P C **19 C. W. N. 125 = 15 Cr. L. J. 309.** Where a document was produced before a Magistrate by a party but was forged beforehand at the time of registration held that sanction of the Magistrate was necessary under s 191 (1), C **44 C. 1002; 5 L. 550.**

109. Sanction not desirable when there is a difference of opinion between two Courts—Where a Court of first instance finds a document to be genuine and the Appellate Court, proceeding mainly upon a comparison of signatures finds the document to be false, when the matter rests upon a very doubtful consideration of the comparison of handwriting and also upon more or less evenly balanced testimony and when there is such difference of opinion between the two trying Courts it is not desirable that the Appellate Court should grant sanction to prosecute under this section, **1 C. W. N. 400.**

110. False document given in evidence—Pleader's responsibility.—A Sessions Judge granted sanction for the prosecution of a Pleader for presenting on behalf of his client, a document, merely on the ground that it bore on its face such marks of its being a fabricated document, that the Pleader s suspicions must have been aroused at the first sight of it, and that he ought to have strictly examined it, and had he done so he would either have rejected it or advised his client to produce it in Court on his own risk or responsibility *held* that a Pleader is under no higher obligation than any other agent, and to justify his prosecution for offences under ss. 196 471 and 109 I P C., in connection with a document presented by him on behalf of his client, it must be shown that he was a party (principal or accessory) to the concoction of the document or had the knowledge that it was concocted The mere fact that his suspicions ought to have been aroused by the sight of the document is not *prima facie* evidence that he knew or had reason to believe the document to be forged, **22 B. 317.**

111. No sanction necessary for prosecution of a witness or agent in respect of the offences dealt with in cl (c), sub-sec. (1)—No sanction is necessary to prosecute a witness as the clause is limited to a party to the proceeding, **25 M. 671; 18 C. W. N. 565 = 12 Cr. L. J 101; 26 M. L J. 220 = 15 Cr. L. J. 242.** *See* also **3 M. 400.** A prosecution commenced on a sanction which includes both a party and a witness is not invalid **18 B. 581** *at p* **583** *(but see* **18 A. 80**) *No sanction is necessary to prosecute the agent of a party,* **9 P R. 1879; 3 Bur. L. T. 103 = 12 Cr. L. J. 87.**

112. No sanction necessary for prosecution of abettor not a party.—*The offences for which s. 195,* [illegible]

113. No sanction necessary if the completed offence has no connection with any Court.—*See* Note 7 (iii).

114 Where sanction is accorded for forgery, trying Magistrate might try for any cognate offence—Where sanction is accorded for a prosecution for forgery, the trying Magistrate might charge the accused in addition with fraudulent using (s. 471, I P C.) or abetment of forgery, **6 W. R. 20;** *see* also s. 230 and **10 Bur. L. R. 77.** Under sub-sec. (5) when sanction is given for prosecution for a particular offence, the Magistrate may frame a charge for any other offence covered by the same facts and referred to in this section, **30 C. 905.**

members of the Revolutionary Society, the existence whereof was sought to be established at the trial does not affect the validity of the sanction, **15 C. L. J. 517 = 13 Cr. L. J. 609.** Sanction by telegram from Government is sufficient under this section. **(1918) M. W. N. 926; 42 M. L. J. 108.**

A letter purporting to be issued from the Chief Secretary to the Government of Bengal was signed by the Deputy Secretary, not in his official capacity, but for the Chief Secretary, and it was *held* that there was no legal proof that the Local Government had sanctioned the prosecution under s. 196 of the Code, **30 C. 135** (**35 C. 141** *distinguished*).

10. Authority need not be signed by the Governor.—The authority under this section need not in the case of Local Government be signed personally by the Lieutenant-Governor; it is enough if it is signed by one of his accredited and Gazetted Officers. It must be presumed that all official acts have been duly performed and s. 144, *Indian Evidence Act*, amply supplies all omissions in the method of communication of the sanction to the prosecuting officer and the Magistrate, **35 C. 141.** The order granting the sanction need not be signed personally by the Governor, **37 C. 467 at p. 493; 42 M. L. J. 557; 44 M. L. J. 166.**

11. Sanction must be strictly proved and accused's identity established.—In a trial under s. 121, I.P.C., the sanction of the Local Government, required by this section, must be strictly proved in the manner laid down in s. 78 of *the Evidence Act* and the identity of the prisoner named in the sanction must be established, **1 Bur. S. R. 389.** But where the letter of authority for a prosecution under s. 124-A did not specify the name of the accused, but he was sufficiently indicated from the first and his name was supplied at the commencement of the Police Court proceeding, *held*, it was a sufficient compliance with the section, **35 C. 141.**

12. Absence of Government sanction, does not affect accused's liability for other offence requiring no sanction.—Where a person is accused of committing acts which constitute a grave offence requiring sanction under this section, but the Government refuses to accord sanction, it does not affect the accused's liability to punishment on the same facts for a minor offence under some other section which requires no sanction. Thus the accused was tried and convicted by an Assistant Sessions Judge of abetting or attempting dacoity. The Sessions Judge on appeal *held* that the evidence disclosed the offence of attempting to wage war against the Queen under s. 122, I.P.C., but as no charge could be framed under that section for want of sanction by Government, the accused could not be brought to trial at all and he set aside the conviction. On appeal by Government, the High Court reversed the acquittal *holding* the refusal of the Government to prosecute under s. 122, I.P.C., did not effect the liability of the accused under other sections, **25 B. 90.** *See* also **13 B. 502** which proceeds on the same principle, and also **42 C. 957; 7 Lah. 218.**

13. Commitment for offences not in complaint authorised by Government, bad.—Where an order under s. 196 authorised a particular Police-officer to prefer a complaint of offences under ss. 121-A, 122, 123 and 124 of the Penal Code, "*or under any other section of the said Code which may be found applicable to the case,*" and the examination of the complainant also referred to the same sections. *Held*, that no complaint under s. 121 of the Penal Code was thereby authorised by the Local Government or in fact preferred, and that the Magistrate had no power to commit thereunder, **37 C. 467 at p. 491.** But in **32 M. 3** it was *held* that a sanction for an offence under s. 124-A, I.P.C., will authorise a complaint under ss. 124-A and 114, I.P.C. *Quære* whether this section deals with offences of abetment (except that under s. 108-A, I.P.C.) and any sanction is necessary, **20 M. 8** *referred to.*

14. Local Government cannot delegate its powers.—The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognisance shall be taken by the Court of an offence mentioned in this section, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be proceeded by a deliberate determination in this respect. An order authorising a complaint under certain specified sections '*or under any other sections found applicable,*' if it means found by anyone other than the Government, involves a delegation which cannot be sustained, **37 C. 467 at pp. 489 and 490.**

15. Definition of Lottery.—Lottery is a scheme for the distribution of property by lot or chance among persons who had paid or agree to pay a valuable consideration for the privilege of participating in such scheme.—*MacClain's Criminal Law of the United States.*

16. Publication of advertisement of lotteries.—The publication of advertisement in newspapers of any proposals relating to lotteries which have not been authorised by the Government is an offence punishable under s. 294-A, I.P.C. Magistrate should, therefore, take steps to make the Government acquainted with any such cases occurring in their district in order that sanction to the prosecution of offenders may be obtained

relied on as constituting the offences and the words of the sections of the Penal Code were literally copied out *held* that after an elaborate inquiry and trial it was plainly no longer competent to the accused to invite the Appellate Court to set aside the conviction on the ground that the inquiry was materially defective Such a case is completely covered by s. 537 **15 C L J 517 = 13 Cr L J 609** The proper course is to bring up the question of the sufficiency or legality of the complaint to the proper tribunal before the completion of the case in the Subordinate Court and get the proceedings quashed **11 C W N 178 = 5 Cr L J 13** *referred to* *Per* MUKERJEE J in **15 C L J 517 = 13 Cr L J 609** In such a case to make the whole proceeding void *ab initio* it is necessary for the accused to show that there was no complaint before the Magistrate and Magistrate had no other course but to refuse issue of process on the ground that he had no jurisdiction It is not enough to say that the materials which the Magistrate had before him were meagre or even insufficient for if the Magistrate had jurisdiction to issue process, the trial would be perfectly regular even if the Magistrate had exercised that jurisdiction on insufficient material. *Per* HARINGTON J *ibid*

6 **Complaint must set out facts and not merely copy the sections of the Penal Code** —MUKERJEE J *held* that the following complaint was defective as it did not state the concrete facts constituting the offences but merely copied the words of the sections.— Your petitioner has reasons to believe that the persons named in the Government Order dated the 26th July 1910 which is hereunto annexed have amongst themselves and together with other persons known or unknown conspired to wage war against His Majesty the King and to deprive His Majesty of the Sovereignty of British India and they have collected arms and have otherwise prepared to wage war with the intention of either waging war or being prepared to wage war against the King and have further concealed with intent to facilitate a design to wage war against the King and have thereby committed offences punishable under ss 121 A 122 and 123 I P C **16 C. W N. 1105 = 15 C. L J 517 = 13 Cr L J 609**

7 **Letter of Government is not the complaint nor the person who signs it, the complainant.**— A letter by Government sanctioning the prosecution of S K under s 121 I P C may be an authority to institute a complaint but the letter itself is not a complaint **16 P R 1890** Nor is the person who signs the letter of authority the complainant and it is not therefore necessary to take his examination under the law The person who armed with authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken **35 C 141**

8 **Want of sanction cannot be cured even by subsequent order of Government.**—The accused were committed for trial under s 121 I P C At the trial objection was taken to the charge for want of sanction of Government. An order authorising the institution of a complaint was obtained from the Government while the case was before the Court of Sessions and the accused were convicted. *Held* that the subsequent order was of no value Under s 196 the only order or authority within the competence of the Government is one that permits a complaint but no complaint was made **37 C. 467 at p 492** Where the sanctions as they originally stood contained a misdescription of the articles on which the prosecution was based and this was rectified by a subsequent sanction filed in course of the trial *held* the petitioner was not prejudiced and the defect was cured by s. 537 **35 C. 141** S. 537 does not cure any irregularity in or defect of a sanction under s. 194 **31 M 80**

9 **Section does not prescribe any particular form of order and does not even require the order to be in writing** —At the trial of Mr Tilak for an offence under s. 124 A I P C an order for his prosecution given by Government under this section in the following form was tendered in evidence — Under the provisions of s 196 Cr Pro Code M A Baig Oriental Translator to Government, is hereby ordered by H E. the Governor in Council to make a complaint against Mr Bal Gangadhar Tilak Publisher Proprietor and Editor of the *Kesari* and against Mr Hari Narayan Gokhale Printer of the said newspaper in respect of certain articles appearing in the said newspaper under s. 124 A I P C. and any other section of the said Code which may be found to be applicable to the case. Counsel for the accused objected that the order was too vague and should have specified the articles with reference to which the accused was to be charged. *Held* following **9 B 288**, that the order was sufficient and was admissible **22 B 112 at p 150**, **19 C. 35**; but *see* **37 C. 467** What the section requires is that the complaint should be made upon authority from the Local Government. There is nothing in the section to warrant the construction that the actual complaint must be expressly authorised by the Local Government. The only question which the Court has to consider is 'is the complaint which I am asked to entertain a complaint made by order or under authority of Government **32 M 3** When the persons to be prosecuted are named and the sections under which they are alleged to have committed the offences as also the period of their activity are specified the mere circumstance that these persons are not described as

Select Committee. "We think that these safeguards will satisfactorily ensure that the provisions of the Bill will only be used when prosecutions are necessary in the public interest." *See* the Report of the Select Committee, 10th March, 1913.

Thus to take cognisance of the offence of criminal conspiracy, it is requisite that if the object of the conspiracy is (1) to commit an offence specified in sub-sec. (1) of s. 195, there must either be the complaint or sanction of the public servant or Court as the case may be, or is (2) to commit an offence specified in s. 196, there must be a complaint made by order or under authority of the Governor-General in Council, etc., or is (3) to commit a non-cognisable offence or a cognisable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards and not specified in s. 195, there must be to the initiation of the proceedings a consent in writing of the Local Government or a Chief Presidency or District Magistrate empowered in this behalf by the Local Government, or (4) to commit either an illegal act other than an offence, or a legal act by illegal means, there must be a complaint as specified in sub-sec. (1) above.

So there is no condition precedent to a Court taking cognisance of a criminal conspiracy the object of which is to commit an offence punishable with death, transportation or rigorous imprisonment for two years or upwards and not specified in ss. 195 and 196; *see* **49 C. 573 = 26 C. W. N. 680.**

3-A. The proviso "not punishable with death, etc." in s. 196-A does not apply to the commission of a non-cognisable offence but is confined to a cognisable offence only, **15 A. L. J. 841.**

4. What a complaint for conspiracy must set out.—Generally a tolerably full statement of the concrete facts must be incorporated in the complaint so as to enable the Magistrate to discharge his judicial functions under ss 203 and 204, and in the event of the issue of process under the latter section to furnish indication to the accused of the outlines of the case for the prosecution. A complaint which merely copies out literally the words of the sections in the Penal Code is a colourable compliance with the requirements of the statute and not a complaint as required by s. 190. 'It is well settled that in accordance with the general rule in criminal prosecutions, an indictment or information for conspiracy must contain a statement of the facts relied upon as constituting the offence in ordinary and concise language, with as much certainty as the nature of the case will admit: *Rex* v. *Jones* **(1832) 4 B. and Ald. 345**; *Rex* v. *King* **(1844) 7 Q. B. 782—795.** I am not unmindful of the view sometimes taken that where conspiracy is made a statutory offence, if the statute sets out fully and without uncertainty or ambiguity, the elements necessary to constitute the offence intended to be punished, a charge in the language of the statute is sufficient, *Reg.* v. *Rowlands* **(1851) 17 Q. B. 671.** But it is indisputable that if the statute employs broad and comprehensive language descriptive of the general nature of the offence denounced, the complaint should embody a particular statement of the facts and circumstances; *Rex* v. *Peck* **(1839) 9 A. and E. 682**; *Pettibone* v. *United States* **(1892) 148 W. S. 197.'** *Per* MUKERJEE, J., **16 C. L. J. 517 = 13 Cr. L. J. 609.** *See* also **42 C. 957.**

5. Absence of complaint under authority or consent in writing.—In the absence of a complaint or consent in writing as required by the section the proceedings would be void *ab initio.* S. 537 does not remedy the absence of a complaint or of a consent as required by this section. *See* Note 4 to s. 196.

Consent in writing of the authorities specified in s. 196-A of the Criminal Procedure Code is not necessary to a prosecution for criminal conspiracy to commit a non-cognisable offence when s. 195 (3) is applicable, **50 C. 461** (**49 C. 561** *followed*).

Where the criminal conspiracy falls within sub-sec. (1) of s. 196-A absence of complaint by the Governor-General would altogether vitiate proceedings in a Magisterial Court. Further *held*, that s. 196-A of the Code applies only to a prosecution for conspiracy punishable under s. 120-B, I.P.C., and not for abetment of conspiracy punishable under s. 109, I.P.C., **3 R. 95.**

6. Charge for conspiracy.—*See* Note 8 under s 223.

***196-B.** In the case of any offence in respect of which the provisions of section 196 or section 196-A apply, a District Magistrate or Chief Presidency Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a Police-officer nor

Preliminary inquiry in certain cases.

* Section 196 B has been added by the Criminal Procedure (Amendment) Act, 1923.

under the provisions of this section. *Reg and Ord., N-W P., p* 376. Before deciding not to proceed against the parties concerned in a lottery, he should investigate the matter and take the orders of Government. *Madras Notification, 4th June*, 1874

Prosecution for certain classes of criminal conspiracy

196-A. No Court shall take cognisance of the offence of criminal conspiracy punishable under section 120 B of the Indian Penal Code,

(1) in a case where the object of the conspiracy is to commit an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order or under authority from the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognisable offence, or a cognisable offence, not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or a District Magistrate empowered in this behalf by the Local Government has by order in writing consented to the initiation of the proceedings

Provided that where the criminal conspiracy is one to which the provisions of * sub-section (4) of section 195 apply, no such consent shall be necessary.

Notes.—1. Section new.—This section was inserted by s 5 of the *Indian Criminal Law Amendment Act* VIII of 1913

2 Definition and punishment of criminal conspiracy.—*See* Chapter V A newely inserted by s 3 of Act VIII of 1913 in the Indian Penal Code

120-A When two or more persons agree to do or cause to be done—

(1) An illegal act or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done to effect the object thereof by one or more parties to such agreement.

Explanation—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120-B (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall where no express provision is made in this Code for the punishment of such a conspiracy be punished in the same manner as if he had abetted such offence

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid, shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

3. Object and scope of the section—Except s. 121 A I P C., the offence of criminal conspiracy *per se* was unknown to the Indian Criminal Law By Act VIII of 1913 criminal conspiracy was for the first time made a substantive offence in British India. The word 'illegal' used in the definition of the offence (s 120-A I P C) is as defined by s. 43 I P C applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action The very wide scope of the definition would make even a civil trespass indictable as a criminal conspiracy Under English Law to which the Indian Law has been assimilated indictments for conspiracy extend to almost every possible sort of case (see *Russell on Crimes*). In order to avoid any possible danger of the provisions of the new Act being misused two safeguards—*viz*, (1) amendment of s. 195 by the addition of the words 'criminal conspiracies to commit such offences and to' after the words 'the abetment' in sub-secs. (1) and (2) the insertion of this section, were introduced in the

* The words " sub-section (4) " was inserted for sub section (3) by Act XVIII of 1923.

recorded as such, *e.g.*, a *volunteer* in a Tahsildar's office. (3) Every *Manager under the Sindh Encumbered Estates Act*, s. 35 of Act XX of 1896, is a public servant within the meaning of the I.P.C. As to Chairman of a Union Panchayat, *see* **(1916) M. W. N. 384 = 17 Cr. L. J. 168.** But a receiver appointed by a Court committing acts in excess of his authority is not protected by this section. **52 Bom. 898 ; 30 Bom. L. R. 1273,** nor a Tahsildar who acted as a polling officer in a municipal election, **51 Mad. 259.**

3. **Municipal Commissioner is a public servant.**—A Municipal Commissioner appointed under Act XIII of 1884 (now Act XX of 1891), is a public servant, he not being removable from his office except by Government; therefore he cannot be prosecuted for any act done by him in his capacity as a Commissioner except with the sanction of Government, **14 P. R. 1890** *followed* **17 P. R. 1902.** Similarly as regards a *Municipal Chairman*, **Weir I, 243.** But a *Chairman delegate* is not so protected for acts done by him as such, even though he be also a Municipal Councillor, **Weir II, 226.** But the President of a Local Board being removable only by the Local Government is protected, **52 Mad. 448** and so is the President of a Panchayat Court, **29 Cr. L. J. 324.**

4. **Municipal Corporation not a public servant.**—A Municipal Corporation is not a public servant within the meaning of this section, and may, therefore be prosecuted under the Penal Code without the previous sanction of Government, **3 C. 758 = 2 C. L. R. 520.** A Corporation is liable to prosecution for nuisance under the Penal Code in the same way as any ordinary individual.—*The Birmingham and Gloucester Ry. Co.*, **3 Q. B. Rep. 223 ;** *Scott*, **8 Q. B. Rep. 847 ;** *The Great North of England Ry. Co.*, **9 Q. B. Rep. 315 ; Weir I, 143.**

5. **Sanction not necessary where public servant removable from office without sanction of Government.**

(*i*) *Police patel in Bombay.*—The prosecution of a Police *patel* for an offence committed by him in his official capacity as such needs no previous sanction. The provisions of the Bombay Act VIII of 1867 (*Village Police Act*), s. 9, as amended by Act I of 1876, render a Police *patel* removable from his office without the previous sanction of Government, and, therefore, this section does not apply, **4 B. 357 and 479 ; Ratanlal 147.** But a Revenue *patel* is removable from his office only with the sanction of the Local Government and therefore he cannot be prosecuted without previous sanction, **29 Bom. L. R. 707.**

(*ii*) *Sub-Overseer in Madras.*—No sanction is necessary to prosecute a Sub-Overseer in the Madras Presidency, for a charge of bribery against him, inasmuch as under the rules of the Public Works Department he can be appointed or removed by the Superintending Engineer without reference to the Local Government, **12 M. L. T. 351 = 13 Cr. L. J. 770.**

(*iii*) *Member of Union Committee.*—The sanction of the Local Government under s. 197 of the Code, is not necessary for the prosecution of the Chairman of a Union Committee who is not removable from his office only by the Local Government, **29 C. W. N. 650.**

6. **Effect of delegation by Government of the power of removal.**—Where a public servant is one not removable from his office without the sanction of the Government the fact that the power of removal has been delegated to other authorities does not remove the public servant from the category of persons who are not removable from office without the sanction of Government. The delegation by the Local Government of its power to a special officer only means that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done and it is an ordinary case of *qui facit per alium facit per se.* **1916 M. W. N. 384 = 17 Cr. L. J. 168.**

7. **Village Headman in Madras.**—A Village Magistrate whose authority and position as Village Magistrate were made use of in order to constrain a person to give a bribe was held not liable to be prosecuted for extortion without sanction under this section, **Weir II, 221.** But it was *held* that no such sanction was necessary when the Village Magistrate was alleged to have caused hurt in trying to prevent an altercation, because in so doing he was preventing an offence and not trying an offender. Illustration (*d*) to s. 19, I.P.C., makes it clear that in such capacity he was not a Judge and since he is not a public servant within the meaning of this section no sanction is necessary. A Village Magistrate exercising jurisdiction and trying an offender under Regulation IX of 1816 would be a Judge, **23 M. 540.** So also when a Village Magistrate is charged for extortion no sanction is necessary, **6 M. L. T. 126,** and when a Village Magistrate fabricates a record, of a Criminal case, sanction is not required for his prosecution, for a Magistrate who fabricates a record in which he figures as a Judge cannot properly be said to be acting as a Judge when he does so, **32 M. 255.**

being below the rank of Inspector in which case such Police-officer shall have the powers referred to in section 155, sub section (3)

Note —This new section is designed to meet the difficulty which arises from the fact that cases under ss 196 and 196-A cannot be properly investigated by the Police before complaints are made Doubts have arisen as to whether investigation can be ordered under s. 155 cl (2) by a Magistrate without his taking cognisance of the case The new section will provide for a preliminary investigation We recognise that it does not altogether meet the case where the desirability of adding a new charge arises in the Sessions Court It has been suggested that this difficulty might be met to some extent by substituting the words proceed to the trial for the words take cognisance in ss 196 196-A But on the whole we prefer not to make this change and to leave the sections unaltered (*Report of the Joint Committee* 1922).

Prosecution of Judges and public servants.

*197. (1) When any person who is a Judge within the meaning of s 19 of the Indian Penal Code or when any Magistrate or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty no Court shall take cognisance of such offence except with the previous sanction of the Local Government

Power of Government as to prosecution.

(2) Such Government may determine the person by whom the manner in which the offence or offences for which the prosecution of such Judge Magistrate † or public servant is to be conducted and may specify the Court before which the trial is to be held

Note —Referring to amendment of this section the Select Committee say It has been pointed out to us that difficulties with regard to s. 197 have recently come to light There are certain public servants who are only removable from office by the Secretary of State, and it is unreasonable that they should obtain no protection under the section. Further in view of s 4, cl (2) of the Code the word 'Judge has to be interpreted according to the definition given in s 29 of the Indian Penal Code with the result that Magistrates acting in certain capacities under the Code *e g*, when holding inquiries obtain no protection. We have therefore proposed a re-draft of sub-sec. (1) of s 197 to meet these difficulties We have confined the operation of the section to public servants removable by a Local Government or some higher authority and have provided that the sanction required for a prosecution will be the sanction of the authority which has power to remove Mr Chaudhari would prefer to leave s. 197 unaltered save in so far as the Bill proposed to amend it he considers that the amendment proposed by us would enhance the difficulty of obtaining sanction

Notes —1 Scope of this section —The section does not apply unless the person accused is (1) a Judge or public servant, **3 C. 758**, and (2) not removable from office without the sanction of Government **4 B 357** and **479**; and **12 M L T 351 = 13 Cr L J 770**, and (3) the act constituting the offence was done by the accused while acting as Judge or public servant. The section applies to those cases only in which the offence charged is an offence which can be committed by a public servant only *i e* in which his being a public servant is a necessary element in the offence **25 C. 852, 2 Bom L. R 1079, 32 M 255; 30 C. 927, 23 M 540; 2 B 481** For the distinction between ss 197 and 195 *see* **2 Lah 305**, where it is *held* that a District Judge ordering sanction against a Sub-Judge under s 197 acts in his executive capacity and such order cannot be revised by the High Court

I—JUDGE AND PUBLIC SERVANTS

2. Who are public servants ?—*See* ss. 19 and 21, I P C. and s. 4 (-) which make these definitions applicable—(1) *Committing Magistrate* —Though all Judges are public servants, all public servants are obviously not Judges *e g* a committing Magistrate inquiring into a case triable exclusively by a Court of Session though not a Judge, would be protected by this section as a public servant, **6 M H C. Appx XXI** (2) *Volunteer* —In **8 A. 201**, Mr Justice STRAIGHT *held* that any person whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs those duties and accept those responsibilities and is recognised as filling the position of a public servant, must be

* S 197 (1) was substituted by Act XVIII of 1923 † The word Magistrate" added by Act XVIII of 1923

it was not illegal to treat the charge as a charge of extortion, and to proceed with the trial without sanction for the prosecution, **7 B. H. C. R. Ca. 61,** *followed* in **2 B. 481,** and *approved* in **26 C. 852;** but want of sanction for an offence covered by the section vitiates the trial, **31 M. 80.** *See* also **19 B. 51;** Note 19; **9 B. 288** and Note 17.

10-A. Is sanction necessary for offence of criminal breach of trust by a public servant.—The question before the Court in **1916 M. W. N. 384 = 17 Cr. L. J. 168 = 33 In. Ca. 648** was 'whether an offence is committed by a person as a public servant when the statute says that he commits the same offence as any other person but the property in respect of which he commits criminal breach of trust comes into his hands as a public servant. The public servant was charged with an offence under s. 409, I.P.C.' COUTTS-TROTTER, J., *held* after considerable hesitation that sanction was not necessary. 'I think on the whole that even if it is a necessary averment to say that he was a public servant and not a mere matter of proof, nevertheless the offence is the offence of criminal breach of trust, and that it is not an offence which is committed by him in his capacity of public servant as such, his capacity of public servant being only that which puts him, so to speak, in a position in which such an offence can be committed.'

11. Conviction for abetment when sanction is given for substantive offence only.—The omission from this section of a provision similar to s. 195 (3) does not necessarily suggest that separate sanction for an *abetment* is necessary when sanction for the substantive offence has been granted. By virtue of s. 230 when the conviction for an abetment of an offence is based on the same facts in respect of which sanction for the substantive offence has been granted no fresh sanction is necessary from the *abetment,* **30 C. 1905.**

III.—SANCTIONING AUTHORITY IN FORM OF SANCTION.

12. Sanctioning authority as regards Village Headmen, Police Inspectors, etc., in Madras.—The power of sanctioning prosecution of heads of villages in their capacity as Village Munsiffs as well as in their magisterial capacity is vested in the District Magistrate (G.O. No. 1886-J., dated 9th October, 1874). Similarly the power of sanctioning the prosecution of Subordinate Magistrates, Tahsildars and Deputy Tahsildars in their magisterial and revenue capacities is delegated to the Board of Revenue (G.O. No. 1281-J., dated 29th June, 1891), while in regard to all other classes of Magistrate the like power is reserved to the Governor in Council (*Fort St. George Gazette*, 1873, p. 1503).

Inspectors of Police are public servants not removable from office without the order of Government and the power of sanctioning under this section their prosecution is given to the Inspector-General of Police and to the District Magistrate (G.O. No. 1085, Judicial, dated 8th June, 1874, and G.O. No. 1365, Judicial, dated 25th July, 1874. See *Mad. Pol. Man., Vol. I, p.* 175). The like power as regards Registrars and Sub-Registrars is vested in *the Inspector-General of Registration*, **Mad. Jur. 31.**

12-A. Meaning of 'empowered in this behalf.'—The words 'empowered in this behalf' mean empowered to give sanction for prosecution and not empowered to order his removal, **1916 M. W. N. 384 = 17 Cr. L. J. 168.**

13. Sanction against kulkarni may be given by mamlatdar or patel.—The sanction for the prosecution of a *kulkarni* for making a false report as a public servant may be given by the *mamlatdar* or by the *patel* to whom such *kulkarni* is subordinate. The sanction of the Collector is not necessary, **7 B. H. C. R. Ca. 64.**

14. Power of superior Court or officer to sanction prosecution.—Every Court or officer to whom the Judge or other public servant is subordinate has implied authority unless such authority has been expressly limited by Government, to sanction or direct a prosecution for an offence committed by such Judge or public servant in his capacity as such public servant, **7 M. H. C. R. 58.** *See* **4 P. R. 1919 (Cr.).**

15. No particular form in which sanction has to be given.—The Code does not prescribe any particular form for the sanction required by this section, as it does, *e.g.*, by sub-sec. (4) of s. 195. Hence the omission to mention the place or time does not affect the validity of sanction, **27 M. 54.** Where an Executive Engineer by a letter addressed to the Magistrate gave sanction to prosecute a first-grade Overseer (a public servant within the meaning of this section) *held*, that the letter constituted a sufficient sanction for prosecution, **Ratanlal 32; 30 C. 905; 20 Bom. L. R. 607.**

16. Sanction to be in respect of specific offence—Delegation of authority to sanction prosecution.—The sanction required by this section must be granted with reference to some *specific offence* with which the

7-A. A member of a Village Panchayat in Madras.—A member of a Village Panchayat established under Act II of 1920 is a Judge and complaint of an offence alleged to have been committed by him either under s. 171 F or s. 161 I P C., requires sanction. In the former case under s. 196 Cr P C., as amended by s. 3 of Act XXIX of 1920 in the latter with reference to s. 199 *Cr P Code* **42 M. L. J. 139.**

7-B. A member of a Municipal Board.—A member of a Municipal Board is protected **A. I. R. 1928 All 758, 51 All 377,** and an elected Chairman of a municipality under the Bengal Municipal Act is protected by this section as a public servant, **32 C. W. N. 1035,** so also a Village Munsiff, **52 Mad. 347.**

II.—OFFENCES FOR WHICH SANCTION IS REQUIRED.

8. Sanction to prosecute a Judge for words uttered or acts done on the Bench.—Where a Judge was charged with using defamatory language to a witness during the trial of a suit it was *held* that under s. 197 the complaint could not be entertained by a Magistrate without sanction, **9 M. 439,** *followed in* **9 P. L. R. 1905,** where it was *held* that sanction was required where a Munsiff was charged under ss. 342, 500 and 506, I P C. *See* also **29 P. R. 1904, 17 P. R. 1902.** But the Madras case was *dissented from* in **26 C. 852** and **25 M. 15.** In the Calcutta case it was *held* that sanction under this section is necessary in those cases only in which the offence charged is an offence which can be committed by a public servant only, *i.e.*, in which his being a public servant is a necessary element in the offence. The language of the section "is accused as such Judge etc." seems sufficient to indicate that the offence charged must involve as one of its elements that it was committed by a person filling that character and it is not apparent why in cases outside that category the sanction provided by the section should be required. This case was *followed* in **2 Bom. L. R. 1079,** where it was *held* that no sanction was required to prosecute a Magistrate for having used abusive language to another Magistrate when both were sitting together as a Bench. *See* **2 B. 431.** A Magistrate who fabricates a record in which he figures as Judge cannot be said to be acting as a Judge when he fabricates the record and no sanction is necessary. **32 M. 235.**

9. Section extends only to offences which could be committed by public servants alone.—This section extends to all acts ostensibly done by a public servant, *i.e.*, to acts which would have no special signification except as acts done by a public servant, **2 B. 431; 7 B. H. C. R. Cr. Ca. 61; 26 C. 852; 9 M. 439** and **8 P. R. 1879.** Thus, sanction under this section is not necessary to prosecute a public servant, when the offence charged does not involve as one of its necessary elements that it can be committed only by a person filling that character, **25 M. 15; 26 C. 852,** where a Village Magistrate is charged with extortion, **6 M. L. T. 17** and **32 M. 235.** Again where the *Administrator General of Bengal* was appointed by the High Court, administrator to a particular estate and in his capacity as such administrator was charged with an offence under *the Calcutta Municipal Act, held* that the fact that he was administrator to that particular estate was a mere accident and that no sanction under this section was necessary as he was not charged as a public servant with any offence committed in his public capacity, **30 C. 927** where **26 C. 852** is *followed. Quære* whether this section is limited in its application to Chap IX of the I P C alone? In all cases where a public servant purports to exercise his function as such he must be deemed to be acting 'as such public servant.' The test is not whether the particular act is within his power, but whether he acted in the capacity with which he is clothed. Of course if he simply uses his position as a public servant to commit an illegal act he will not be acting as such public servant. **17 Cr. L. J. 394 (M.).** Where a Magistrate abuses or defames a witness or a legal practitioner appearing before him it cannot be said that he is acting in a judicial capacity. But if in order to examine a witness he detains him until the time of his re-examination comes or until he makes inquiries as to the failure of the witness to appear before him his acts are purely judicial and if any offence is committed by the Magistrate exceeding his powers in doing those acts, sanction should be necessary under s. 197, **25 C. W. N. 956.**

9-A. Acting.—Meaning of ——It is no part of the British policy to set an official above the common law. If he commits a common offence he has no peculiar privilege. But if one of his official acts is alleged to be an offence the State will not allow him to be prosecuted without its sanction, for otherwise official action would be beset by private prosecution. This privilege however only extends to acts which can be shown to be in discharge of official duty or fairly purporting to be in such discharge. The section might well run thus "............ is accused of any action done by him in the discharge of his official duty alleged to be an offence." **50 Mad. 754.** *See* also **33 C. W. N. 1058,** and **31 Bom. L. R. 789.**

10. No sanction necessary for offences not covered by this section.—Where a complaint charged a person who was one of the public servants mentioned in this section with committing acts which if committed by a private individual would have constituted the offence of extortion, *held* (in the particular case) that

it was not illegal to treat the charge as a charge of extortion, and to proceed with the trial without sanction for the prosecution, **7 B. H. C. R. Ca. 61**, *followed* in **2 B. 481**, and *approved* in **26 C. 852**; but want of sanction for an offence covered by the section vitiates the trial, **31 M. 80**. *See* also **19 B. 51**; Note 19; **9 B. 288** and Note 17.

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11. Conviction for abetment when sanction is given for substantive offence only.—The omission from this section of a provision similar to s. 195 (3) does not necessarily suggest that separate sanction for an *abetment* is necessary when sanction for the substantive offence has been granted. By virtue of s. 230 when the conviction for an abetment of an offence is based on the same facts in respect of which sanction for the substantive offence has been granted no fresh sanction is necessary from the *abetment*, **30 C. 1905**.

III.—SANCTIONING AUTHORITY IN FORM OF SANCTION.

12. Sanctioning authority as regards Village Headmen, Police Inspectors, etc., in Madras.—The power of sanctioning prosecution of heads of villages in their capacity as Village Munsiffs as well as in their magisterial capacity is vested in the District Magistrate (G.O. No. 1886-J., dated 9th October, 1874). Similarly the power of sanctioning the prosecution of Subordinate Magistrates, Tahsildars and Deputy Tahsildars in their magisterial and revenue capacities is delegated to the Board of Revenue (G.O. No. 1281-J., dated 29th June, 1891), while in regard to all other classes of Magistrate the like power is reserved to the Governor in Council (*Fort St. George Gazette*, 1873, p. 1503).

Inspectors of Police are public servants not removable from office without the order of Government and the power of sanctioning under this section their prosecution is given to the Inspector-General of Police and to the District Magistrate (G.O. No. 1085, Judicial, dated 8th June, 1874, and G.O. No. 1365, Judicial, dated 25th July, 1874. See *Mad. Pol. Man., Vol. I, p.* 175). The like power as regards Registrars and Sub-Registrars is vested in *the Inspector-General of Registration*, **Mad. Jur. 31.**

12-A. Meaning of 'empowered in this behalf.'—The words 'empowered in this behalf' mean empowered to give sanction for prosecution and not empowered to order his removal, **1916 M. W. N. 384 = 17 Cr. L. J. 168.**

13. Sanction against kulkarni may be given by mamlatdar or patel.—The sanction for the prosecution of a *kulkarni* for making a false report as a public servant may be given by the *mamlatdar* or by the *patel* to whom such *kulkarni* is subordinate. The sanction of the Collector is not necessary, **7 B. H. C. R. Ca. 64.**

14. Power of superior Court or officer to sanction prosecution.—Every Court or officer to whom the Judge or other public servant is subordinate has implied authority unless such authority has been expressly limited by Government, to sanction or direct a prosecution for an offence committed by such Judge or public servant in his capacity as such public servant, **7 M. H. C. R. 58.** *See* **4 P. R. 1919 (Cr.).**

15. No particular form in which sanction has to be given.—The Code does not prescribe any particular form for the sanction required by this section, as it does, *e.g.*, by sub-sec. (4) of s. 195. Hence the omission to mention the place or time does not affect the validity of sanction, **27 M. 54.** Where an Executive Engineer by a letter addressed to the Magistrate gave sanction to prosecute a first-grade Overseer (a public servant within the meaning of this section) *held*, that the letter constituted a sufficient sanction for prosecution, **Ratanlal 32; 30 C. 905; 20 Bom. L. R. 607.**

16. Sanction to be in respect of specific offence—Delegation of authority to sanction prosecution.—The sanction required by this section must be granted with reference to some *specific offence* with which the

accused is charged in his capacity as a public servant, and the intention of the Legislature clearly was that the authority empowered to grant the sanction should take the responsibility of deciding whether there were reasonable grounds for prosecuting such public servant for such offence Therefore, where an order was passed by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the district for 'bribery or such of the charges set forth in the Deputy Collector s report as he thinks likely to stand investigation by a Criminal Court" *held* that it is not a legal sanction within the meaning of s. 197, as the Board had no power to delegate its discretion, **16 M. 468** Unlike s 195 a general sanction is insufficient under this section. But the offence need not be specified with the same precision as is necessary in framing a charge, **13 C W. N. 1062; 29 Bom. L. R 996.** The Local Government granted sanction for the prosecution of one of its servants of an offence ' under s 161, I P C., or any other section of the Code that may be found to be applicable in respect of the offence briefly described in the schedules hereto annexed and in the schedule the facts were duly set out It was contended that this section was too vague and indefinite and that the Local Government practically delegated its functions under s 197 to some other person which it had no power to do, *held* that the sanction was not vague or indefinite and that there was no delegation, **16 M 468,** *distinguished* All that the Local Government has done is to make it clear that it sanctions the prosecution of the petitioner in respect of certain specific acts committed by him, that it considers that these acts are punishable under s. 161 I P C but that it leaves it open to the Court to convict him upon these facts of any other offence, if in the opinion of the Court some other section of the I P C is more relevant thereto than s 161, **37 C. 467,** which deals with a sanction under s 196 is not in point The considerations which arise in a case to which s 197 is applicable are essentially different from those considerations of policy which underlie the sanction under s. 196 referred to in that case, **11 P. R. 1911 = 146 P. L. R. 1911 = 12 Cr. L J. 217.** No doubt the authority which gives the sanction must specify the offence but that does not mean that the particular section of the Penal Code should be mentioned If the facts mentioned in the sanction point to a particular offence the terms of the section are complied with, **1916 M W. N. 384 = 17 Cr. L. J. 168** *See* also **43 Bom. 147.**

17. Notice to accused before sanction not necessary.—The sanction given by Government under this section cannot be held to be null and void for the reason that no notice was given to the accused to show cause why sanction should not be given It is a matter left entirely to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution **27 M. 54**

18. Preliminary inquiry before granting sanction is not a judicial proceeding — There is no provision of law which authorises the Government or its officer to whom the power of granting sanction is delegated to inform his mind by holding a judicial inquiry himself or by another, and there is no authority in him or the person acting for him to administer an oath and the inquiry held by such person is merely departmental. Therefore a person giving false evidence such inquiry cannot be prosecuted for perjury under s. 193 I P C, **23 M. 223.**

IV.—ABSENCE OF SANCTION.

19. Want of sanction vitiates the trial.—The saving clause of s 537 will not avail where the previous sanction required under this section is wanting Where therefore, a Village Magistrate was convicted of an offence *in his official capacity of Village Magistrate, without previous sanction being obtained under this section* the conviction was set aside, **31 M 80** Where a sanction is granted in general terms and is too vague, s 537 will not cure the defect, **16 M. 468; 9 B. 288; 9 P. L R. 1905.** In **42 B. 172** it is *held* that absence of sanction renders a commitment by a Magistrate illegal and s 537 will not cure such defect, but in **35 M L. J 259** holds a contrary view to the effect that an order of commitment upon a complaint in respect of which sanction is necessary under ss 195 and 197 of the Code, but in respect of which no sanction was obtained, is not necessarily invalid and the provisions of ss. 531 and 537 of the Code apply to such a case. But it is submitted that in view of the new amendment of s. 537 by the omission of cl. (*b*) to s. 537 containing references to ss. 195 and 476 the Legislature has adopted the Bombay view

20. Commitment without previous sanction not necessarily invalid.—An European British subject being a public servant was committed for trial to the High Court without any previous sanction being obtained under s 197 No objection as to sanction was raised at the magisterial inquiry *Held* that the language of s 197 is so strong in requiring a previous sanction that if it be not previously obtained there is no jurisdiction; but the Judge presiding in a Court of Session to which the prisoner had been committed, has power in his discretion under s 532 to accept the commitment and proceed with the trial, **9 B. 288 at p. 296;** *followed* in **22 B. 112** *See* Note 9 under s. 193. But now *see* **25 M. 61 (P.C.)** and Note above. *See* **20 Bom. L. R. 89.**

21. Subsequent sanction is of no effect.—A sanction obtained subsequently, *i.e.*, after commencement of the trial, is of no effect, **9 B. 288; 2 B. 481; 7 M. H. C. R. 58; 7 B. H. C. R. Cr. Ca. 61.**

22. Inquiry without sanction is a departmental inquiry and not a "taking cognisance of an offence."—The Local Government, having received petitions charging a Deputy Collector with bribery, forwarded them to the Commissioner, who sent them to the Collector for inquiry and report, with directions to take evidence in support of the charges if the petitioner persisted in them and to give the Deputy Collector full opportunity of rebutting them, and after this inquiry to submit a report. The District Magistrate (on account of want of sanction) could take no magisterial cognisance of the case but had produced before him one of the petitioners, whom he examined. Government then permitted the Deputy Collector to prosecute such petitioner for defamation by words spoken by him in reply to questions put by the District Magistrate in the so-called preliminary inquiry, and the accused was convicted under s. 211, I.P.C. *Held*, that on account of want of sanction under s. 197, the District Magistrate's inquiry was not a "taking cognisance of an offence," but a mere departmental inquiry, **19 B. 51.**

23. Taking sworn statement of complainant would not amount to "taking cognisance."—A Magistrate may receive a complaint against a public servant and if he thinks right make under s. 202 a preliminary inquiry into the truth thereof. But he should not cause the attendance of the accused, or take any evidence against him until he has obtained the necessary sanction, **7 B. H. C. R. Cr. Ca. 61.** The preliminary examination of the complaint is not such cognisance as is intended by this section. It is often necessary to examine the complainant before his complaint can be understood, and the complaint must be understood before sanction can be given, **7 M. H. C. R. 182 at p. 187; 3 C. W. N. 17.** A complaint against a public servant, *e.g.*, the Chairman of a Municipality, must be dealt with in the same manner as any other complaint. The question of the applicability of s. 197 to the case should be postponed until after the complainant has been examined on oath in accordance with law, **3 C. W. N. 17.**

24. Non-compliance with terms of Government Order vacates jurisdiction.—Where the Local Government directed by its sanction that the accused public servant should be prosecuted upon such charges as Mr. C. might be prepared to prefer against him, and there was nothing on the record to show, nor did it otherwise appear that Mr. C. had preferred any charge against, or taken any part in the prosecution of the accused public servant, the High Court quashed the conviction of the accused as being without jurisdiction, **8 B. H. C. R. Cr. Ca. 32.** The person by whom the prosecution of such Judge or public servant is to be conducted, cannot delegate his authority to anyone else, unless specially authorised so to do. When the Government gives specific directions as to the person by whom and the manner in which the prosecution is to be conducted, the Court has no jurisdiction to entertain a charge preferred otherwise than in accordance with such direction.

V.—SUB-SEC. (2)—POWER OF GOVERNMENT AS TO PROSECUTION.

25. Local Government can specify any Court for trial of public servant irrespective of jurisdiction.—'In **4 L. B. R. 265 = 8 Cr. L. J. 70,** it was *held* that the power given in s. 197 (2) of the Code overrides the general rule contained in s. 177. As such the Local Government was entitled to specify any Court for the trial of a public servant, charged with offences under ss. 162 and 164, I.P.C., committed within the jurisdiction of the Judicial Commissioner of Upper Burma, and that a Magistrate within the jurisdiction of the Chief Court of Lower Burma who refused to receive a complaint presented by the Government Advocate, Mandalay, erred in holding that he had no power to receive the complaint.'

26. Specifications of Court is not subject to control of High Court.—The power of Government to specify the Court before which the Judge or public servant shall be tried is not subject to the exercise of the general power of the High Court to transfer a criminal case—*vide* s. 526 (7).

27. Validity of joint trial of a Judge and one not a public servant, when sanction specifies a particular Court.—*K*, a Subordinate Judge, was charged under ss. 161 and $\frac{164}{109}$, I.P.C., and *S* not a public servant within the meaning of this section under s. 164, I.P.C., abetted by *K*. The Local Government in the exercise of its power under this section, specified the Sessions Court at Tellicherry as the Court which should try both the prisoners, and as Mr. Cox, the permanent Judge, was disqualified to try this case by reason of having taken a special interest in launching this prosecution, Mr. Irvine was appointed the Officiating Sessions Judge of Tellicherry. By a subsequent Government Order Mr. Irvine was appointed Additional Sessions Judge of Tellicherry. On the conviction of both the prisoners, it was objected in appeal on behalf of *S* (*i*) that

accused is charged in his capacity as a public servant, and the intention of the Legislature clearly was that the authority empowered to grant the sanction should take the responsibility of deciding whether there were reasonable grounds for prosecuting such public servant for such offence Therefore, where an order was passed by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the district for bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court' *held* that it is not a legal sanction within the meaning of s. 197, as the Board had no power to delegate its discretion, **16 M 458** Unlike s 195 a general sanction is insufficient under this section. But the offence need not be specified with the same precision as is necessary in framing a charge **13 C W. N. 1062; 29 Bom. L. R 996.** The Local Government granted sanction for the prosecution of one of its servants of an offence under s 161, I P C, or any other section of the Code that may be found to be applicable in respect of the offence briefly described in the schedules hereto annexed and in the schedule the facts were duly set out It was contended that this section was too vague and indefinite and that the Local Government practically delegated its functions under s 197 to some other person which it had no power to do *held* that the sanction was not vague or indefinite and that there was no delegation, **16 M. 458,** *distinguished* All that the Local Government has done is to make it clear that it sanctions the prosecution of the petitioner in respect of certain specific acts committed by him, that it considers that these acts are punishable under s. 161 I P C but that it leaves it open to the Court to convict him upon these facts of any other offence if in the opinion of the Court some other section of the I P C is more relevant thereto than s. 161, **37 C. 467,** which deals with a sanction under s 196 is not in point The considerations which arise in a case to which s 197 is applicable are essentially different from those considerations of policy which underlie the sanction under s 196 referred to in that case, **11 P. R. 1911 = 146 P. L. R. 1911 = 12 Cr. L. J. 217.** No doubt the authority which gives the sanction must specify the offence but that does not mean that the particular section of the Penal Code should be mentioned. If the facts mentioned in the sanction point to a particular offence the terms of the section are complied with, **1916 M. W. N. 384 = 17 Cr L. J. 168** *See* also **43 Bom. 147.**

17. Notice to accused before sanction not necessary—The sanction given by Government under this section cannot be held to be null and void for the reason that no notice was given to the accused to show cause why sanction should not be given It is a matter left entirely to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution, **27 M. 54**

18 Preliminary inquiry before granting sanction is not a judicial proceeding—There is no provision of law which authorises the Government or its officer to whom the power of granting sanction is delegated to inform his mind by holding a judicial inquiry himself or by another, and there is no authority in him or the person acting for him to administer an oath and the inquiry held by such person is merely departmental Therefore a person giving false evidence such inquiry cannot be prosecuted for perjury under s 193, I P C., **23 M. 223**

IV.—ABSENCE OF SANCTION.

19. Want of sanction vitiates the trial—The saving clause of s 537 will not avail where the previous sanction required under this section is wanting Where, therefore, a Village Magistrate was convicted of an offence in his official capacity of Village Magistrate, without previous sanction being obtained under this section the conviction was set aside, **31 M 80.** Where a sanction is granted in general terms and is too vague, s. 537 will not cure the defect, **16 M. 458, 9 B. 288; 9 P. L. R. 1905.** In **42 B 172** it is *held* that absence of sanction renders a commitment by a Magistrate illegal and s 537 will not cure such defect, but in **35 M. L. J. 259** holds a contrary view to the effect that an order of commitment upon a complaint in respect of which sanction is necessary under ss 195 and 197 of the Code, but in respect of which no sanction was obtained, is not necessarily invalid and the provisions of ss. 531 and 537 of the Code apply to such a case. But it is submitted that in view of the new amendment of s. 537 by the omission of cl. (*b*) to s. 537 containing references to ss 195 and 476, the Legislature has adopted the Bombay view

20. Commitment without previous sanction not necessarily invalid.—An European British subject being a public servant was committed for trial to the High Court without any previous sanction being obtained under s 197 No objection as to sanction was raised at the magisterial inquiry *Held* that the language of s 197 is so strong in requiring a previous sanction that if it be not previously obtained there is no jurisdiction; but the Judge, presiding in a Court of Session to which the prisoner had been committed, has power in his discretion under s 532 to accept the commitment and proceed with the trial, **9 B. 288 at p. 296;** *followed* in **22 B. 112** *See* Note 9 under s. 195 But now *see* **25 M. 61 (P.C.)** and Note above *See* **20 Bom. L. R. 89.**

I.P.C. referred to in this section. It does not matter that the complainant originally charged the accused with an offence under some other section only, **25 A. 209** where **1 C. L. R. 528** is *followed.* When the case is properly once before the Magistrate he may proceed against any person implicated. Where in the course of proceedings before a Magistrate against a person of having taken away or kept complainant's wife, it appeared from information obtained by the husband after the institution of such proceedings, and communicated to the Magistrate, that the wife had committed bigamy with another man, and the Magistrate thereupon, without fresh complaint by the husband against the wife, made the latter an accused person, and the husband proceeded to adduce evidence against her of the second marriage, on which she was committed for trial by the Magistrate. *Held*, that the proceedings of the Magistrate were not irregular and such committal was perfectly good, **1 C. L. R. 523.** But *see* **5 A. 233; 29 C. 415; 10 A. 39; 14 C. W. N. 275** and Note 3 to s. 199.

In **6 Lah. 375** it was held that it is sufficient for the complainant to state the true facts in his own language and it is for the Magistrate to apply the law to those facts. Thus where in a complaint purporting to be made under ss. 193 and 211, I.P.C. The Magistrate after hearing the evidence framed a charge of defamation and convicted the petitioner under s. 500, I.P.C. *Held* that, provided the complainant personally satisfied the conditions of s. 198 of the Code, the failure in his complaint to mention specifically an offence under s. 500, I.P.C., did not restrict the Magistrate from taking cognisance under that section.

(*ii*) *Appellate Court may alter finding without complaint.*—An Appellate Court can under s. 423, *infra* convert a conviction under s. 182, I.P.C., into one of defamation under s. 500, I.P.C., notwithstanding the provisions of this section and the fact that no complaint of defamation had been made, **25 A. 534.** *See* Notes to s. 423.

3. **Abetment, taking cognisance of without complaint bad.**—A Magistrate who takes cognisance of an offence falling under s. 494, I.P.C., (and any section of the Code) under abetment, must be held to take cognisance of an offence under s. 494 within the meaning of this section, **4 P. R. 1888.**

4. **Public servant complaining of defamation.**—The following order has been passed by the Government of India in regard to a complaint by an officer of Government.

No officer of Government is permitted to have recourse to the Courts for vindication of his public acts or of his character as a public functionary from defamatory attacks upon it, as it is for the Government to decide in each case whether the institution of proceedings is necessary or expedient. The Local Government will decide whether the circumstances are such that the Government shall bear the costs of the proceedings, civil or criminal, or leave the officer to institute the suit or prosecution at his own expense, and in the latter case it will also determine, in the event of the matter being decided by the Court in the officer's favour, whether he should be recouped by the Government the whole or any part of the costs of the action in connection with this subject (*Government of India, 5th September*, 1890). It may be added that all officers of Government have been forbidden, without the official consent in writing of the Local Government under whom they may serve, to communicate to the press any explanation or defence of their official conduct (*Government of India*, 20*th May*, 1900).

5. **Who is a person aggrieved by defamation depends upon circumstances.**—It is impossible to lay down any inflexible rule determining for every case whether the complainant is a person aggrieved by the offence alleged within the meaning of this section. It must be determined in each case according to its own circumstances whether the complainant can be said to be in a legal sense a person aggrieved. Where the complainant is the head of the family, his son a lunatic and the daughter-in-law is living under his protection and an allegation is made to the effect that she was taken away to her father's house and married to another person, the offence, if true, seriously affects his reputation and status in society. Hence the father-in-law is *the person aggrieved* within the meaning of this section and is competent to institute a complaint. *Grievance* referred to in the words "person aggrieved" in this section does not contemplate any fanciful sentimental grievance. It must be such a grievance that the law can appreciate; it must be a legal grievance and not a *state proratione voluntas reason* (*per* MUKERJEE, J.), **3 C. L. J. 38 = 3 Cr. L. J. 187** where **25 B. 151 (F.B.)** and **32 C. 425** are *referred* to and **10 B. 340** *explained*; **1914 M. W. N. 351 = 15 Cr. L. J. 357.** Where certain allegations in a newspaper against *A* and others found to be true as regards *A* though untrue as regards the others, *held A* was not a person aggrieved by the publication of the allegations, **1914 M. W. N. 351 = 15 Cr. L. J. 357.** In cases of defamation, the words "person aggrieved" must be treated as equivalent with the expression "person injured," the object of the section apparently being to limit the right of complaint to the person who suffered injury, **1 Bur. S. R. 617.**

Government having designated the Sessions Court of Tellicherry as the Court which should try the case and an Additional Sessions Court being a Court entirely distinct from a Sessions Court, Mr Irvine had no jurisdiction to try the case, and (ii) that Government had no power to specify the Court which should try *S* he being not one of the class of public servants referred to in this section *Held* though there can be only one Sessions Court for each Sessions division, there may be more than one Judge for each Sessions Court and that the appointment of Mr Irvine as an Additional Sessions Judge did not constitute an Additional Sessions Court and that as an Additional Sessions Judge has jurisdiction to try only such cases as the Government might refer to him under s 193 Mr Irvine as Additional Sessions Judge of the Court of Tellicherry, had jurisdiction to try the cases against both *K* and *S*, **Weir II, 215.**

VI.—REVISION.

28 Power of High Court to revise orders under this section.—Having regard to s. 439 the powers of the High Court, Appellate and Revisional, are co-extensive, and s. 195 does not confer on an Appellate Court any authority in respect of an order made by a Subordinate Court under this section, **26 C. 852** The High Court therefore refused to interfere under s. 439, but affirmed its power of interference with orders of Subordinate Courts made under this section under s 15 of *the Charter Act*

Prosecution for breach of contract defamation and offences against marriage

198. No Court shall take cognisance of an offence falling under Chap XIX or Chap XXI of the Indian Penal Code, or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence

*"Provided that, where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf"

Notes.—1. Chap XIX—*Of Criminal Breaches of Contracts of Service* Chap XXI—*Of Defamation* Sections 493—496, relate to *offences against marriage*

2. Taking cognisance of an offence mentioned in the section without a complaint is illegal.—For definition of 'complaint,' *see* s 4 (*h*) and Notes thereto and *see* Notes to s 190 A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s 200 (whether of his own accord or in consequence of suggestions from the Magistrate) is not a legal "complaint made by an aggrieved person within the meaning of s 4 (*h*) and this section so as to enable the Magistrate to take cognisance of the offence, **10 A. 39; 5 A. 233** Putting forward even a false claim on a post-card does not *prima facie* amount to defamation and a Magistrate to whom such a post-card is privately handed over, without a complaint as is required by s. 198 commits material irregularity and acts without jurisdiction in starting thereon a criminal prosecution and the High Court can interfere, *3 P. W. R 1909 = 9 Cr. L. J. 184* *A Criminal Court is not competent to amend or alter a complaint* under s 501, I P C., into one under s 500 The two offences are distinct, and a Court cannot take cognisance of an offence under Chapter XXI, I P C, except upon complaint by a person aggrieved of such offence, **18 P. R. 1889** *See* the new amendment in the proviso authorising some other person to complain on behalf of a woman or child.

(i) *Substance of the complaint must be looked to*—A complaint was made to the Magistrate under s 211 that the accused had made a false charge against him (the complainant) of poisoning his daughter in law with a view to injure his reputation, but the Magistrate dealt with it under s 500 and framed a charge under the latter section to which the accused pleaded, and put in his defence and called witnesses and eventually appealed against conviction *Held*, that looking to the substance of the complaint made to the Magistrate, it could not be affirmed that there had been in the action of the Magistrate any violation of the rule laid down by this section **24 P. R. 1884** *See* also **8 P. R. 1891.** It is not necessary that a complainant should state precisely the section in the Code under which the accused shall be charged It is sufficient if the complainant lays before the Magistrate facts which if proved, would be sufficient to sustain a charge under any of the sections of the

* This proviso was added by Act XVIII of 1923, s. 51

7. Unwillingness of husband to proceed with the prosecution.—Where the husband professed himself unwilling to proceed with the prosecution and the Assistant Sessions Judge thereupon ordered the accused to be discharged, the High Court declined to interfere, **5 B. H. C. R. Cr. Ca. 27.** But in similar circumstances it was *held* a Magistrate who had made out the order of committal cannot discharge, the High Court alone having the power to quash a committal under s. 215, **4 A. 150.** *See* s. 218 (2) which is new, as to cancelling a charge already framed.

8. Marriage must be strictly proved.—In all prosecutions for adultery, under s. 497, I.P.C., the legal marriage of the woman with whom the adultery is said to have been committed, should be strictly proved. Neither the assertion of the complainant nor a general admission on the part of the accused is sufficient for this purpose—*C. P. Cr. Cir. No. 18.* Marriage should be strictly proved, **7 C. W. N. 148** and there should be neither consent nor connivance on the part of the husband, **1 P. R. 1874.** Where the complainant had divorced his wife previous to making his complaint an order of acquittal under s. 498 was upheld, **27 P. R. 1879.**

9. Right of care-taker is limited to 'absence' of husband.—The words '*in his absence*' limit the right of the care-taker and therefore a complaint of the care-taker would not give jurisdiction unless the husband was absent. The absence must be from the place and where a complaint was by a nephew of the husband when the husband was bed-ridden with paralysis, *held* that the Court could not take cognisance. The Legislature has made no provision for the protection of the lunatic, paralytic or invalid husbands, and the word absence cannot be taken to include such cases, **8 S. L. R. 15 = 9 Cr. L. J. 450.** A father in whose custody a minor wife is, may complain even if the husband stands by, **17 Cr. L. J. 558 (M.)**

10. Acquittal from want of a proper complaint is no bar to a fresh trial on proper complaint.—Brother of the husband alleging authority from husband instituted complaint under s. 498, I.P.C. After taking evidence the Magistrate acquitted the accused as the brother had no authority. On the husband instituting a complaint under s. 498, I.P.C., *held*, that previous acquittal was no bar, **31 A. 317.** *See* also **16 Cr. L. J. 657 (B.)**

11. Cases under ss. 497 and 498 how registered.—The High Court of N.-W. P. has directed that cases under ss. 497 and 498 ought not to be registered as "*King-Emperor v. Accused*," but only as "*Private Complainant v. Accused*."—*N.-W. P. Gazette*, 1879, *p.* 128.

*199-A. "When in any case falling under section 198, or section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall before granting the application, give him a reasonable opportunity of objecting to the granting thereof."

Objection by lawful guardian to complaint by person other than person aggrieved.

CHAPTER XVI.

Of Complaints to Magistrates.

†200. A Magistrate taking cognisance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate.

Examination of complainant.

Provided as follows :—

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under s. 192;

‡(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require

* Added by Act XVIII of 1923.

† The words "subject to the provisions of section 476" have been omitted by the Criminal Procedure (Amendment) Act, 1923.

‡ Clause (aa) has been added by the Criminal Procedure (Amendment) Act, 1923.

6. "Some person aggrieved" is not limited to the person defamed—(i) *Husband*—When an imputation of unchastity is cast upon a married woman, living with her husband *prima facie* her husband is the person aggrieved by it, therefore he has a right to lodge a complaint about defamation of his wife, **14 M. 379; Weir II, 231; 15 M. L. J. 225 = 2 Cr. L. J. 331; 23 P. R. 1882; 25 B. 151 (F.B).** (RANADE, J., *dissenting*) **Ratanlal 527** *overruled* In **18 M 250** it was *held* that the husband was not entitled to sue in tort for defamation of his wife (ii) *Son* As regards his capacity to institute criminal proceedings under s. 499 I P C, the Allahabad High Court in **1893 A. W N. 207** *held*, that a son is not in the same position with respect to his mother as a husband is with respect to his wife and he cannot therefore lodge a complaint for the alleged defamation of his mother (iii) *Brother* But this view was not accepted by the Calcutta High Court which remarked "A Hindu lady living with her father her brother or her son is a member of his family and her reputation is bound up with the reputation or the person in whose house and under whose charge she is living If any imputation is made against her character, that would affect as much the relative with whom she is living as herself' and therefore having regard to the circumstances and conditions under which pepole live in Bengal, the brother of a Hindu widow who was defamed and with whom she was living was *held* to be an aggrieved person competent under this section to lodge a complaint **32 C 425.** In this case the Bombay Full Bench view, in **25 B. 151** was *dissented from* and **18 M. 250** *distinguished* (iv) *Father-in-law* *See* **3 C. L. J. 38 = 3 Cr. L. J 187** noted above *See* **5 Lah. 301; 22 M. L. J. 745.** (v) An adopted son is a person aggrieved when the adoptive mother is living with him **28 Cr. L. J. 996.**

7. Municipal President not person aggrieved when his subordinates have been defamed.—When certain newspaper-comments, alleged to be defamatory, were made against the Health Officer and his Subordinates who were all subordinate to the President of the Municipal Corporation and the latter officer lodged a complaint contending that he was responsible for the efficient discharge of their duties by his subordinate officers and that his credit had been injured *held* that assuming the statements were of the subordinate officers they were not defamatory of the complainant and that he was not therefore *a person aggrieved* within the meaning of this section though he was responsible for the efficient administration of the Health Department **26 M. 43.**

8. Person aggrieved in respect of bigamy is either the first or second husband.—In the case of an offence under s 494, I P C, the husband of the woman is the person aggrieved, **26 C. 336** The mother of a minor husband cannot be regarded as the person aggrieved The husband alone can make such a complaint **Weir II, 231.** *See* also **10 B 340; 1 C. L. R. 523; 25 A 132** The father of either of the husbands is not a person aggrieved, **32 A. 78**; the father of the girl is not a person aggrieved, **13 Cr. L. J. 204 (Mad).** Brother of the husband is not a person aggrieved, **11 O C. 145 = 7 Cr L. J. 457** The brother of a fanatic, whose wife is charged with having committed bigamy, is not 'a person aggrieved by such offence' within the meaning of this section **10 B 340; 1 C L. R 523,** nor is the brother of the second husband, **25 A. 132.**

9. Abatement of prosecutions for defamation on death of complainant—Since the offence of defamation is compoundable without the permission of the Court before conviction, and even after conviction with the permission of the Appellate Court the death of the complainant during the course of criminal proceedings for defamation has the effect of terminating those proceedings, **112 P. L. R. 1908 = 10 P. R. 1908 = 7 Cr. L. J. 290 at p. 353.** *See* **31 C. 993 (F.B).**

10. No complaint for defamation would lie against a witness.—A witness cannot be prosecuted for defamation in respect of statements made by him in a judicial proceedings as they are privileged, nor can the witness be sued in tort, **17 B. 127 and 573; 16 M. 233, 11 M. 477; 28 C. 794.** But if a witness makes a statement irrelevant to the matter under inquiry or trial maliciously and not in reply to a question put to him he is not protected from prosecution for defamation, **32 C. 756.**

Prosecution for adultery or enticing a married woman.

199. No Court shall take cognisance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or in his absence, *"made with the leave of the Court" by some person who had care of such woman on his behalf at the time when such offence was committed

* The words in inverted commas were added by Act XVIII of 1923

7. **Unwillingness of husband to proceed with the prosecution.**—Where the husband professed himself unwilling to proceed with the prosecution and the Assistant Sessions Judge thereupon ordered the accused to be discharged, the High Court declined to interfere, **5 B. H. C. R. Cr. Ca. 27.** But in similar circumstances it was *held* a Magistrate who had made out the order of committal cannot discharge, the High Court alone having the power to quash a committal under s. 215, **4 A. 150.** *See* s. 213 (2) which is new, as to cancelling a charge already framed.

8. **Marriage must be strictly proved.**—In all prosecutions for adultery, under s. 497, I.P.C., the legal marriage of the woman with whom the adultery is said to have been committed, should be strictly proved. Neither the assertion of the complainant nor a general admission on the part of the accused is sufficient for this purpose—*C. P. Cr. Cir. No.* 13. Marriage should be strictly proved, **7 C. W. N. 143** and there should be neither consent nor connivance on the part of the husband, **1 P. R. 1874.** Where the complainant had divorced his wife previous to making his complaint an order of acquittal under s. 498 was upheld, **27 P. R. 1879.**

9. **Right of care-taker is limited to 'absence' of husband.**—The words '*in his absence*' limit the right of the care-taker and therefore a complaint of the care-taker would not give jurisdiction unless the husband was absent. The absence must be from the place and where a complaint was by a nephew of the husband when the husband was bed-ridden with paralysis, *held* that the Court could not take cognisance. The Legislature has made no provision for the protection of the lunatic, paralytic or invalid husbands, and the word absence cannot be taken to include such cases, **3 S. L. R. 15 = 9 Cr. L. J. 450.** A father in whose custody a minor wife is, may complain even if the husband stands by, **17 Cr. L. J. 363 (M.).**

10. **Acquittal from want of a proper complaint is no bar to a fresh trial on proper complaint.**—Brother of the husband alleging authority from husband instituted complaint under s. 498, I.P.C. After taking evidence the Magistrate acquitted the accused as the brother and no authority. On the husband instituting a complaint under s. 498, I.P.C., *held*, that previous acquittal was no bar, **31 A. 317.** *See* also **16 Cr. L. J. 657 (B.).**

11. **Cases under ss. 497 and 498 how registered.**—The High Court of N.-W. P. has directed that cases under ss. 497 and 498 ought not to be registered as "*King-Emperor* v. *Accused*," but only as "*Private Complainant* v. *Accused*."—*N.-W. P. Gazette*, 1879, *p.* 123.

Objection by lawful guardian to complaint by person other than person aggrieved.

***199-A.** "When in any case falling under section 198, or section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall before granting the application, give him a reasonable opportunity of objecting to the granting thereof."

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

Examination of complainant.

†200. A Magistrate taking cognisance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate.

Provided as follows:—

(*a*) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under s. 192; ‡(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require

* Added by Act XVIII of 1923.

† The words "subject to the provisions of section 476" have been omitted by the Criminal Procedure (Amendment) Act, 1923.

‡ Clause (aa) has been added by the Criminal Procedure (Amendment) Act, 1923.

the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;

(*b*) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing, but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing,

(*c*) when the case has been transferred under s 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant

Notes.—1. The proviso *(aa) to this section has been newly added to this section with a view to dispense with the examination of the complainant when the complaint is under s 476 (*see* Select Committee Report, 1916).

2. Proceeding of Magistrates not empowered.—As to the effect of a Magistrate not empowered in that behalf erroneously and in good faith taking cognisance of an offence on a complaint under s. 190 (1), cl (*a*), *see* s 529 (*e*).

3 Taking cognisance.—A Magistrate takes cognisance of a complaint under s 190 (1), (*a*), *see* Note 3 thereto A Magistrate is bound to take cognisance, *see* Note 16 under s 140

4. Complaint.—For definition, *see* s 4 (*h*), and for what is or is not a complaint, *see* Notes 2—12 thereunder and Notes under Heading II under s 190 The provisions of this section and s 203, do not apply to applications under s 552 for restoration of abducted females when no offence is alleged, **4 Bom. L. R. 609.**

5. Complainant—who may complain.—*See* Notes 3 and 14 under s. 190

(*i*) *Complaint in a State prosecution authorised under s* 196 —*See* **35 C. 141; 32 M. 3.** Note 7 and Note 11 to s. 196

6. Ordinarily complaint must be presented in person.—The words 'at once' clearly indicate that ordinarily a complaint must be presented in person A complaint should never be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint **40 C. 91.**

(*i*) *Mukhtyar cannot present complaint*—A complaint under ss. 408 and 409, I P C, having been presented by the complainant's Mukhtyar instead of by the complainant herself who was not present in Court, *held*, that the Magistrate was justified in dismissing the complaint, as he had no opportunity of examining the complainant as required by this section, **Ratanlal 625.** But it is not necessary for a Magistrate receiving a Police report to treat the reporting office as a complainant, **2 L. B. R. 146.**

(*ii*) *Agent may present complaint.*—Where sanction to prosecute has been accorded to a particular person, the prosecution might be initiated either by his heir or by any person specially authorised but, in the latter case, the Magistrate is bound to record the authority of the actual complainant, even though the Magistrate be a Presidency Magistrate to whom cl (*b*) of this section applies No summons could lawfully issue on the accused, until the complainant s authority had been exhibited and recorded, **32 C. 469.** *See* also **8 C. W. N. 797.**

7. Sections 200—203 must be strictly complied with.—Ss. 200—203 should be read together, **14 C. 141.** The procedure laid down by these sections must be strictly complied with. *See* **11 A. L. J. 921 = 15 Cr. L J. 21; 1834 A. W. N. 47; 10 M. L. T. 120 = 12 Cr. L. J. 463; 10 C. W. N. 773 = 3 Cr. L. J. 471; 30 C. 923; 9 C. W. N. 199; 8 C. W. N. 840; 17 Cr. L. J. 396 (C.).**

(*i*) *Magistrate must deal with the complaint as provided by this Chapter and cannot refer to Police under s* 156 (3).—On the presentation of a complaint the Magistrate has no option of either taking cognisance in the manner provided by this Chapter or of referring to the Police for Investigation under s. 156 (3). It is his duty to immediately proceed in the manner laid down in this Chapter (1911) **2 M. W. N 74 = 10 M. L. T. 120 = 12 Cr. L. J. 463;** *see* also **54 Cal. 303.** The case in **30 C. 923,** it was explained does not pronounce any opinion on the legality of the action in not proceeding as laid down by s. 200, but merely considers the effect of his omission on the legality of orders subsequently passed under ss 200 and 476

* Clause (aa) has been added by the Criminal Procedure (Amendment) Act, 1923

(*ii*) *Cannot refer to a superior Magistrate for orders.*—A Magistrate who receives a complaint and examines the complainant must deal with it himself under s. 203 or 204, and cannot send it to the District Magistrate for orders, **40 C. W. N. 1086.** Where a complaint against a Police-officer was preferred to a Deputy Magistrate who having examined the complainant, put the case up before the District Magistrate and the latter officer on the strength of a report from the District Superintendent of Police dismissed the complaint under s. 203, without even examining the complainant, *held* that the provisions of ss. 201 and 202 not having been complied with and the complainant not being examined by the Magistrate who dismissed the complaint, the order of dismissal was wrong and illegal, **9 C. W. N. 199 = 2 Cr. L. J. 51.** *See* also **6 C. W. N. 843; 39 C. 1041.**

(*iii*) *Magistrates cannot decline jurisdiction and refuse to entertain complaint.*—A Magistrate cannot decline jurisdiction because the offence complained against is cognisable by the village headman, **7 M. H. C. R. Appx. XXXI = Weir II, 237.** A Magistrate cannot refuse a summons to a complainant, even in a case in which the charge might have been made to the Police in the first instance, **14 W. R. 36.** A complaint properly laid under the *Indian Penal Code* should be investigated even if the case be one in which a civil action will lie, **10 W. R. 40.** But where a complaint is purely of a civil nature and discloses no offence, the Magistrate may refuse to entertain it. An order directing the petition of complaint to be filed, *i.e.*, to be shelved in the office is illegal, **16 W. R. 58.**

8. **Object of examination is to ascertain if there is a prima facie case.**—The object of the provision is to prevent the issue of process in cases where the examination of the complainant would show that the complaint was clearly false, frivolous or vexatious and that further proceedings would tend merely to harass unnecessarily ... ...son and waste the time of the Court, **11 P. R. 1911 = 146 P. L. R. 1911 = 12 Cr. L. J.**
... under s. 498, I.P.C., *held*, that ...
... an accused pers...
217; 10 A. L. J. 79 = 13 Cr. L. J. 70 ... 498 **how register... made.**—A cross-examination of a complainant by a Magis-

9. **Examination of complainant how to be** ... *King-Emperor v.* ... another Magistrate is not a sufficient trate taking cognisance of a case on the depositions recorded ... compliance with law to enable the Magistrate to deal with the case under s. 203 ... **30 C. 923.** *See* **13 B. 600** as to whether a Magistrate can cross-examine a complainant. The prescribed mode of ascertaining ... what a complaint is, is to examine the complainant and reduce his examination to writing, **Weir II, 237.** Care should be taken in conducting examinations of complainants, under this section, to make the inquiry sufficiently full to enable the Magistrate to judge whether there are any grounds for proceeding—*Bom. C. Cr. Cir., p.* 14. The examination of the complainant is not to be a *mere form*, but an intelligent inquiry into the subject-matter of the complaint, carried far enough to enable the Magistrate to exercise his *judgment* as to whether there is or is not sufficient ground for proceeding, **Wilkins 2.**

In every case the complainant should be examined intelligently in such a manner as to enable the Magistrate to determine whether *there is prima facie* sufficient ground for proceeding. The indiscriminate issue of process almost as a matter of course encourages false, frivolous and vexatious complaints and results in serious hardship to a large portion of the persons accused, besides wasting the time of the Courts. Special caution should be used when several persons are accused at once, and in cases where it appears that there is dispute between the complainant and the accused about a matter which should be decided by the Civil Courts. Magistrates should also bear in mind the provisions of s. 95, I.P.C., and apply them reasonably to the complainants before them, with reference to the position in life of the parties concerned and the habits of the class to which they belong. The law requires that the complainant shall be examined "*at once.*" The practice of fixing a future date for the examination of a complainant is absolutely prohibited.—*C. P. Cr. Cir., Part II, No* 14.

(*i*) *Can complainant be examined on commission?*—A commission cannot be issued for the examination of a complainant, inasmuch as s. 503 relates to commissions for the examination of witnesses, and in the preliminary stage of proceeding a complainant is not a witness but a complainant, **10 P. R. 1896.** *Contra* **42 C. 19,** where it was *held* that the terms of s. 503 are very wide. They refer not only to an inquiry and a trial, but to any other proceeding. The section authorises the examination of any witness and a complainant is certainly a witness.

(*ii*) *Effect of omission to take the signature of the complainant.*—The omission to take the signature of the complainant vitiates the record and cannot be cured by s. 537, so that a conviction cannot be had under s. 193, I.P.C. in respect of two contradictory statements, one made under this section but not signed, and the other made while examined as a witness, **6 C. W. N. 850.**

the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties,

(*b*) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and need not be reduced to writing, but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing,

(*c*) when the case has been transferred under s 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant

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3. Taking cognisance.—A Magistrate takes cognisance of a complaint under s 190 (1) (*a*) *see* Note 3 thereto A Magistrate is bound to take cognisance *see* Note 16 under s 140

4 Complaint—For definition, *see* s 4 (*h*) and for what is or is not a complaint, *see* Notes 2—12 there under and Notes under Heading II under s 190 The provisions of this section and s. 203, do not apply to applications under s 552 for restoration of abducted females when no offence is alleged **4 Bom L R. 609.**

5 Complainant—who may complain.—*See* Notes 3 and 14 under s 190

(*i*) *Complaint in a State prosecution authorised under s* 196—*See* **35 C. 141, 32 M. 3** Note 7 and Note 11 to s. 196

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(*ii*) *Agent may present complaint*—Where sanction to prosecute has been accorded to a particular person, the prosecution might be initiated either by his heir or by any person specially authorised but in the latter case, the Magistrate is bound to record the authority of the actual complainant, even though the Magistrate be a Presidency Magistrate to whom cl (*b*) of this section applies No summons could lawfully issue on the accused, until the complainant s authority had been exhibited and recorded **32 C. 469.** *See* also **8 C. W. N. 797.**

7. Sections 200—203 must be strictly complied with—Ss. 200—203 should be read together, **14 C. 141.** The procedure laid down by these sections must be strictly complied with *See* **11 A L. J 921 = 15 Cr. L. J 21; 1834 A. W. N. 47; 10 M. L. T. 120 = 12 Cr. L. J. 463; 10 C. W. N. 773 = 3 Cr L. J 471; 30 C. 923; 9 C. W. N. 199; 8 C. W N. 840; 17 Cr. L. J. 396 (C.).**

(*i*) *Magistrate must deal with the complaint as provided by this Chapter and cannot refer to Police under s* 156 (3).—On the presentation of a complaint the Magistrate has no option of either taking cognisance in the manner provided by this Chapter or of referring to the Police for investigation under s. 156 (3). It is his duty to immediately proceed in the manner laid down in this Chapter (**1911) 2 M W. N. 74 = 10 M. L. T. 120 = 12 Cr. L. J. 463;** *see* also **54 Cal 303** The case in **30 C. 923,** it was explained does not pronounce any opinion on the legality of the action in not proceeding as laid down by s. 200, but merely considers the effect of his omission on the legality of orders subsequently passed under ss 200 and 476

* Clause (aa) has been added by the Criminal Procedure (Amendment)

of the complainant under s. 211, I.P.C., 33 C. 1; 10 C. W. N. 773 = 3 Cr. L. J. 471; *see* also 14 C. 707; 27 C. 921; 4 C. W. N. 805; 5 C. W. N. 254; 7 M. 292; 22 B. 596; 15 A. 336; 2 P. R. 1912 = 11 P. L. R. 1912 = 12 Cr. L. J. 539; 18 C. W. N. 96; 26 Bom. L. R. 183.

Where a complainant prefers a criminal charge before a Magistrate who neither examines him on oath nor takes down his statement in writing, he cannot be proceeded against under s. 211, I.P.C., even if the charge turns out to be a false one. 28 Bom. L. R. 490.

(*v*) *When omission amounts to mere irregularity.*—Where a Tahsildar sent a *Yadast* to a Magistrate charging a person with an offence under s. 174, I.P.C., it was *held* that the omission of the Magistrate to examine the Tahsildar was but an irregularity curable by s. 537, 11 M. 443; 15 C. W. N. 65. Every Magistrate who takes cognisance of an offence upon complaint should, as a matter of ordinary practice forthwith examine the complainant on oath and reduce the substance of his examination to writing and make the complainant sign the same. This is a very salutary provision of law and Magistrates should be careful strictly to observe it in every case. Where, however, the complaint was preferred by a responsible public official, was reduced to writing and signed by the said official and was accompanied with a formal sanction by the Local Government for the prosecution of one of its servants and the accused person was actually convicted, *held* the Magistrate's failure to examine the complainant on oath had not in any way prejudiced the accused or caused a failure or miscarriage of justice and that the irregularity had been covered by s. 527 (*a*), (9 A. 666, 11 M. 443 and 63 P. R. 1901 *followed*) 11 P. R. 1911 = 136 P. L. R. 1911 = 12 Cr. L. J. 217. Omissions to examine complainant is a mere irregularity, 15 Cr. L. J. 649 (Sindh); 13 A. L. J. 840. But in 43 M. L. J. 710 it is *held* that omission to examine the complainant under s. 200 is a serious irregularity justifying interference in revision by the High Court. But 46 C. 807 holds that a Police report in a non-cognisable case is either a complaint under s. 4 or a Police report within s. 190 (1), (*b*) and the Magistrate has jurisdiction to take cognisance of an offence under s. 211 of the I.P.C., disclosed therein (25 B. 150 and 32 M. 3 *not followed*). If it is a complaint the omission of the Magistrate to examine the Police officer under s. 200 is a mere irregularity not going to the root of his jurisdiction. Failure to examine the complainant was merely an irregularity covered by s. 537-A as it did not occasion a miscarriage of justice or prejudice the accused in any manner, 4 Lah. 359 (11 P. R. 1911 *followed*).

12. **Procedure after examination.**—Having examined the complainant, the Magistrate must either (*i*) issue summons, s. 204, or (*ii*) order inquiry under s. 202, or (*iii*) dismiss the complaint under s. 203, 13 C. 334; 12 B. 161; 16 C. W. N. 143 = 13 Cr. L. J. 125.

(*i*) *Magistrate cannot refuse judicial inquiry.*—A complainant is entitled to be examined on his complaint and if his case is found to be true, to have process against the accused. After having found the complaint to be true, the Magistrate cannot refuse judicial inquiry on the ground that there is no probability of conviction, 29 C. 410; 13 C. 334. *See* Note 7 to s. 203 and Note 16 to s. 190.

13. **When complaint suspicious, complainant may be warned.**—When Magistrates have a suspicion that a charge is false and vexatious, but the suspicion is not strong enough to justify them in withholding process they may, before directing issue of process or ordering a local inquiry, warn the complainant of the risk he runs of being prosecuted for a false complaint, or of being ordered to pay compensation to the accused by way of amends. Magistrates should always endeavour to avoid compelling a person to appear before them to answer a criminal charge, unless they have first satisfied themselves that there is reason for proceeding against such person, Oudh Cr. Dig., p. 7.

14. **Original complaint not to be returned.**—It is irregular to endorse and return to a party his petition or complaint alleging an offence. The petitioner is only entitled to an authenticated copy of the Magistrate's order, on proper stamp, Weir II, 237.

15. **Refusal to sign statement** is punishable under s. 180, I.P.C.

16. **Complaint and examination of complainant whether and when admissible in evidence.**—A complaint though sworn to is a statement not made in presence of the accused and cannot be taken as evidence as against him, 10 M. L. T. 506 = (1911) 2 M. W. N. 576 = 12 Cr. L. J. 585. A petition of complaint and the examination of complainant on oath taken under this section are admissible as dying declarations under s. 32, clause (1) *of the Evidence Act*, and are not, as such, matters required by law to be reduced to the form of a document within the meaning of s. 91 of that Act so as to exclude parol evidence of their terms. The statement admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and

10. Complainant must be examined at once.—Is attestation or complaint on oath sufficient?—It is the Magistrate's duty at once to examine the complainant on oath and reduce the substance of that examination into writing It is his duty to find out whether there is any matter which calls for investigation by a Criminal Court, **10 A. L J. 79 = 13 Cr. L. J. 704.** On presentation of a complaint the Magistrate must examine the complainant upon oath and reduce or cause to be reduced the substance of that examination to writing and that writing must be distinct from the complaint. Merely calling upon the complainant to attest the complaint on oath is not sufficient compliance with the law, **18 A. 221.** In distinguishing the case in **9 A. 666,** the High Court observed "that the case was of an exceptional character The complaint was made by an Englishman against an Englishman. The contents of the complaint, which was drawn up in English had evidently been drawn up with a great deal of care and not in the way in which complaints are so often prepared for the Courts of Magistrates Except when the complaint, is in writing and he tranfers the case under s. 192, the Magistrate taking cognisance of the offence is bound to examine the complainant, and then he can either issue a summons to the accused or order an inquiry under s 202, or dismiss the complaint under s 203 **18 C. 334.** *See* also **6 Bom. L. R. 662; 35 M. 606.** A Presidency Magistrate need examine the complaint only when the complaint is oral and he transfers the case under s 192, **2 P. R. 1912 = 11 P. L. R. 1912 = 12 Cr. L. J. 539.** In **6 Bom. L R 662** it is stated that when a complaint is in writing and is sufficiently clear, it may frequently be a sufficient compliance with s 200 if the Magistrate reads it over to the complainant and the complainant is on oath asked to subscribe it It is only when the written complaint is obscure or vague, that the Magistrate is bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made

11. Effect of omission to examine complainant.—(*i*) *Cannot dismiss complaint.*—The examination of a complaint is not a matter of form, and when a Magistrate dismisses a complaint without making such examination himself, the omission is a material one and he does what he has no authority to do under the Code, **U. B. R. (1910) I. 73 = 12 Cr. L. J. 385** Where a Magistrate, before whom a complaint was laid dismissed the complaint and sanctioned proceedings against the complainant under s 182, I P C, without examining the complainant or the witnesses named by him but only on a comparison of the complaint and the papers connected with a complaint that had previously been made at a Police-station *Held* that the proceedings were irregular and must be quashed, and the Magistrate should be directed to re-open the inquiry and examine the complainant **4 C. L R. 134** *See* also **17 W. R. 2.** Dismissal of complaint without examination will be set aside, **30 C. 923; 9 C. W. N. 199; 3 C. W. N. 17; 26 Bom. L. R. 183**

(*ii*) *Cannot refer for inquiry and report under s 202.*—*See* Note 10 to s 202. Unless a complainant is duly examined, inquiry and report under s 202 cannot be called for and if made, are made without jurisdiction and cannot form the basis of any further action **27 C. 921, 4 C W. N. 305, 1900 A. W. N. 189; 2 P. R. 1912 = 11 P. L. R. 1912 = 12 Cr. L. J. 539**

(*iii*) *Cannot issue process for appearance of accused*—Process issued to the accused without examining complainant may be set aside, **17 C. W. N. 448 = 14 Cr. L J. 76.** Where a Magistrate summoned the accused before examining the complainant it was *held* that he had misconceived his duty in supposing that it was not his business to examine the complainant, **1864 W. R. 37; 4 M H. C. R 162.** But where an accused person appears voluntarily before a Magistrate to answer a charge, the want of a complaint on oath, necessary for the issuing of a summons or warrant becomes immaterial, **5 B. H. C. R. Cr. Ca. 29.**

(*iv*) *Calling for report from accused before examining complainant.*—It is an irregular proceeding on the part of the Magistrate to call on the person complained against to submit a report as to the truth or otherwise of the allegations made against him, at any rate, this should not be done before the complainant has been examined, **3 C. W. N. 17; 9 A. 666.** *A* presented a complaint to a District Magistrate against a first-class Magistrate for his having used certain offensive words during the course of an inquiry, which *A* alleged amounted to defamation. The District Magistrate expressing himself satisfied with the report of the first-class Magistrate rejected *A's* complaint without examining him *Held*, that the action of the District Magistrate in calling for the report was not proper, and that in any case he ought to have heard the complainant and his witnesses before acting upon any statement made in the report by the person complained against, **Ratanlal 834.**

(*v*) *No sanction can be granted for prosecution under s 211, I P C*—Where a complainant presented a petition to a Magistrate impugning the correctness of a report made by the Police regarding proceedings instituted by him at the *thana*, *held* the complaint to the Magistrate ought to have been dealt with under this section and the complainant examined, before any order can legally be made for the prosecution

Note.—Under the new amendment a Magistrate can act under s. 202 though a case be transferred to him under s. 192 (dealing with transfer of cases by Magistrates). The proviso under sub-clauses (*a*) and (*b*) is newly added. Clause (2-A) was newly inserted.

46 C. 854 which was decided before the section was amended, holds that it has been a long practice to refer complaints to Subordinate Magistrates for local inquiry and report. The words "direct a previous local investigation by any officer subordinate" include a local investigation by a Subordinate Magistrate. The definitions of "inquiry" and "investigation" in s. 4 are not exhaustive and are expressed to be subject to the context. The present amendment clearly confers the power upon a Magistrate other than a Magistrate of the third class to direct an inquiry or investigation to be made by any Magistrate subordinate to him; and therefore expressly adopts the view held in **46 C. 854**. And the rulings in **38 C. 68** and **15 A. L. J. 642** holding to the contrary are no longer good law. (*See* Note 9, *infra*.)

Scope of section.—What is contemplated by this sec... is merely ... preliminary examination of the complainant and his witnesses such as the Magistrate de..ms fit to examine in the absence of the accused. If the Magistrate deems it proper also to give the accus.d an opportunity to appear and state his say about the accusation, even accept and consider his documen..ry evidence if he produces any. He is not prohibited by law from doing so. The Magistrate when he passe. an order after a preliminary inquiry he should either dismiss the complaint or issue process against the accused, as the case may be. Simply saying "notice is discharged" is highly objectionable, **52 Bom. 448 = ? Bom. L. R. 642.**

Notes.—1. (*a*) *Issue of process.—See* ss. 68 and 75. For their forms, *see* Sch. V, Nos. 1 and 2.

2. *All the powers of a Station Hous. Officer.—See* ss. 55, 56, 127, 128, 153, 156 and 157.

3. In Madras, all Presidency Magistrates are specially empowered.—In Madras, all Presidency Magistrates, other than the Chief Presidency Magistrate, have been invested with powers under this section—*Fort St. George Gazette*, 1892, *Pt. I, p.* 585.

APPLICATION OF SECTION.

4. Third-class Magistrates not competent to postpone process.—A Magistrate of the third class cannot postpone the issue of process even if he distrusts th. truth of the complaint.

5. Section applies only when Magistrate takes cognisance on complaint.—*Magistrate cannot make* ...*quiry without complaint.*—This section by its terms only applies to cases where there is a *complaint*, which is expressly distinguished from *information* in s. 191, and further applies only to cases where the Magistrate sees reason to distrust the truth of the complaint and a Magistrate acting upon second-hand information, cannot be sai... acting upon complaint, **24 P. R. 1888.** Magistrate taking cognisance under s. 190 (*c*) is not competent t... **L. R. 75 = 14 Cr. L. J. 600.** When there is no formal complaint before a Magistrate, any inquiry made by h... ..uth of any information received by him is not an investigation directed by law and has no legal c... not in any sense a judicial proceeding. Therefore any person making a false statement on ...ry cannot be p... d for giving false evidence as the Magistrate had no more authority to ...r compel ... ns to be answered than a private individual, **15 P. R. 1894**, *cf.* **32 A. 30.** — **11 Cr.** ... n receipt of a Police report of an offence under s. 173, a Sub-divisional ...ther ... Magistrate to investigate, the Subordinate Magistrate examined ... isional Magistrate who thereupon directed the issue of summons; ... It was open to the Sub-divisional Magistrate to take cognisance of ...se to do so and proceeded to make over the case for inquiry and ... with was on a complaint under s. 200. The proceedings before the ... with the provisions of the law, **40 C. 854; 17 C. W. N. 795 = 14 Cr.** ... lged with the Police who reported it to be false and a Magistrate ...rder 'complainant to prove his case' and made over the case to ... s. 476; *held* that such order was made without jurisdiction. **17 C.**

... *when person discharged under s.* 253.—The inquiry under this ...iry under Chapter XVIII. This section applies only to the case ... see fit to issue process. It is not competent to a Magistrate in

not the record of it and such oral statement must be proved by the person who recorded it or heard it made 8 C. 211 and 6 C W N 72 *followed* in 36 C. 659

17 No action lies for defamation in respect of statements made in complaint.—A statement contained in a complaint is absolutely privileged If the complaint is false the complainant may be prosecuted for preferring a false charge but he cannot be convicted of defamation 11 M L T 431 = 13 Cr L J 293, 33 C 850 *See* also *Lilley* v *Roney* 61 L J Q B 727, 36 M 216 (F B)

Procedure by Magistrate not competent to take cognisance of the case.

201. (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognisance of the case he shall return the complaint for presentation to the proper Court with an endorsement to that effect

(2) If the complaint has not been made in writing such Magistrate shall direct the complainant to the proper Court.

Notes —1 Oral complaints —Sub-sec (2) which is new contemplates the presentation of oral complaints. The corresponding section of the 1882 Code dealt only with complaints in writing

2 Competency of Magistrates —The want of competency contemplated by this section may be due to (*i*) the Magistrate not being empowered under s 190 or (*ii*) want of local jurisdiction or (*iii*) want of previous sanction under s 132 or ss 195—199 or under some Special or Local law or (*iv*) to the Magistrate not being qualified to try under Sch II col 8 or to commit for trial under s 206 or (*v*) where the accused is an European British subject. A refusal to act for want of a proper sanction is no bar to a subsequent complaint with a proper sanction 24 M 337

3. Procedure where Magistrate is not competent —If on perusal of the petition of complaint, the Magistrate finds he has no jurisdiction he is not bound to examine the complainant and indeed he could not do so but should return it after making the endorsement required by this section when the complaint is in writing Agra N A 1862 at p 318 If not competent to take cognisance the Magistrate should act immediately under this section without examining the complainant 10 C. W N 1086

Postponement for issue of process.

***202.** (1) Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognisance or which has been transferred to him under section 192 may if he thinks fit for reasons to be recorded in writing postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or if he is a Magistrate other than a Magistrate of the third class direct an inquiry or investigation to be made by any Magistrate subordinate to him or by a Police-officer or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint

Provided that no such direction shall be made—

(*a*) unless the complainant has been examined on oath under the provisions of section 200 or

(*b*) where the complaint has been made by a Court under the provisions of this Code

*(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a Police-officer such person shall exercise all the powers conferred by this Code on an officer in charge of a Police-station except that he shall not have power to arrest without warrant

†' (2 A) Any Magistrate inquiring into a case under this section may, if he thinks fit take evidence of witnesses on oath '

(3) This section applies also to the Police in the town of Calcutta and Bombay

* Sub-sections ( ) and ( ) were substituted for the original sub-sections by Act XVIII of 1923 s. 55

† Sub-section (2 A) is added by Act XVIII of 1923 s 55.

(*iii*) *Cannot direct local investigation by a superior Magistrate.*—A Deputy Magistrate in charge of the District Magistrate's office at headquarters, has no power as such, after taking cognisance of a complaint and examining the complainant on oath to send the case under this section for local investigation by the Sub-divisional Officer to whom he is by law subordinate, nor dismiss the complaint, and to direct the prosecution of the complainant under s. 476 on the report and investigation by the latter, **39 C. 1041.**

(*iv*) *Cannot refer the matter for the orders of the District Magistrate.*—' After the examination of the complainant a Subordinate Magistrate may either dismiss the complaint for good cause or direct any investigation under this section postponing the issue of process or immediately issue process for the attendance of the accused. He cannot suspend action and report the matter for the orders of the District Magistrate, because that officer directed that he should do so whenever a complaint is made of a particular class of offence. Such a direction is illegal, **10 C. W. N. 1086 = 4 Cr. L. J. 213.** But if he has not suspended his proceedings, but has proceeded either under this section or under s. 204, there seems to be no reason why he may not report to the District Magistrate so as to enable the latter either to withdraw the case for trial by himself or to transfer it to some other competent Magistrate for trial.

9-A. After receipt of result of the local investigation, cannot Magistrate hold another inquiry?—When a Magistrate has once acted under s. 202 and ordered an investigation by a person other than himself he is precluded from following the local investigation up by another inquiry. If there is ground, for any further inquiry, it is better that process should issue against the accused and the evidence adduced in his presence, **11 A. L. J. 755 = 14 Cr. L. J. 493.** But *see* **38 C. 68,** Note 9 (*ii*).

10. Reference cannot be made before examination of complainant.—A complainant must be examined either by the Magistrate who receives the complaint or by some other Magistrate to whom the case might have been transferred before a report can be called for under this section, **Ratanlal 368.** Where, therefore, a report was called for before the examination of the complainant; *held*, that the inquiry conducted by the Magistrate who was asked to report was irregular and made without jurisdiction and that no action could validly be taken upon such report, **27 C. 921;** *see* also **4 C. W. N. 305; 30 C. 923; 4 C. L. R. 134; 13 C. 334; 3 C. W. N. 17** and **9 C. W. N. 199; 2 P. R. 1912 = 11 P. L. R. 1912 = 12 Cr. L. J. 539; 8 S. L. R. 21 = 15 Cr. L. J. 662.** When without examining the complainant, the Magistrate referred the case for Police investigation and on receipt of the report proceeded to act under s. 203 and the complainant asked for a judicial inquiry, *held* that it could not be refused, **29 C. 410.** Unless a complainant is duly examined, an inquiry and report under this section, cannot be called for, and if made, are without jurisdiction and cannot form the basis of any further action; and a complainant, who was not examined, cannot be prosecuted in respect of his complaint which was dismissed on a report called for under this section, **2 P. R. 1912 = 11 P. L. R. 1912 = 12 Cr. L. J. 539.**

(*i*) *Examination by Subordinate Magistrate of no avail, when reference made by superior Magistrate.*—Where a superior Magistrate transferred to his own file a case pending on the file of a Magistrate subordinate to him after the complainant had been examined by the latter, and referred it to the Police for inquiry and report, without examining the complainant and recording his reasons for distrusting the truth of the complaint and on receipt of a report from the Police that the complaint was not *bona fide*, dismissed it; *held*, the order of dismissal was illegal for failure to follow the provisions of this and the next section, **Weir II, 244.**

11. Reference cannot be made after issue of process to accused.—Once process has been issued against the accused, the Magistrate cannot exercise the option of holding a preliminary inquiry. He must proceed with the trial, **6 S. L. R. 83 = 13 Cr. L. J. 749.** When a Magistrate has accepted a complaint and issued process upon it, and taken evidence for the complainant, his successor cannot refer the case to the Police for inquiry. Such a procedure is contrary to the provisions of s. 350, **9 M. 282.** This section does not contemplate action being taken under it when the case for the prosecution has closed, **1900 A. W. N. 189.** A Magistrate discharging an accused under s. 253 cannot order further inquiry, **Weir II, 239.** The procedure prescribed by this section can only be adopted before a process issues compelling the attendance of a person complained against. A Magistrate who, after issue of process and taking of evidence in a case, calls upon another person to make inquiry and report, acts distinctly in contravention of the procedure prescribed by law. When he acts upon that report, which is not evidence, and decides the case upon it, he in fact abdicates his judicial functions, and instead of deciding the case himself upon evidence, as the law requires him to do, leaves it to another person not authorised by law to decide it, **1896 A. W. N. 140.** The previous inquiry provided for by this section before complaint is taken up ought not to be made after the accused has been brought before the Court under a warrant, **21 W. R. 44.**

virtue of this section to direct further inquiry to be made by the Police into a case in which the accused has been discharged under s 253, Weir II, 239.

(ii) *No power to refer for inquiry in maintenance cases, s* 488.—A petition under s 488 is not a case instituted on a complaint as defined in s. 4 (*h*) and therefore the Magistrate to whom such a petition is preferred must inquire into it himself and has no power to refer it to a Subordinate Magistrate for inquiry and to dismiss it on his report, **29 P. R 1905 = 90 P. L. R 1905 = 2 Cr. L. J. 421** *following* **11 M. 199.**

5-A. Ss. 202 and 203 of this Code are applicable only to complaints A proceeding under section 107 is not a complaint under section 4 (1) (*h*) **29 Cr. L J. 866=111 I. C 450.**

6. Complainant entitled to be believed and have process issued—Every complainant is entitled to have the accused summoned unless the Magistrate who takes cognisance of the complaint does not believe it or has some doubts regarding its truth, **27 C. 798, U B. R (1910) I. 73 = 12 Cr. L. J. 335.** When a man files a complaint and supports it by his oath, rendering himself liable to prosecution and imprisonment if it is false he is entitled to be believed, unless there is some apparent reason for disbelieving him and he is entitled to have the persons against whom he complains, brought before the Court and tried, **40 C. 444** The Magistrate should start upon the right and healthy presumption that a person who has taken the trouble to come into Court and to take the further step of instituting a complaint, is acting upon knowledge or information which he believes to be true To start with the presumption that a complaint is false is not a sound method of procedure Hence it is that when a Magistrate is not satisfied as to the truth of a complaint, the law requires him to record his reasons for not being so satisfied, **11 A. L. J. 754 = 14 Cr. L. J. 493** *See* also **29 C. 410.**

7. Process may be postponed only when Magistrate is not satisfied as to the truth of the complaint.—Ordinarily after the examination of the complaint process shall issue The Magistrate has no discretion to make a judicial inquiry Such an inquiry can be *held* only when he is not satisfied as to the truth of the complaint, **14 C. 141; 9 A. 85, 1900 A. W. N. 189.** A Magistrate can send a case for inquiry by the Police under this section only when for reasons stated by him he distrusts the truth of the complaint. A circular issued by the District Magistrate that all cases against the Police should be sent for inquiry to the Superintendent of Police is illegal, **20 M. 387.**

8. Magistrate must record his reasons for distrusting the truth of the complaint.—The Magistrate is bound to state his reasons for not being satisfied **27 C. 921; 14 C. 141, 1884 A W. N. 47, 1902 A W N 195, 6 S L R 83 = 13 Cr. L. J. 749, 20 M. 387; 40 C. 41**—The reasons so recorded will enable the Court of Revision to see whether proper discretion has been exercised **14 C. 141, 17 Cr. L. J 396 (C.)**

(i) *Reason for amendment.*—'We have substituted the words *is not satisfied as to* the truth of a complaint for *sees no reason to distrust* the truth of a complaint, in sub-sec. (1) in order to give a little further latitude to the Magistrate's discretion.' —*Sel Com Rep*

(ii) *Failure to record reasons*—The failure of a Magistrate having jurisdiction to act under this section, to record his reasons before ordering an inquiry is at most an irregularity, and unless it in fact occasions a failure of justice, it can be no ground for setting aside his order of discharge under s 203, **25 M. 546, Weir II, 244; 8 M. L. T. 79; 10 M. L. T. 120 = (1911) 2 M. W. N. 74 = 12 Cr. L. J. 463; 15 A. L. J. 642.** But *see* **14 C 141; 27 C. 921** and **40 C. 41** Where it was *held* that such a failure was not a mere irregularity as the provisions of the statute were imperative and were directly disobeyed. *See* Note above.

9. Magistrate may 'inquire' or 'direct inquiry or investigation'—Magistrate not competent to adopt any other course—(i) *Cannot call for and consider papers*—If a Magistrate taking cognisance of complaint is not after examination of the complainant satisfied as to the truth of the complaint he has no power to send for and consider papers which resulted from a previous petition for inquiry and consisted of a local inquiry made thereon prior to the filing of the complaint The Magistrate should strictly follow the provisions of this section, if he is not satisfied as to the truth of the complaint, **11 A. L. J. 921 = 15 Cr. L. J. 21.**

(ii) *Can call upon the Subordinate Magistrate to make an inquiry other than a local investigation*—Under the old section a Magistrate could not call upon a Subordinate Magistrate to make an inquiry other than a local investigation, but now under the present amendment a Magistrate other than a Magistrate of the third class may direct an inquiry by a Subordinate Magistrate Therefore **36 C. 668** and **15 A. L. J. 642** holding the contrary view are no longer law (*see* Note above).

(*iii*) *Officer subordinate to such Magistrate—A first-class Magistrate is not subordinate to a District Magistrate.*—This section does not contemplate the subordination of a Magistrate of the first class to the District Magistrate. Both are Magistrates of the first class and the District Magistrate is not competent to direct another Magistrate of the first class to make inquiry under this section, **2 P. R. 1912 = 11 P. L. R. 1912 = 12 Cr. L. J. 539.** *See* also **39 C. 1041.**

(*iv*) *Directing Police-officer who is himself accused to inquire is illegal.*—If the accused be himself a Police-officer and as such subordinate to a Magistrate, it is not proper, and it was never contemplated, that the Magistrate should call for report from him for the purpose of ascertaining the truth of the complaint, **14 C. 141; 3 C. W. N. 17; 1884 A. W. N. 47.** In such cases it is generally better that the inquiry should be prosecuted by a Magistrate, **20 M. 387,** and he should arrive at a conclusion from evidence taken by himself, **4 C. W. N. 221; 1901 A. W. N. 169.** Where there is a complaint against an officer of the Police force, it is inadvisable to direct the Superintendent of Police to make a local investigation and to report as to the truth of the facts of the complaint, **9 C. W. N. 199 = 2 Cr. L. J. 51.**

14. Indiscriminate use of Police agency for investigating complaints objectionable.—It is an abuse of the power given by this section to refer petty cases of assault and the like to the Police for inquiry. The proper course for a Magistrate is to take action on the complaint at once unless it is manifestly false. There is abundance of serious work to occupy the time of the Police force, without setting them to make preliminary inquiries into petty matters, in which, moreover they are under a strong temptation to make money out of the complaint, **19 P. R. 1894.** It is not a proper course for a Magistrate when a complaint is made before him of an offence of which he can take cognisance to refer the complainant to a Police-officer. He is bound to receive the complaint, and after examining the complainant to proceed according to law. A different course would foster abuses and defeat the purpose of law, which is to give to persons who have been injured an access to justice independent of Police, **12 B. 161.** Magistrates are cautioned against the indiscriminate use of Police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is especially needful in respect of cases triable under Chapter XX and cases regarding offences not cognisable by the Police.—*Wilkins* 108. The practice of referring trivial cases for Police investigation is objectionable on general grounds, and tends to produce undesirable results in Police administration. It will be frequently found sufficient to limit the inquiry to the particular matters which have created distrust as to the truth of the complaint. When inquiry is found necessary, and the case is of a serious nature, the Police should ordinarily be employed, but in trivial cases, unless there be some special reason for using a Police-officer, one of the other modes of inquiry permitted by the section should be adopted.—*Punj. Cir., Chap. XLI, p.* 229. The employment of the Police to inquire into non-cognisable cases is open to much objection and should be discouraged. When, however, it is necessary to employ the Police in such cases, the Magistrate should mention the section under which the complaint seems to fall, and should indicate clearly the particular point or points into which inquiry is needed—*Beng. Pol. Code, p.* 370.

15. Procedure in referring for investigation complaints of non-cognisable offences through Police.—In referring complaints of non-cognisable offences to the Police for investigation, Magistrates should adopt the following procedure:—

(1) Before issue of orders to the Police to investigate any complaint, the complainant should be examined and the substance of his statement recorded on the back of his petition. (2) In no case should the original petition be made over to the Police. Should it appear necessary or advisable, for the proper understanding of the points which require local investigation, to communicate the terms of the petition to the Police, a copy of the petition should be sent (3) The point or points requiring local inquiry should be definitely and specially stated in the order sent to the Police. (4) Only such complaints should be referred to the Police for investigation as the Magistrate considers cannot be properly decided without such inquiry, and he should, in all cases, record on the original his reasons for ordering the inquiry.—*Reg. and Ord., N.-W. P.*, p. 307.

(2) Omission to examine a complainant on oath is not an illegality but is merely an irregularity and the Court has to see whether the accused by reason of the irregularity has been put to any substantial injustice.

16. Magistrate making local investigation acts judicially and may administer oaths.—Where a Magistrate after taking cognisance of a case on complaint sent it to another Magistrate who after inquiry directed the prosecution of the complainant under s. 476, *held*, that he was competent to do so as the proceeding

(i) *District Magistrate cannot direct further inquiry after a Magistrate has taken cognisance and has issued process—Perils of the combination of executive and judicial functions in the same officer*—A complaint was filed before a first-class Magistrate on behalf of the Collector as the head of the excise administration against *S* under s. 49 of *the Excise Act* XII of 1896 Process was duly issued under s 204 without any inquiry under this section, and proceedings under ss 242 and 244 were also taken. Notwithstanding all this, the Collector, who was also the District Magistrate, ordered the Police to make independent investigation in the case On being asked by the Chief Court, the District Magistrate explained that he acted as head of the excise administration *Held*, that the procedure of the District Magistrate as such, or as a Collector was wholly illegal and *ultra vires* Also, when an illegal order is passed and action taken which involves matters coming within the purview of law and justice and within the scope of the authority of the Courts such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer, but in his executive capacity, and the High Court can interfere in such matters in revision, **4 P. R. 1908 = 7 Cr. L. J. 202.**

(ii) *Interference by District Magistrate illegal when Subordinate Magistrate has ordered issue of process*—Where a Subordinate Magistrate has after examination of the complainant ordered process to issue the District Magistrate, unless he thought it proper to remove the case to his own file under s 528 has no power to interfere in the trial of the case and to pass an order (*e g*, one directing a judicial inquiry by another Magistrate) in the case, so as to postpone the trial. *Quære*, even if the District Magistrate had withdrawn the case to his own file, whether he could direct a judicial inquiry by any other Magistrate before the issue of process so as to *postpone* the trial, because every complainant is entitled to have the accused summoned, unless the Magistrate who takes cognisance of the complaint does not believe it or has some doubts regarding its truth, **27 C. 798.** *See* also **27 C. 979; 4 C. W. N. 242** and **30 C. 449; 15 A. L J. 642.**

LOCAL INVESTIGATION.

12. Magistrate must himself make inquiry and not refer without necessity.—After a perfunctory examination of the complainant, the Magistrate who took cognisance of the complaint had directed an investigation of the case (*viz*, a criminal breach of trust against a *munim*) by a Subordinate Magistrate, Knox J, *held* that such an order was illegal. The duty of making such an inquiry lies upon the Magistrate, taking cognisance. The present was no case for a local investigation There was no quarrel about boundaries or any matter of that kind and it is only a local investigation which the Magistrate after examining the complainant can pass on to someone else, **10 A. L. J. 79 = 13 Cr. L. J. 704** The Magistrate of a district who took cognisance of a complaint against a public officer, made it over to a first-class Magistrate to make a local inquiry and then dispose of the case The first-class Magistrate held the local inquiry, examined the prosecution witnesses and passed an order dismissing the complaint and directed the prosecution of the complainant under s. 476 for an offence under s 211, I P C *Held*, that the order of the District Magistrate before whom the complaint was laid, directing the Subordinate Magistrate to whom the case was transferred to hold a local inquiry was bad inasmuch as the Code made no provision for such a course **18 C. W. N. 95 = 15 Cr. L. J. 70.** The Code does not permit a Magistrate to refer a complaint to another Magistrate for inquiry and report, **20 C. W. N. 63.** A Magistrate may inquire into the case himself before directing a local investigation, a Magistrate taking cognisance cannot hold a further inquiry after receipt of the report of a local investigation, **11 A. L. S. 754 = 14 Cr. L. J. 493.** The existence of a previous departmental inquiry exonerating accused from accusation which formed the subject of complaint is not a sufficient substitute for the personal inquiry or the local investigation contemplated by this section, **33 P. R. 1837.**

13. Who may make investigation—(i) *Even a clerk*—The investigation contemplated by this section may be made by any officer subordinate to the Magistrate, even though he be a clerk, but if the investigation is entrusted to a Subordinate Magistrate he can in conducting the investigation exercise all magisterial powers, including the power to administer an oath, **36 C. 72.**

(ii) *Magistrate not competent to take cognisance of complaint*—A Magistrate holding a local investigation under this section need not be competent to entertain the complaint which he is asked to investigate Where the Magistrate who directs the investigation is competent to entertain it and dispose of the complaint on the evidence recorded at the local investigation there is no irregularity, and the complainant is not entitled to have all his witnesses examined by a Magistrate competent to take cognisance of the complaint, **6 C. W. N. 295.** But if a District Magistrate to whom a complaint of an offence exclusively triable by a Court of Session is made makes it over for inquiry to a second-class Magistrate before examining the complainant, such inquiry cannot be regarded as one made under this section, **4 C. W. N. 305.**

reason to think that the Magistrate was biased against the accused or that the latter has any plausible grounds for apprehending its existence, 5 N. L. R. 81 = 8 Cr. L. J. 20. *See* also 32 C. 1085; 23 C. 493; 16 B. 661; 12 Cr. L. J. 207 (C.) and also Note 2 to s. 204. *See* also 27 C. W. N. 196 where the Magistrate caused notice to be served upon a person named as an accused in a petition of complaint and directed him to show cause why process should not issue against him, and on such cause being shown by a pleader on his behalf, dismissed the complaint against him, *held* that the procedure adopted was improper and was not in accordance with the provisions of the Code of Criminal Procedure as laid down in ss. 202 and 203. An accused person has no *locus standi* to appear or to be represented by a lawyer before the issue of process against him.

20. **Practice—permitting Advocates or Pleaders to watch on behalf of person complained against, during preliminary inquiry.**—Although a person with regard to whom a preliminary inquiry is held under this section is not by any rule of law entitled to intervene, there is no reason why he should not, in practice, be admitted to watch the proceedings and assist the Court in making its preliminary investigation, by allowing a duly authorised Advocate or Pleader of Court, on his behalf to act as *amicus curiæ* in the preliminary inquiry, 12 Cr. L. J. 207 (C.). The practice is strongly condemned in 40 C. 434.

21. **Report of investigation forms part of the record.**—The report made and submitted by the Police-officer to whom the complaint has been referred for investigation forms part of the record of the case, especially when the Magistrate dismisses the complaint under s. 203, on the result of such investigation, 14 C. 141.

21-A. **Police whether can arrest accused and frame charge-sheet.**—When a Magistrate has referred a complaint for investigation under this Code, the Police are not entitled to arrest the accused and send him up for trial under a charge-sheet as if they had taken cognisance of the case under their ordinary powers, 53 Bom. 339.

22. **Magistrate making inquiry is not disqualified thereby from trying the case.**—A Magistrate before whom a complaint is made, and who before issuing process holds a preliminary inquiry under this section for the purpose of ascertaining its truth or falsehood, and afterwards tries the case, is not disqualified from trying the case To such a case s. 556 is not applicable, inasmuch as the Magistrate had not initiated the proceedings against the accused person. nor taken an active part in the arrest or collection of evidence against such person, 24 C. 167; 4 C. W. N. 604; *see* 20 C. 857 and 23 C. 328, as to circumstances under which he is disqualified from trying.

23. **Magistrate holding inquiry under this section is disqualified from recording a confession.**—A Magistrate holding an investigation under this section, is not competent under s. 164 or s. 364 to record a confession made by an accused person. Consequently, if recorded, it is not admissible in evidence against him under s. 80 of *the Evidence Act*, unless it is proved by some evidence to have been made as so recorded, 32 C. 1085. But *see* 37 C. 457, where this case is *distinguished* and Note 4 to s. 164.

24. **Date must be fixed for return of report.**—In every case referred for inquiry a date should be fixed by the Magistrate by which the report or an explanation of the cause of delay is to reach him; the complainant should be informed of this date. *Beng. Pol. Code, p.* 870.

25. **Statement by the person complained against.**—A statement made during an inquiry under this section, by a person against whom the complaint is made cannot be used in evidence against him as proving itself but the question whether such a statement could be proved in any way was left open, 32 C. 1085.

26. **Complaint kept pending for a long time.**—Magistrates have no right to keep complaints without passing orders for several months; such action is in the highest degree improper and shows want of proper understanding as to what their duties are, 18 Cr. L. J. 271.

Dismissal of complaint.

203. The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint, if, *"after considering the statement on oath (if any) of the complainant and the result of any investigation or inquiry under s. 202" there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

Notes.—1. When resort may be had to this section.—This section may be resorted to (*i*) when after examination of the complainant the Magistrate has reason not to believe the truth of the complaint or

* The words "after———— s. 202" were substituted for the words "after examining the complainant and considering the result (if any) made under s. 202" by Act XVIII of 1923.

conducted by him was a judicial proceeding where witnesses were examined, **35 C. 72** It is clear from the definition of 'Court' in *the Indian Evidence Act* which includes all Magistrates and from s. 4 of the Oaths Act which authorises all *Courts* to administer oaths that a Magistrate conducting a local investigation is competent to administer oaths to persons examined by him at such local investigation As this local investigation is held by the Magistrate under authority of the law, *i e*, s 202, the oath was lawfully administered by him in the course of such investigation Sub-sec. (2) and the concluding portion of sub-sec. (1) make it clear that the local investigation if entrusted to a Magistrate is entrusted to him as a Magistrate subordinate to the Magistrate directing the local investigation and he can therefore exercise all the powers of a Magistrate including the power to administer on oath Such proceeding is a judicial proceeding within the meaning of s. 476, **1 Cr. L. J. 118 (M)** *Contra.*—A preliminary investigation undertaken by a Court under this section is not a judicial proceeding and therefore a person cannot be prosecuted for an offence brought to the notice of the Court during such investigation, **21 M. L. J. 795 = 10 M. L. T. 47 = (1911) M. W. N. 9 = 12 Cr. L J. 323**, where **23 M. 223; 4 C. W. N. 366, 22 B. 936; 15 P. R. 1905** were referred to Where a compl[illegible]
or [illegible]
the [illegible]
making a false statement under such circumstances was set aside as illegal, **Weir II, 167.**

17. Evidence need not be confined to complainant alone.—The provisions of the section do not confine evidence in the inquiry under it to that of the complainant but leave it to the discretion of the Magistrate to examine such witnesses and make such inquiry as he thinks fit, **Ratanlal 669.** The investigating officer may examine the complainant and his witnesses and the defendant and his witnesses, if any, **33 C. 1282.** Want of personal knowledge on the part of the complainant of the circumstances alleged in the complaint is not a sufficient reason for dismissing the complaint. The complainant should be allowed to bring evidence to prove them But *see* **11 C. W. N. 170.**

18 Local investigation not intended to supersede a regular trial —The object of this section is to prevent the issue of process where there is some initial ground for doubting the truth of the complaint and where on a local investigation there appears no evidence to support it A local investigation was not intended by the Legislature to supersede a regular trial When it is found that there is evidence in support of the complainant's charge, the function of the officer making the local investigation is fulfilled. Process should then be issued and the truth or falsity of the evidence should be determined in a regular manner The officer who conducts the local investigation cannot himself decide upon the truth or falsity of the complaint, **U. B. R. (1910) I, 73 = 12 Cr. L J. 385**

19. Person complained against not an accused person—Has he any right or duty to appear during preliminary inquiry?—The Magistrate having jurisdiction to ascertain the truth of the complaint before issuing process under this section, may, before issuing it, take any preliminary steps for finding out whether the complaint is true or not. He may call upon the person complained against to show cause why process should not issue against him and the person is at liberty to appear or not, whereas under *a process issued under this section, he is bound to appear,* **8 Bom L. R. 91.** *A Magistrate acts illegally* when proceeding under s 202 he calls for a report from an accused person, even if that person happens to be an officer subordinate to that Magistrate, **14 C. 141.** The practice of conducting the preliminary inquiry in the presence of the accused is to be highly condemned and the accused should not be allowed to cross-examine the complainant's witnesses, **40 C. 444** A person complained against is not a party to the investigation held under s. 202, nor is he entitled to claim under s 340 the right to be represented by a pleader at the investigation, **38 C. 880; 17 Cr L. J. 398 (C.)** A trial cannot be said to have commenced and a person complained against does not become an accused person until it has been decided to issue process against him, under Chapter XVI of this Code Section 340 does not, hence, entitle a person complained against to be represented by a pleader during the preliminary inquiry which may be held under s. 202 (1). If he chooses to attend the proceedings, he may, of course do so like any other member of the public, but he has no *locus standi* as a party, the purpose of the law being clearly to exclude him until sufficient ground for joining him has been made out by the complainant Where, therefore, a Magistrate, acting under s. 202 (1), refused permission to the person complained against to cross-examine the complainant's witnesses and an application for transfer of the case was made to the Judicial Commissioner's Court on the ground, *inter alia* that the Magistrate's refusing permission to cross-examine the complainant's witnesses gave cause to apprehend some bias in his mind against the person complained against, *held* dismissing the application, that there was no

has no power to transfer a case remanded for further inquiry by a Sessions Judge to a Deputy Magistrate, **11 C. W. N. 316 = 5 Cr. L. J. 112** *followed* in **8 C. L. J. 241 = 8 Cr. L. J. 386.**

6. **District Magistrate's jurisdiction to discharge accused.**—A District Magistrate called for proceedings from a Subordinate Magistrate, and having perused them ordered the discharge of the accused; *held,* that if the Magistrate came to the conclusion that there was no case of criminal character made out against the accused, he was not only competent, but was bound to order the discharge of the accused, **6 B. L. R. Appx. 6 = 14 W. R. 63.**

7. **Direction to submit particular classes of cases to the District Magistrate illegal.**—A direction by a District Magistrate that as regards a particular class of cases, Subordinate Magistrate taking cognisance of them are not to pass orders under this or the next section, but to submit them to him is clearly illegal, **10 C. W. N. 1086 = 4 Cr. L. J. 213.** *See* also **27 C. 798** and Note 11 to s. 202.

DUTY OF MAGISTRATES BEFORE DISMISSAL.

8. **Must examine complainant.**—*See* Notes 12 and 13 to s. 200. A Magistrate is bound to examine the complainant before dismissing the complaint, **3 B. L. R. Ap. Cr. 58.** He cannot dismiss a complaint under this section until he has examined the complainant to see whether there is *prima facie* evidence of criminal offence. Until the Magistrate has examined the complaint, he is not in a position to exercise the discretionary power to issue process or dismiss the complaint, **4 M. H. C. R. 162.** A Magistrate to whom the case is transferred cannot dismiss the complaint summarily, unless he has satisfied himself by examining the complaint that there is no sufficient ground to proceed, **3 C. W. N. 235.** *See* also **30 C. 923** and **9 C. W. N. 199; 3 C. W. N. 17** and Note 12 (*i*) to s. 200. *See* also **26 Bom. L. R. 183 = 48 Bom. 360.**

9. **No examination necessary when complaint is in form of Police report.**—A complaint made in the form of a Police report may be dismissed under this section without examining witnesses, if the facts stated in the report constitute no offence. The complainant need not be examined, because a Police report is expressly excluded from the definition of complaint in s. 4 (*h*), **Weir II, 246.** *Procedure on Receipt of Police report.*—A Magistrate having before him a Police report submitted on him under s. 157 (*b*) may determine as he thinks expedient either (*i*) to take no further steps or (*ii*) to take cognisance of the offence under s. 190 (*b*) or (*iii*) proceed under this section, **Weir II, 119.**

10. **Must afford opportunity to complainant to substantiate his complaint.**—A complainant should be afforded an opportunity of being heard before any final order is passed on his complaint, **Ratanlal 365.** A Magistrate must give an opportunity to the complainant to prove his case, **16 C. W. N. 143 = 13 Cr. L. J. 126.** But a Magistrate disbelieving the story of the complainant is not bound to examine all his witnesses, but may proceed under this section on the investigation report, **6 C. W. N. 295.** Where the complainant was willing to produce evidence and the Magistrate refused and ordered proceedings under s. 476, *held* that the proceeding was illegal and must be set aside, **21 M. L. J. 795 = (1911) 2 M. W. N. 9 = 10 M. L. T. 47 = 12 Cr. L. J. 323.** It is improper for a Magistrate to dismiss a complaint while sitting in his private room and without giving the complainant or his pleader an opportunity of being heard, **10 C. W. N. 1086.** Where on the acquittal of a co-accused, the other accused against whom process of arrest had been issued, surrendered before the Deputy Magistrate who tried the accused, and he passes an order directing that the accused should not be proceeded against. *Held,* that the order of the Deputy Magistrate was bad in law and should be set aside. The proper course for him was to send notice to the complainant, require him to proceed with the case and then dispose of it according to law, **12 C. W. N. 68.** Where the Magistrate, after examining the complainant on oath, without either dismissing the complaint at once or issuing process, adjourned the case to another date, and on that date, he made certain inquiries and heard the pleaders of the accused who had appeared without process and looked into certain papers filed by him and dismissed the complaint. *Held,* that the procedure adopted by the Magistrate was irregular, and that, having elected to hold an inquiry under this section, he ought not to have dismissed the complaint without giving the complainant an opportunity to adduce evidence in support of his case, **16 C. W. N. 143 = 13 Cr. L. J. 125.** When a Magistrate adjourns a case he must be taken to have elected to proceed under s. 202 and then it is his duty to impress on the complainant that he is bound to produce his evidence on the adjourned date.

11. **Must hear all complainant's evidence.**—A Magistrate examined the complainant and only one of the witnesses for the prosecution, recorded the statement of the accused and then dismissed the complaint. *Held,* that he could not pass the order without receiving the entire evidence of the prosecution unless he

(ii) after such examination the Magistrate entertains a reasonable doubt of such complaint, which doubt is confirmed by a proper report called for under s. 202 In all other cases the complainant as soon as he has been examined is entitled to have the accused person brought before the Magistrate 27 C. 921. *See* also U B R. (1910) I, 73 = 12 Cr L J 335 A Magistrate may dismiss a complaint in one of the three following cases and refuse to issue process—(i) If he upon the statement made by the complainant reduced to writing under s 200 finds that no offence has been committed (ii) If he distrusts the statement made by the complainant, and (iii) If he distrusts the complainant s statement but his distrust is not sufficiently strong to warrant him to act upon it, he proceeds under s. 202 and after considering the result of the investigation he finds no sufficient ground for proceeding 14 C. 141; 13 B 600

2. **Must strictly comply with the provisions of ss 200 and 202** —A complaint was preferred to a Magistrate who, without examining the complainant sent it to the Police for inquiry, purporting to act under s. 156 and on receipt of the Police report directed a Subordinate Magistrate under s 159 to make a preliminary inquiry into the case On receipt of the Subordinate Magistrate s report the superior Magistrate not being satisfied with it cross-examined the complainant and some of his witnesses examined three witnesses sent up by the Police and dismissing the complaint under this section directed the prosecution of the complainant for an offence under s 211, I P C. *held* that on the materials before him the Magistrate had no jurisdiction to deal with the case or to dismiss it under this section, as there was no previous local investigation ordered under s. 202 nor any examination of the complainant as directed by s. 200 On receipt of the report of the preliminary inquiry under s 159 he should have dealt with the case in the same way as he would have dealt with it on receipt of a report from a Police-officer, 30 C 923 *See* also 9 C. W. N 199 = 2 Cr L J 51; 33 C 1, 2 P R. 1912 = 11 P L. R 1912 = 12 Cr. L J 539 and 11 A L J 921.

3 **Section does not apply when process has issued** —This section applies only to cases falling under Chapter XVI, where there has been no issue of process. When an accused person has been summoned to appear before a Magistrate there has been a commencement of proceedings and a complaint cannot be dismissed under this section Ratanlal 544, 11 A L J 451 = 14 Cr L J 412

COMPETENCY OF COURTS TO DISMISS COMPLAINTS

4 **Magistrate taking cognisance of complaint must deal with it unless it is withdrawn by superior authority** —The Magistrate to whom a complaint was preferred examined some witnesses and recorded an order that he did not believe the complainant but instead of dismissing the complaint submitted it to the District Magistrate The District Magistrate, however directed the issue of summons and made over the case for disposal to another Magistrate, *held* that the order of the original Magistrate submitting the case to the District Magistrate and the order of the latter Magistrate directing issue of summons were both illegal The Magistrate who has power to receive the complaint has power to deal with it finally and it is his duty to do so It is for him to dispose of it either by grant of process, or by dismissing the complaint. The District Magistrate has no power to pass any order for the issue of process unless he first removes the case to his own file 6 C. W N 843 *See* also 9 C. W. N 199 and 10 C. W N 1036 The proper officer to issue a warrant is the officer who has heard the complaint made because it was he who can best exercise a discretion with regard to the *prima facie* merits of the complaint. When that officer has issued the warrant the case ought to go on in due course according to the procedure prescribed by the Code unless something occurs to show that the Magistrate, who had issued the warrant had from some cause or another made a wrong exercise of his discretion Where a District Magistrate removed a case from the file of the Subordinate Magistrate to his own after a complaint had been made and warrants issued by the Subordinate Magistrate upon the footing of the complaint and thereupon suspended the warrant and dismissed the complaint without hearing it in due course of procedure, *held* that it was an improper proceeding he ought to have proceeded with the case from the stage at which it was when he removed it 10 B L. R. Appx. 26 = 19 W R 23

5 **Power of District Magistrate to dispose of case pending on the file of Sub-Magistrate.**—A District Magistrate has no power to pass an order of dismissal under this section in a case which has been transferred to a Sub-Magistrate and which was at the time pending on the file of the latter, 3 C. W N 490 Where a superior Magistrate makes over a case to a Subordinate Magistrate for trial the jurisdiction of the former Magistrate to do anything more in the case ceases so long as the transfer is in existence Until he formally withdraws the case the only person who can deal with the case is the Subordinate Magistrate to whom the case has been made over, 12 W. R. 53; 27 C. 793; 27 C. 979; 30 C. 449, 4 C. W N 242. A District Magistrate

(*iii*) *That the complaint is based upon evidence which is privileged and not allowed to be produced.*—Where a complaint is based on some official communication, oral or in writing, falling within the ss. 123, 124 or 125 of the Indian Evidence Act, and there is no likelihood of proving the communication by primary or direct evidence, the Magistrate is justified in dismissing the complaint. No secondary evidence regarding the contents of written communications, made in official confidence is admissible, **4 P. W. R. 1910 = 11 Cr. L. J. 205.**

18. What are not proper grounds for dismissal.—(*i*) *Low caste of complainant is no ground.*—The fact that the complainant is of low caste and the accusation was theft of a goat, and that such an accusation against such a man was only a harm under s. 95, I.P.C., and not an offence, is no ground for dismissal of a complaint of defamation under this section, **2 W. R. 35.**

(*ii*) *Tendency to stir up religious ill-feelings no ground.*—It is not competent to a Magistrate to refuse to entertain a complaint or to dismiss it summarily on the ground that if entertained it would encourage hundreds of similar complaints and would also stir up old religious ill-feelings, **Ratanlal 562.**

(*iii*) *Bad motive and conduct of complaint not legal ground for dismissal.*—The existence of malicious feeling on the part of complainant is not a legal ground for refusing to entertain a complaint of an offence, and that the circumstance, that the alleged offence was committed six years ago and would be difficult of proof, that party feeling ran high at the place, and that if the act of the accused were held criminal, a large part of the population of the district would soon be in jail, do not justify such a refusal, **Ratanlal 549.** In exercising his discretion the Magistrate ought not to allow himself to be influenced by a consideration of the motive by which the complainant may have been actuated in moving in the matter, **13 B. 590 (F.B.).** The motives by which complainants are actuated must necessarily be of the most varied description; any attempt to determine them would open out a very wide and speculative field of inquiry. The object of the Code is to provide a machinery for the punishment of offences against the substantive criminal law. Had it been intended that the Magistrate should only proceed to inquire into an alleged offence when the complainant's motives were such as he could approve of, very different language would have been used, **13 B. 590, p. 598 (F.B.).** That the Magistrate considered the probable result of the proceeding undesirable or the motives and conduct of the complainant discreditable, are not relevant considerations, **38 M. 512.**

(*iv*) *Libellous matter being a mere re-publication is no ground.*—The fact, that the libellous publication complained of is a mere re-publication or re-production of what had been previously printed and published in another newspaper, is not sufficient ground for dismissing a complaint under this section; for s. 499, I.P.C., makes no exception in favour of a second or other publication as compared with the first. If the complaint is properly laid in respect of a publication which is *prima facie* defamatory, the Magistrate is bound to take cognisance of the complaint, and deal with it according to law, **12 B. 167.**

(*v*) *Want of personal knowledge by the complainant* of the circumstances alleged by him is not a sufficient reason for dismissing a complaint, but the complainant should be allowed to bring forward evidence to prove them, **Ratanlal 669.** But *see* cases noted under Note 7 to s. 200 *supra.*

(*vi*) *Existence of civil remedy no ground.*—If upon any complaint duly made before a Magistrate it should appear to him that the act imputed amounts to an offence under the *Indian Penal Code* or any other penal law in force, and that there is a *prima facie* reason to suppose the accusation to be true, it is his duty to proceed, although he may consider a civil suit may afford the more convenient an appropriate remedy, **8 W. R. 65; 23 C. 983; (1911) M. W. N. 125 = 12 Cr. L. J. 123.** *See*, however, **8 M. 140** and **1 M. H. C. R. 66.** In the last mentioned case the Magistrate had in the exercise of his discretion refused to proceed with a criminal charge pending a civil action in respect of the matter out of which the charge arose, but the High Court refused to grant a *Mundamus* to compel the hearing of the charge. In **10 P. W. R. 1913 = 33 P. L. R. 1913 = 14 Cr. L. J. 128,** it was observed that every discouragement should be given to the habit of rushing into the criminal Courts when a civil suit is pending.

(*vii*) *Bare denial of accused.*—Where certain statements in a book were complained of as defamatory of the complainant, but the Magistrate dismissed the complaint on the bare denial of the accused that they referred to the complainant, *held* directing further inquiry, that the complainant must be given an opportunity to prove that the statements were intended to apply to the complainant **(1911) 2 M. W. N. 8 = 10 M. L. T. 96 = 12 Cr. L. J. 497.**

(*viii*) *No possibility of conviction.*—*See* **29 C. 410.**

considered for some very strong reason that evidence unnecessary **11 A. L. J 451 = 14 Cr L. J 412.** When a complaint has not been disposed of under this section but summonses have been issued to the complainant's witnesses the Magistrate is bound to examine the witnesses tendered by the complainant and is not at liberty to acquit the accused on a consideration of the complainant's statement alone **20 M 338** But where the Magistrate disbelieves the story of the complainant the latter is not entitled to have all his witnesses examined by the Magistrate to whom the complaint was made **14 C 707; 27 C. 921** and **6 C. W N 295**

12 Must consider the result of the investigation under s 202—Magistrate of all grades should clearly understand that while the Police perform their proper duty in collecting evidence it is the function of the Magistrate alone to decide upon the sufficiency or credibility of his evidence when collected **6 C. 496 = 7 C. L. R 467**

13. Accused may appear and apply for dismissal where complainant omits to take out summons.—A complainant by omitting to take out a summons cannot keep a case hanging over a man for an indefinite time The summons is merely a means of procuring attendance, but if the accused appears of his own accord without a summons he is entitled to require that the complaint shall be proceeded with or dismissed If no evidence is offered against the accused, he must be formally discharged **26 B 552**

REASONS FOR DISMISSAL

14 Reasons for dismissal must be recorded—The last sentence embodies the ruling of the Calcutta High Court in **14 C 141** It is an imperative provision of law that a Magistrate shall briefly record his reasons for dismissing a complaint. There can be no question of irregularity when the provisions of the statute are imperative and are directly disobeyed **40 C 41** No circular of Government can authorise Magistrates to infringe or in any way alter the statute law

15 Order of dismissal without reasons liable to be set aside—An order of a Magistrate dismissing a complaint under this section without recording any reasons for dismissal but merely stating that he agrees with the Police report is improper and will be set aside, **21 M L. J 492 = 7 M L. T 175 = 11 Cr. L. J 331** A Magistrate ought not to dismiss a complaint merely on a Police report He is bound to make an inquiry and must state his reasons for dismissing the complaint **13 C. W. N 281** Mere omission by a Magistrate to record his reason for dismissing a complaint is an irregularity and where the omission has been supplied by a statement under s 441, High Court will not interfere **5 M L T. 79** *See* also **25 M 546**

16 Reasons must be based upon proper evidence.—The expression "sufficient ground" points exclusively to the facts which the complainant brings to the knowledge of the Magistrate and to their establishing a *prima facie* trustworthy case against the accused **13 B 590 (F B).** The reasons for dismissing a complaint should be based on inferences of facts arising from or disclosed by (*i*) the complaint (*ii*) the sworn statement of the complainant and (*iii*) the investigation if any made under s 202 This provides a wide field Anything outside it is *extra judicial* and must be discarded **9 Bom L. R 742 = 6 Cr L. J 85** The decision whether there is sufficient ground must be reached by exercise of discretion based on judicial considerations In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available an order *dismissing the complaint merely on consideration of motive is illegal* **33 M 512** *A Magistrate* cannot act legally under this section upon information which is merely extraneous and *extra judicial*, **13 B 600**

17 What are proper grounds for dismissal.—(*i*) *Default of complainant to appear*—Where a Magistrate called upon the complainant to produce proof *ex parte* to justify the issue of process and upon default dismissed the charge, the High Court declined to say that, as a matter of law Magistrate acted illegally in dismissing the case **17 W R 3.** In **111 I C 126 (?) = 29 Cr L. J 798 (2)** it was also held that the complainant could not come in at a later stage and apply for further inquiry In **13 B 600**, it was laid down that where the offence is a summons-case and not a warrant-case the Magistrate ought to proceed with the inquiry or trial in spite of the withdrawal of the complainant if he finds the elements of an offence on the facts as set forth in the complaint. *See* also **23 C. 211** and Notes to ss. 247 and 253

(*ii*) *That the offender is unknown*—Where the complaint discloses a cognisable offence against an [illegible]

evidence against the accused) the Magistrate is competent under s. 523 to pass such order as he thinks fit respecting the disposal of the property and in this case an order of forfeiture of the property to the Government was upheld, **24 M. L. J. 1 = 14 Cr. L. J. 27.**

24. **Compensation of false and vexatious complaint cannot be awarded.**—In cases in which the complaint is dismissed under this section without the issue of process to the accused, the fact that the latter was present with a pleader at the inquiry under s. 202 would not enable the Court to award compensation to the accused under s. 250, **3 P. R. 1906 = 84 P. L. R. 1906 = 4 Cr. L. J. 36; 29 A. 137** and **14 P. R. 1897.**

25. **Prosecution for preferring false complaint.**—So long as a complaint is not dismissed under this section, or otherwise judicially determined, no proceeding can be instituted under s. 211, I.P.C., against the person lodging that complaint. The original complaint must be first disposed of according to law, before such proceedings can be taken, **3 C. W. N. 758.** But where a Magistrate after receiving a complaint, examined the complainant and on receipt of an investigation report under s. 202, dismissed the complaint, under this section, it was *held* that there was a legal determination of the complaint for the purpose of a prosecution under s. 211, I.P.C., **6 C. W. N. 295; 2 P. R. 1907 = 5 Cr. L. J. 491; 49 P. L. R. 1907 = 6 Cr. L. J. 258.** But *see* **8 A. 38.** *See* Notes to ss. 195 and 200.

COMPETENCY OF COURTS TO ENTERTAIN COMPLAINTS ONCE DISMISSED.

26. **A Court is competent to take cognisance of complaint once dismissed under this section.**—It was *held* by the majority of the Full Bench (SUBRAMANIA AIYER AND DAVIES, JJ., *dissenting*) that a Court dismissing a complaint under this section is competent to re-hear the complaint without any order for further inquiry by a superior tribunal under s. 437, **29 M. 126 (F.B.)** *following* **28 C. 652 (F.B.).** (Presidency Magistrates) and **29 C. 726 (F.B.)** (Mofussil Magistrate); *dissenting from* **23 C. 983** and **24 C. 286**; *overruling* **28 M. 255** and **Weir II, 247** *approving*; **1 B. 64** and **9 A. 85**; *distinguishing to* **22 A. 106** *referring to* **19 B. 782; 22 B. 949** and **28 M. 310.** *Quære* (BENSON, J.) whether it would not make any difference if the Magistrate seeking to revive the complaint be different from the Magistrate that originally acted under this section? (*Quære* MOORE, J.) whether the Full Bench view could be sustained if the case was one of discharge under s. 253 or s. 259. In **8 Pat. 537** it was held that where a Magistrate dismisses a complaint under this section, it is open to him at a later stage to issue summons and revive the proceedings The fact that in the meanwhile the Sessions Court has in revision directed or refused to direct further inquiry is immaterial in this connection.

Where the accused is once discharged under s. 203 of the Code it is open to the complainant to file another complaint on the same facts before another Magistrate, but it is incumbent on the complainant to inform the second Magistrate the dismissal of the first complaint, **27 Bom. L. R. 352.**

SUBRAMANIA AIYER, J. (DAVIES, J., *concurring*). If a person against whom a *prima facie* case has been made out, but who was acquitted after trial, is entitled to be protected, then a person against whom the case is so weak as not to warrant his being put on his trial is a *fortiori* entitled to protection.

Held by WHITE, C.J., in the Madras Full Bench Case, that an order under this section is not a judgment within the meaning of s. 369, and that the revisional powers conferred on Superior Courts cannot be regarded as in any way restricting the jurisdiction conferred on Magistrates to inquire into offences. *See* also **1 C. W. N. 49** and **5 C. W. N. 169; 4 M. L. T. 140 = 3 Cr. L. J. 208; 9 Bom. L. R. 250 = 5 Cr. L. J. 255; 18 C. W. N. 1211 = 15 Cr. L. J. 726.** In **16 Cr. L. J. 713 (M.)** a second complaint was made as the case instituted on the previous complaint was said to have abated by reason of the death of the complainant. The High Court dismissed the second complaint but directed the previous case to be restored to file and proceeded with. A complaint was filed by a woman charging the accused with certain offences one of which was that her daughter was wrongfully taken away by the accused. The complaint was dismissed. A second complaint was filed by the husband of the girl, the acts complained of being the same as in the complaint of the mother, although the offences suggested were different. *Held* that the Magistrate had jurisdiction and was bound to entertain the second complaint and deal with it according to law, **29 A. 7.** *See* also **9 A. 85; 1895 A. W. N. 86; 5 A. L. J. 137 = 1908 A. W. N. 67 = 7 Cr. L. J. 297; 36 A. 53.**

In **1 N. L. R. 18,** it was *held* following the Rulings approved of by the Madras Full Bench, that a Magistrate dismissing a complaint under this section may entertain fresh complaint upon the same facts but if the order of dismissal or discharge amounts to a judgment within the meaning of s. 367, a fresh complaint cannot be entertained. The Punjab Chief Court in **10 P. R. 1911 (F.B.) = 24 P. W. R. 1911 = 205 P. L. R.**

(ix) *Withdrawal of a complaint in a warrant case*—*See* s. 248 and 14 C. 141.

(x) *That the complainant is not personally injured or affected by the offence*—Where the offence is one against public interest (bribery) a Magistrate acts wrongly in dismissing a complaint by reason of the absence of personal injury to the complainant, and the fact of his being a mere instrument, 13 B. 600.

(xi) *Failure to pay process fee*—This section does not apply where process has been issued *See* s 204 (3) for dismissal of complaint where process fee has not been paid

(xii) *Death of complainant*—As there is no abatement of a criminal case on the death of a complainant it ought not to be dismissed *See* 16 C. L. J. 713 (M.) and Note 4 to s. 247

(xiii) *Where on the conclusion of the hearing of a case*—The Bench Magistrates directed the accused, to be present on the day fixed for judgment and the accused having absented himself on that date the Bench Magistrates ordered the complainant to file process-fee to secure the attendance of the accused on a subsequent date and on complainant s failure to deposit such process-fee, dismissed the case for default of prosecution and acquitted the accused, *held* that the Magistrates, proceeding subsequent to the order fixing a date for pronouncing judgment were entirely illegal and that the order on the complainant was without jurisdiction, 23 A. L. J. 304

IRREGULAR ORDERS THAT MAY OR MAY NOT AMOUNT TO DISMISSAL.

19. Striking off case from Police file is not legal disposal.—Where after a complaint was referred to the Police, the Magistrate made an order directing that the complaint may be struck off the Police file, *held* that such a direction was not a legal disposal of the complaint (1911) 2 M. W. N. 74 = 10 M. L. T. 120 = 12 Cr. L. J. 468.

20. Expunging from list is not dismissal—A person made a complaint to the Police that the accused had enticed away his wife (non-cognisable offence), and committed theft, a cognisable offence The Police inquired into the latter offence only, and finding no *prima facie* case made out reported to that effect to the Magistrate who directed that that offence be expunged from the list of reported offences *held* that under the circumstances, there had been no dismissal of the complaint in respect of the former offence and that there was no bar to the complaint of that offence being taken up and proceeded with 5 B. 405.

21. Dismissing complaint for want of sanction under s 195 is not a proper disposal—This section refers to the procedure of a Magistrate who has taken cognisance of a case Where therefore a complainant requiring sanction is made to a Magistrate without previous sanction obtained, he must refuse to take cognisance of it and not dismiss it under this section Where a Magistrate erroneously dismissed a complaint under this section while in fact it was dismissed for want of sanction. *Held* that the Magistrate was competent to re-entertain the complaint after sanction is got, 24 M. 337. This ruling is no longer of importance having regard to the *Full Bench Ruling* in 29 M. 126.

22. Refusal to issue process may amount to dismissal.—On a complaint against several persons the Magistrate proceeded against only one and convicted him Thereafter the complainant applied for processes against the others, but the application was refused *Held* that such a refusal was to all intents and purposes an order under this section, subject to the Sessions Judge s power of revision under s 437, 29 C. 457; 2 C. W. N 290. *See* also 27 C. 979. Where upon a complaint the Magistrate merely passed an order to the effect enter mistake of law' and refused to issue processes *held following* 29 C. 457 and 8 C. W. N 456 = 1 Cr. L. J 355 that the order amounted to dismissal 17 C. W. N. 461 = 14 Cr. L. J. 123; 4 C. W. N 242, 30 C. 449; 32 C. 449; 32 C. 783 at p 790. But where one of the accused is tried for one offence only and is convicted of that offence, because there has been a conviction on that complaint the complaint cannot be said to have been dismissed in regard to the other offences for which the accused was not tried at all nor with regard to the other accused mentioned in the complaint 27 C. 658; 5 B. 405. *See* 12 C. W. N. 68; 24 M. 136; 17 C. W. N. 451 = 14 Cr. L. J. 123.

INCIDENTAL ORDERS THAT MAY BE PASSED ON DISMISSAL OF COMPLAINT.

23 Is a Court dismissing a complaint competent to pass any order as to disposal of property?—Where a complaint is dismissed under this section, it cannot be said that there has been any inquiry or trial in a Magistrate's Court and therefore no order can be made under s 517; but where property has been seized by the Police in the investigation of a false complaint and the Magistrate is of opinion that the property was found under circumstances which create suspicion of the commission of an offence (in this case of fabricating false

Judge under s. 436 can only direct a full and proper enquiry of the same nature as the Magistrate has already held, and cannot direct a further enquiry after summoning the accused.

The practice of allowing the accused to be represented in an enquiry under s. 202 has been condemned.

34. **Case remanded for further inquiry cannot be transferred.**—Where a Sessions Judge remands a case which was dismissed by a Deputy Magistrate under s. 203 and directs that further proceedings should be held under the same section, the case cannot after remand be transferred by the District Magistrate from the Deputy Magistrate, **11. C. W. N. 316 = 5 Cr. L. J. 112.**

APPEAL.

35. **No appeal from an order under this section.**—Having regard to section 404, no appeal can lie from an order under this section, but further inquiry might be ordered under s. 437.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

Issue of process.

204. (1) If, in the opinion of a Magistrate taking cognisance of an offence there is sufficient ground for proceeding, and the case appears to be one in which according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in the section shall be deemed to affect the provisions of s. 90.

(3) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

Notes.—1. S. 68 relates to the issue of summons, s. 75 to that of a warrant and s. 90 to the issuing of warrant in lieu of, or in addition to, summons. For forms *see Sch. V. Nos.* 1 *and* 2.

2. **Till process is issued, person complained against is not an accused person.**—When an accused person has been summoned to appear before a Magistrate, there has been commencement of proceedings within the meaning of Chapter XVII, of the Code, **Ratanlal 544.** Till process is issued under this section the person complained against does not become an accused person, he is not a part to the investigation under s. 202 nor is he entitled to claim under s. 340 the right to be represented by a pleader at that investigation. If he is present, that is not by compulsion of law but out of his own free will, **38 C. 880; 37 C. 358.** Therefore no suit for malicious prosecution will lie when a complaint is dismissed under s. 203, **25 M. L. J. 1.** *See*, however, **2 B. 481; 28 B. 226** and Note 19 at pp. 578 and 579.

DUTY OF MAGISTRATES BEFORE ISSUING PROCESS.

3. **Until there is sufficient ground for proceeding, process must not issue.**—The Magistrate should not issue process unless satisfied that there is sufficient ground for proceeding with the complaint. So when the complainant stated in his examination that he made his statements solely on information derived from others the Magistrates should satisfy himself upon proper materials that a case has been made out before issuing such process, otherwise his proceedings are liable to be quashed, **10 C. W. N. 1090.** It is not competent to a Magistrate to issue a warrant or order of arrest in anticipation of an offence being committed. Such a case is merely one for the interference of the Police, **Ratanlal 90.** Where a Government Pleader having no personal knowledge of the facts constituting an offence, lodges a complaint on mere information, *held* it was not a proper complaint under section 200 on which *a judicial inquiry* could be directed and that a Court, before issuing summons against an accused, should satisfy itself on proper materials that a case has been made out for issuing summons, **11 C. W. N. 170 = 5 Cr. L. J. 13.** *See* also **10 C. W. N. 1095; 1090 and 1864 W. R. 33** and **18 Cr. L. J. 626.**

1011 = 12 Cr. L. J. 364 following the other High Courts overruled **33 P. R. 1894** where it was *held* that a second complaint cannot be entertained. *See* also **26 P. W. R. 1908 = 8 Cr. L. J. 349; 17 O. C. 273 = 15 Cr. L. J. 633.** In **8 S. L. R. 196 = 16 Cr. L. J. 174** it was *held* following **29 M. 126** that the mere fact that a complaint has been dismissed under s 259 is not a sufficient ground for refusing to entertain a second complaint. But the complainant was directed by the High Court to enter into a bond with one surety undertaking to pay the costs of the accused if the prosecution did not succeed as the complaint was of a trivial kind.

Successor may take cognisance of a fresh complaint—A second complaint was made to a Magistrate who had dismissed a previous complaint on the same facts, but before he could dispose of the second complaint he was transferred and his successor took up the case and ordered process to issue. *Held*, that the successor in office of a particular Magistrate although a different individual constituted the same tribunal and had jurisdiction to deal with the second complaint, **36 A. 129** *distinguishing* **22 A. 106.**

27. Magistrate bound to entertain cognisable case if sent by Police even if he had previously dismissed it—A Magistrate is not only competent, but is bound to entertain a cognisable case forwarded to him by the Police notwithstanding that he may have previously dismissed the same case under this section **Oudh. S. C. No. 230**; *cf* **36 A. 53.**

28. Cannot Magistrate of co-ordinate authority re-hear complaint?—Another Magistrate of co-ordinate authority is not competent to hear a complaint which has been dismissed under this section **22 A 106** It is submitted that though this case has not been overruled but expressly distinguished in **29 A. 7** and **36 A 129,** it is of doubtful weight in the light of the decisions of all the High Courts *See* **16 Cr. L. J. 814 (M).** But unless there are very special reasons, a Magistrate might not entertain a complaint for the second time *See* **10 P. R. 1912 = 12 Cr. L. J. 354 (F.B).**

29. Revival of Complaint after District Magistrate or Sessions Judge has refused further inquiry — There is nothing illegal or *ultra vires* of a Deputy Magistrate reviving a complaint which he had dismissed under s 203, after the District Magistrate has on an application made to him declined under s 437 to order further inquiry into the complaint, **36 C. 415.** In **11 P. W. R. 1910 = 11 Cr. L. J 347,** however it was *held* that a Magistrate cannot entertain a fresh complaint when a previous one on the same facts has been dismissed by his predecessor after a full inquiry and the order of dismissal has been upheld by the Sessions Judge In such a case the complainant's remedy is to apply to the High Court for revising the Lower Court s orders.

REVISION.

30. Revisional powers of High Court in cases of complaint dismissed by Presidency and other Magistrates—The High Court has under s 423, embodied in s. 439, power to set aside the order of discharge passed by all subordinate Criminal Courts including Presidency Magistrate, and direct a charge to be framed and tried by the proper Court. It can, under s. 436 and probably also under s. 439 order a further inquiry instead of a committal, irrespective of the question of jurisdiction **35 C. 994** *applying* **28 C. 211 (F B) 15 C. 608 (F.B); 26 C. 746; 27 B. 84;** and *dissenting* from **27 C. 126** and not *approving* **33 C. 1282** and **6 C. L. J. 705** *See* also **7 C. W. N. 521** and **13 O. C. 239 = 11 Cr. L. J. 629.** In **Weir II, 255** and **33 M. 512,** this point was raised, but not decided.

31. Power of the High Courts under the Charter Act.—The High Court cannot interfere under s 15 of *the Charter Act* with the order of a subordinate Court on the ground of an error in law but only for an error affecting jurisdiction, *i.e*, either a want or refusal of jurisdiction or an illegality in the exercise of it **35 C. 994; 1 A. 101; 26 C. 745; 6 C. L. J. 705.** There is no form of judicial injustice which the High Court if need be, cannot reach under *the Charter Act* **12 C. W. N. 678 = 7 Cr. L. J. 499.**

FURTHER INQUIRY.

32. Further inquiry and notice to accused—*See* s. 436 and Notes thereunder, **16 A L. J. 30**

33. When directed to make further inquiry, Magistrate cannot again dismiss under this section.—Where a case once dismissed under this section is remanded under s. 437 now 436 the Magistrate holding further inquiry ought to summon the accused, but is not justified in again dismissing the complaint under this section, **11 C. W. N. 316.** *See* Note 18 to section 436.

But it should be noted that in **30 C. W N. 312** it is held that where on receipt of a complaint a Magistrate holds an enquiry under s. 202 of the Code and dismisses the complaint under s. 203 the Sessions

Judge under s. 436 can only direct a full and proper enquiry of the same nature as the Magistrate has held, and cannot direct a further enquiry after summoning the accused.

The practice of allowing the accused to be represented in an enquiry under s. 202 has been conde

34. **Case remanded for further inquiry cannot be transferred.**—Where a Sessions Judge rem case which was dismissed by a Deputy Magistrate under s. 203 and directs that further proceedings sho held under the same section, the case cannot after remand be transferred by the District Magistrate fro Deputy Magistrate, **11. C. W. N. 316 = 5 Cr. L. J. 112.**

APPEAL.

35. **No appeal from an order under this section.**—Having regard to section 404, no appeal from an order under this section, but further inquiry might be ordered under s. 437.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

Issue of process.

204. (1) If, in the opinion of a Magistrate taking cognisance of an offence th sufficient ground for proceeding, and the case appears to be one in according to the fourth column of the second schedule, a summons s issue in the first instance, he shall issue his summons for the attenda the accused. If the case appears to be one in which, according to column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks summons, for causing the accused to be brought or appear at a certain time before such M trate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in the section shall be deemed to affect the provisions of s. 90.

(3) When by any law for the time being in force any process fees or other fees are able, no process shall be issued until the fees are paid, and, if such fees are not paid wit reasonable time, the Magistrate may dismiss the complaint.

Notes.—1. S 68 relates to the issue of summons, s. 75 to that of a warrant and s 90 to the issui warrant in lieu of, or in addition to, summons. For forms *see Sch. V. Nos.* 1 *and* 2.

2. **Till process is issued, person complained against is not an accused person.**—When an ac person has been summoned to appear before a Magistrate, there has been commencement of proceedings the meaning of Chapter XVII, of the Code, **Ratanlal 544.** Till process is issued under this section the p complained against does not become an accused person, he is not a part to the investigation under s. 20 is he entitled to claim under s. 340 the right to be represented by a pleader at that investigation. If present, that is not by compulsion of law but out of his own free wi l, **38 C. 880; 37 C. 358.** Therefore no s malicious prosecution will lie when a complaint is dismissed under s. 203, **25 M. L. J. 1.** *See*, however, **2 B 28 B. 226** and Note 19 at pp. 578 and 579.

DUTY OF MAGISTRATES BEFORE ISSUING PROCESS.

3. **Until there is sufficient ground for proceeding, process must not issue.**—The Magistrate shou issue process unless satisfied that there is sufficient ground for proceeding with the complaint. So whe complainant stated in his examination that he made his statements solely on information derived from the Magistrates should satisfy himself upon proper materials that a case has been made out before issuing process, otherwise his proceedings are liable to be quashed, **10 C. W. N. 1090.** It is not competent to a M trate to issue a warrant or order of arrest in anticipation of an offence being committed. Such a case is m one for the interference of the Police, **Ratanlal 90.** Where a Government Pleader having no personal know of the facts constituting an offence, lodges a complaint on mere information, *held* it was not a proper com under section 200 on which *a judicial inquiry* could be directed and that a Court, before issuing sum against an accused, should satisfy itself on proper materials that a case has been made out for issuing sum **11 C. W. N. 170 = 5 Cr. L. J. 13.** *See* also **10 C. W. N. 1095; 1090 and 1864 W. R. 33 and 18 Cr. L. J. 626.**

Magistrate must come to an independent conclusion of his own—The opinion of the Magistrate referred to in this section, is his own independent opinion Where a Police inquiry is ordered and the result reported the opinion expressed by an Inspector will not warrant the complaint being dealt with, otherwise than it would have been if there had been no such report, **4 M. H. C. R. 162.** *See* also cases cited in Note 18

4. Magistrate must be properly seized of the case before he can issue process.—Where a Subordinate Magistrate to whom a case had been made over for disposal convicted some of the accused, but refused to issue process against the others *Held* that the issue of the process under this section by the superior Magistrate who made over the case was without jurisdiction, **32 C. 783.** *See* also **27 C. 978, 30 C. 449** and **4 C. W. N. 242.**

5. Caution and discretion must be used in issuing process—In exercising the discretion under this section, Magistrates must be guided by the circumstances of each case, the main point for consideration being whether having regard to the nature of the offences charged and the age, sex, position, etc of the accused his appearance can be secured or not without his arrest. In cases relating to hurt, criminal force or assault, marriage, defamation, mischief and criminal intimidation, caution and discretion should be used in issuing summonses. An accused person ought not to be dragged off to answer a charge merely because a complaint has been lodged against him The Magistrate should see there is a *prima facie* case against the accused, and, if not should refuse the summons, or direct complainant first to produce his witnesses, or one or two of the chief of them and should then grant or refuse the summons according as a *prima facie* case is or is not made out.—*Oudh Cr Dig*, *p* 7

6. Supervision by District Magistrates to prevent hasty and inconsiderate issue of process.—Magistrates of districts should endeavour, by exercising a systematic supervision over the procedure of Subordinate Magistrate, to prevent hasty and inconsiderate issue of process on complaints, and to enforce payment of compensation for frivolous or vexatious complaints or information. By requiring periodical returns of the results of criminal trials in the subordinate Courts, District Magistrate will be able to keep themselves regularly informed of the working of those Courts, and to interpose, promptly, and effectively, whenever they observe any tendency to laxity of procedue—*Oudh Cr Dig*, *p* 7. As to unauthorised interference by the District Magistrate, *see* s 202, Note 11 at p 575

7. If complaint is believed, process must issue.—*See* Note 6 to s. 302. Where the Police report was to the effect that the complainant was true and the Magistrate thereupon had directed the case to be entered as such, he cannot decline to enter on a judicial inquiry merely because in his opinion there was no chance of conviction and no useful purpose would be served by an inquiry The complainant was entitled to have process against the accused for the attendance of his witnesses, **29 C. 410.** The only condition requisite for the issue of process is that the complainant s disposition must show some ground for proceeding, **1864 W R. 33** and **37.** *See* also **4 M. H. C. R. 162.** It appears to be a common fault on the part of Magistrate to issue process against some of the accused, although there is no reason in the examination of the complainant to discriminate between the several accused Such a procedure is without jurisdiction and in every view objectionable, **4 C. W. N. 560.**

ISSUE OF PROCESS.

8. Notice to the person complained against is not a 'process.'—Where proceedings begin with the issue of a summons or warrant after a complaint is instituted, and the Magistrate issues a notice to the person complained against that a preliminary inquiry will be held in the matter of the complaint, such a notice does not amount to a summons or to the invitation to the party charged to appear to take any step in the matter, such a notice is not contemplated either by the Code nor is it one of the forms in the Fifth Schedule, **25 M. L. J. 1.**

9. Conviction cannot be quashed for issuing warrant instead of summons.—If a Magistrate issues a warrant in a case in which he ought to have issued a summons and passes a sentence, the High Court cannot quash the conviction on the simple ground that the Magistrate was mistaken in issuing a warrant, **1 W. R. 16.**

10. Substitution of summons for warrant discretionary.—Magistrate should use the discretion given them by this section and should not issue a warrant as a matter of course, especially in cases where a petty charge of defamation, insult to provoke a breach of the peace or criminal intimidation, is preferred before them.—*C P Cr Cir*, Part II, No 16—*Oudh Cr Dig*, *p* 8.

11. Magistrate can cancel warrant issued and issue summons.—A Magistrate has also discretion under this section on sufficient cause being shown to *cancel* the warrants issued at first against an accused and issue summons instead, **1 S. L. R. 69 = 8 Cr. L. J. 187; 7 S. L. R. 40 = 14 Cr. L. J. 634.** *Vide* s. 75.

12. Magistrate may issue bailable warrant even in non-bailable cases.—*See* s. 76. Where on a complaint made against the accused, of robbery of certain articles belonging to a *Mutt* of which accused claimed to be the head, two witnesses were examined to prove the charge, and a non-bailable warrant was issued. *Held*, in the circumstances only a bailable warrant should have been issued, **(1911) 1 M. W. N. 452 = 12 Cr. L. J. 430.**

13. Summons unnecessary where accused appears voluntarily.—Where the accused appears voluntarily to answer a charge, the want of summons or of a complaint antecedent to the issue of summons becomes immaterial, **Ratanlal 8.** If the complainant does not take up process against all the persons accused every one of them may appear voluntarily and insist either that the complaint against him shall be proceeded with or dismissed, **26 B. 552.**

SUB-SEC. (3)—PROCESS-FEES.

14. Power to direct further inquiry into dismissed complaints.—When a complaint is dismissed under sub-sec. (3) for non-payment of process-fee, the High Court or Sessions Judge or District Magistrate may under s. 437, direct a further inquiry.

15. Dismissal of maintenance case for failure to pay process-fee.—An application for maintenance under section 488 should not, however, be dismissed under sub-sec. (3) on the applicant's failure to comply with an order for the payment of process-fees, as neglect to maintain is not an *offence* and process-fee is leviable under *the Court Fees Act* only for an offence, **16 M. 234.**

16. Complaint cannot be dismissed under cl. (3) when case adjourned.—Where a Magistrate who has entertained a complaint, is unable to record evidence on the date originally fixed and has adjourned the case, the witnesses in attendance should be told to appear on the adjourned date, and a party should not be required to repeatedly summon his witnesses on payment of fresh process-fees. A dismissal of the complaint under clause (3) is not therefore justifiable in law, **3 P. W. R. 1912 = 60 P. L. R. 1912 = 13 Cr. L. J. 176.**

17. Court-fees.—As to the payment of Court-fees in connection with criminal cases, *see Court Fees Act* VII of 1870, s. 20, and the Rules framed by the various High Courts thereunder.

REVISION.

18. High Court competent to suspend proceedings.—*See* s. 439 and Notes thereto. Where neither the complaint nor the evidence for the prosecution made out any case against a person, but process was issued, the High Court quashed the proceedings against him holding that it was most unfair to him that he should be called on to rebut a charge which upon the evidence was baseless in so far as it affected him, **26. C. 786; 1899 A. W. N. 212; 22 C. 131; 25 C. 233; 38 C. 68; 20 B. 543; 20 W. R. 23; 28 M. L. J. 505 = 16 Cr. L. J. 477.**

Magistrate may dispense with personal attendance of accused.

205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

Notes.—1. No warrant for ex-parte proceedings in criminal cases.—Under the Code, an accused person cannot be proceeded against *ex-parte.* The Code does not contemplate such a proceeding. It is only with the special leave of the Magistrate that his personal attendance can be dispensed with and he be allowed to appear by an agent, **24 W. R. 25.**

2. Pleader how far he may act for accused.—As to the definition of the word *Pleader see* s. 4 (*r*). It includes any person appointed with the permission of the Court to act in a criminal case and thus an agent may come within the definition. But where he is allowed to appear by a Pleader, even a judgment may be pronounced in the presence of such Pleader, where the sentence is one of fine only. *See* s. 366.

3. What a Pleader may do.—When an order is made under this section allowing the accused to appear by Pleader, such appearance involves the performance of all acts which devolve upon the accused in the course of the trial, such as answering the examination by the Court under s. 342 or pleading or refusing to plead to the charge under s. 255. The terms of s. 366 (2) support this view, for it contemplates the absence of the accused up

Magistrate must come to an independent conclusion of his own —The opinion of the Magistrate referred to in this section, is his own independent opinion Where a Police inquiry is ordered and the result reported the opinion expressed by an Inspector will not warrant the complaint being dealt with, otherwise than it would have been if there had been no such report, **4 M. H. C. R. 162.** *See* also cases cited in Note 18

4 Magistrate must be properly seized of the case before he can issue process.—Where a Subordinate Magistrate to whom a case had been made over for disposal convicted some of the accused, but refused to issue process against the others *Held* that the issue of the process under this section by the superior Magistrate who made over the case was without jurisdiction, **32 C 783.** *See* also **27 C 979; 30 C. 449** and **4 C. W. N 242.**

5. Caution and discretion must be used in issuing process—In exercising the discretion under this section, Magistrates must be guided by the circumstances of each case, the main point for consideration being [illegible]

An accused person ought not to be dragged off to answer a charge merely because a complaint has been lodged against him The Magistrate should see there is a *prima facie* case against the accused and, if not should refuse the summons, or direct complainant first to produce his witnesses, or one or two of the chief of them and should then grant or refuse the summons according as a *prima facie* case is or is not made out.—*Oudh Cr Dig, p* 7

6. Supervision by District Magistrates to prevent hasty and inconsiderate issue of process—Magistrates of districts should endeavour, by exercising a systematic supervision over the procedure of Subordinate Magistrate, to prevent hasty and inconsiderate issue of process on complaints, and to enforce payment of compensation for frivolous or vexatious complaints or information. By requiring periodical returns of the results of criminal trials in the subordinate Courts, District Magistrate will be able to keep themselves regularly informed of the working of those Courts, and to interpose, promptly, and effectively whenever they observe any tendency to laxity of procedue—*Oudh Cr Dig, p* 7 As to unauthorised interference by the District Magistrate, *see* s 202, Note 11 at p 575

7. If complaint is believed, process must issue—*See* Note 6 to s. 202. Where the Police report was to the effect that the complainant was true and the Magistrate thereupon had directed the case to be entered as such, he cannot decline to enter on a judicial inquiry merely because in his opinion there was no chance of conviction and no useful purpose would be served by an inquiry The complainant was entitled to have process against the accused for the attendance of his witnesses, **29 C. 410.** The only condition requisite for the issue of process is that the complainant s disposition must show some ground for proceeding **1864 W R 33** and **37.** *See* also **4 M. H. C. R. 161.** It appears to be a common fault on the part of Magistrate to issue process against some of the accused, although there is no reason in the examination of the complainant to discriminate between the several accused Such a procedure is without jurisdiction and in every view objectionable, **4 C. W. N. 560.**

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8. Notice to the person complained against is not a 'process'—Where proceedings begin with the issue of a summons or warrant after a complaint is instituted, and the Magistrate issues a notice to the person complained against that a preliminary inquiry will be held in the matter of the complaint such a notice does not amount to a summons or to the invitation to the party charged to appear to take any step in the matter, such a notice is not contemplated either by the Code nor is it one of the forms in the Fifth Schedule **23 M. L. J 1.**

9. Conviction cannot be quashed for issuing warrant instead of summons—If a Magistrate issues a warrant in a case in which he ought to have issued a summons and passes a sentence, the High Court cannot quash the conviction on the simple ground that the Magistrate was mistaken in issuing a warrant, **1 W. R. 16.**

10. Substitution of summons for warrant discretionary—Magistrate should use the discretion given them by this section and should not issue a warrant as a matter of course, especially in cases where a petty charge of defamation insult to provoke a breach of the peace or criminal intimidation, is preferred before them.—*C P Cr Cir*, Part II, No 16—*Oudh Cr Dig., p* 8.

11. Magistrate can cancel warrant issued and issue summons.—A Magistrate has also discretion under this section on sufficient cause being shown to *cancel* the warrants issued at first against an accused and issue summons instead, **1 S. L. R. 69 = 8 Cr. L. J. 187; 7 S. L. R. 43 = 14 Cr. L. J. 634.** *Vide* s. 75.

the trying Magistrate proceeded with the case and convicted her. *Held*, that the father-in-law of the accused might probably have been received by the trying Magistrate as person appointed by her to act in the proceedings before him consistently with s. 4 of the 1884 Code, and that the High Court did not consider it necessary in so trivial a case to make any order, **Ratanlal 206.**

11-A. Appearance by an Estate Manager.—Where the personal appearance of an accused is dispensed with and he appears by his estate-agent, the fact of such appearance should be taken note of by the Court. The Court allowing the estate agent to appear for the accused can act upon a plea given by the estate-agent in a case falling under ss. 242 and 243 of the Code. **50 B. 250.**

12. Reasons for refusing leave to appear by Pleader to be recorded.—The Magistrate should place upon record his reasons for refusing an application for leave to appear in Court by a Pleader and not in person, more particularly when such application is made by a *pardanashin* woman accused of an offence, **6 A. 59.** *See* also **6 C. W. N. 59,** where an order requiring the personal attendance of an invalid was set aside as unreasonable.

13. Recognisance bond should be taken from accused and not from his agent.—Where the personal attendance of an accused is dispensed with, a recognisance bond if such be deemed necessary should be taken from him and not from his agent, binding him (the accused) to appear either in person or by an agent; and if the agent neglects to attend when the case is called on, the recognisance bond may be held to be forfeited and the accused made liable for the payment of the penalty. A Magistrate has no legal authority to secure the attendance of an agent by such a bond. **5 B. H. C. R. Cr. Ca. 64.**

14. A Sessions Judge can dispense with the personal attendance of an accused person under s. 205, read with s. 353:—

A Sessions Judge has power to dispense with the personal attendance of an accused and allow him to appear by a Pleader during a sessions trial, **45 M. 359.**

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.*

Scope of Chapter.—Nowhere but in this Chapter is the procedure laid down to be followed in making a commitment. The procedure to be adopted under this Chapter is not confined to cases exclusively triable by the Court of Session, but is also applicable to cases which, in the opinion of the Magistrate concerned, ought to be tried by such Court, **6 A. 477; 24 C. 429** and **4 Bom. L. R. 85.** The provisions of this Chapter must be conformed to by every committing Magistrate. If *ab initio* he is convinced that the case ought to be committed, he should follow the procedure laid down by this Chapter from the start; and if he becomes convinced at a late stage of any inquiry or trial that the case ought to be committed, he should stay further proceeding and adopt the procedure laid down by this Chapter. S. 347 ought not to be so construed as to override the express provisions of this Chapter, **5 Bur. L. T. 239 = 6 L. B. R. 129 = 13 Cr. L. J. 877 (F.B.)** *dissenting from* **36 C. 48** and **Ratanlal 975.** The direction in s. 347 to stop further proceedings does not justify a Magistrate in disregarding the provisions of this Chapter but only requires him to stop proceedings with the case as a trial and instead to commit the case under the provisions of this Chapter, **36 M. 321; 15 Cr. L. J. 366 (M.);** *contra* **15 Cr. L. J. 704 (M.).**

Power to commit for trial.

†**206.** (1) * Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, or any Magistrate ‡ (not being a Magistrate of the third class) empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

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* Magistrates exercising jurisdiction in the *Town of Rangoon* when committing prisoners for trial commit them to the Chief Court. *See* s. 13 of the *Lower Burma Courts Act* VI of 1900, which came into operation on the 16th April, 1900. See *Gazette of India*, 1900, Pt. I, p. 226.

† The words and figures "subject to the provision of s. 443" have been omitted by the Cr. Law Amendment Act, 1923 (XVII of 1923).

‡ The words in brackets were added by Act XVIII of 1923

to the stage of judgment and even after that stage where the judgment is one of acquittal or one awarding a sentence of fine *See* also form of summons to an accused, Sch V, Form I, 6 S. L. R. 206 = 14 Cr. L. J. 272

4. Prosecution cannot be ordered for disobedience of summons where accused appears by Pleader.—Where appearance is made on behalf of the accused, by his *Mukhtyar* who asked the Magistrate to dispense with the personal attendance of the accused, a prosecution under s 174 I P C., cannot be directed against the accused for disobedience of summons. Appearance by a *Mukhtyar* is valid appearance, though not a personal appearance 27 C. 985. In such cases, the Magistrate should rather tell the *Mukhtyar* that he requires the personal attendance of the accused on some fixed day and that if the accused does not choose to appear, he will issue a warrant

5. Applicability of section to security proceedings.—Though the Madras High Court in **Weir II, 84,** *held* that this section is not applicable to proceedings under Chapter VIII, and that a person required to show cause why he should not be bound over for good behaviour, cannot be permitted to appear by an agent yet it was *held* in 25 A. 375 *following* 23 C. 493 and 27 C. 656 that persons against whom proceedings are taken under Chapter VIII are accused persons within the meaning of the Code and as such have a right to be defended by a pleader and that notice of the date of hearing should be given them, *Quære* Whether personal attendance could not be dispensed with in such a case under special circumstances?

6. Section applies to all cases where a summons is issued.—The application of this section is not limited to summons-cases, but to any case in which a Magistrate may issue a summons Therefore in a warrant-case if a Magistrate issues a summons in the first instance to a *pardanashin* lady, he can dispense with her personal attendance and this he has discretion to do under s. 204, 21 C. 533; 20 P. W. R. 1908 The section applies only to cases where a summons is issued in the first instance, 2 Pat. 793

7. Accused cannot be exempted when warrant issued—S 205 applies only to case where accused persons are summoned, where a warrant is issued to compel the attendance of accused, he cannot be exempted from personal appearance in Court, unless the accused is by reason of his illness unable to attend personally, 13 C. W. N. 150; 18 Cr. L. J. 975. But if a warrant has been issued by inadvertence the Magistrates has power to act under this section. The Magistrate may on discovering his mistake direct the major process of warrant to take effect as a summons, 7 S. L. R. 40 = 14 Cr. L. J. 604.

8. Personal appearance may be dispensed with any number of times.—A Magistrate can excuse the attendance of an accused as often as he pleases, 14 C. W. N. 131.

9. Section should be freely utilised.—In 3 S L. R. 167 = 11 Cr. L. J. 197; 7 S L. R. 40 = 14 Cr L. J. 604 it has been pointed out that s 205 is not confined to strict *pardanashins* and that the section should be freely utilised in such a country as Sindh where so much prejudice exists against the appearance of females in public. *See* also 6 S. L. R. 206 = 14 Cr. L. J. 272. Where the accused is a *pardanashin* lady, it is in the discretion of the Magistrate to dispense with her personal attendance and to permit her to appear by a Pleader until he has before him some legal and satisfactory evidence indicative of her having committed a breach of the criminal law, when it will be proper time to require her to appear personally, 6 A. 59; 7 S L. R. 161 = 15 Cr L. J. 539. In 17 C. W. N. 1243 = 15 Cr. L. J 231, where a Magistrate refused to dispense with the presence of certain *pardanashins*, the High Court in revision made an order allowing them to appear by Pleader before the Magistrate as also in the Court of Sessions, if they were committed subject to their having to appear to hear sentence in case of conviction. *See* s. 210 which provides for the charge being read and explained to the accused. As to the right of *pardanashin* women to give evidence in their *palanquins*, *see* 1 B L. R. (S.N.) v and 41 P R. 1897.

10. Personal appearance of a Pardanashin lady.—*Pardanashin* women are not of *right* exempted from personal attendance in Court, 5 A. 92. But a Criminal Court should abstain from compelling a *pardanashin* woman to attend in person, unless and until the case against her has reached the stage at which her personal attendance is clearly and legally required in the interests of justice 5 P. W. R. 1909.

11. Accused being represented by her mother-in-law or father-in-law.—A woman was charged with causing obstruction under *Bombay District Municipal Act* VI of 1873 s. 48. She having gone to a village, her mother in law appeared in Court on her behalf, and the Magistrate proceeded with the case and convicted her *Held*, that the conviction must be set aside as the accused was neither present nor duly represented in the case, Ratanlal 203 But where a woman was charged with the offence of 'fouling water' under s 61 of *Bombay District Municipal Act* VI of 1873, she being unwell, her father in-law appeared in Court on her behalf, and

Notes.—1. The following procedure shall be adopted.—The language is imperative. S. 347 ought not to be construed to override the terms of this section. *See* Note at the head of this Chapter.

2. Cases which ought to be tried by such Court.—The words "*ought to be tried by the Court of Session*" in this section and in s. 347 must be read with s. 254, and a case which ought to be tried by a Court of Session is one which the Magistrate is not competent to try or in which in his opinion adequate punishment cannot be inflicted by him, **4 Bom. L. R. 85**, where **24 C. 429** and **Ratanlal 110** are referred to. *See* also **16 B. 580 ; 11 A. L. J. 439 = 14 Cr. L. J. 304.** If the case be one which the Magistrate is both competent to try and can adequately punish, he has no discretion to commit it to the Court of Session, **8 S. L. R. 23 = 16 Cr. L. J. 664.**

This section is apparently to be interpreted in the light of s. 254 so that a case which "ought to be tried" by the Court of Session, as contemplated by the former section, must be taken to be a case in which adequate punishment cannot be awarded by the Magistrate, and not merely one which, for any other reason he may think it desirable that the Court of Session should try.—*C. P. Cr., Cir.*, Part II, No. 30.

3. Is commitment of case not exclusively triable by Sessions Court bad?—*See* Note 9 to s. 215.

4. Joint inquiry into the case of several accused persons.—There is no provision in the Code which requires a separate inquiry in respect of each accused person, as the provision contained in s. 233 relates to separate *trials* only. The trial no doubt could not be joint, but there is no objection to a joint inquiry on the ground that the inquiry was conducted against the accused jointly with others, **7 Bom. L. R. 457 = 2 Cr. L. J. 432 26 M. 592 ; 1900 A. W. N. 206.** *See* Note 7 (i) to s. 215.

5. Object of preliminary inquiry.—The object of the law in providing that the inquiry shall be held by the Magistrate before the accused has to undergo a trial in the Court of Session seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction, **5 A. 161 at p. 162 ;** and the Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without having previously had a fair opportunity of meeting the charge upon which he is to be committed, **10 B. L. R. 285 at p. 289.** *See* also **3 M. 351.** The legislature has laid down provisions for procedure before commitment, some of which were obviously intended for the benefit of accused persons. The object of its provision that all the witnesses for the prosecution shall be called is plainly that the accused shall be made aware of all the evidence that he will have to meet on his trial ; the object of cross-examining prosecution witnesses and hearing defence witnesses is to give the accused a full opportunity of convincing the Magistrate, that there are not sufficient grounds for committing him for trial and thereby putting on him the anxiety and expense of defending himself at a trial and in a great many cases depriving himself of his liberty for a considerable term possibly. *See* **5 Bur. L. T. 239 = 18 Cr. L. J. 877.**

Taking of evidence produced.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution and in such case the prosecutor may re-examine them.

Process for production of further evidence.

(3) If the complainant or officer conducting the prosecution, or the accused applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

Notes.—1. Sub-sec (2) incorporates the decision in **21 C. 642,** and merely re-enacts the provisions of s. 138 of *the Evidence Act.*

2. Rules for the examination of complainants and witnesses framed by the Calcutta High Court.—

(*a*) **Examination to be viva voce in Court.**—Every witness shall be examined *viva voce* in open Court.

Notes—1. "This amendment is on the same lines as that of s. 144, cl. (1), we do not think that the powers under this section should be granted to a Magistrate of third class" *Report of Select Committee, 1916*

2. **Sessions Judge can only take cognisance when the accused is committed.**—*See* s. 1903 A Sessions Judge can only take cognisance as a Court of original jurisdiction when the accused has been duly committed Where there is no proper commitment he cannot try the case.

3. **Magistrates empowered in this behalf**—In Madras all Magistrates are empowered to commit to the Court of Session (*Fort St George Gazette*, 1873, p 717) except the Tahsildar Magistrates of taluks in which there are Stationary Sub-Magistrates (*Fort St George Gazette*, 1893 Pt I p 579). In Bengal and in the Punjab, all Magistrates of the second class were similarly empowered but this power has been cancelled in Bengal (*Calcutta Gazette*, 1891 Pt I, p 1000) and withdrawn in the Punjab (*Punjab Gazette*, 9th March 1883)

Concurrent jurisdiction of Magistrate and Coroner—An inquisition made by a Coroner has the effect of a valid commitment to the High Court in Calcutta or Bombay when the High Court accepts the commitment, **31 C 1.** But the power to commit has been taken away *See* s 25 of the *Coroner's Act* 1871, Appendix VIII

4. **Effect of committal by Magistrate not empowered**—Under s 532 if any Magistrate purporting to exercise powers duly conferred which were not so conferred commits for trial, the Court to which the commitment is made may accept the commitment if it considers that the accused was not injured thereby and no objection was taken to the authority of such Magistrate but if it considers that accused was injured or that objection was taken the Court shall quash the commitment and direct a fresh inquiry Where a Magistrate without jurisdiction commits an accused to the Sessions Court, such commitment is void and no reference to the High Court is necessary to have it set aside, **11 C. L. R 55.** But a commitment made with jurisdiction can only be quashed by the High Court on a point of law under s. 215 *See* s 532 as to the validation of irregular commitments under certain circumstances *See* **Ratanlal 922.**

5. **Committal by Magistrate not having local jurisdiction**—Where a Magistrate duly empowered to commit makes an order of committal in respect of an offence over which he has no territorial jurisdiction such commitment is valid unless such irregularity has in fact occasioned a failure of justice *See* s 531 **26 M. 640, 17 M. 403; 7 Bur. L. T. 26 = 15 Cr. L J. 270.** In **11 C. L. R. 55** such a commitment was, however, *held* to be void If a Magistrate commits to a Court of Session without having any jurisdiction over the offence or the offenders, the commitment is clearly invalid and the Sessions Judge if satisfied by the evidence before him on these points could, notwithstanding the commitment discharge the accused If however, the illegality affects the procedure of the Magistrate and does not affect the jurisdiction of the Sessions Judge, a reference to the High Court under s 215 was the only way to set aside a duly made commitment **Ratanlal 922.**

6. **Committal to Court having no local jurisdiction**—If the committal is made to a Court having no local jurisdiction under s 177 over the offence, the Bombay and Allahabad High Courts are of opinion that the commitment ought not to be set aside unless there has been a failure of justice *See* **8 B. 312; 16 B 200; 18 A. 350;** but the Madras High Court *held* in **36 M. 387,** that such a commitment must be set aside. *See* Note 8 to s 177 and Notes to s 531

7. ***Interference of District Magistrate with the discretion of other Magistrates as to commitment.***—For purposes of commitment, a Subordinate Magistrate, if duly empowered, has equal powers with the District Magistrate and the latter cannot give instructions to the Subordinate Magistrate regarding a judicial proceeding, *e.g.*, the commencement of the preliminary inquiry or the desirability of commitment If the District Magistrate desires to interfere he must first withdraw the case to his own file **8 W. R 61.** Where a Magistrate of the first class who conducted a preliminary inquiry under this Chapter made over the case after taking all the evidence, to a Deputy Commissioner with special powers under s. 30, it was *held* that the Magistrate was bound by law either to discharge or to commit the accused to the Court of Sessions, but that he had no authority to act in the way he did. The accused who had been convicted were, however, held not prejudiced by such irregular commitment, **7 C. W. N. 457.**

8 **Power to commit includes power to dispose of the case.**—The powers conferred under this section convey authority to carry into effect any of the provisions of Chapter XVIII of the Code, **6 A. 477.**

Procedure in inquiries preparatory to commitment

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Sess on or High Court, or, in the opinion of the Magistrate, ought to [illegible] ich C[illegible]

(1) in support of the prosecution; (2) on behalf of the accused and (3) as may be called for by the Magistrate. If he does not take that evidence, he errs, unless he can justify his procedure on some such ground as the evidence of a witness is obviously irrelevant or that he considers the fact in issue between the parties proved one way or the other by the evidence already produced, **10 A. L. J. 144 = 13 Cr. L. J. 443.** As *all* the evidence, and not merely a part, should be ready at the trial, it is the duty of a committing Magistrate to make full and careful inquiry into the alleged offence and to record the testimony of witnesses. He ought to do this even when confession of the accused had been recorded, as there are many cases to show that confessions are often retracted at the trial, **Ratanlal 842.** It is the duty of the committing Magistrate to place before the Sessions Court all the evidence procurable. A commitment made without examining all the witnesses for the prosecution is illegal, **4 M. 227.** A commitment made without taking any evidence on a preliminary is illegal, **Ratanlal 100.** A committing Magistrate cannot discharge before examining all the witnesses for the prosecution, **4 M. 329.**

8. **Prosecution bound to produce all the available evidence.**—The prosecutor is bound to produce all the evidence in his favour directly bearing upon the charge. He is not free to choose how much evidence he will bring before the Court. It is *prima facie* his duty accordingly to call those witnesses who prove their connection with the transaction in question and who must be able to give important information. *Per* WILSON, J., in **6 C. 121 at p. 124.** *See* also **10 C. 1070; 14 C. 245; 14 A. 521; 15 A. 6.** *See* **13 P. R. 186 = 17 Cr. L. J. 267.**

In a trial before a Court of Session or the High Court if a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if examined, he is not bound to call that witness or to tender him for cross-examination. In cases in which the prisoner is undefended, the presiding Judge should look at the deposition of any witness appearing in the Calendar as a witness for the Crown and not called as such or tendered for cross-examination, in order to ascertain whether he should not himself take action under s. 540, **16 A. 84** at **p. 87.** *See* Notes under s. 286

9. **Magistrate's duty to take evidence for the defence in a Session case—Procedure.**—Sub-sec. (1) contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate; sub-sec. (3) contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded by him, to refuse to issue process if he deems unnecessary to do so. The distinction between the duty of the Magistrate in regard to the evidence *produced* before him by the accused and evidence not produced before him but which the accused desires to obtain by issue of process must be borne in mind. Ss. 209 and 210 do not require the Magistrate to record the evidence of witnesses whom in the exercise of the discretion given by sub-sec (3) he has deemed it unnecessary to summon. It is open to a Magistrate to decline to issue summonses where the application has been delayed until the last minute before the charge, **36 M. 321; 42 C. 608.** *See* Note 7 (*v*) to s. 215 A Magistrate inquiring into a case under this Chapter is not empowered to frame a charge or make out an order of commitment until and after he has taken all such evidence as the accused may produce before him for hearing, **20 A. 264.** A Magistrate investigating a case and committing the accused to the Sessions, without examining the witnesses applied for by the accused, acts erroneously under sub-sec. (3) of this section and the order of commitment must be set aside as bad in law, **26 A. 177; 6 Rang. 531.** Where a Magistrate, after recording the evidence for the prosecution, had summoned witnesses for the defence and had consented to make a local inspection also, but in pursuance of a direction of the Sessions Court, committed the accused without examining the defence witnesses or making the local inspection, *held* that the commitment was bad in law, **1906 A. W. N. 306 = 4 Cr. L. J. 452,** but *see* **15 Cr. L. J. 704 (M.); 46 A. 137.**

10. **Witnesses who fail to appear must be compelled to attend.**—The accused has further the right to call upon the Court to compel the attendance of witnesses who have been summoned and who have neglected to attend, **1 C. W. N. 548.** The accused ought to have an opportunity of adducing evidence on his behalf before the Magistrate, and which the Magistrate cannot refuse to take without recording his reasons, **Ratanlal 100.** A Magistrate going on leave exercises an improper discretion in committing to the Court of Session a case properly triable by the Magistrate, merely on the ground that the witnesses for the defence are not in attendance, and that it would be inconvenient for his successor to commence the trial anew, **Ratanlal 110.**

11. **Right to cross-examine when to be exercised.**—Fox, C.J., of the Burma Chief Court is of opinion that as this Chapter contains no provision similar to that in s. 256 (1) for recalling prosecution witnesses for cross examination, the proper time for cross-examining a witness in an inquiry under this Chapter is in the

(*b*) **No other business to be attended to.**—A Magistrate or Judge shall not be engaged in any other business whilst the examination of the witness is going on, or whilst any documentary evidence is being read

(*c*) **Supervision of examination.**—If, after examination of a witness has commenced, the Magistrate or Judge is compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to

(*d*) **Interruption.**—The examination of the witness shall not be interrupted for the purpose of enabling the Magistrate or Judge to attend to other business, unless such business is of an urgent nature.

(*e*) **Violation of rules to be reported.**—It shall be the duty of every Appellate Court subordinate to the High Court to examine the memorandum of the evidence made by the subordinate Court and to report to the High Court cases in which it shall appear that the above rules have not been strictly and properly attended to

(*f*) **Evidence to be in presence of deciding officer.**—The evidence of every witness shall invariably be recorded in the presence of the officer who may decide the case except in the cases provided by ss 349 and 350 of the Code, in which the recalling and re-examination of the witnesses is optional with the superior Magistrate No more than one deposition should be written on each sheet of paper

(*g*) **Trial or inquiry.**—After the examination of witnesses has commenced, the trial or preliminary inquiry, under Chap XVIII should be proceeded with until all the witnesses in attendance have been examined those for the prosecution being first examined and, if any witness be detained for a longer period than two days, the Magistrate should record a memorandum stating the reasons of such detention.

(*h*) **Adjournment.**—When it is deemed necessary to adjourn the hearing of a case, the adjournment shall be for as short a time as possible, and no person accused of any offence shall be remanded to custody for any period exceeding 15 days (s. 344).

(*i*) **Hour of business.**—Every Sessions Judge and Magistrate shall sit daily and punctually at the hour appointed for the opening of his Court unless prevented by circumstances which are to be recorded in the proceedings of the Court *Wilkins* 6

3. Witnesses not to be kept waiting.—(*a*) The evidence of witnesses should invariably be recorded as soon as possible after their attendance. If from unavoidable causes an adjournment is indispensable there should be no unnecessary delay Witnesses remaining over one day should, as a rule, be examined at the first sitting of the Court on the following day By this means the public will be put to no inconvenience, and justice will be administered in a prompt and satisfactory manner

(*b*) **Supervision.**—Chief Magistrates of Districts should carefully supervise the returns of their subordinates as they will be held responsible for the correction of irregularities, the prompt discharge of witnesses and the early completion of all trials. *Wilkins* 7

4 Remand without taking evidence.—A prisoner arrested under a warrant should be promptly brought before a Magistrate who has then no authority to detain him further in custody or to remand him to prison, *without some reason being made manifest to him, either in the shape of sworn testimony given before him, or* in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison, and there to be detained for a limited period for further examination, a period which is never, in any case to exceed 15 days, **20 W. R. 23**; also **6 M. 53** and **69** *See* s 344 and Notes thereunder

5 Precautions to be taken in granting further periods of remand.—In Police prosecutions the general rule is that when an accused person is brought before a Magistrate and a remand is required by the prosecutor, it is ordinarily sufficient to show by the evidence of a Police-officer that the Police are in possession of information believed to be reliable that the accused has committed an offence, but when the accused is again brought up after remand and a further remand is needed, some direct evidence of the guilt of the accused is required by the Magistrate to justify him in refusing bail and with each remand the necessity for production of evidence of guilt becomes stronger, **6 M 69**; **31 C. 174** and Notes to s 344

6 Preliminary inquiry to be in the presence of the accused—Where a Magistrate recorded evidence in the absence of the accused and committed him for trial, it was held that his procedure was illegal **Weir II, 259**; **5 C. W. N. 110.**

7. Duty of Magistrate is to make full inquiry and take all evidence.—In every inquiry into a Sessions case a Magistrate is bound, before he draws up a charge, to take all such evidence as may be produced

Chapter, **Weir II, 255.** But if the accused desires to make a statement it is not competent to the Magistrate to refuse to allow him to do so, **10 C. L. R. 54.**

3. **Power of examining accused not to be abused.**—The accused should never be examined with a view to filling up gaps in the evidence for the prosecution, **26 C. 49,** or to supplement the evidence where it is deficient, **1 C. L. R. 436.** The Code empowers the Magistrate to commit without inquiring into the defence of the accused. The Magistrate should therefore be careful not to abuse the discretion given by this section to examine the accused, **14 W. R. 16** and **1 B. L. R. (Sh. N.) 16.** The discretionary power given by this section should be used to ascertain from the prisoner how he may explain facts in evidence appearing against him so that those facts should not stand against him unexplained, but not to drive him to make self criminating statement, **1 M. H. C. R. 199; 1 C. L. R. 436; 6 C. L. R. 521; 25 W. R. 57; 8 W. R. (F.B.) 47; 6 C. L. R. 431; 6 C. 279 = 7 C. L. R. 385; 17 C. W. N. 354 = 14 Cr. L. J. 129.** The proceedings should not be of an inquisitorial nature. *See* also **3 B. H. C. R. Cr. Ca. 51.** The accused need not be examined at all, when the evidence is not sufficient to charge him with the offence, **10 W. R. 25.** A commitment without examining the accused is bad in law, **23 M. 636.**

4. **May discharge at any stage.**—Sub-sec. (2) of this section and s. 253 (2) relieve a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has been already deposed to, that a criminal charge cannot be sustained, **Ratanlal 201.** Where a Government officer has been discharged, on an application by the head of the Department, a copy of the order of discharge shall be given free of cost.—*Government of India,* 31st August, 1899.

5. **Magistrate may proceed for minor offence summarily.**—Where in the opinion of the Magistrate the evidence is not sufficient to justify a committal, but discloses an offence over which he has summarily jurisdiction, it is competent for him to deal with the case summarily and in such a case he cannot be said to disregard that part of the charge which takes the case out of his summary jurisdiction for the purpose of dealing with the case summarily, **22 M. 459.**

6. **Conviction for minor offence when evidence discloses graver offence, not invalid.**—But where a complaint was laid of an offence under s. 409, I.P.C., and the accused was tried and convicted for that offence, and on appeal the contention was set up that the Magistrate who convicted had no jurisdiction, because the evidence disclosed an offence under s. 466, I.P.C., triable exclusively by the Court of Session, *held per* KNOX, J., that the complaint gave the Magistrate jurisdiction to try the accused for the offence complained of and if it was established, to convict him and that the Magistrate was not bound to commit, merely because the evidence disclosed another offence triable exclusively by the Court of Session, **27 A. 69.** *See* **24 M. 675; 22 M. 459; 2 M. L. T. 495 = 7 Cr. L. J. 215; 27 A. 69; 25 B. 90;** but *see* Note 20 at p. 604.

7. **Magistrate ought not to treat a grave offence as a less grave offence to clutch at jurisdiction.**—A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction; nor should he ordinarily go into the defence evidence in a case triable exclusively by a Court of Session and in which a *prima facie* case for committal has been made ought by the prosecution, since to do so is to take upon himself the function of a superior Court, **1910 M. W. N. 852 = 12 Cr. L. J. 20;** *see* also **30 C. W. N. 840.**

8. **Procedure when several persons are charged and the offence of one or more of them is beyond the Magistrate's cognisance.**—When several persons are charged with different offences arising out of one act or transaction, one or more of which are beyond the cognisance of the Magistrate, and the rest within his cognisance, he shall not try the persons accused of the offences within his cognisance, and commit the other accused persons, but commit the whole of them to the Sessions Court.—**Oudh Cr. Dig.** at **p. 8; Wilkins,** at **p. 108.** *See* Note 6 to s. 210.

9. **No compensation when accused discharged in a Sessions case.**—Although a first-class Magistrate discharges the accused under this section on account of the charge being vexatious, yet if the offence charged be triable exclusively by the Court of Session, the Magistrate cannot award compensation under s. 250 to the accused, **Ratanlal 961; 40 A. L. J. 486.**

10. **Discharge of accused before recording any evidence and without recording any reasons therefore whether legal.—Competency of discharged co-accused to testify.**—Though a Magistrate has power to discharge an accused even before recording evidence he should then and there record his reasons for so doing, but if he

ordinary course immediately after the witnesses' examination, 5 Bur. L. T. 239 = 13 Cr. L. J. 877. It is impossible to construe this section as conferring upon an accused the right, if he thinks fit, to ask for an order and to have an order made that the cross-examination of the witnesses for the prosecution may be reserved until after all the prosecution witnesses have been examined in chief, 14 M. L. T. 532 = 15 Cr. L. J. 29. *See* also 36 C. 49 As each witness is examined he should then and there be cross-examined and re-examined and allowed to go home It is illegal for a Magistrate not to allow any cross-examination before he frames a charge or till such time that the examination in chief of all witnesses for prosecution is over, 10 A. L. J. 144 = 13 Cr. L. J. 443. But it is open to a Magistrate to allow cross-examination of witnesses for the prosecution even after a charge is drawn up 39 C 825. *See* also 5 C. W. N. 110, 6 Pat. 293; and 33 C. W. N. 535.

12. Effect of not allowing cross-examination.—When depositions of witnesses for the prosecution were taken without any cross-examination being allowed, *held*, that such depositions were improperly treated as evidence in the Sessions trial as they had not been "duly taken" within the meaning of s. 288, 21 C. 642 and *see* Notes to s. 288

13. Is Magistrate committing under s. 347 not bound to allow cross-examination and hear defence evidence ?—Section 347 is not to be read as subject to the provisions of this section and it is not imperative on the Magistrate to allow the accused to cross-examine the witnesses for the prosecution or to call witnesses in his defence before ordering commitment under that section, 38 C. 843, Ratanlal 975; 15 Cr. L. J. 704 (M). This view was not accepted by the Madras High Court, 36 M. 321; and by the Burma Chief Court in 6 L. B. R. 129 (F.B.) = 5 Bur. L. T. 239 = 13 Cr. L J. 877. *See* Note under s. 347 and the Note at the head of this Chapter

14 Evidence to be recorded in manner hereinafter provided—*See* Chapter XXV, ss. 356, 357, 359 and 360, s 363 makes a special provision for the recording of evidence by the Presidency Magistrate

15. Evidence of an accused person—An accused person cannot be admitted as an approver in a preliminary inquiry against others jointly accused with him, until he is either discharged or pardoned 7 W. R 41.

16 Attendance of respectable Hindu ladies as witnesses.—The attendance of Hindu ladies of secluded habits and respectability as witnesses should not be insisted upon when no distinct charge is made out 8 W. R 46.

When accused person to be discharged.

209. (1) When the evidence referred to in section 208, sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless

Notes—1. Examination of accused before committal absolutely necessary.—It is the duty of a Magistrate before committing accused persons for trial to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of this section is that it is not left to the discretion of a Magistrate who intends to commit, to examine the accused persons. He is bound to examine the accused and if he makes an order of commitment without examining him the order is irregular and might be quashed if the irregularity has occasioned a failure of justice, 23 M. 636. But *see* 2 W. R. 50.

2 Extent and scope of the examination of the accused.—*See* s 342. The real object of the Law in allowing the accused to be examined is to enable the Judge to ascertain from time to time from a prisoner, particularly if he is undefended what examination he may desire to offer regarding any fact stated by the witnesses or after the close of the case how he can meet what the Judge may consider to be damnatory evidence against him *per* PRINSEP, J, in 6 C. 96 at p. 102 = 6 C. L. R. 521 at p. 527. *See* also 2 C. W. N. 702; 5 A. 253 at p. 256. A Magistrate has no power to order the accused to file a written statement in proceedings under this

thoroughly inquired into. It is not sufficient to say that the accused might bring witnesses to prove his innocence at the trial. It is possible that the accused may not know the names of witnesses; and, if the witnesses can give evidence in his favour to exculpate him, he should not be committed. A long time elapses before a trial at the Session comes on, and witnesses cannot then give as clear evidence, more especially as to time and duty, as when the facts have only lately occurred. I think every inquiry should have been made previous to commitment, to ascertain, not only whether there was presumption of the guilt of the accused, but also whether he was innocent. It is the duty of the Police and the Magistrate, not only to bring the parties suspected of being guilty to trial, but also to ascertain whether the suspected can clear themselves from the crime of which they are accused. There is a clause in the Procedure Code which empowers Magistrate to commit inquiry into the defence of the accused. I believe the discretion given by this clause is much abused. It may be applied in certain cases, but in serious charges of murder when the life of the accused is at stake I think, the clause should not be acted upon, because no certainty of the accused's guilt can arise until his defence is negatived, and proof that his defence is false is frequently very strong evidence in favour of the prosecution of the result of the inquiry into the defence leaves the matter in doubt, it is the duty of the Magistrate to commit and leave the Sessions Court to decide which is the true story." *Per* JACKSON, *J., in* **14 W. R. 16.**

17. If no evidence against accused is forthcoming, Magistrate is bound to discharge him.—Where the accused, who has been duly summoned or arrested under a warrant, is present to meet any charge, and no evidence is forthcoming against him owing to the absence of the prosecutor and his witnesses, if it be not shown to the Magistrate that the case is one in which he ought to adjourn the inquiry under s. 344, he is bound to discharge such accused person, **15 W. R. 53.** A commitment to the Sessions would not be justifiable unless the committing Magistrate considers that a *prima facie* case had been made out, which in his judgment ought to be tried at the Sessions, **15 M. 39.** Superior Magistrates ought not in any way fetter the discretion of their subordinates in this matter. A commitment must depend on the evidence before the Court and not on evidence which may be given in the future, **16 Cr. L. J. 5 (C.)**; **37 A. 355.**

18. Magistrate must decide whether or not there are sufficient grounds to commit and not whether accused is innocent or guilty.—A committing Magistrate has no doubt to perform the task of weighing the evidence before him with a view to decide a particular question, but the question he has to decide is not whether the accused is innocent or guilty, but whether or not there are sufficient grounds for committing the accused for trial, *i.e.*, whether or not there was sufficient legal evidence or reasonable ground of suspicion, **26 A. 564.**

19. When Magistrate may commit or discharge.—The law requires that a Magistrate should take not merely all the evidence produced in support of the prosecution; but also that produced on behalf of the accused. *He is also empowered to examine the accused.* Even after framing a charge a Magistrate is entitled upon consideration of the evidence, adduced before him by the accused to cancel the charge and discharge the accused, s. 213 (2). A Magistrate is not justified simply because there is evidence before him which seeks to lay to the charge of an accused person an offence triable by a Court of Session, in committing the accused, **1899 A. W. N. 135**; nor is he justified in a grave case triable by the Court of Session, when the prosecution evidence pointed both to a dacoity having been committed and to the accused having been the persons concerned in the dacoity, in discharging the accused without there being any rebutting evidence because the evidence seemed to him improbable and exaggerated, **26 A. 564**; **11 B. 372.** It is not possible to fix positively the limits within which the Magistrate should exercise his discretion and different Judges have laid down various tests (some of them conflicting) which should guide a Magistrate in committing or discharging. One of the tests suggested is—*If there is sufficient evidence to go to the jury, the Magistrate must commit.*—'I should prefer to express the rule negatively, by saying that he must not in any way encroach upon the functions of a jury' BAKEWELL, J., in **14 M. L. T. 200 = 14 Cr. L. J. 529**; **15 Cr. L. J. 373 (M.).** "The test which should be applied to decide whether a committal ought or ought not to be made on the facts is this:—Assuming that the whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there was any evidence which called for an answer, however great the preponderance in favour of the prisoners might be, then the committal was proper."—*Per* HARRINGTON, J., in **9 C. W. N. 829.** "The object of the preliminary inquiry in a criminal case is to ascertain whether there is any real case against the accused before a commitment is made and if all that can be said is that there is a mere *scintilla* of evidence, there should be no commitment."—*Per* HENDERSON, J., *ibid.*; *see* also **11 B. 372.** Another rule laid down is *where a prima facie case is made out*

omits to do so, the discharge is not illegal Where one of two accused persons sent up by the Police was discharged by a Magistrate without recording evidence and without recording any reasons and the discharged person was examined as a witness against the co-accused, *held*, that his evidence was admissible, **23 B. 213** *followed* **4 L. R. 362 = 6 Cr. L. J. 370.**

11. Effect of discharge on subsequent inquiry for the same offence.—The discharge of a person accused of an offence triable exclusively by the Court of Session is no bar to his being brought up again with a view to commitment before a Magistrate who may proceed without an order for further inquiry An order of discharge might be passed at any stage of the case and does not amount to an acquittal, **8 W. R. 61.** *See* also **10 B. 319; 9 B 100; 28 C. 397; 24 M. 136; 20 C. 633, 23 M. 225** In **28 C. 397** it was laid down that an order under s 437 would be necessary in such a case But now *see* **29 C. 726 (F.B), 28 C. 652; 27 B. 84** and **28 M. 310,** where it was *held* no order under s 437 was necessary But evidence must be taken *de novo*, **5 C. 121 = 4 C. L. R. 305.** *See* Notes 27 and 28 to s 203

A Court which has passed an order of discharge cannot re-open the same case, but there is no bar to a second case being instituted, the order of discharge does not stand in the way of such proceedings being taken, **21 A. L. J. 215.**

12. Remedy for improper exercise of discretion by inquiring Magistrate—The remedy for an erroneous exercise of discretion is provided for in ss. 436 and 437 But in considering whether an accused has been improperly discharged within the terms of s. 436 a Sessions Judge or District Magistrate is bound to consider all the grounds upon which the discharge has been passed, including the evidence which has not been disbelieved or *held* to be sufficient to establish a *prima facie* case before ordering a commitment or directing a further inquiry **7 C. W. N. 77.** *See* also **9 B. 100; 5 A. 161, 9 W. R 5; 2 C. 110** and **28 C. 397.**

13. Superior Court's power of interference to be exercised in clear cases only.—*See* s 436 and Notes thereto The fact that the District Magistrate or Sessions Judge might be disposed to take the view that the Magistrate discharging an accused discredited the prosecution evidence for insufficient reasons and discharging the accused without committing him for trial is no ground for interference by it, **Weir II, 255.** Where a Sessions Judge acting under s 436 directs a Magistrate to commit on evidence which is unreliable and insufficient, it was *held* the High Court had authority to set aside the commitment on the merits of the case **7 C. W. N. 327; 39 M. 224; 15 Cr. L. J. 373 (M).**

14. Power of High Court to revise an order of discharge by a Presidency Magistrate.—The Madras High Court has held that it has power under the Code to interfere with an order of discharge made by a Presidency Magistrate which contravenes an express provision of law or where on the merits the order of discharge was wrong, **Weir II, 255; 27 B. 84; 36 C. 994** *dissenting* from **33 C. 1282; 6 C. L. J. 705** and **27 C. 126.** *See* also **14 M. L. T. 200 = 14 Cr. L J. 529.**

15. Refusal of Magistrate to charge accused with an offence triable exclusively by Court of Session amounts only to discharge.—Where a Magistrate on a complaint charging the accused with offences under ss 379 and 477, I P C, tried and acquitted them of the charge under s. 379, but refused to charge them with the offence under s 477, *held* that such refusal was in substance an order of discharge under sub-sec. (1) of this section, as there is no other provision of the Code for dealing with a case where the Magistrate is of opinion that there is no evidence of an alleged offence exclusively triable by a Court of Session and as he could not proceed to act under the latter part of sub-sec. (1) until he had discharged the accused under the former part of the sub-section, a Sessions Judge had jurisdiction to make an order under s 436 in respect of the offence under s. 477, I P C., **24 M. 136,** where **20 C. 633** and **23 M. 225** are *dissented from*

FUNCTION OF AN INQUIRING MAGISTRATE—SESSIONS CASES.

16. Magistrate must make a thorough inquiry and sift every fact bearing upon the case.—"I have, for some time, felt from examination of criminal trials that many Magistrates are too hasty in making commitments, or rather that they do not make the thorough inquiry which, I think, they ought to make previous to commitment In a case of murder more especially, there can be no doubt that it is the duty of the Magistrate to sift every fact bearing on the case In order to ascertain whether the accused is guilty or innocent, and to examine the accused on the facts which bear against him. One of the points of the evidence in this case which led to presumption of the accused's guilt was that he had been absent about the time the murder was committed. His statement as to where he was at that time should have been recorded, and should also have been

the whole that he came to the conclusion that no *prima facie* case has been made out, **Weir II, 255.** *See* Notes to s. 210.

22. **Duty of Magistrate in dealing with the evidence adduced before him.**—It is in laying down the principles which should guide a Magistrate in dealing with the evidence adduced before him that there appears to be a sharp line of difference of opinion. On the one hand it is laid down that *a Magistrate must decide only on the possibility of conviction and not weigh the evidence.* A Magistrate ought to commit a case to the Court of Session when the evidence is enough to put the party on his trial and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. Weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly the function of the Court having jurisdiction to try the case, **Ratanlal 319.** Where there is evidence on which a conviction is possible in law, the Magistrate has sufficient grounds for committing and he is bound to commit. The weighing of evidence to arrive at an opinion as to the guilt of the accused is the function of the Court having jurisdiction to try the case, **27 B. 84.** *Sufficient ground for committing* means not ground for convicting, but when the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses made statements, which, if believed would sustain conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. Where, therefore, a Magistrate, holding a preliminary inquiry, could not believe the statement of witnesses, who saw the accused setting fire to the complainant's crop or immediately afterwards, and discharged the accused, the High Court set aside the order of discharge, and directed the commitment of the accused, remarking that it was not alleged that the three witnesses for the prosecution were of infamous character, nor does it appear that any evidence was adduced tending to show that they cannot possibly have spoken the truth, **11 B. 372; 27 B. 84; 14 P. R. 1908 = 8 Cr. L. J. 263.** "Although a Magistrate has large powers of discharging the accused, he should only exercise it when he is clearly of opinion that the evidence for the prosecution is untrustworthy. If it is a matter of weighing probabilities, he would be well advised in leaving the case to the Court which alone is empowered to try it, and should not discharge the accused because in his opinion the accused ought to have the benefit of the doubt." AIKMAN, J., **26 A. 564; 1904 A. W. N. 5; 1899 A. W. N. 135; 9 Bom. L. R. 225 = 5 Cr. L. J. 213; 12 Bom. L. R. 923 = 11 Cr. L. J. 692.** The existence of a possible ground of defence is not a sufficient reason for a Magistrate to refuse to commit a person for a trial against whom a *prima facie* case is made out; otherwise, the thief found in the possession of jewels recently stolen ought never to be committed or trial since it is always possible that the jewels might have been foisted on him without his knowledge. It is ordinarily for the Court that has power to try the case, nor for the Magistrate who makes the preliminary inquiries, to determine whether, having regard to all the facts and probabilities guilt is brought home to the accused. BENSON, J., in **14 M. L. T. 200 = 14 Cr. L. J. 529.** Magistrate's duty is to determine whether the accused should be put on his trial, and to commit if he is satisfied that there are credible witnesses to facts, which, if believed by a jury, would justify the conviction of the accused of the offence complained of. If he proceeds to weigh the evidence, to accept some statements and reject others, to deal with probabilities or to draw inferences as to knowledge or intention, he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of a trial Court. *Per* BAKEWELL, J., *ibid.* The Magistrate ought to commit when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case, **11 B. 372.** This case was considered in **35 B. 163.** *See* also **4 Rang. 471** and **49 All. 443.**

On the other hand it is laid down that *a Magistrate must weigh the evidence and need not commit if the evidence will not justify a conviction.*—"A Magistrate conducting an inquiry may, if he is convinced that the case against the accused is false, discharge him at an early stage of the case, but he has to hear all the evidence produced before him by whichever side, and it is only after recording that evidence he can consider whether there are or are not sufficient grounds for committal and has no power whatever to pronounce a definitive judgment on the question whether the accused is guilty or innocent. The discretionary power should be exercised with caution but there is nothing in the law which prohibits the discharge of the accused even though the evidence against him is that of professed eye-witnesses but whom the Magistrate entirely discredits. The object of the law in providing that the inquiry shall be held by the Magistrate before the accused has to undergo a trial in the Court of Session seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction. **The provision of the law is calculated, on the one hand, to save the subjects**

against the accused and credible witnesses have given evidence, he must be committed. "The duty of the committing officer is to ascertain whether by the evidence of the prosecution a *prima facie* case is made out against the accused. Magistrates are apt to suppose that it is incumbent on them to satisfy themselves fully of the guilt of the accused before making a commitment. This idea is erroneous Where there is a sufficient ground for putting an accused on his trial, the Magistrate should make a commitment, and he has discharged all the duty imposed upon him —*Per* TURNER, J in **3 N. W. P. H. C. R. 27.** But a Magistrate will not be justified in making a commitment to the Sessions unless he considers that a *prima facie* case has been made out, which in his judgment ought to be tried at the Sessions **15 M 39.** In **Weir II, 652**, the Madras High Court observed "that a Magistrate is justified in committing an accused person for trial by a Court of Session where a *prima facie* case is made out that the accused has committed an offence cognisable by a Court of Session In other words, where there is evidence not obviously false and on which if it be accepted as reliable a Court of Session might convict an accused person the Magistrate is justified in sending up the case for trial, and if the case is triable by a Court of Session only, he is bound to do so" *See* also **Weir II, 542.** Where in an inquiry into a case triable by the Court of Session the prosecution evidence pointed both to a dacoity having been committed and to the accused having been the persons concerned in the dacoity, but the Magistrate considering the evidence improbable and exaggerated rejected it and discharged the accused without there being any rebutting evidence it was *held* that the Magistrate ought not to have discharged the accused as by thus pronouncing upon evidence, merely because it did not commend itself to his mind he really *tried* the case and not merely considered whether there were sufficient grounds for committing the accused for trial, **26 A. 564.** *See*, however, the cases cited in Note 17

20 **In grave offences it is better to commit the accused** —Where it appears from some of the evidence the accused might have been charged with an offence beyond the jurisdiction of the Magistrate to take cognisance of, an officer invested with powers under s. 34 should rarely, if every, try a case himself under this section, **10 C. 85 = 13 C. L. R. 375, Wilkins, 112** *See* also **13 B 502, 24 M. 675; 25 B 90, 3 P. R. 1891** and **1 P. R. 1893.**

(i) *Where death is caused by violence Magistrate ought to commit*—The accused threw his wife down and deliberatly kicked her several times, thus inflicting injuries which caused her death. The first class Magistrate convicted him of voluntarily causing hurt and sentenced him to five minutes simple imprisonment. *Held* that in such a case where death is caused by violence the accused ought not finally to have been dealt with by the Magistrate but should have been committed to the Court of Session **Ratanlal 332.** *Instructions as to cases where death has ensued*—In cases where death appears to have resulted from injuries voluntarily inflicted by the accused party Magistrate ought to be very careful not to take it upon themselves to absolve the accused from the graver charge, and convict him of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder, or culpable homicide not amounting to murder **Wilkins, 112, 10 C. S. 85 = 13 C. L R. 375, Ratanlal 332; 13 B. 502; 3 P. R. 1891**, and where the act amounts to an attempt to commit murder **5 M. L T. 257 = 9 Cr L. J. 224.**

(ii) *Attempt to murder*—Where the act of the accused amounts *prima facie* on the evidence to an attempt to murder, a Magistrate should commit the case and not try the case himself Where he did so, the conviction was set aside, and the accused committed to the Sessions, **5 M. L. T. 257 = 11 Cr L. J 195**

(iii) *Grievous hurt and robbery must be committed*—If a Magistrate finds an accused person has caused grievous hurt in committing robbery he is bound to commit him to the Court of Session under s. 397, I P C It is illegal to treat the grievous hurt as simple hurt and convict the accused under s. 394, I P C. **Ratanlal 476**

(iv) *False charge of rape*—The offence of making a false charge of rape are triable by a Sessions Court exclusively, therefore a first-class Magistrate has no power to convict the accused under s. 376, I P C., but must after framing charge commit him to the Sessions **Ratanlal 593; 5 M L. T. 257 = 9 Cr. L. J. 224.**

21. **Where the question of discharge or commitment is one merely of probabilities better to commit.** —A Magistrate has in cases triable by a Court of Session, a wide discretion in the matter of weighing the

into under this Chapter is proper if the Magistrate had applied his mind to the evidence, and the order shows on

reasons for making commitment to the Court of Sessions. Where a Magistrate finding that there was a *prima facie* case against an accused person under ss. 352 and 447, I P C., committed the accused to the Court of Session, it was *held* that the commitment was wrong on a point of law because (*i*) there was no warrant for the commitment of such cases and (*ii*) the maximum punishment under each offence was one which the Magistrate could inflict, **1906 A. W. N. 23 = 3 A. L. J. 14 = 3 Cr. L. J. 94; 15 Bom. L. R. 998 = 2 Bom. Cr. Ca. 165; 8 S. L. R. 23 = 15 Cr. L. J. 664.**

27. Magistrate must give reasons.—The Magistrate must give his reasons so as to enable the High Court to judge whether the commitment is made in the sound exercise of the discretionary power vested in him by law, **11 Bom. L. R. 18 = 9 Cr. L. J. 163.** The Magistrate should specially state that the case has been committed with a view to the infliction of a heavier sentence than he is competent to inflict, **24 C. 429.** If the Magistrate does not give adequate reasons, the commitment may be quashed, **1906 A. W. N. 23 = 3 A. L. J. 14 = 3 Cr. L. J. 94, 6 A. L. J. 989 = 11 Cr. L. J. 5; 15 Bom. L. R. 998 = 2 Bom. Cr. Ca. 165 = 14 Cr. L. J. 657; 8 S. L. R. 23 = 15 Cr. L. J. 664.**

28. Offence exclusively triable by Magistrate cannot be committed.—A commitment of the accused charged under s 9 of Act I of 1878 (*Opium*) is bad in law, as under that section the conviction, if there be one, must be before a Magistrate, **19 A. 465; 1 W. R. 5; 5 M. H. C. R. 277.**

When charge is to be framed

210. (1) When, upon such evidence being taken and such examination (*if any*) being made, the *Magistrate is satisfied that there are sufficient* grounds for committing the accused for trial, he shall frame a charge under his hand declaring with what offence the accused is charged.

Charge to be explained and copy furnished to accused

(2) As soon as * such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so require, be given to him free of cost.

Notes.—1. Upon such evidence being taken.—A commitment made without taking any evidence on a preliminary inquiry is illegal and ought to be quashed, **Ratanlal 100.** Having regard to s. 208, a Magistrate inquiring into a case under this Chapter is not empowered to frame a charge or make out an order for commitment until he has taken all such evidence as the accused may produce before him, **20 A. 284; 28 A. 177.** This section does not require a Magistrate to record the evidence of witnesses, whom in the exercise of the discretion given by sub-sec (3) of s. 208, he has deemed unnecessary to summon, **38 M. 321.** But when an accused person wishes to make a statement the Magistrate is bound to record it, **10 C. L. R. 54,** though an omission to comply with s 342 might be treated as an irregularity, **23 M. 636.** *See* Notes 7 to 10 to s. 208.

Magistrate may commit on evidence recorded by another Magistrate.—After the prosecution evidence was recorded by a second-class Magistrate, the District Magistrate transferred the case to a first-class Magistrate who, acting on the evidence already recorded by the second-class Magistrate, committed the accused, *held*, the order of commitment was not illegal, **36 A. 315.**

2. Discretion of the inquiring Magistrate ought not to be fettered by superior Magistrate.—A District Magistrate is not justified, having regard to the express language of the section, in calling on a Subordinate Magistrate to commit a case, unless it can be shown that if that Magistrate was not satisfied as required by this section, he ought to have been satisfied, **9 Bom. L. R. 225 = 5 Cr. L. J. 213,** where **11 B. 372** and **27 B. 84** are *referred to.*

3. Adding charges merely for the purpose of committing is bad.—The practice followed by some Magistrates of adding charges apparently for the purpose of enabling them to commit those cases to the Court of Session without any reasonable ground for the addition is to be highly deprecated, **11 Bom. L. R. 18 = 9 Cr. L. J. 163.**

4. Magistrate should frame a charge before commitment.—If no charge is framed, the procedure under s. 226 will have to be observed. In the Code generally, the word *charge* is used as a statement of a specific offence and not as indicating the entire series of offences of which a person is accused, **8 B. 200.** *See* definition of charge, s 4 (*c*).

* The words "such charge" have been substituted for the words "the charge" by Act XVIII of 1923.

from prolonged anxiety of undergoing trial for offences, not brought home to them, and, on the other hand, to save the time of the Court of Session from being wasted over cases in which the charge is not obviously supported by such evidence as would justify a conviction. Taking this view of the law, I am of opinion, that the power given to Magistrates under this section extends to weighing of evidence, and the expression "*sufficient grounds*" must be understood in a wide sense. I must not, however, be understood to lay down that this discretionary power should be exercised by the Magistrate without due caution, or that he should take upon himself to discharge the accused in Sessions cases in the face of evidence which might justify a conviction. But when the evidence against the accused is such that, in the opinion of the Magistrate, it cannot possibly justify a conviction, I hold that there is nothing in the law which prohibits the discharge of the accused even though the evidence against him consists of witnesses who state themselves to be eye-witnesses, but whom the Magistrate entirely discredits." *Per* MAHMOOD, J., **8 A. 161.** It is not incompetent to a Magistrate holding a preliminary inquiry into Sessions cases to examine the credibility of evidence adduced in the course of the inquiry. Such Magistrate should not commit the accused if he be of opinion that notwithstanding direct evidence adduced against the accused, the prosecution case is improbable and the evidence is unreliable. **12 C. W. N. 117 = 8 Cr. L. J. 406.** "I am invited to lay down the general proposition that a Magistrate having before him formally and categorically evidence which discloses a case for trial in some Court to which such Magistrate might in his discretion commit, is bound to so commit and that he is wrong in point of law in exercising a discretion and considering the sufficiency of evidence. The proposition is dangerously large. It is not the practice of Magistrates within the range of my experience, nor have I heard the law so laid down in England." *Per* BLAIR, J., in **21 A. 265.** A Magistrate need not commit merely because there is evidence sufficient to put the case to the jury. An accused person is entitled to adduce evidence before an order of committal is made, either in order to show that the evidence adduced for the prosecution is quite untrustworthy or to show that the facts proved by the prosecution are consistent with his innocence when taken in conjunction with other facts proved by him in his defence. A Magistrate need not make an order of committal when, in his judgment, the evidence adduced for the prosecution is clearly insufficient to justify the conviction of the accused and the prosecution evidence is clearly untrustworthy (*see* **7 C. W. N. 77**). He should, no doubt, realise that it is not his duty to form a final conclusion on the evidence for the prosecution whether the conviction of the accused if committed is reasonably certain, but it is his duty to be satisfied whether there are fair grounds for concluding that the accused is guilty, so far as appears from the evidence put before the Court. It is only then that *sufficient grounds can be said to exist for committing the accused for trial.* *Per* SUNDARA IYER, J., *in* **14 M. L. T. 200 = 14 Cr. L. J. 529.** A Magistrate in considering the sufficiency of grounds may properly consider whether on the evidence before him, it is probable that a conviction will be arrived at, **1 S. L. R. 103 = 8 Cr. L. J. 360; 14 W. R. 16; 7 C. W. N. 77.** *See* also **Ratanlal 746; 10 P. R. 1909 = 11 Cr. L. J. 18; 215 P. L. R. 1910 = 11 Cr. L. J. 751, 9 M. L. T. 71 = (1910) M. W. N. 352 = 12 Cr. L. J. 20.** Where the Magistrate finds that there are not sufficient grounds for committing the accused person for trial, he is bound to discharge. He may so find either because there is no evidence whatever or because the evidence tendered by the prosecution appears to him to be totally unworthy of credit. Where, however, the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving the doubt and assessing the evidence should be left to the Court of Session **35 B. 163.** Where most of the important witnesses are totally unworthy of credit and the case itself bristles with improbabilities, the Magistrate would be right in discharging the accused. **15 Cr. L. J. 373 (M.).** When a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit and *a fortiori* [illegible] on behalf of the accused he has come to the conclusion that [illegible] well within [illegible] his powers in cross-examining the prosecution witnesses to find out the truthfulness of the witnesses and is discharging the accused because the evidence adduced is interested, unreliable and unbelievable. The chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely *incredible* on every ingredient of the offence that is charged, **1915 M. W. N. 233 = 16 Cr. L. J. 307.** *See* also **12 A. L. J. 50 = 12 Cr. L. J. 234.** In **17 Bom. L. R. 910 = 16 Cr. L. J. 747, 35 B. 163** was followed and it was *held* that the Magistrate was well within his powers in cross-examining the prosecution witnesses and if the evidence tendered is totally unworthy of credit it was not only within his power but it is his duty to discharge the accused under s. 209. *See* also **20 C. W. N. 732 = 17 Cr. L. J. 202; 44 A. 57; 46 A. 837; 43 M. 874 = 49 M. L. J. 153; 4 Lah. 64**

and even when the Magistrate entertains doubts as to the value of their evidence, as it is impossible to state beforehand what credit will be given to their evidence 6 B L. R. Appx. 78 = 15 W. R. 15. As a matter of right, a prisoner *is entitled to have the witnesses in the list*, which he delivers to the Magistrate, summoned and examined, 23 W. R. 56, 2 W. R. 6, 3 W. R. 38.

2. Duty of Magistrate to call upon the accused specifically to give in the list.—The question by the Magistrate to the accused *have you any evidence?* ' is not a sufficient compliance with this section. It is ambiguous and might suggest to the accused only an enquiry as to whether he had witnesses ready in Court. What the Magistrate is bound to do under this section is *to require the accused to give a list of the witnesses* he desires to call, **7 Bom. L. R. 723.** Though the language of the section is thus imperative, there is nothing in it which leaves it open to a Magistrate to prevent a prisoner from reserving his defence for the Court of Session, **4 B. L. R. Appx 1.**

3. *Accused's right to reserve defence and not to disclose names of his witnesses* —An accused person may reserve his defence and also refuse to furnish the Magistrate with a list of his witnesses, as for instance for fear that his witnesses might be tampered with In such a case he might bring his own witnesses but is not entitled as of right to have the assistance of the Court to compel their attendance, **14 A. 242.**

4. Witnesses' list may be filed after commitment.—Committing Magistrates cannot force the accused to disclose either the names of their intended witnesses, *or what those witnesses would be called to prove*, **14 A. 242.**

5 Accused has no right to have his witnesses summoned after committal.—If an accused person on being called upon under this section to give a list of witnesses whom he wishes to be summoned to give evidence *on his trial, declines to give in such list, he cannot compel the Magistrate after committal to issue any* summons for witnesses on his behalf. Neither under such circumstances will the Sessions Judge be obliged to issue summonses for the attendance of such witnesses unless he is satisfied that their evidence may be material, **19 A. 502.**

6 Grounds of refusal to summon defence witnesses must be stated.—*See* Note 9 to s. 208. When a prisoner under this section gives in a list of witnesses he wishes to summon, after his case has been committed, the Magistrate is bound to exercise his discretion upon the point, and to state whether he will summon the witnesses or not, and he ought to state his reasons for not doing so If he thinks the witnesses were included in the list *for the purpose of delay, he should proceed under the second proviso of s. 210* **16 W R. 14.** *There* is no reason to refuse an application for summons, simply because a large number of witnesses is mentioned therein, **11 C. 764 at p. 760.**

Power of Magistrate to examine such witnesses, s 200, para. 2.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given to him under section 211

Notes.—1. Object of the section —The object of this section is to prevent the concoction of false evidence after commitment This is a discretion that should be rarely exercised, for the inconsiderate examination of witnesses cited for the defence at the trial, may seriously prejudice the accused person and harass the witnesses. But if he examines such witness at his own motion or at the request of the accused and is satisfied from such evidence that there is no sufficient ground for committing the accused then s. 213 (2) enables him to cancel the charge and discharge the accused

2. Examination of defence witnesses by Magistrate when defence reserved —The fact that an accused person committed to a *Court of Session by a Magistrate has reserved his defence does not preclude the* Magistrate from acting under this section. The section gives the Magistrate the widest possible discretion to summon and to examine any *witness named* in any list given to him under s. 211 The Code does not require a Magistrate to record his reasons. He is given a discretion which he may be trusted to use properly and it will be *for a* person impugning his order to prove that a judicial discretion is not used, before the High Court will interfere, **18 A. 380; 4 B L. R. Appx. 1.**

3. Legality of commitment without such examination when Magistrate intended to examine.—Where the evidence for the prosecution had been recorded and certain witnesses for the defence had been summoned and the Magistrate at the *request of the accused had also consented to make a local inspection*, but finally at the direction of the Sessions Judge committed the case to the Sessions, without examining any of the defence witnesses and without making the intended local inspection, *held*, the commitment was bad in law and ought

5. Even after framing a charge Magistrate can make an order of discharge.—*See* s. 213 (2). A Magistrate framed certain charges against the accused intending to commit the case to the Court of Sessions. On objection being taken that a charge was bad for want of sanction, the Magistrate amended the charges and expressed his desire to hear the case himself. It was then contended that the Magistrate could not amend the charge and proceed with the case himself when once he had committed to the Court of Sessions and s. 215 was relied on, *held* that the mere framing of a charge against the accused as required by s. 210 is distinct from and does not amount to an order of commitment which has to be made under s. 219. It is only the order of commitment under s. 213 or s. 214 which takes away the Magistrate's power of proceeding further with the case. Even after framing a charge under s. 210 it is open to the Magistrate to consider whether he ought to commit or not, **12 Bom. L. R. 521 = 11 Cr. L. J. 436; 5 C. W. N. 110; 39 C. 835; U. B. R. (1915) 3rd Cr. 29.** *See*, however, **Ratanal 161** where it was laid down that the drawing up of a charge must always follow the determination of a Magistrate to commit a case to the Court of Sessions, which determination when duly expressed the Magistrate becomes *functus officio* as to that matter. Where, therefore, a Magistrate first drew up a charge directing the commitment of the accused, and afterwards, taking further evidence, discharged them. *Held* that the order of discharge is illegal and the case should be committed for trial to the Court of Session. *See* Note 4 to s. 213.

6. Persons implicated in the commission of the same offence should all be tried or committed together.—When several persons are accused *of the commission of the same offence* it would be obviously inconvenient if a Magistrate were to punish some and commit others to the Court of Session; and as the Code does not seem to contemplate such a procedure, Magistrate should, if he considers the case to be one for the Sessions commit all those concerned for trial before that tribunal, *Wilkins*, 108; *Oudh Cr. Dig., at p.* 8; **1881 A. W. N. 6.** But the mere fact that the accused who have been committed to the Sessions were acting in concert with those who have not yet been arrested is no reason for quashing the commitment, **7 M. L. T. 187 = 11 Cr. L. J. 333.** *See* also **Weir I, 413,** where it was *held*, that were two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one, the proper course is to commit both or all for trial before the Court of Session. *See* also **15 Bom. L. R. 998 — 2 Bom. Cr. Ca. 165 = 14 Cr. L. J. 657.**

7. Charge when framed shall be read to the accused.—The Magistrate when he has prepared the charge is bound to read it to the accused and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf at the Sessions, **2 W. R. 50.**

8. Sessions Judge must either accept or frame other charges.—Where a Magistrate gives reason for committing a case for trial in a certain way, the Sessions Judge must either accept the charge as framed or frame others himself. He is not authorised by the Code to insist on a re-drawing of the charge by the Magistrate unless he specifies the charge which he wishes to be sent up, **25 W. R. 17.**

9. Remission of Court-fee on copy of charge.—In the exercise of the powers conferred by s. 35 of *the Court Fees Act* (VII of 1870), the Governor General in council is pleased to remit the fee payable on a copy of a charge or translation thereof when the copy is given to an accused person. *Notification, Government of India No.* 310 *of* 21*st January*, 1886; *Wilkins*, 177, *Adden*, 153.

List of witnesses for defence on trial.

211. (1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

Further list

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Notes.—1. Accused is entitled to have the witnesses named in the list summoned to attend at the trial.—Section 291 lays down that an accused shall not be entitled of right to have any witness summoned other than the witnesses named in the list except as provided by this section and s. 231. *See* s. 216 as to duty of the Magistrate. An accused person is entitled to have his witnesses summoned and examined even though they were named as implicated in the offence with which he is charged, **6 B. L. R. Appx. 65 = 15 W. R. 7; 19 M. 375,**

quashed on the merits. An order of commitment made by a District Magistrate in direct contravention of the provisions of s. 436 (*a*) in committing the accused without allowing them an opportunity to show cause against the commitment is bad in law and must be quashed, **26 P. W. R. 1913 = 14 Cr. L. J. 605; 15 M. L. J. 373 = 2 Cr. L. J. 774; 6 M. 372.**

3. Does this section oust the general revisional jurisdiction of the High Court?—In **2 A. 398**, STUART, C.J. (SPANKIE, J., *doubting*), was of opinion that the terms of the section were not used in any exclusive sense so as to deprive the High Court on its large powers of revision.

4. Jurisdiction of the Criminal Appellate Bench of the High Court to quash the commitment made to it in its original criminal jurisdiction.—It is doubtful if the Criminal Appellate Bench of the High Court has jurisdiction to quash a commitment made to the High Court for trial under its ordinary original criminal jurisdiction. The practice has been to apply to the Judge exercising the original criminal jurisdiction of the High Court, **36 C. 48; 56 Cal. 785.**

5. High Court alone can quash commitment.—Except the High Court no other authority is competent to quash any commitment, even in a compoundable case, **4 A. 150; 16 M. L. J. 525; Weir II, 262.** If in the opinion of the Sessions Judge, commitment made to his Court is illegal, he should refer the case for the orders of the High Court, the insufficiency of the legal evidence against the prisoner is no ground for such a reference, **1 W. R. 8.** In such cases it may sometimes be advisable to bring the matter to the notice of the District Magistrate with a view to his instructing the committing Magistrate to obtain additional evidence.

5-A. Point of Law.—The High Court will not ordinarily interfere with an order of committal unless it is satisfied from the records that there was an illegality in the order. **31 Bom. L. R. 523 = A. I. R. 1929 Bom. 269**; *see* also **A. I. R. 1929 Cal. 756 (F.B.).**

6. No application to quash commitment will lie after commitment of trial.—This section is inapplicable to a case in which a reference is made to quash the commitment after the accused has been put on his trial before the Court of Session and pleaded *not guilty* and has been tried with the aid of assessors, **Weir II, 262; 12 C. L. R. 120; 9 Cr. L. J. 250 (Sindh).** *See contra* **6 C. 564**, where it was *held* that the High Court can quash a commitment at any stage of the case.

7. Irregularities in procedure how far vitiate a commitment.—The principles laid down in s. 537 should in general guide the High Court in dealing with an application under this section, **12 Cr. L. J. 320 (Sindh).**

(*i*) *Joint inquiry does not vitiate commitment.*—There is no provision of law requiring separate inquiry in respect of each accused person. S. 233 refers to trials only. Though the trial could not be joint there can be no objection to the proceedings prior to commitment, on the ground there was misjoinder of offences or offenders at the preliminary inquiry, **7 Bom. L. R. 457 = 2 Cr. L. J. 432.** The ruling of the Privy Council in **25 M. 61** cannot be extended to a preliminary inquiry leading up to a commitment so as to render the commitment itself illegal because there was misjoinder of offences or offenders. S. 233 and the succeeding sections apply to joint trials only. In such a case the Sessions Court ought to frame separate charges and try the accused separately as if there were two or more commitments, **26 M. 592, 17 Cr. L. J. 369.** *See* also **1900 A. W. N. 206**, where it was *held* that the fact the Magistrate had wrongly committed jointly three persons charged with offences under ss. 212 and 216, I.P.C., to the Sessions, when they should have been committed separately under s. 233 was not a sufficient ground for quashing their commitment under this section. A commitment is not vitiated because charges are framed in respect of offences which cannot be tried together **(1916) 2 M. W. N. 179 = 17 Cr. L. J. 369.** Where, however, a Magistrate held a joint investigation in the case of four accused persons who were charged with different offences under ss. 211, 214, 465 and 193, I.P.C. *Held* that the procedure was illegal and so much to the prejudice of the accused that the commitment must be quashed. **Ratanlal 925.** *See* Note 4.

(*ii*) *Issuing a warrant instead of a summons.*—The error of a Magistrate in proceeding by a warrant instead of by a summons is not an error for which the commitment is quashed.

(*iii*) *Initialling instead of signing the warrant of commitment* is not material. **12 Cr. L. J. 320 (Sindh).**

(*iv*) *Want of sanction under s.* 195.—Unless the accused have been prejudiced and there has been a failure of justice, a commitment ought not to be quashed merely because of the absence of sanction under s. 195. *See* **12 Cr. L. J. 320 (Sindh.)** and Note 23 to s. 195 and **24 M. 121.** *See*, however, **6 A. 98.**

(*v*) *Refused by the Inquiring Magistrate to allow cross-examination or to examine witnesses of the accused under s.* 208.—A Magistrate in making a commitment must follow the provisions of this Chapter.

6. Power to commit after cancelling discharge.—Where a Magistrate after examining four witnesses for the prosecution discharged the accused but subsequently on becoming aware that there was a fifth witness present cancelled his order of discharge took further evidence and committed the accused for trial to the Court of Session *held* that the commitment was good, **7 M. H. C. R. Appx. XL; 23 C. 211.**

7. Magistrate must marshal the evidence.—In preparing the "reasons for commitment," the committing Magistrate should marshal the evidence in the order in which it should come under judicial consideration As a general rule, chronological order is the best, **Oudh Cr. Dig 10** A Magistrate in his grounds of commitment should specifically note with exactness and precision the proof against each particular prisoner and the manner in which it is supported **5 W. R. 6**

8. Magistrate must give reasons for committal.—Failure of the Magistrate to give reasons for committal in a case which he could deal with may amount to an illegality and the High Court may set aside the commitment **15 Bom. L R. 998 = 2 Bom. Cr Ca 165 = 14 Cr. L. J. 657** and *see* Note 27 to s. 209

9. Magistrate must sign warrant of commitment.—The signature of the Magistrate to the warrant of commitment should not be affixed by a stamp, **6 M. 395.**

10. Commitment in the absence of the accused.—Where one of the accused is absent when the proceedings are held at which the order of commitment is made, the order is illegal, **8 C. W. N. 110.** But where a person who was allowed under s 285 to appear by agent was committed, the High Court *held* that the commitment was not necessarily illegal, but as the agent had not been required to give in a list of witnesses whom he wished to have summoned for his principal, the Court directed the Magistrate to make the demand, **2 W. R. 50.** *See* also **17 C. W. N. 1248**

11. Joint indictment of two or more persons.—When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one, the proper course is to commit both or all for trial before the Court of Session **Weir I, 443.** But the adoption of a different course by the committing Magistrate is not in contravention of any provision of law, **Weir II, 258** *See* Note 6 to s. 210

12. Opposing factions not to be jointly committed.—Where riot is charged and the Magistrate is about to commit the contending parties for trial, not only should separate charges be drawn up against each party but separate trials should be held since the offences of each party are distinct and separate and both the parties have not the same common object, **8 W R. 47; 9 W. R. 33, 6 C. 96; 14 C. 358; 20 C 537, 8 C. W. N. 180** But the ruling in **25 M. 61 (P C.)** does not apply to preliminary inquiries prior to commitment, **26 M. 592.** In cases of joint commitment the Sessions Judge should frame separate charges and try seperately *See* Note 7 to s. 215

13 High Court's power of quashing commitment.—A commitment made under this section can be quashed by the High Court under s 215 only on a point of law, **13 A. L J 756.** Absence of evidence to warrant commitment is a point of law and may furnish good ground for quashing commitment, **U. B. R. (1917) 3rd Cr 29.** But a commitment made under s 436 is liable in revision to be set aside by the High Court on the merits *e.g.*, where it is made on evidence which is insufficient and unreliable, **7 C. W. N. 327.**

214. [Repealed by Act XII of 1923] *See* Chapter XXXIII

Quashing commitments under section 213.

215. A commitment once made under section 213* by a competent Magistrate † or by a Civil or Revenue Court under section 478 can be quashed by the High Court only, and only on a point of law

Notes.—1. Section applies only to commitments made under the four sections specified.—This section does not deal with commitments directed by the District Magistrate or Sessions Judge under s. 436, **31 C. 1; 7 C. W. N. 327; 30 M. 224; 27 M. 54.** An order passed by the High Court directing a commitment under s. 526 (1) (iv) is not at all subject to its revisional powers, nor is this section applicable to such a commitment, **27 M. 54**

2 Section does not apply to directions to commit but High Court may revise.—This section only applies to a commitment actually made and not to a case where under s 436 a Sessions Judge has merely directed a commitment to be made, **30 M 224,** where **7 C. W. N 317; 15 C. 621** and **14 M. 534** are *referred to*,

[illegible]

taken at the preliminary inquiry are not exclusively triable by the Sessions Court is no ground for quashing the commitment, 7 M. L. T. 186 = 11 Cr. L. J. 333; 16 M. L. J. 526 = 6 Cr. L. J. 99. Where a Magistrate in his discretion commits an accused being of opinion that the accused cannot be adequately punished by him the High Court cannot interfere as there is no point of law, 11 A. L. J. 439 = 14 Cr. L. J. 301. A Magistrate going on leave exercises an improper discretion in committing to the Court of Session a case properly triable by the Magistrate, merely on the ground that the witnesses for the defence are not in attendance, and that it would be inconvenient for his successors to commence the trial anew, but in so doing he does not commit such illegality as will justify the High Court in quashing the commitment, Ratanlal 110. Where a Magistrate committed the accused on a charge under s 323, I P C, triable by any Magistrate, *held* that the words '*ought to be tried*' in ss 207 and 347 of this Code must be read with s. 254 and a case which ought to be tried by a Court of Session is one which the Magistrate is either not competent to try or is one in which, in his opinion, adequate punishment cannot be inflicted by him As this was not the opinion of the Magistrate, the Bombay High Court in the case of *Porna Ramchod* (3rd January, 1902) quashed the commitment, holding the same illegal and directed the Magistrate to dispose of the case according to law. But where there were counter-charges of riot one of which resulted in homicide and the Magistrate committed both cases although the charge under s. 143, I.P.C., in one case was purely magisterial, the High Court refused to quash the commitment as it was not illegal and the Magistrate's discretion ought not to be lightly interfered with, 1896 A. W. N. 356; 1900 A. W. N. 206. In 1906 A. W. N. 38; 3 A. L. J. 14 = 3 Cr. L. J. 91 and 6 A. L. J. 989 = 11 Cr. L. J. 51, it has, however, been *held* where a Magistrate, finding there was a *prima facie* case against an accused person under ss 352 and 417, I.P.C., committed the accused to the Court of Session, *held* the commitment was wrong on a point of law; because (*i*) there was no warrant for the commitment of such case and (*ii*) the maximum punishment under each offence was one which the Magistrate could inflict

10. Grounds held sufficient to quash a commitment.—(*i*) *That the Sessions Court has no territorial jurisdiction over the offence.*—In 8 B. 312 and 18 A. 350, it was *held* that though commitment to a Sessions Court having no jurisdiction to try the case is illegal, yet the High Court may direct the case to the Court having jurisdiction; but in 36 M. 387, however, it was *held* that the High Court cannot uphold the commitment, by directing the transfer to the Court having jurisdiction.

(*ii*) *Commencement of prosecution six months after sanction, s.* 195 (6).—When prosecution is commenced after expiration of six months from the date of sanction given under s. 195, and proceedings are carried on in spite of the objection of the accused and he is committed to the Sessions, the High Court will quash the commitment, 22 C. 176; s 537 cannot cure such a defect.

(*iii*) *Quashing of the commitment of the European British subject jointly charged.*—If the commitment of an European British subject be quashed on account of any irregularity in the proceedings, *e g.*, want of sanction, the commitment of a person jointly charged with him must be quashed also, 9 B. 268 at p. 200. *Per* SARGEANT, C.J.

(*iv*) *Commitment without the exercise of judicial discretion, but at the suggestion of another Magistrate.*—Where a commitment is made by a Magistrate without exercising his judicial discretion, but at the suggestion of the District Magistrate; *held* that the commitment must be quashed, 15 M. 39. An order directing a Magistrate to commit an accused person who has been discharged by him, simply because the offence is triable, exclusively by the Court of Session is bad in law, Weir II, 260; 9 Bom. L. R. 225 = 5 Cr. L. J. 213.

(*v*) *Commitment of approver along with co-accused.—See s.* 337. A Magistrate believing that an approver to whom pardon had been tendered had given false evidence in the case, declared the tender forfeited and committed him along with others to the Court of Session. *Held*, that the commitment must be quashed and that nothing could be done against such person till after the case in the Sessions Court against his co-accused had finished, and that then his trial should be commenced *de novo*, if it is deemed necessary to take proceedings against him, 23 B. 493; 24 M. 321; 14 W. R. 10; 19 W. R. 43; 25 B. 675. Where the conditional pardon tendered to an accused person was forfeited and he was committed to the Sessions Court for trial along with the others charged with the same offence, the commitment was quashed, because he had not had an opportunity of cross-examining the witnesses, 20 A. 529. The Sessions Judge has no power himself to direct the trial of such a person or to try him at once with the others, for, under s. 193 except as otherwise specially provided, a Sessions Court cannot take cognisance of an offence without a committal, 22 C. 50; 15 M. 352. A preliminary inquiry should, therefore, precede the commitment. *See* Notes to ss. 337 and 339.

Where he has not carried out the imperative provisions of law laid down in s. 208 before committing the accused for trial, the case come before the Sessions Court in a manner not contemplated by law and the commitment is illegal and must be quashed A Magistrate is bound under s 208 to take all the evidence which may be produced by the prosecution to allow all the witnesses of the prosecution to be cross-examined by the accused and to take all such evidence as might be produced on behalf the accused A commitment made without complying with these provisions is illegal and will be quashed, **6 L. B. R. 129 = 5 Bur. L. T. 239 = 10 Cr. L. J. 877 (F.B)**, ROBINSON, J, *dissenting* But where as under s. 208 (3) and ss. 212 and 213 the law allows a Magistrate a discretion and does not compel him to summon and examine witnesses for the defence and a Magistrate refused to summon certain witness for the accused on the ground that the application for summoning the witnesses was made too late, the commitment is valid, **38 M. 321; 42 C. 608.** A Magistrate is not empowered to frame a charge or make out an order for commitment until and after he had taken all such evidence as the accused had before him for hearing, **20 A. 264, 26 A. 177.** In these two cases the rule is stated in terms wider than those of the Code and no reference is made to the discretion of the Magistrate *See* also **1906 A. W. N. 306 = 4 Cr. L. J. 452** A Magistrate errs if he does not take all the evidence produced before drawing up a charge unless he can justify his procedure on some such ground as the evidence of a witness is obviously irrelevant or that he considers the fact in essence between the parties proved one way or the other by the evidence already produced **10 A. L J. 144 = 13 Cr. L J. 453** In **Ratanlal 975** and **36 C. 48**, it was *held* that under the provisions of s 347 a Magistrate was not bound to examine the witnesses of the accused and a commitment was not illegal because the Magistrate refused to do so These cases were not followed in the Burma Full Bench Case. In **36 C. 48** the accused did not cross-examine the prosecution witnesses immediately after their examination in chief, but applied to cross examine the witness after the prosecution closed its case The decisions may be supported though the reasoning is open to question In **15 Cr. L. J. 704 (M)** it was *held* following **36 C. 48** and dissenting from **20 A. 264** and **26 A. 177** that the Magistrate has a discretion to examine witnesses or not after he reaches the stage of framing a charge under s. 210

(*ii*) *Not giving reasons may invalidate commitment*—*See* Note 9 below

8. Insufficient of evidence, how far a ground for quashing commitment—A committal can be quashed on a point of law only An order of committal cannot be quashed on the ground that there is no evidence on the committing Magistrate's record to sustain the charges **13 Bom L. R. 201 = 12 Cr. L. J. 258; 7 Bur. L T 26 = 15 Cr L. J. 270**, *see* also **A. I. R. 1929 Pat. 121.** In **27 M. L. J. 593 = 15 Cr. L. J. 665**, it was *held*, following **13 Bom L. R. 201** that it is not open to a High Court to quash a commitment on the ground that there is no evidence to justify the commitment and in such a case the accused ought not to be deprived of the benefit of an acquittal, the case in **6 A. 98** was not followed. A commitment made withourt direct evidence and merely on presumption is not erroneous in point of law, and as such cannot be quashed under this section Where there is evidence that a forged document was used on behalf of an accused person with his knowledge or under his instructions or with his approval, which might be proved by the conduct of the accused it cannot be said that there is no evidence upon which commitment could be made, **4 C. W. N. 116.**

[illegible]

[illegible] commitment may be quashed In **5 C. W. N. 411** and **9 C. W. N 829**, the Calcutta High Court has laid down that whether there is or is not sufficient evidence to warrant a commitment is a question of law within the meaning of this section Commitments duly made could be quashed under this section, when the evidence stopped short of a case which could properly be left to a jury Under the Code, a Sessions Judge has not the power to withdraw a case from the jury on any account whatsoever But if the evidence in a case is such that the the presiding Judge would, if he had the power, withdraw it from the jury, the High Court (which alone has the power to quash a commitment) ought not to allow the commitment to stand But it is questionable, how far it is for the benefit of the accused to object to the commitment The result of the trial would be an acquittal, but by obtaining an order under this section he would be liable under s. 403 to further proceedings if evidence is found against him which was overlooked before **2 A 398.** *See* also **1898 A. W. N. 236**

9 That the case is triable by a Magistrate whether a ground for quashing commitment.—If a Magistrate thinks that a case not exclusively triable by the Court of Session must be committed he must state his grounds in the order to enable the High Court to judge whether the committal is made in the sound exercise of the discretionary power vested in him by law, **11 Bom. L. R. 18 = 9 Cr. L. J. 163; 15 Bom. L. R. 998** and **999** = [illegible]

a Magistrate and the question of its genuineness is pending in a suit in the Civil Court though subsequently brought, it is desirable to postpone further criminal proceedings in respect of the complaint of forgery.

(v) *Discovery of fresh evidence after commitment.*—Where a Magistrate after commitment made, held further inquiry and recorded that if the inquiry had been previously made he would not have committed, the High Court refused to quash the commitment but ordered the trial to proceed, **1885 A. W. N. 53.** The proper course for the Magistrate under such circumstances would be to instruct the Public Prosecutor to withdraw from the prosecution under s. 494 with the consent of the Sessions Judge. But the Public Prosecutor ought not to abandon the case without the sanction of the Court at the mere direction of the District Magistrate, as that would amount to the *indirect* reversal of the order of the committing Magistrate of which the direct reversal would have been illegal.

(vi) *Committal in cases of perjury, to the very Judge before whom false evidence was given not bad*—An accused having been committed to the Sessions Court on a charge under s. 193, I.P.C., for having given false evidence in a judicial proceeding before the same Sessions Judge, *held* that the commitment could not be quashed; because there was no error in law, but in the absence of an Additional or Assistant Sessions Judge, the case was transferred to another Sessions Court, **1 B. 311; 4 A. 150.**

(vii) *Omission to inquire into false charge brought by accused will not invalidate commitment.*—A commitment for trial under the provisions of s. 211, I.P.C., for knowingly instituting a false charge is not illegal, merely because the complaint which the accused made had not been judicially inquired into, but is based on the report of the Police that the case was false, **6 C. 552.**

(viii) *Simultaneous commitment of robber and receiver of stolen property not illegal.*—The commitment for trial in one and the same case of accused, some for the offence of robbery, and the rest for receiving property stolen in that robbery, not being illegal, cannot be quashed under this section, **Ratanlal 915.**

(ix) *That a number of the joint offenders have not been arrested.*—The fact that some of the accused were committed while other persons acting in concert were not yet arrested is not a ground for quashing the commitment, **7 M. L. T. 187 = 11 Cr. L. J. 333.**

(x) *Commitment of European British subjects in British Baluchistan to a Court of Sessions.*—A commitment of an European British subject to the Court of Session by the Extra Assistant Commissioner, Quetta, is proper and cannot be quashed under this section, as the Court of Sessions in Baluchistan have by Regulation VIII of 1896, jurisdiction to try European British subjects duly committed, **5 P. R. 1907 = 6 Cr. L. J. 108.**

(xi) *Commitment on evidence recorded by Magistrate from whose file case was transferred.*—It is open to a Magistrate to commit an accused on evidence recorded by another Magistrate from whose file the case was transferred under s. 528. S. 350 applies to such a case, **26 A. 315.**

12. Sessions Judge must forthwith examine the record of commitment.—Sessions Judges shall carefully examine the record of each case committed, in order to satisfy themselves that Magistrates have carried out the requirements of the law, and the instructions issued by the Judicial Commissioner. This should be done immediately on receipt of the record, so that it may be at once returned to the committing Magistrate to supply the deficiencies, if there are any, *Oudh Cr. Dig.* at *p.* 10.

13. When Court of Session can discharge without trial.—It is only when the charge attributes acts which do not constitute an offence that the Court of Session can discharge without a trial. But in all other cases, where a prisoner has once been committed for trial on a certain charge, the Court of Session is bound to require him to plead to the charge, however insufficient the evidence may appear to be. Where the order of commitment rests upon a misapprehension and there is no evidence upon which it could be supported, the High Court alone can, under this section, set aside the order and quash the commitment, **Weir II, 262**

14. Court of Session has no power to remand case committed for further evidence.—A Court of Session to which a case may be committed for trial has no power to remand it to the committing Magistrate for the cross-examination of the prosecution witnesses whose cross-examination may have been reserved by the accused for the Sessions Court, **Weir II, 260.**

15. Order quashing commitment if amounts to discharge.—Primary effect of the order quashing commitment is to supersede any action taken by the Magistrate under section 210 of this Code and his proceedings subsequent thereto, and in such a case it is necessary for the Magistrate to go back to the point at

(vi) *Commitment of approver before trial of other accused liable to be quashed*—There may arise cases in which owing to the absconding of the offenders the trial of an approver who may not have complied with the conditions of pardon will appear to be necessary or expedient and in such cases the result of the trial of the principals may not be waited for But still as a general rule the provisions of s. 337 must be complied with and ordinarily in every such case he should be examined as witness and until he has been so examined, his trial for any offence connected with the one in respect of which pardon has been granted should not take place In **14 A. 336**, the Allahabad High Court in a murder case, quashed the commitment of an approver made before the completion of the trial of the principal offenders charged with the murder

(vii) *Commitment in the absence of or without notice to the accused liable to be quashed*—A commitment based on evidence recorded in the absence of the accused is illegal, **Weir II, 259**; it is illegal to make an order of commitment in the absence of the accused **5 C. W. N. 110; 6 M. 372**, *see* also Note 10 to s. 213 But *see* **12 C. L. R. 120**

(viii) *Committing two accused for reason that one or other of them is guilty*—Where a Magistrate by the same committal order commits two sets of accused on the ground that one or other of them is guilty of the murder of a boy, the commitment is illegal **17 M. L. J. (S N) 46**

(ix) *Commitment made under the mistaken view that the Magistrate has no jurisdiction to try*—When a Magistrate committed a case under s 147, I P C, owing to a mistaken view of a High Court Circular which he thought prevented him from trying the case, the commitment was quashed **24 C 429.**

(x) *Commitment on the request of the accused.*—The committal of an accused to the Court of Session either on his own request or because the case has created sensation in his community or on the ground that the amount involved is large, is not proper and is liable to be set aside by the High Court. **23 Bom L. R. 223.**

11. What are not proper grounds for quashing a commitment—

(i) *That the committing Magistrate had no territorial jurisdiction*—If the commitment is valid on the face of it a Sessions Judge cannot refer the case to the High Court simply because the accused were not British subjects and the offence with which they were charged was committed out of British India He should dispose of the case according to law Should he, after taking evidence, find that he has no jurisdiction over the accused by reason of their being foreign subjects and the offence being committed in foreign territory he must discharge the accused **Ratanlal 922.** A commitment ought not to be quashed for want of territorial jurisdiction on the part of the committing Magistrate unless a failure of justice has in fact been caused **7 Bur. L. T. 26 = 15 Cr L. J 270** *See* also **16 B. 204, 26 M. 640.** The facts that the committing Magistrate had no territorial jurisdiction over the place in which the alleged offence was committed and that the Sessions Judge did not quash the commitment under s 532 even though objection was taken prior to commitment, were *held* to be no grounds for setting aside the conviction of the Sessions Court, **17 M. 402** *See* Notes under s 531

(ii) *That the committing Magistrate was not duly empowered*—*See* s 531 and Notes 2 to s 207

(iii) *That the committal has been made after a previous discharge*—Where a Magistrate after examining four witnesses for the prosecution discharged the accused and subsequently, on becoming aware that there was a fifth witness present cancelled his order of discharge, took further evidence and committed the accused for trial to the Court of Session, *held* that the commitment was good, **7 M. H. C. R. App. XL** Similarly a commitment by a Presidency Magistrate on fresh evidence was held legal although the accused may have been discharged by another Presidency Magistrate and the order of discharge had not been set aside **8 C. W. N** [illegible]

Judge to order a retrial is not a defect of law for which the High Court would quash the commitment under this section

(v) *Filing of regular suit to establish genuineness of document is no ground for quashing commitment*—The fact that a regular suit has been filed to establish the genuineness of a transaction is not sufficient to enable the High Court to quash a commitment regularly made by a Subordinate Judge to the Sessions Court or to direct the trial to be adjourned pending the hearing of the civil suit or appeal thereon, **15 B 511; 31 C. 858.** But it was *held* in **Weir II, 260** that where a complaint of forgery of a document has been dismissed by

the day fixed on account of some delay in the service of the summons. In such a case it was *held*, the Magistrate was bound to make a further attempt— the first being a nominal one only—to secure the attendance of the absent witness, **4 A. 53.**

8. **Deciding as to credit to be attached to evidence before hearing.**—It is not open to a Judge to decide on the credit to be attached to the evidence of a witness before he had an opportunity of hearing it. By doing so he simply exceeds the discretion given to him by law, **19 M. 375; 6 B. L. R. Appx. 65 = 15 W. R. 7.**

Bond of complainants and witnesses.

217. (1) Complainants and witnesses for the prosecution and defence whose attendance before the Court of Session or High Court is necessary and who appears before the Magistrates, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

Detention in custody in case of refusal to attend or to execute bond.

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

Notes.—1. Witnesses whose attendance is necessary.—It is not necessary for the Magistrate to bind over every witness who is examined before him. He is only bound to bind over those whose evidence is material to the case. It is always open to the accused or the Sessions Judge to procure the attendance of such of the Crown witnesses as have been examined at the preliminary inquiry and who do not appear at the trial. **1883 A. W. N. 37.**

2. **Binding of medical witnesses.**—The attention of Magistrates is called to s. 509, Cr. P. C., and they are informed that a committing Magistrate should not, except for some special reason, bind over a medical witness, whose evidence he has taken to appear in the Sessions Court. It is very undesirable that medical men in the districts should be taken away from their dispensaries more frequently or for a longer period than is absolutely necessary.—*Bom. H. C. Cr., p.* 18.

3. **Witnesses cannot be asked to furnish sureties.**—Under this section, Magistrates have no jurisdiction to call for bonds with sureties, nor have they power to require recognisances from defence witnesses who have never appeared before them. A complainant who withdraws from his charge after commitment, will forfeit his recognisance, **2 W. R. 57.**

Commitment when to be notified.

218. (1) When the accused is committed for trial, the Magistrate shall issue an order * to such person as may be appointed by the Local Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

Charge, etc., to be forwarded to High Court or Court of Session.

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

English translation to be forwarded to High Court.

(1) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

Note.—Completion of the record of commitment.—A committing Magistrate is bound to make his record complete, if he fails in the first instance to get all the necessary evidence down, he should discover his own mistake when he is preparing the calendar, and if he thus made the order of commitment under s. 213 he

* *See* Sch. V, Form XXVII.

which he took cognisance of the complaint. The order does not amount to discharge and no fresh complaint is necessary **A I R 1929 Cal 756 (F B)**

216. When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself to appear before the Court to which the accused has been committed

Summons to witnesses for defence when accused is committed

Provided that where the accused has been committed to the High Court the Magistrate may, in his discretion leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly

Refusal to summon unnecessary witness unless deposit made

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied may refuse to summon the witness (recording his reasons for such refusal) or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses

Notes—1 Refusal to summon witnesses for defence.—A Magistrate is not justified (except on grounds of vexation delay etc) in refusing to summon witnesses named for the defence merely because the evidence appears to him (the Magistrate) not to be material or reliable **Weir II, 263** A prisoner is entitled as a matter of right to have any witnesses named in the list he delivers summoned and examined, **23 W. R 86; 2 W. R 6; 3 W. R 36** The Magistrate must deal with the application for summonses and not merely direct it to be filed **6 C. W N. 548** *See* Note 1 under s. 213

2 **Reasons for refusal must be recorded.**—When he does refuse he must record his reason for such refusal They must show that the witnesses not material Simply saying that the reasons assigned for the [illegible]

to be summoned again to meet fresh evidence given subsequent to the defence being closed **6 C 716 = 8 C. L. R 70**

3 **When such order is improper**—An order by a Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused though legal should be passed very sparingly and is an improper order in a case in which the accused is unable or unwilling to deposit money, and the result is that he is convicted without his witnesses being heard, especially if the case is one in which severe sentence is inflicted **7 P. R 1898**

4 ***A Magistrate cannot inquire into the nature of defence***—*Proviso 2 of this section is not intended* to enable the Magistrate to inquire into what the defence of the accused person is to be, and to consider whether on learning the nature of the defence he is absolutely to abstain from summoning the whole of the witnesses cited by the accused **3 C. 573 = 2 C. L. R 62**

5 **Magistrate ought to fix the amount to be deposited**—Though a Magistrate is at liberty under this section to decline to summon the person named in the list when the prisoner declines to satisfy him that they are material witnesses, yet he ought to fix the amount which he considers necessary to defray the cost of the attendance of the persons named and intimate to the prisoner his readiness to issue summonses on that amount being deposited **4 M H C. R 81** The amount may include not only the process fee but also travelling and diet allowances of and all other proper expenses such as the fee of experts.

6 **A Magistrate cannot order deposit money to be credited to Government.**—A Magistrate has no jurisdiction to order a sum of money deposited (for the expenses of witnesses), for the refund of which an application is made to be credited to Government **6 M H C. R. Appx IX**

7 **A Magistrate is bound to re summon absent witness, when absence is due to delay in service of summons.**—The last proviso is clearly inapplicable where a witness, though once summoned, failed to appear on

Specific name of offence sufficient description.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and the section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

(6) In the Presidency towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out

(7) If the accused* "having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence," the fact, date and place of the previous conviction shall be stated in the charge. If such statement† "has been omitted," the Court may add it any time before sentence is passed.

Illustrations.

(*a*) *A* is charged with the murder of *B*. This is equivalent to a statement that *A's* act fell within the definition of murder given in ss. 299 and 302 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to s. 300, or that if it did fall within exception I, one or other of the three provisos to that exception applied to it.

(*b*) *A* is charged, under s. 326 of the Indian Penal Code, with voluntarily causing grievous hurt to *B* by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by s. 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(*c*) *A* is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that *A* committed murder, or cheating, or theft, or extortion, or adultery or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must in each instance, be referred to in the charge.

(*d*) *A* is charged, under s. 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Notes.—1. For forms, *see* Schedule V, No. XXVIII. *See* s. 75, I.P.C., and s. 4 of the *Whipping Act*, 1909, Appendix III as to when previous conviction affects punishment.

2. What is a charge?—A charge may be defined to be a written document containing the description of the offence which the Court, either in an inquiry or trial, finds *prima facie* proved by evidence before it to have been committed by the accused, so as to require him to defend himself. In spite of the definition in s. 4 (*c*), the Code uses the term throughout as the statement of a specific offence and not as indicating the entire series of offences of which a prisoner is accused, **8 B. 200.** One count charging each separate offence and describing it with a reasonable degree of certainty is sufficient, **5 W. R. 7.** *See* **9 A. 525.**

* The words in inverted commas were substituted by Act XVIII of 1923.

† The words "has been omitted" were substituted for the words "is omitted" by Act XVIII of 1923.

can still take further evidence under s. 219 without any order from the Sessions Judge.—*Pun Cr, Chap LIV para 11 A, p 235, Oudh Cr Dig, p 10*

Power to summon supplementary witnesses.

219. (1) * "The committing Magistrate or, in the absence of such Magistrate any other Magistrate empowered by or under section 206" may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial and bind them over in manner herein before provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall, "† be given to the accused free of cost"

Note — We have given effect to the suggestion of the Calcutta High Court that powers under s. 219 should only be exercised by Magistrates who are empowered to commit for trial.' (*Report of Select Committee*)

Notes —1 Directing committing Magistrate to take additional evidence after commencement of trial is illegal —After a Sessions trial has commenced, the Sessions Judge can only cause witnesses to be summoned before himself or under certain circumstances have them examined by commission. He has no authority to direct the committing Magistrate, or any other person to call additional witnesses and hold an inquiry Such Magistrate's authority ceases with the commencement of the trial **29 P. R. 1888** But *see* **6 C. 714 = 8 C. L R 70** as to power of Magistrate to record evidence at any time after commitment but before commencement of trial, under s 540 If additional evidence is recorded under this section an opportunity should be given to the accused to cite witnesses to meet such evidence. *See* also **8 A 668.**

2 Proper course for taking evidence after commitment.—If on receiving the order of commitment a Sessions Judge in view of Magistrate's recorded opinion thinks that further evidence should be taken, the proper course is to point out to the committing Magistrate that he could summon and examine any supplementary witness who could give evidence and bind them over under s 219 to appear at the trial, and not to send the case to the Magistrate after the conclusion of the trial and the opinions of the assessors have been taken, **4 P. R 1892.**

3 Preliminary inquiry to be full and complete —Where there is nothing to show that the committing Magistrate had declined to record any evidence offered for the prosecution the High Court *held* that s. 215 did not empower it to quash the commitment but it directed the Magistrate to act under this section by taking full examination of persons acquainted with facts even where the accused had confessed **Ratanlal 842**

4 Copies to be given free of cost.—Under s. 35 of *the Court Fees Act* VII of 1870 copies of the evidence of witnesses given to an accused person under this section are exempt from Court fees —*Government of India Notification, 21st January* 1886

Custody of accused pending trial. Act of 1875, s. 26.

220. Until and during the trial the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant, to custody

Note —As to bail, *see* Chap XXXIX, and as to place of imprisonment, s. 541

CHAPTER XIX

OF THE CHARGE

Form of Charges

Charge to state offence.

221. (1) Every charge under this Code shall state the offence with which the accused is charged

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* The words "The committing Magistrate ... section 206" were substituted for the words "the Magistrate" by Act XII of 1923

† The words "be given ... free of cost" were substituted for the words "if the accused so requires be given free of cost" to him by Act XVIII of 1923

It is not enough to know that there was embezzlement at some time before, during or after the period charged, because the charge was framed under the special provisions in s. 222 (2) and it is at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named in the charge or some part of it committed within the space of one year, **17 C. W. N. 470 = 14 Cr. L. J. 210.**

13. Sub-sec. (2) does not cover cheating or falsification of accounts.—The alteration in law made by para. 2 of this section does not apply to a charge under s. 477-A, I.P.C. It applies only to criminal breach of trust or dishonest misappropriation of money, **26 C. 560; 41 C. 722; 13 A. L. J. 1059; 4 Bom. L. R. 433.** Similarly, a charge of *cheating* relating to the sum-total of different items, about 26 in number, said to have been taken by the accused on false representations from the complainant on different occasions is contrary to law. Such a charge is not justified by this section and a conviction on such a charge cannot be upheld, **1 A. L. J. 599.** *See* Notes 7 and 8 to s. 234.

14. Charge for criminal misappropriation how to be framed when several persons are implicated.—Where two persons are implicated in a case of criminal misappropriation or breach of trust with respect to a certain sum of money, the charges against them are of misappropriation in one case and of abetment in the other. It is also open to the Court to frame the charges against each of them in the alternative, *i.e.*, of misappropriation or of abetment, **16 C. W. N. 800 = 13 Cr. L. J. 566.**

223. When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

When manner of committing offence must be stated.

Illustrations.

(*a*) *A* is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(*b*) *A* is accused of cheating *B* at a given time and place. The charge must set out the manner in which *A* cheated *B*.

(*c*) *A* is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by *A* which is alleged to be false.

(*d*) *A* is accused of obstructing *B*, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which *A* obstructed *B* in the discharge of his functions.

(*e*) *A* is accused of the murder of *B* at a given time and place. The charge need not state the manner in which *A* murdered *B*.

(*f*) *A* is accused of disobeying a direction of the law with intent to save *B* from punishment. The charge must set out the disobedience charged and the law infringed.

Notes.—1. Particular in charges of unlawful assembly, rioting and under s. 149, I.P.C.—*Common object.*—In every charge of rioting and unlawful assembly, the common object must be set out in the charge, **22 C. 276; 26 C. 630; 11 C. 106** and a conviction of rioting on a charge which does not state the common object is liable to be set aside, **3 C. W. N. 605; 33 C. 295;** but as the offence of rioting can be legally described by its specific name and the question whether any further particulars are necessary under s. 223 must be a question of discretion in each case, **39 C. 781,** but where there is evidence on the record to show what the common object was and the accused have not been prejudiced the conviction will not be bad, **21 C. 827; 9 C. W. N. 599; 38 P. W. R. 1907,** if the variance between the common object charged and the common object found is material the conviction will be set aside, **36 C. 865,** but if not material the conviction will not be set aside, **37 C. 340; 35 C. 384.** In every charge under s. 149, I.P.C., it is absolutely necessary that the common object must be set out:—'There is no specific name for the offence and the fact that any offence is committed in prosecution of the common object is of the essence of the case and there could be no conviction for any offence committed with a different common object. It is therefore obligatory to set out the common object in a charge under s. 149 unless it has been already specified in the main charge under s. 147,' **39 C. 781.** The accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company, **11 C. 106.** The omission to mention the common object in the charge-sheet does not necessarily vitiate the trial **17 Cr. L. J. 92 = 32 In. Ca. 684 (C.).**

3. Drawing up charges not governed by English authorities as to indictments.—As respects the framing of charges, the Courts in this country are governed by the provisions of the Code which are not and do not purport to be an exact reproduction of the English rules as to indictments, and indeed were expressly framed in such a manner, as to give no room for merely technical objections not going to the merits of the case, **32 M. 384.** *See* also **32 M. 3** and **19 C. W. N. 72 = 16 Cr. L. J. 41.**

4. Charge under I P.C. how to be drawn up—Sections 221, 222 and 223.—If the law does not give the offences (*e g*, offences under ss 124 A and 153 A, I P.C.) any specific name, then under s. 221 (3), so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged Then under s. 222 the charge must contain particulars as to the time and place of the alleged offence and under s 223, when the offence is such that the particulars in ss. 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose *Per* WALLIS J in **32 M. 384, p. 393.** The charge of an offence under the I P C should be drawn up in the words of the section defining the offence, **5 C. P. Cr. 18.** The models of charge given in Sch. V, contain or imply the setting forthwith reasonable particularity of the matters alleged to constitute the offence, **2 B. 142 at p. 144.**

5. Cases where no charge need be framed joint trial of warrant and summons-cases.—*See* ss 177 (2) 242 and 263 *See* **29 C. 431,** Note 3 under s 225 and Note 3 to s. 233. Where a warrant-case and summons-case are tried together at one trial, the trial of the two together forms only one case and not two and as the case relates to an offence punishable with more than six months' imprisonment, it is a warrant-case. The fact that it relates to some other offence also does not alter its nature and so formal charges ought to be framed for both offences Thus, where the accused had committed the offences of mischief and insult on two different occasions, charges of the two offences could not be tried together, as they did not form parts of one transaction within the meaning of this section, **3 L. B. R. 113 = 3 Cr. L. J. 350.**

6. Useless details must not be inserted.—A common fault in the framing of charges is the insertion of useless details It should be remembered that nothing, which is not essential to the offence, should be included in the charge, except such details of time and place as are sufficient to give the accused notice of the matter with which he is charged It is unnecessary for instance, to specify in a charge of murder the weapon with which the murder was committed In prosecutions for giving false evidence under ss. 193, 194 and 195 I P C., the particular statements alleged to be false must invariably be set out in the charge, to enable the accused to fully understand the offence with which he stands charged—*C P Cr Cir., Part II, No* 18. Unnecessary allegations may be treated as surplusage, **4 Bom. H. C. R. 17.**

6-A. In a charge under s. 120, I P Code of having agreed to do a series of illegal acts, it is not necessary that the charge should give all the details of the specific acts the conspirators had agreed to do, **6 Rang. 6**; so also Rioting is an offence with a specific name and it is sufficient to describe that offence by that name only, **221 (2) Cr. P. C. 55 Cal. 879 = 29 Cr. L. J. 823.**

7. Accused entitled to know exact value of charge made against him.—An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, and unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in case where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company, **11 C. 106.** *See* also **22 C. 276; 391 at p. 402** and **4 C. W. N. 195; 42 C. 957.** Thus in **Ratanlal 529,** the accused was summoned for storing wool and was convicted of storing cotton. *Held*, that the conviction could not be upheld as the accused had no proper notice and no proper opportunity of answering the charge of storing cotton. Similarly, where the accused is liable to be punished under *the Whipping Act*, the charge must state the liability, **5 M. 158.** *See* also **17 C. W. N. 419 = 14 Cr. L. J. 212; 12 C. W. N. 577.** An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him. But where the accused fully understood the nature of the offence with which they were charged they had clearly not been prejudiced by the omission of the words "unlawfully and maliciously" and "in British India" occurring in section 4 (*b*) of Act VI of 1908. Such an omission can be cured by the verdict. *The Queen* v. *Manslow*, **(1895) 1 Q. B. 758,** *referred to*, **42 C. 957.**

But where in a charge of cheating, the manner of the cheating was set out to be "by deceiving with false representations and promises as well as by conduct," held that the expressions used were too vague and indefinite to give the accused proper notice of the manner of the cheating and was so dangerously wide as

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Effect of errors.

Illustrations.

(*a*) *A* is charged under s. 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that *A* was in fact misled by this omission the error shall not be regarded as material.

(*b*) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge, or is set out incorrectly. *A* defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(*c*) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge. There were many transactions between *A* and *B* and *A* had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in this case, a material error.

(*d*) *A* is charged with the murder of Khoda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haider Baksh, and the date of the murder was the 30th January, 1882. *A* was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haider Baksh. The Court may infer from these facts that *A* was not misled, and that the error in the charge was immaterial.

(*e*) *A* was charged with murdering Haider Baksh on the 20th January, 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January, 1882. When charged for the murder of Haider Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haider Baksh. The Court may infer this that *A* was misled and that the error was material.

Notes.—1. Error or omission in stating the common object in a charge of rioting or unlawful assembly.—In **22 C. 276**, a man *E* was charged with "joining an unlawful assembly knowing that it was likely that force would be used, and in which force was used, and the death of one *N* caused by a blow of a *lathi* on his head in taking away mangoes from a garden in charge of *N* and thereby committing an offence punishable under ss. 304 and 149, I.P.C." The unlawful common object necessary to sustain a charge under s. 149 was not specifically mentioned in the charge. At first the common object was to take mangoes from the garden in charge of *N*, but as the proceedings developed, the object changed to one to injure *N*. In his charge to the jury the Session Judge referred to both these objects though only one had been set out in the charge. The jury returned a verdict of guilty. On appeal to High Court the conviction was set aside as it was impossible to say which of the two common objects had been accepted by the jury, and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not an opportunity of meeting. But it was *held* that the omission to state correctly the common object of unlawful assembly by a Judge in the charge to a jury does not vitiate the trial by such omission has not in any way prejudiced the accused in their defence, regard being had to the provisions of this section. Again where the accused was charged with rioting with a specified common object they cannot be convicted of that offence committed with another common object, that being an offence in respect of which they have had no opportunity of defending themselves, **27 C. 990; 2 C. L. J. 516.** The essence of the offence defined by s. 114, I.P.C., is the common unlawful purpose, and an accused person cannot be convicted, if the common object proved is different from the common object charged.—*Per* SANKARAN NAIR, J., **6 M. L. T. 17; 40 C. 168.** But when the difference is only slight and the accused has not been prejudiced the conviction is good, **35 C. 384.** *See* also **11 C. 106; 22 C. 391** and **36 C. 158.** It is not a general proposition of law that a conviction under s. 147 of the Penal Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land and, thereby to forcibly oust them, but the common object established by the facts found by the Sessions Judge was to maintain possession of the land by the accused. *Held*, that the

Property—Where the common object is alleged to be to take possession of certain property, the property must be specified, 33 C. 295. *See* Notes under ss. 235 and 239

2. Particulars in a charge of perjury.—Charges of perjury should contain a distinct assertion with regard to each statement intended to be characterised as perjury, that it was made, that it is untrue in fact, and the accused knew it to be so when he made it, **9 W. R. 54.**

(*i*) *Date must be given*—The charge should disclose the exact date on which the offence was committed, **16 W. R. 47; 7 B. L. R. Appx. LXVI.**

(*ii*) *Court*—The Court or other officer before whom the offence was committed must be specified, **16 W. R. 47.**

(*iii*) *Stage of the judicial proceeding*—The particular stage of the judicial proceeding should be specified, **1 B. L. R. Appx. XIII; 10 W. R. 37.**

(*iv*) *Exact words of the statement alleged to be false must be set out in the charge*—*See* **23 W. R. 28; 5 W. R. 71; Rataulal 152; 9 W. R. 14 and 25; 38 C. 808; 1 L. B. R 268** Where the charge was "you on or about the 7th May, 1904, at *L* gave false evidence in a judicial proceeding, namely, in a case under s. 133, I P C. and thereby committed an offence punishable under s 193,' it was *held* that the charge was vague and the conviction set aside, **10 C. W. N. 1099 = 4 Cr. L. J. 227 = 4 C. L. J 558.** But compare **13 C. W. N. 685 (P C.)** where it was stated that the whole evidence of a witness was a tissue of falsehood and it was *held that the charge did* not admit of being formulated in a series of specific allegations of perjury but the gist of the accusation was sufficiently clear to the accused.

3. Charge of attempt to cheat.—Where a charge under ss 417 and 511, I P C., was silent both as to the person upon whom the alleged attempt to cheat was made and also as to the manner in which it was intended by the accused to influence the conduct of that person and these omissions were not remedied until the close of the prosecution *held* that the omission was a somewhat serious defect and placed the accused at a considerable disadvantage in the conduct of his defence, **8 C. W. N. 278.**

4. Charges under s. 124-A, I P.C., for seditious writing or speeches—Where an offence under s 122 A, I P C, is alleged to have been committed by words spoken, then the charge is defective if it does not set out the speeches or words alleged to be seditious. As the accused has not been prejudiced the defect was held not to vitiate the charge, **32 M. 3.** But the actual words need not be set out, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, that is, if the charge states the words used with substantial, though not absolute accuracy *Per* WALLIS and BENSON, JJ, **32 M. 354.**

SANKARAN NAIR, J, *contra*, *held* that where the charge under s. 124 A, I P C, is for exciting disaffection of bringing His Majesty into hatred, the culpability consists in the disastrous consequences brought about by the words of the accused and the charge need not set out the words nor need the words themselves be proved as the gist of the offence in that case would be exciting disaffection, not the uttering of seditious words and the speaker may be guilty, even though his words may be innocent or uttered in a sense different from that in which they were understood by the audience But where the charge is for attempting to create disaffection the facts to be proved by the prosecution are entirely different. The section shows that a person must (*a*) speak or write certain words and (*b*) by such words *attempt* .. and to judge whether the words are seditious, it is essential that the words themselves used by the speaker must be proved, otherwise it would be impossible for him to know what he is to defend. Therefore, in that case, as the words written or spoken are the gist of the offence, they ought to be set out in the charge, and those words themselves, whether set out or not must be proved Attempt implies intention. It is not enough, therefore, that a person writes certain words. He may write a seditious pamphlet and keep it locked up in his drawer He has not thereby committed an offence Similarly, it is not enough that he entertains an intention to excite disaffection, to bring him within the scope of the section The offence constituted by it requires an act coupled with a distinct intention. A man's intentions must be gathered from the words used by him, not by what others rightly or wrongly understood him to mean. Whether the words spoken are seditious or not, is a matter of law to be determined by the Judge and should not be left to the judgment of witnesses and, for the Court to judge whether the words are seditious, it is essential that the words themselves alleged to have been used ought to be set out in the charge and must be proved. If the words be not in the English language, it must be set out in the spoken language *verbatim* with an English translation.

2. **"Without charge."**—These words will apply not only to the case in which there is no charge at all, but also to the case in which there is no charge in respect of such offence as the Sessions Judge or Clerk of the Crown may think the prisoner ought to be tried for, **B. 8200.** In **27 M. 54** it was pointed out that no charge need be framed when a commitment is made under s. 436 or under s. 526 (i)—(iv).

3. **Sessions Court has no power to expunge a charge altogether.**—When an accused person is committed to take his trial on specific charges before the Sessions Court, the Judge has no power under this section to expunge a charge before calling on the accused to plead to it, **7 C. L. R. 143.**

4. **Power of Sessions Judge to add charge at any stage.**—The combined effect of ss. 226 to 231 is to confer a very wide jurisdiction upon the Court of Session. At the beginning of the trial, if the Judge finds that the Magistrate has omitted to frame a charge, he may supply the omission and frame the charge that is made out on the evidence recorded by the Magistrate. If the charge framed by the Magistrate is imperfect or erroneous, the Judge may alter or add to the charge having regard to the offences disclosed in the evidence recorded by the Magistrate. Again, if in the course of the trial evidence is recorded which shows that the offences are different in character from those charged or that other offences also have been committed, the Judge may alter the charge or add to the charge and include the offences so disclosed. The material on which the Judge acts under s. 226 is the evidence recorded by the Magistrate and under s. 227 is the evidence recorded by himself in the course of the trial. Either under s. 226 or s. 227 charges for different offences may be added to the original charge and ss. 228 to 231 do not imply that this power is limited in any way. The provisions for adjourning the trial, for directing a new trial, for recalling witnesses and even for obtaining sanction to the prosecution indicate very clearly that there need not necessarily be any connection between the added charge and the original charge. But the added charge must be for an offence made out by the evidence recorded before the Magistrate, s. 226 or by the evidence recorded by the Judge in the course of the trial, s. 227; and secondly the accused must not be prejudiced and the trial on the added charges must not contravene the provisions of ss. 233 and 239, **16 Cr. L. J. 573** where **8 B. 200** and **11 Bom. H. C. R. 278** are referred to with approval; **3 M. 351** is *distinguished;* and **8 A. 665**; **32 C. 22** disapproved, *see* **28 C. W. N. 561.**

(*a*) *Is the power of Sessions Court to add a charge limited by s.* 193?—The "addition" of a charge when not supported by evidence before the committing Magistrate, is not merely an error of procedure, but an improper assumption of jurisdiction, although such charge may arise out of the same circumstances as the charge on which the accused has been committed. The object of restricting a Sessions Court from taking cognisance of any offence (except as provided in ss. 480, 477 and 478) unless the accused person has been committed by a Magistrate, is to secure to the prisoner a preliminary inquiry which affords him an opportunity of becoming acquainted with the circumstances of the offence imputed to him and enables him to make his defence, **3 M. 251; 8 C. W. N. 784; 32 C. 22,** but *see* **8 A. 665** and judgment of SCOTT, J., in **8 B. 200.**

(*b*) *Must the added charge be cognate to the charge on which committed?*—Where a Sessions Judge altered a charge under ss. 417 and 511, I.P.C., into one under ss. 420 and 511, I.P.C., in that the accused attempted to cheat a Loan Office and convicted him, *held*, that the conviction must be set aside as there was no complaint by the Loan Office but that the prosecution was instituted by a person in respect of a different matter having no concern with the Loan Office and as the Magistrate did not commit the accused with reference to an offence committed against the Loan Office. The Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment. Matter not covered by the charge before the Court cannot be made the subject of an additional charge, **32 C. 22; 20 P. W. R. 1900 = 11 Cr. L. J. 131.** Where a Session Judge added a charge of an offence which although it arose out of the same circumstances, was distinct from that for which the accused had been committed to take his trial; and inasmuch as the charge so added could not be supported by the evidence taken by the Magistrate and a witness not examined at the preliminary inquiry by the Magistrate was for the first time examined by the Sessions Court, and, on her evidence alone, the conviction on the added charge was based. *Held*, that the conviction was bad as the action of the Judge in adding the charge was *ultra vires*, and was not merely an error of procedure but an improper assumption of jurisdiction, **3 M. 351.** *See* also **31 B. 218; 21 C. 97; 3 N.-W. H. C. R. 337; 28 C. W. N. 561.**

5. **When committed for an offence against A, it is illegal to add a charge of offence against B.**—It is not open to a Sessions Judge in a committal of the accused for the offence of the murder of *A* to add a charge

common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was therefore, bad, 36 C. 865. *See* 11 P. W. R. 1915 = 16 Cr. L. J. 334, Note 9 under s. 223 as to defects in a charge of conspiracy

But in a Bombay case it is decided that the omission in a charge to state a common object of an unlawful assembly is not fatal to the trial, where it is specified in the complaint and found by the Court, 23 Bom. L. R. 497.

Duty of Appellate Court—Where a charge, as drawn up by the Magistrate, alleges several alternative common objects of the unlawful assembly, it is incumbent on the Appellate Court to determine whether it is sustainable and, if so which of the common object stated has been made out, 25 C. 718. But when the common object is mentioned in the charge but there is no finding as it was not disputed, the conviction is good, 28 C. 158.

2. Test as to whether accused had been prejudiced.—In determining whether any error, omission or irregularity has occasioned a failure of justice, the Court should have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings and to the manner in which the accused person has conducted his defence. It is for the Court to decide whether the accused has been misled, 10 B. H. C. R. 373, 42 C. 957. *See* also 32 M. 3; 25 B. 90; 32 M. 334, cited in Notes 4 and 5 to s. 223 where defective charges were held to be cured by this section. *See* also 10 B. 124 Where the charge was that the accused had committed criminal breach of trust in respect of certain deeds but the accused was convicted of embezzling not the deeds but the amount obtained by them, *held* the conviction was bad 12 C. W. N. 577 = 7 Cr. L. J. 372

3. In joint trial of warrant and summons-cases separate charge should be framed for the summons-case also.—Where a person is being tried on a charge framed for a warrant case if it is intended to try him on a summons-case as well the offence in the latter case should also form a portion of the charge. Any omission in this respect, prejudicially affecting the accused in his defence in the summons-case would make the conviction in respect thereof bad, 29 C. 431. *See* Note 5 at p 624

4. Duty of Magistrate when charge found to be defective.—A charge of house-breaking with intent to commit theft broke down, but the Magistrate convicted the accused finding that he had another object the High Court quashed the conviction and *held*, that where it appeared that there was another object, it was the bounden duty of the Magistrate to have given the accused notice of that, by drawing up a charge clearly stating what it was that he was accused of doing 41 C. 743.

Procedure on commitment without charge or with imperfect charge.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges

Illustrations

1 *A* is charged with the murder of *C*. A charge of abetting the murder of *C* may be added or substituted

2. *A* is charged with forging a valuable security under s 467 of the Indian Penal Code A charge of fabricating false evidence under s. 193 may be added

3. *A* is charged with receiving stolen property knowing it to be stolen During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under s 235 of the Indian Penal Code cannot be added

Notes.—1. Signification of the word "charge."—In the Code generally the word "charge" is used as the statement of a specific offence and not as indicating the entire series of offences of which a prisoner is accused There is nothing in the Code to indicate that the word is to have a different construction in ss. 226 and 227 from what it has in other section *Per* SARGENT, C.J., and BAYLEY, J., 8 B. 200. The word "charge" is used in the Code both as indicating the whole series of counts or heads of charge, and also as indicating a charge of one specific offence. In s. 227 it is used in the latter sense. *Per* SCOTT, J., 8 B. 200 The latter construction was evidently approved by the Legislature when the word 'or add to' were added in s. 227 by the 1898 Code, 18 Cr. L. J. 573 (Sindh) *See* definition of charge s. 4 (c).

amendment has been found to be necessary, should also form part of the record, **1 Agra 87.** *See* also **17 B. 869** as to the alteration of a major offence (dacoity) which is extraditable into a minor offence (theft) which is not extraditable. *See* Note 4 to s. 226 as to the power of the Sessions Court to add a charge during the trial.

2. **Section does not warrant the striking out of a charge to cure an illegality when the mischief has been done.**—Where a person was charged with and tried for four offences committed all within a year, it is not open to a Magistrate purporting to act under this section to strike out one of the charges and convict the accused on the remaining three. Although the words of this section are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment yet the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed and after the mischief which the Legislature intended to guard against had been done, **29 M. 569; 49 M. L. J. 93.**

3. **When the additional charge would prejudice the accused, it should not be added.**—While the law empowers a Sessions Judge to add a charge at any time before judgment is delivered, he must in doing so exercise a sound and wise discretion. Where therefore in a Sessions trial, after the prosecution case had been closed and defence witnesses examined, the Judge suddenly added a grave charge like *dacoity*, proceeded with the trial without even granting an adjournment and convicted the accused on the newly-added charge, *held*, the Judge had altogether failed to exercise a proper discretion, **6 C. W. N. 73.** The accused was committed to the Court of Sessions on the specified charge that he gave false evidence in his deposition before the Sessions Judge. In the Sessions trial, the Judge added a charge of giving false evidence by reason of the alleged contradictory statements, *i.e.*, one before a Magistrate under s. 164 and another before a Sessions Judge. The trial was confined to proving in evidence the two statements alleged to be contradictory, and the accused was acquitted. *Held*, reversing acquittal and ordering re-trial, that the accused was prejudiced, inasmuch as he had no notice, until the new charge was added, that he would have to meet the charge of making contradictory statements and he was at an obvious disadvantage in defending himself against that charge either by cross-examining the Magistrate, who was called as a witness for the Crown, or by calling witnesses to show that what he said before the Magistrate had been misunderstood or had otherwise been incorrectly recorded, **1899 A. W. N. 39.** Where an accused was tried twice under s. 409, I.P.C., and the Judge in the third trial added a charge under s. 447-A, I P.C. *Held*, that he had not exceeded his powers under the law, **26 C. 560** and *see* Note 8 to s. 226. But where the accused was committed to the Sessions on charges under ss. 363 and 366, I.P.C., and at the late stage, after the prosecution case had closed and the defence evidence recorded, the Court of its own motion added a charge under s. 498, I.P.C., and convicted the accused on all three charges. *Held*, that the procedure followed by the Sessions Judge was not regular. The additional charge framed at the stage it was framed was prejudicial to the accused, and therefore the conviction under s. 498, I.P.C., was set aside and a re-trial ordered on the other charges, **31 B. 218.** *See* also **29 C. 415** which *follows* **5 A. 233.** An accused would be seriously prejudiced by the addition of a charge under s. 143, I.P.C., to charges under ss. 426 and 451, I.P.C., **16 Cr. L. J. 737 (M.)**, *see* **26 C. W. N. 344.**

4. **Application for alteration when to be made.**—The application for alteration of the charge should be made immediately after the charge has been read and explained by the Magistrate, **27 C. 839 (F.B.).** Such an application should be considered at once and not deferred until the conclusion of the trial before the Sessions Court, **16 B. 414.**

(*i*) *Alteration of charge after verdict.*—On a trial by jury the Sessions Judge has no power to alter the charge after the delivery of the verdict, **5 B. H. C. R. Cr. Ca. 9.** These words "*return of verdict*" mean return of the final verdict which the Judge is bound to record, **8 B. 200,** nor has he power to do so after the assessors have given their opinion, **17 Cr. L. J. 454.**

(*ii*) *Alteration after presentation of petition of compromise.*—Where a Court has drawn up a charge of an offence compoundable without sanction of Court and this charge having been read and explained to the accused has been pleaded to, that Court should upon the presentation to it of a petition of composition, at once accept the petition and acquit the accused and has no power to alter the charge already drawn up, **29 P. R. 1914 = 16 Cr. L. J. 81.**

5. **Effect of omission to read out and explain additional charge.**—When the accused is defended and his counsel is present in Court the omission to read out and explain the additional charge is an irregularity which unless it has prejudiced the accused does not affect the result of the trial, **8 B. 200.** *See* also **7 C. 96; 9 M. 61.**

under s. 326, I P C., for causing grievous hurt to *E*, 20 P. W. R. 1909 = 11 Cr. L. J. 131. Where a person was charged with having caused hurt to one person but was convicted of having hurt another person, the conviction was set aside, 14 C. W. N. 259. But in 8 A. 653 such an addition was *held* to be a mere irregularity which had not prejudiced the accused Three persons were committed to the Court of Session two of them were charged with culpable homicide not amounting to murder of *J*, and the third with abetment of the offence. At the trial the Sessions Judge added a charge against all the accused of causing of hurt to *C*, and convicted them both upon the original charges and the added charge The assault upon *C* took place either at the same time as, or immediately after, the attack which resulted in the death of *J* *Held*, that the case did not come within the terms of the section, and the adding of the charge was an irregularity but as the accused were not prejudiced in their defence, the High Court declined to interfere, 8 A. 665.

6. Application of evidence taken upon charge under one section to a wholly different offence.—Three persons were charged under s. 372, I P C, and also separately under s. 109 of the same Code After their commitment, but before the commencement of the Sessions, supplementary evidence was incorporated in the case as to the age of the minor At the commencement of the trial, the Sessions Judge was asked to allow a charge of abetment of rape to be entered founded upon that additional evidence—evidence taken only after the Sessions had commenced, and after the Judge at the trial had drawn attention to the fact that the original depositions contained no evidence of age whatever *Held*, that under the circumstances of the case it would not be right to include the charge of abetment of rape, or apply the evidence taken upon a charge under one section to a wholly different one, 21 C. 97.

7. Dismissal of complaint by Magistrate is no bar to Sessions Judge's adding new charge.—Where new heads of charges are proposed to be added before the Sessions Judge, the fact that a complaint regarding them was made to and dismissed by a Magistrate is no bar to the Sessions Judge's adding them.—*Per* TELANG, J., 16 B. 414.

8. Adding a fresh charge at the third trial.—Where an accused was tried twice under s. 409, I P C and acquitted and the Sessions Judge in the third trial added an entirely new charge under s. 477 A, I P C., the High Court observed "We think that it is doubtful whether on the former reference the parties ever contemplated that under the order of the Court an entirely new charge might be framed but looking to the terms of the order we cannot say that the Magistrate and the Sessions Judge overstepped the limits of their powers." Anyhow the charge newly framed was held irregular, though not absolutely illegal, 26 C. 560 at p. 563.

9. Power of otherwise altering the charge.—The power to alter ought to be used with great caution 6 B. H. C. R. Cr Ca. 76 and discretion 6 C. W. N. 72. The Sessions Judge might withdraw a charge which he himself has framed and added to those already sent up by the committing Magistrate, 12 A. 531. Or the omission on the part of the Magistrate to frame a charge so as to contain a separate head for each offence may be remedied by the Sessions Judge, 7 W. R. 8; but not after delivery of the verdict, 5 B H. C. R. Cr. Ca. 9 He could also substitute charge of abetment for the substantive offence 11 B. H. C. R. 278. *See* also 8 C. 450 = 10 C. L. R. 421 as to the circumstances under which the Sessions Judge could amend the charge.

Court may alter charge

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

Notes.—1. Addition of charge at the trial.—If the word "*alter*" is to be taken to include "*addition*" the addition must be an addition to some specific charge in the nature of and alteration and not the addition of a new charge, 8 B. 200. *Contra, see* 9 A. 525, where it was *held*, that on a trial upon charges under ss. 467 and 471 of the I P C., the Court had power, under this section, to add a charge under s. 113 of the I P C., upon which the prisoner had not been committed for trial *See* also 3 N.-W. P. H. C. R. 337 and 8 A. 655. The conflict of decisions found in these rulings has now been removed by the words "or add." Amendment in a charge ought to be made formally and should appear on the face of the record, 9 W. R. 14 and whenever a Sessions Judge may see cause to amend a charge the reasons for such amendment, or at all events a statement that such

6. **'Alter' includes 'withdrawal' of charge.**—The word "*alter*" includes withdrawal by the Sessions Judge of a charge added by him to the charge on which the commitment was made, **12 A. 551.** But it does not warrant the striking out of a charge for the purpose of curing an illegality which had been committed, as for instance when a person is charged with and tried for four offences committed in the same year, to strike out one of the charges and convict the accused on the remaining three, **29 M. 569.**

7. **Power to add charge is not limited by the terms of the certificate under s. 188.**—Once a certificate has been granted, the Court has power to add any charges arising out of the facts, **33 A. 514** and *see* Note 11 to s 188

8. **Duty of Magistrate when altering charge.**—When a Magistrate amends the charge he should not write over the original charge, but should leave it on the file for reference, if necessary and should write the new charge separately and correctly date it, **8 Bur. L. T. 17 = 16 Cr. L. J. 2.**

When trial may proceed immediately after alteration

228. If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

When new trial may be directed, or trial suspended

229. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary

Notes.—1. New trial may be waived.—Where the accused was not called on to plead to a new charge but his counsel, on being asked, did not require a new trial it was *held* he was not prejudiced by the omission, **8 B. 200.** *See* also **5 M. 20** and **11 B. H. C. R. 278,** but if the trial itself is illegal, no waiver on the part of accused can cure the illegality, **20 M. L. J. (Sh. N.) 1.**

2. **Where new trial directed, evidence at the old trial cannot be referred to unless put in.**—Where a new trial has been directed, under this section, the Magistrate holding the new trial is not justified in referring to the former record as a whole but only to such portions of it as have been especially put in evidence before him, **7 C. L. R. 193.**

3. **Proceeding to trial immediately on amendment of charge.**—Where the original and amended charges were so nearly related that the trial might be deemed to have been a trial on the amended charge from the commencement and where no objection was raised by the pleader of the accused as to the admissibility of the confession of a co-accused on the original charge, *held* that the prisoner was not prejudiced, **11 B. H. C. R. 278.** *See* also **1914 M. W. N. 382 = 15 Cr. L. J. 622.** Where, however the new charge would raise different question of law or would admit of a different defence on the facts the Court should always act under s. 229, **6 B. H. C. R. Cr. Ca. 76.** *See* **6 C. W. N. 72.** *See* also **31 B. 218** *referred to* in Note 3 to s. 227

Stay of proceedings if prosecution of offence in altered charge require previous sanction.

230. If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Note.—No fresh sanction necessary for a different offence on the same facts.—This section incorporates, **11 B. H. C. R. 34.** The expression '*on the same facts*' is important. Thus where prosecution of a Sub-Registrar was sanctioned for offence under ss. 468 and 417, I.P.C., and the Sub-Registrar was convicted under ss. 468 and 109 of *the abetment of forgery for the purpose of cheating*, and it was contended that the conviction cannot stand as there was no sanction for the abetment. *Held*, that the original sanction covered the new charge, as the charge of abetment was based on the same facts for which sanction had been granted, **30 C. 905.**

amendment has been found to be necessary, should also form part of the record, **1 Agra 67.** *See* also **17 B. 869** as to the alteration of a major offence (dacoity) which is extraditable into a minor offence (theft) which is not extraditable. *See* Note 4 to s. 226 as to the power of the Sessions Court to add a charge during the trial.

2. **Section does not warrant the striking out of a charge to cure an illegality when the mischief has been done.**—Where a person was charged with and tried for four offences committed all within a year, it is not open to a Magistrate purporting to act under this section to strike out one of the charges and convict the accused on the remaining three. Although the words of this section are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment yet the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed and after the mischief which the Legislature intended to guard against had been done, **29 M. 569; 49 M. L. J. 93.**

3. **When the additional charge would prejudice the accused, it should not be added.**—While the law empowers a Sessions Judge to add a charge at any time before judgment is delivered, he must in doing so exercise a sound and wise discretion. Where therefore in a Sessions trial, after the prosecution case had been closed and defence witnesses examined, the Judge suddenly added a grave charge like *dacoity*, proceeded with the trial without even granting an adjournment and convicted the accused on the newly-added charge, *held*, the Judge had altogether failed to exercise a proper discretion, **6 C. W. N. 73.** The accused was committed to the Court of Sessions on the specified charge that he gave false evidence in his deposition before the Sessions Judge. In the Sessions trial, the Judge added a charge of giving false evidence by reason of the alleged contradictory statements, *i.e.*, one before a Magistrate under s. 164 and another before a Sessions Judge. The trial was confined to proving in evidence the two statements alleged to be contradictory, and the accused was acquitted. *Held*, reversing acquittal and ordering re-trial, that the accused was prejudiced, inasmuch as he had no notice, until the new charge was added, that he would have to meet the charge of making contradictory statements and he was at an obvious disadvantage in defending himself against that charge either by cross-examining the Magistrate, who was called as a witness for the Crown, or by calling witnesses to show that what he said before the Magistrate had been misunderstood or had otherwise been incorrectly recorded, **1899 A. W. N. 39.** Where an accused was tried twice under s. 409, I.P.C., and the Judge in the third trial added a charge under s. 447-A, I P.C. *Held*, that he had not exceeded his powers under the law, **26 C. 560** and *see* Note 8 to s. 226. But where the accused was committed to the Sessions on charges under ss. 363 and 366, I.P.C., and at the late stage, after the prosecution case had closed and the defence evidence recorded, the Court of its own motion added a charge under s. 498, I.P.C., and convicted the accused on all three charges. *Held*, that the procedure followed by the Sessions Judge was not regular. The additional charge framed at the stage it was framed was prejudicial to the accused, and therefore the conviction under s. 498, I.P.C., was set aside and a re-trial ordered on the other charges, **31 B. 218.** *See* also **29 C. 415** which *follows* **5 A. 233.** An accused would be seriously prejudiced by the addition of a charge under s. 143, I.P.C., to charges under ss. 426 and 451, I.P.C., **16 Cr. L. J. 737 (M.)**, *see* **26 C. W. N. 344.**

4. **Application for alteration when to be made.**—The application for alteration of the charge should be made immediately after the charge has been read and explained by the Magistrate, **27 C. 839 (F.B.).** Such an application should be considered at once and not deferred until the conclusion of the trial before the Sessions Court, **16 B. 414.**

(*i*) *Alteration of charge after verdict.*—On a trial by jury the Sessions Judge has no power to alter the charge after the delivery of the verdict, **5 B. H. C. R. Cr. Ca. 9.** These words "*return of verdict*" mean return of the final verdict which the Judge is bound to record, **8 B. 200,** nor has he power to do so after the assessors have given their opinion, **17 Cr. L. J. 454.**

(*ii*) *Alteration after presentation of petition of compromise.*—Where a Court has drawn up a charge of an offence compoundable without sanction of Court and this charge having been read and explained to the accused has been pleaded to, that Court should upon the presentation to it of a petition of composition, at once accept the petition and acquit the accused and has no power to alter the charge already drawn up, **29 P. R. 1914 = 16 Cr. L. J. 81.**

5. **Effect of omission to read out and explain additional charge.**—When the accused is defended and his counsel is present in Court the omission to read out and explain the additional charge is an irregularity which unless it has prejudiced the accused does not affect the result of the trial, **8 B. 200.** *See* also **7 C. 96; 9 M. 81.**

Held, the conviction was wrong, as the offences were distinct and should have formed the subject of separate charges and the accused had been materially prejudiced by the omission of those charges, **30 C. 288.** When a Court draws up a charge under s. 325 read with s. 149, I P C., it clearly intimates to the accused persons that they did not themselves cause grievous hurt to anybody, but that they are guilty by implication of such offence, inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. Therefore when these accused persons are acquitted of rioting, *obviously all the offences, which they are said to have committed by implication disappear and the defence* cannot be called upon to answer to the specific offence of causing grievous hurt simply because it may have appeared in the evidence, **16 C. W. N. 1077 = 13 Cr. L. J. 502.** *See* also **18 C. W. N. 1276 = 15 Cr. L. J. 704; 18 C. W. N. 1274 = 16 Cr. L. J. 42** and **41 C. 662.**

3. **Accused prejudiced.**—In **8 C. 211**, the charge being defective and in exact as regards the second and third clauses of the definition of murder, s. 300, I P C., the High Court set aside the conviction and sentence for murder, but convicted the prisoner on his own confession and the evidence of two other persons under s 3.d, I P C. *See* also **30 C. 288** and **7 C. W. N. 74.** But where the accused had been convicted of an offence under *s. 211, I P C., instead of the abetment of that offence, the High Court in revision refused to interfere, as there was* no prejudice, **7 C. W. N. 556.**

4. **Vagueness in charge of perjury.**—For a case where a conviction for perjury was set aside on account of the vagueness of the charge, *see* **10 C. W. N. 1099 = 4 C. L. J. 558 = 4 Cr. L. J. 227.** *See* Note 2 under s. 223

5. **Charge of one offence and conviction for another is bad.**—The accused was summoned to answer *a charge of storing wool, but on his godown being inspected at his request, some loose cotton was found there.* He was convicted for storing cotton contrary to the Act. *Held*, reversing the conviction and sentence that the accused had no proper notice, and no proper opportunity of answering the charge of storing cotton **Ratanlal 529.** When two accused were charged under s. 324, I P C, and one charge was framed against them that they voluntarily cause hurt to *B S* and *L* by a *dao*, a cutting instrument, and one of the accused was convicted of using a *lathi* against two of the persons, the conviction was set aside, **17 C. W. N. 419 = 14 Cr. L. J. 212** and *see* Notes 1 and 3 under s. 225

Joinder of Charges

Separate charges for distinct offences

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234, 235 236 and 239

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion *A* must be *separately charged and separately tried for the theft and causing grievous hurt.*

OBJECT OF SECTION.

Notes.—1. Necessity for separate charge for each offence.—This section contains the general law and the reason of it is that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon the different charges resting upon different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges, **7 A. 174 at p. 177.** *Per* PETHERAM, C.J "The charge" says JACKSON, J, in **21 W. R. 72 at p. 82.** "I take to be *first* a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself, *second*, it is an information to the Court which is to try the accused, of the matters to which evidence is to be directed." The object of s. 233 is two-fold —in the first place to give an accused person notice of the charges which he has to meet, in the *second*, to see that he is not embarrassed by having to meet charges in no way connected with one another *Per* BEACHCROFT, J, in **19 C. W. N. 872.** The rule is 'separate trials.' Joint trial is only by virtue of the exceptions quoted in s. 233. The basis of the rule is that the accused should not be prejudiced by being accused of several things at once, **15 B. 491.** *See* also **25 M. 61,** as to the necessity for this salutary rule.

APPLICATION OF SECTION.

2. **Section does not apply to preliminary inquiries.**—Sections 232 and 233 relating to joinder of charges refer to the *trial of the accused. The Privy Council Ruling in* **25 M. 61 = 28 I. A. 257** cannot be extended to preliminary inquiries held by committing Magistrates, so as to render the commitment itself illegal, because

231. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition any witness who may have been examined; and also to call any further witness whom the Court may think to be material.

Recall of witnesses when charge altered.

Note.—Charge altered after commencement of trial—accused not allowed to re-examine, effect of.—*Held* that where after the evidence of the prosecution a charge was framed and after the evidence for the defence was concluded, the Magistrate altered the charge without giving an opportunity to re-examine the witnesses or to produce further evidence for the defence, it was entirely illegal on the part of the Magistrate to order commitment under the circumstances; and it was set aside by the High Court, **22 A. L. J. 233.**

232. (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge, or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

Effect of material error.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence, under s. 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that *A* had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that *A* had no such knowledge, it shall quash the conviction.

Notes.—1. Scope of the section.—Apart from the general powers given to an Appellate Court to order a re-trial under s. 423 (1) (*b*), this section gives an Appellate Court or High Court power to direct a retrial on the ground that the accused has been misled in his defence by the absence of a charge or a defect in the charge. Where certain owners of land were convicted under ss. 154 and 155, I.P.C., for acts or omission on the part of their agents, but the charges framed by the Magistrate referred only to the knowledge or belief and acts or omissions of the accused themselves and not of their agents; and on appeal the Sessions Judge was of opinion that by reason of the omission to insert the word "*or their Agents or Managers*" in the charges, the accused had been seriously prejudiced in their defence, *held* he was competent to set aside the conviction and order a retrial under this section, **7 C. W. N. 301.** *See* also **29 C. 431.** This section applies as well to cases in which the conviction was in compliance with the terms of the law as to cases in which the conviction was irregular, **118 I. C. 323 = A. I. R. 1912 Pat. 712.**

2. Conviction for an entirely different offence when there is no charge framed for it is bad.—A complaint was lodged against one *G* for offences under ss. 499, and 471, I.P.C. At the trial, evidence was directed principally to the charge under s. 471, and at the close of the trial the Magistrate suddenly turned round and convicted the accused under s. 499, although there was no charge of that offence before him. On appeal, the Sessions Judge, not finding sufficient evidence to establish that offence, ordered under s. 423 (1) (*b*), a new trial. *Held*, on revision, that this section rather than s. 423 (1) (*b*) applied and the order of the Judge for new trial was proper. But as there was nothing on the record to show that any valid charge could be preferred against the accused, further proceedings in the matter should be stopped, **28 C. 62.** On appeal, the Appellate Court has, under this section, power to order a new trial of a case. The accused was charged with criminal breach of trust under s. 406, I.P.C., in respect of amount deposited with him as security. The Magistrate found that the accused misappropriated the security money and convicted him both under s. 406 and 420; I.P.C., *held*, that the conviction under s. 420, I.P.C., to which the accused was not called on to plead was illegal, **9 Cr. L. J. 405 (M.).** Where a Magistrate charged and convicted the accused of *rioting*, the Sessions Judge on appeal acquitted them on this charge, but convicted them of *house-trespass* and *hurt.*

should have been drawn up in identical terms for the three offences under s 379, I P C., yet as in the one charge framed the three offences had been kept separate and were distinguished by the letters (*a*), (*b*), (*c*), the error in framing one charge was an error in form rather than in substance and as such did not amount to an illegality but was a mere irregularity curable under s. 537 unless it was shown that the accused had been prejudiced or that a failure of justice had been occasioned in consequence thereof, **11 C. W. N. 54 = 4 Cr. L. J. 415,** where **10 C. W. N. 53 = 3 Cr. L. J. 141** and **33 C. 232** are *distinguished*. *See* also **1907 A. W. N. 208 = 6 Cr. L. J. 215.** Three separate but similar complaints of cheating were laid against the accused by three persons but only one charge was framed setting out only one offence of cheating in respect of all the three complaints and the accused was convicted *Held* that the Magistrate should have drawn up three charges and if he had done so there was no obstacle to the disposal of all three cases at one trial. As, however, the accused had not been prejudiced the error was cured by s. 537 The defect was one of duplicity not of misjoinder and the case was not covered by **25 M 61 (P C.), 41 C 66.** Only one charge was framed in respect of the hurt caused to two persons and the accused convicted, but it was held (FLETCHER, J, *dissenting*) that the irregularity was cured by s. 537 and that the case of **25 M. 61 (P C.)** was not an authority for the proposition that failure to observe the first part of s. 233 is fatal to the trial, **19 C. W. N. 972 = 15 Cr. L. J. 641.** There is no doubt that according to the general principals a duplicity of the charge is not allowed. The indictment must not be doubted that is to say, no one count of the indictment should charge the accused with having committed two or more offences for instance with having committed murder and robbery or the like But where the offence charged whether felony or misdemeanour is one single act, it may be made the subject of a single count. So the indictment may charge the prisoner in the same count with felonious acts with respect to several persons, as in robbery with having assaulted *A* and *B*, and stolen from *A* one shilling and from *B* two shillings, if it was all in one transaction (see *Archbold's* 1910, p 75.) *Per* SHARFUDDIN, J., in **19 C. W. N. 972 = 16 Cr. L. J. 641.** Reference was also made *R* v *Giddins*, **1842) Car. and Mar. 634** *R* v *J A Thompson*, **(1914) 2 K. B. 99.** It is better to have too many charges than to have too few and once a charge has been framed it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of the charges **8 Pat. 289.**

JOINDER OF CHARGES.

8. Though any two out of three charges may stand together, it does not follow that all the three may be tried together.—Although the first (s 409, I P C.) and the second (s. 477 A) charges could properly be tried together as forming part of the same transaction under s. 235 (1), and the second and third charges (s. 477 A) could likewise be tried at one trial under s 234 *non constat* that all the three are triable simultaneously The joinder of three must be brought within the scope of ss. 234, 235, 236 or 239 and when there is nothing to justify the joinder of the third charge with the first, *ergo* the first charge cannot be tried along with the third and either the first or the third must go and the whole trial is invalid, **40 C. 318.**

9. What offence cannot be jointly charged against the same person.—

(i) *A substantive offence and abetment thereof cannot be jointly charged against the same individual.*—An accused can no more be charged as an abettor as well as a perpetrator of the offence abetted not in the alternative but cumulatively, then he can be charged with an *attempt* to commit an offence and the commission of that very offence, **24 M. 523 at p. 547.** *See* also judgment of DAVIES, J in **25 M. 61 and 42 C. 957**

(ii) *A thief cannot be charged with theft and disposal of stolen property*—The real thief cannot be charged with offences under ss. 379 and 215 I P C., **14 Bar. L. R. 67; 12 Cr L. J 72 (Sindh).**

(iii) *A murderer cannot be charged with causing evidence to disappear by concealing the corpse* s. 201 I P C.—**7 W. R. 52; 8 Bom. H. C. R. 126, 2 A 713; 6 C. 789; 7 A. 749; 8 A 252; 22 C. 633; 27 M 271; 8 Bom. L. R 533 = 4 Cr. L. J. 89.**

10. What are not distinct offences.—The mere fact that only a single act was committed does not necessarily mean that only one offence has been committed.

(i) *Making number of false statements in one deposition is one offence*—The making of any number of false statements in the same deposition is one aggregate case of giving false evidence and that charges of false evidence cannot be multiplied according to the number of false statements contained in the deposition, **38 C. 603** *following* **6 Mad. H. C. 27.**

(ii) *Filing three forged documents simultaneously is one using*—When three forged receipts are filed at one time with a written statement in three different cases, on three different occasions, and there was nothing to show that any of the documents had been used at any other time, *held* that it is one using only, and

there was misjoinder of offences or offenders in the preliminary inquiry. *See* **35 M. L. J. 259.** It is open to the Sessions Judge to frame separate charges and try separately as if there had been two commitments, **26 M. 592; 17 Cr. L. J. 369; 7 Bom. L. R. 457,** but this procedure is not calculated to advance justice. *Per* SESHAGIRI AYYAR, J., in **29 M. L. J. 101 = 18 M. L. T. 95 = 16 Cr. L. J. 593 (F.B.).** *See* Note 7 to s. 215 and Note 7 to s. 229.

3. **Does the section apply to security proceedings under Chapter VIII?**—The law as to joinder of charges against a person accused of definite offences has no application to an inquiry under s. 110, **11 C. W. N. 789 = 6 Cr. L. J. 1; 11 Bom. L. R. 740 = 10 Cr. L. J. 375,** but *see* Notes 39—41 under Heading VI to s. 123.

4. **Section applies to summons-cases where no charge is framed.**—The accused were tried and convicted for an encroachment on a grazing ground. It was found that each of the accused cultivated a separate piece of land and that they did not all join together to cultivate the same piece in common. The question being raised as to whether the section applied to a summons-case in which no formal charge was necessary; *held,* that a charge is an essential element in any trial and if the provisions as to joinder of charges do not apply to summons-cases, there are no other provisions of law to guide Magistrates, **3 L. B. R. 52 = 2 Cr. L. J. 739 (F.B.).** In a summons-case, it is not necessary to have a charge embodied in writing but none the less this section applies to summons-cases also; so also when an accused is charged with a summons-case and a warrant-case, **3 L. B. R. 113 = 3 Cr. L. J. 350.** The fact that the trial has taken place in a summons-case does not exclude the application of s. 233, **41 C. 694** *following* **3 L. B. R. 52 (F.B.) = 2 Cr. L. J. 739.** *See* also **(1912) 1 M. W. N. 69 = 13 Cr. L. J. 124,** where it was *held* that each levy of excess toll constitutes a separate offence which should be tried separately.

5. **Section does not affect simultaneous trial of cross-cases.**—*See* **8 C. W. N. 344** where **25 M. 61 (P.C.)** and **13 C. L. R. 275,** are distinguished and Notes under Heading VI to s. 537 and Note 9 to s. 239.

SEPARATE CHARGE FOR EACH DISTINCT OFFENCE.

6. **What is a distinct offence?**—"I understand, when two offences have been committed and each of these two offences has no connection with each other they are distinct offences. The section does not say 'for every offence' but 'for every distinct offence.' The illustration to the section indicates the meaning of 'distinct offence.' In the illustration, the two offences were committed on two different occasions, one was theft and the other was grievous hurt." *Per* SHARFUDDIN, J, in **19 C. W. N. 972 = 16 Cr. L. J. 641.** *See* also Notes under Heading III to s. 36.

7. **Separate offences ought not to be lumped together in a single charge.**—Three separate offences not of the same kind, should not be lumped together in a simple charge, but each offence should form a separate head of charge with reference to which there should be a distinct finding and a distinct sentence, **3 N.-W. P. H. C. R. 314.** Though several offences are charged under the same section, the Magistrate should frame the charge so as to contain a separate head for each offence, **7 W. R. 8; 11 A. L. J. 183 = 14 Cr. L. J. 116.** The joinder in one charge of two distinct offences (two acts of extortion), though arising out of the same transaction is an illegality fatal to the trial. **10 C. W. N. 55 = 3 Cr. L. J. 141.** Two distinct offences of criminal breach of trust (s. 409, I.P.C.) ought not to be included in one charge, **17 C. W. N. 147.** *See* also **10 C. W. N. 520 = 2 C. L. J. 618 = 3 Cr. L. J. 111** where *distinguishing* **27 B. 135,** a joinder in one charge of two attempts to cheat committed on two different dates, one following the other was held to vitiate the whole trial, and so also though offences committed on the same date. In **6 C. L. J. 757 = 6 Cr. L. J. 442** two persons were charged in one charge for misappropriation of three sums of money collected in accordance with their duty from three persons and convicted; the conviction was set aside though the Judges disapproved of the length to which the rule in the **25 M. 61 (P.C.)** was carried, as the accused had in fact been prejudiced. So, too, where theft and escape from lawful custody are joined, because none of the sections referred to in this section will cover such a case, **3 L. B. R. 221 = 4 Cr. L. J. 369; 1 L. B. R. 361.** In **13 C. W. N. 1067 = 10 Cr. L. J. 469** the accused was charged with cheating and one charge alleging delivery of property on three different dates was framed and held to be bad and the conviction was set aside. In **40 C. 846** the trial of the accused on one charge with misappropriating a sum of money made up of two sums collected on different dates was held to be an illegality. *See* also **18 C. W. N. 183.** Where, however, under an agreement made with the concurrence of their pleaders, the accused were tried for three offences committed against three different persons on the same date and forming part of the same transaction and one charge was framed against them instead of three, and it ran thus :—"That you on or about the 3rd day of July at *B* committed theft of paddy from the fields of (*a*) *S. D.*, (*b*) *J. P.*, (*c*) *L. P.* and thereby committed an offence under s. 379, I.P.C., etc." *Held* that although strictly speaking, three separate charges

12. Alternative charge for making contradictory statements but one offence.—Conviction for intentionally giving false evidence may be had upon an alternative charge though the false statement had been made in one deposition This section does not affect the matter *Per* WILSON and TOTTENHAM, J (NORRIS, J, *dissenting*), **10 C. 937.** An alternative charge is not a charge of two offences, but of one, **13 B. L. R. 324 = 21 W. R. 72.** Now *see* s. 236 and Note 17 thereto

13. Joinder of charge in cases of bribery—s. 161, I.P.C.—Each distinct act of receiving an illegal gratification must form the subject of a separate charge except in cases falling under ss. 234 and 235, *see* **25 M. 61.** It is illegal to try in one and the same trial, eight distinct charges of offences under s. 161, I.P.C., **7 A. L. J. 19 = 11 Cr. L. J. 51.** Where a bribe was collected from certain inhabitants of a village by subscription and handed over to the recipient in a lump-sum, it was *held* the recipient could not be charged under s 161, I.P.C., with the receipt of the whole sum collected, but that he must be charged in respect of not more than three separate items constituting the total collection and that the ruling in 26 M. 61 applied, **1904 A. W. N. 223.** Again, where an accused person attempts to cheat a whole body of villagers and speaks to them in a body and not to each individual villager for the purpose, it was *held* he may be tried in one charge for each attempt to get money from them, **10 C. W. N. 520 = 2 C. L. J. 618 = 3 Cr. L. J. 111.**

Where however, certain sums of money were collected from landholders of various villages and where paid in the case of each village in a lump-sum by the persons who collected them to the accused, a Zilladar in the Irrigation Department, with the object of inducing the accused to show favour in his official capacity to each village as a whole and the accused was charged and convicted in respect of such a lump-sum under s 161 I P C., and it was contended that the offence under s. 162, I P C., was in respect of every item of money contributed by various persons and the actual charge against him of having received a certain lump-sum of money from the landholders of a village so and so is illegal on two grounds, (1) that it ignores the fact that the offence was the doing of something in his official capacity for the benefit of each individual landholder who subscribed to the fund and (2) that the Court had thereby joined a number of perfectly distinct offences into one general charge, *held* that the charge as framed was legal and correct, as the motive of the petitioner was to obtain sums of money from each village by promising to show favour to inhabitants of those villages generally (1904) **A. W. N. 223** *discussed*, **11 P. R. 1911 = 146 P. L. R. 1911 = 12 Cr. L. J. 317.** The question in each case is one of fact. Where, therefore, a Sub-Registrar was convicted on a charge that he attempted to obtain Rs. 2 from one *S* and six others as a motive for registering seven sale-deeds executed in their favour by *R* and it was contended that since *R* sold portions of his land to seven different persons by seven different sale-deeds and though they were presented for registration at the same time, and the accused refused to register them unless he was paid in the aggregate a sum of Rs. 14 at a rate of Rs 2 for each sale-deeds and this amounted to seven offences and having regard to s. 235 the accused could not be tried with respect to all of them at one trial *held* that whether the allegation in the charge amounted to seven offences is one of fact. If the accused attempted to obtain Rs. 2 separately from each of the seven purchasers and was willing to register any one purchaser's sale-deed if that purchaser paid him Rs. 2 then the contention of the accused should prevail. But if, on the other hand the Registrar treated this as one transaction and was not willing to register any one of the documents until all the seven purchasers have paid Rs. 2 each, that would be one offence and no question of misjoinder would arise, **13 C. W. N. 1052 = 10 Cr. L. J. 483.** *See* also **10 C. W. N. 520 = 2 C. L. J. 618 = 3 Cr. L. J. 111.**

14. What are distinct offences that cannot be tried together.—The following offences have been held to be distinct offences for which there should be separate charges and separate trials —

(*a*) Ss. 167 and 466, I P C., **8 C. 450 = 10 C. L. R. 421.**

(*b*) Ss. 411 and 413, I P C., **8 C. 634 = 10 C. L. R. 466.**

(*c*) Ss. 380 and 411, I P C., **1 C. W. N. 35; 6 C. L. R. 245; 23 C. 10; 3 P. R. 1905,** or ss. 380 and 414, I P C., **6 Bom. L. R. 725,** or ss 395 and 412, I P C., **11 C. L. J. 182 = 11 Cr. L. J. 244.**

(*d*) Ss. 272 and 273, I P C., **12 M. 273.**

(*e*) Ss. 380 and 224, I P C., **3 L. B. R. 221 = 4 Cr. L. J. 339; 11 M. 441.**

(*f*) Ss. 411 and 450, I P C., **6. C. W. N. 550.**

(*g*) Ss. 409 and 479-A Three distinct criminal breaches of trust and three distinct falsification of account, **30 M. 328; (1911) 2 M. W. N. 538 = 13 Cr. L. J. 21,** and so also three distinct acts of criminal misappropriation and two distinct offences of forgery to conceal the two acts of criminal misappropriation, **30 A. 351, 33 A. 219.**

it is not necessary to frame three separate charges in respect of each receipt, **20 C. 413.** *See*, however, **14 C. L. J. 652 = 13 Cr. L. J. 62.**

(*iii*) *Receiving bribes in one lump.—See* Note 13 below.

(*iv*) *Receiving of properties stolen from different persons.*—When a person is charged with receiving on one occasion various items of stolen property, the result of several distinct thefts, he ought to be convicted of only one offence under s. 411, I.P.C., **3 Bom. L. R. 187**; unless it appears that articles for possession of which the accused is charged came into his possession at different times, the trial is not irregular on account of the fact that the articles were stolen from several persons at different times, **36 P. L. R. 1910.** *See*, however, **13 C. W. N. 418 = 9 Cr. L. J. 277** where *following* **11 C. W. N. 1128**, it was *held* that one trial for having been found in possession of stolen property belonging to two different persons and stolen at two different times is illegal. The case in **9 C. 371** was *held* to have been overruled by **25 M. 61.**

(*v*) *Misappropriation of several sums of money.—See* **29 M. 558; 7 A. L. J. 897 = 11 Cr. L. J. 442** and Note 9 under s. 234. Embezzlement of two separate sums on two different occasions in regard to the same individual is really only one offence, **14 C. 128.** A *Kyedangyi* having no authority to collect capitation tax collected the tax from three separate tax-payers, leading them to believe that he had authority from the *thugyi* to collect. After collection he paid over to the *thugyi* only a portion of his collection from each tax-payer and dishonestly misappropriated the remainder. *Held*, that he could not be punished for three separate offences of criminal breach of trust under s. 406, I.P.C., in the absence of any evidence to show that there were three separate and distinct acts of misappropriation, **1 Bur. B. L. 492.**

(*vi*) *Misappropriating several books of account is but one offence.*—When an executor in charge of an estate for several years was charged with having committed offences under s. 405, I.P.C., in respect of large number of account books of the estate which were found locked up in two boxes and it was contended that there was a separate offence in respect of each book and that the accused could not be tried for more than three of such offences *held*, such contention was untenable. They formed one set of books and may be regarded as one item of property which the accused was dealing in one way, **17 C. W. N. 479 = 14 Cr. L. J. 219.**

(*vii*) *Stealing several articles at one time.*—The stealing of several bullocks from the same herdsman at the same time is one offence, **(1881) A. W. N. 164.** *See* Note 6 (ii) and (iii) to s. 235.

(*viii*) *Receiving a bribe partly on one day and partly another is but one offence.*—**5 C. W. N. 332.**

(*ix*) *Separate acts committed under the Bombay District Municipalities Act constitute one offence only.*—In **4 Bom. L. R. 942**, accused owned a shop which was divided into four compartments, three of which were occupied by himself and the fourth by his tenant. To all these compartments was attached one continuous board which projected into the public street. The accused was charged and convicted under *the Bombay District Municipalities Act* of two offences, one for affixing a board to the portion in his own occupation and the other for affixing a board to the portion let out. *Held*, there was only one offence as there was only one board and the conviction was accordingly set aside and the case sent back for re-trial.

(*x*) *False information against several persons.*—False information in one statement to the Police that property would be found in the houses of two persons is one false statement, and the accused could be charged and convicted for only one offence, **13 C. 270.**

(*xi*) *Cheating a number of persons.—See* **10 C. W. N. 520.**

(*xii*) *Making a number of false entries to cover one defalcation.—See* **41 C. 722.**

11. Several dacoits cannot be charged and tried together.—Where the accused is alleged to have committed three if not four dacoities in the course of the same night and the charge against them was to the effect that they on or about the 12th of December committed dacoity at *Dabri* and thereby committed an offence punishable under s. 395, I.P.C.; *held* that the conviction was unsustainable, as the charge ought to have specified each alleged dacoity separately and the omission cannot be said to be a mere irregularity, even if the dacoities were all so connected together as to from part of the same transaction, **26 A. 195.** Accused cannot be charged at one time with more than three dacoities in all and the dacoities must be particularly specified, **1912 M. W. N. 49 = 13 Cr. L. J. 125.** *See* also **14 A. 502**, and **28 M. L. J. 381 = 16 Cr. L. J. 298.** In **7 P. R. 1901**, three accused were charged with three dacoities committed in a course of a single day and in addition one of them was charged with rescuing a prisoner from Police custody, with the murder of a constable and with taking part in the dacoity in which the constable was murdered; *held* that the joint trial was a mere irregularity curable by s. 537. This was before the Privy Council decision in **25 M. 61.** *See* later Rulings in **5 P. R. 1900; 17 P. R. 1903** and **16 P. R. 1901.**

SCOPE OF SECTION AND EXCEPTIONS.

17. When resort must be had to the rules laid down by s. 233 and when to the exceptions.—This Code requires that for every distinct offence of which any person is accused, there should be a separate charge and that every charge should be tried separately. This is a broad rule and applies to all trials for offences under the criminal law. In section 233 this rule is made subject to four exceptions. But a Court cannot and ought not to treat a case before it as an exception to the general and broad rule unless it is satisfied that in the case before it the charge should be brought within one of the four exceptions, and it would be safer if the Magistrate or the Sessions Judge showed in the charge-sheet or in his judgment that he had reason for briging the case before him under one of these separate sections, **11 A. L. J. 183 = 14 Cr. L. J. 116.** But the Legislature having specially empowered the Courts with large powers as regards joinder of persons and joinder of charges resort must be had to those powers. The object was clearly to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials and to join in one trial those offences with regard to which the evidence would overlap, **1 S. L. R. 73 = 8 Cr. L. J. 191.** However, even where several criminal acts can be included in the same transaction, no joinder of charges of trials should be permitted which will result in bewildering any of the accused, *ibid.* If in any case either the accused are likely to be bewildered in their defence by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence binding by its mere accumulation to induce an undue suspicion against the accused the propriety of combining the charges may well be questioned **15 B. 491**

18. Ss. 234 to 239 do not bar separate trial for each single offence.—The exceptions embodied in s. 234, etc., although authorising the combination of three charges at one trial does not bar the separate trial of the accused for each separate offence. So when the prosecution has made its election under s. 222, cl. (2) and the proviso thereto by choosing some out of the different amount misappropriated during the periods they are not stopped by the provisions of s. 403, from instituting any further prosecution in respect of any fresh itms covering the same period, **12 Bom. L. R. 228 = 11 Cr. L. J. 337; 16 Cr. L. J. 717 M.; 8 C. 481.** *See* Note 1 to s. 234 and Note 2 to s. 239 and Note 2 to s. 235

19. Are the exceptions mutually exclusive?—The words of this section do not favour the view that the exceptions mentioned are mutually exclusive. If it had been intended that section 235 (2) or s. 236 could not be made use of in co-operation with s 234 this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of s. 236 or s. 237 could never be invoked to prevent the miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under s. 234 It is difficult to believe that the Legislature intended that a joint trial of three offences under s. 234 should prevent the prosecution from establishing at the same trial, the minor or alternative degrees of criminality involved in the acts complained of. For these reasons the exceptions are not necessarily exclusive, and ss. 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year Where the exercise by the Court of the permissive powers conferred by these sections may produce embarrassment, the Court may decline to avail itself of its full powers. In this case, a charge was framed against the accused for an offence under s. 124 A, I.P.C., in respect of an article in his newspaper and also two other charges for offence under ss 124 A and 153-A, I.P.C., with regard to another article of a different date in the same paper were framed and the accused was tried at one trial and convicted and sentenced under each of the charges. It was contended that the trial was bad on the ground of his joinder of charges as none of the exceptions taken singly applied to the case and that the exceptions should be taken *singly* and not *cumulatively held*, that there was no irregularity in the trial on the ground of misjoinder of charges (**33 B. 77** *approved*) **33 B. 221.** In **32 A. 219,** however, the decision in 33 B. 221 was criticised and it was laid down that s. 235 (1) and s 234 are mutually exclusive, and that it would be straining the language of s. 234 beyond all bounds to hold that it covered all offences committed in the course of three similar but separate transactions when the number of offences was more than three The facts of the case were that the accused was charged and tried at one and the same trial for three offences of criminal breach of trust under s. 408, I.P.C., and three offences of forgery under s. 467, I.P.C., committed within a period of one year The accused was convicted and sentenced in respect of all the six offences It was contended in support of the conviction that s. 235 (1) must be read with s. 234, and that the three offences mentioned in the latter section must be deemed to include all the offences in three similar transactions such as are contemplated by s. 235 (1), but it was *held following* **25 M. 61 (P.C.)** that the trial was illegal *See* also **30 M. 323** and Note 12 to s. 234

(*g*-1) *Distinct acts of misappropriation.*—The accused was charged and convicted at one trial of offences under ss. 403 and 426, I.P.C., in respect of a large number of trees cut by him between March, 1909 to April, 1910; the evidence showed that the feelings took place on some eight or nine occasions and the charge did not allege that the various feelings so connected together as to form one transaction under s. 235; *held* that the conviction must be set aside even though no objection was taken at the trial, as the charge was framed contrary to the rule laid down by s. 233, **(1911) 2 M. W. N. 467 = 12 Cr. L. J. 567.**

(*h*) Three men *F*, *M* and *J* were sent up for trial under s. 392, I.P.C. Some stolen property was found in the possession of *F* and *M*. Soon after dacoity, other property such as locks and ball cartridges, which had no connection with the dacoity, was found in the possession of *J*., for which he was convicted under s. 379, I.P.C., and *the Arms Act*. *Held*, that the trial was irregular, and the defect was not cured by s. 537, **5 P. R. 1900.**

(*i*) *B*, *M*, *K* and *R* were jointly tried; *B* for receiving stolen property under s. 411, I.P.C., and the others for theft; *held*, that the joinder of charges was illegal and the conviction bad, **1 C. W. N. 35; 3 P. R. 1905.**

(*j*) Where fourteen persons charged with distinct offences under ss. 290 and 291, I.P.C., and were tried together, *held*, that it was an irregularity calculated to prejudice the accused, **5 M. 20.**

(*k*) *False evidence—Separate charge against each accused.*—In prosecutions for giving false evidence under s. 193, I.P.C., even arising out of the same case, the case of each person accused should be separately inquired into, and if committed for trial should be separately tried. It is wholly erroneous to include them in one joint charge, **5 A. 17; 6 M. 252; 10 C. 405, Ratanlal 31; 4 A. 293; 4 Bom. L. R. 38** and **53; 39 P. R. 1888.** The false evidence given by one witness is a transaction complete in itself and not connected with false evidence given by another witness even though in the same case and on the same point, **5 S. L. R. 129 = 13 Cr. L. J. 23.** Each act of giving false evidence is a separate offence, **3 M. H. C. R. Appx. XXXII**; unless a conspiracy is proved **4 Bom. L. R. 63.** But *see* **14 Bom. L. R. 982 = 1 Bom. Cr. Ca. 216 = 13 Cr. L. J. 833** and Notes 28 to s. 239. *See* also **21 C. W. N. 756.**

(*l*) Kidnapping a boy and assaulting the mother who went to demand the boy, **26 M. 454.**

(*m*) Ss. 454 and 325, I.P.C., **2 L. B. R. 19; 5 Bur. L. T. 101 = 13 Cr. L. J. 485.**

(*n*) Ss. 182 and 500, I.P.C., **37 C. 604.**

(*o*) Stealing certain articles and assaulting the owner who went to demand them, **14 C. W. N. 183.**

(*p*) A person accused of an offence under s. 3 of the *Gambling Act* III of 1867 cannot be tried with others charged under s. 4 of the same Act, **5 P. W. R. 1910 = 11 Cr. L. J. 211.**

(*q*) Where accused was tried for (*i*) abetment of falsification of a document, (*ii*) fraudulent destruction and secretion of the document and (*iii*) abetment of criminal breach of trust, the conviction was set aside for non-compliance with this section, **26 M. 125.**

(*r*) Joint trial of a person for abetment of criminal breach of trust and for offences under ss. 388 and 411, I.P.C., which were quite unconnected with the act of criminal breach of trust was held illegal, **5 C. W. N. 294.**

(*s*) Where the accused was charged under ss. 467 and $\frac{467}{511}$, I.P.C., and ss. 468 and $\frac{468}{109}$, I.P.C., in respect of an alleged forgery of a *Kabala* and under s. 82 of *the Registration Act* and ss. 467 and $\frac{467}{109}$ and s. 471, I.P.C., with reference to a mortgage bond, with an attempt to cheat, $\frac{420}{511}$, I.P.C., *held* the trial was bad for misjoinder of charges, **30 C. 822.** *See* also **2 P. R. 1905.**

(*t*) Offences under s. 125 of *the Railway Act* and under s. 225, I.P.C., **29 C. 585.**

(*u*) Ss. 380 and 245, I.P.C. Theft and receiving illegal gratification for the restoration of stolen property, **14 Bur. L. R. 67.**

(*v*) Where the accused were charged with murder and of causing grievous hurt while removing the dead body; *held* the offences were distinct, **10 P. R. 1906 = 4 Cr. L. J. 285.**

15. Joint trial of offences under ss. 124-A and 153-A, I.P.C.—For joinder of charges and trial of offences under ss. 124-A and 153-A, *vide* Note 13 under s. 284 and Note 19 below.

16. Court not ousted of jurisdiction by reason of same facts disclosing another offence not triable by it.—Where the same facts disclose two distinct offences triable by two different Courts, the two offences can be separately tried and the trial by one Court of the offence triable by itself is not illegal, **6 C. W. N. 550.**

(iii) *See* also the opinion of SIR HENRY PRINSEP, 8 P. R. 1905, the opinion of NAPIER, J, in 29 M. L. J. 101 = 16 Cr. L. J. 593 and the opinion of the majority in 19 C. W. N. 972 = 16 Cr. L. J. 641 as to the construction of 25 M. 61 (P.C.).

23. Illegality is not cured by failure of or striking out additional charges.—The defect cannot be cured by merely striking out the additional charges after the mischief which the Legislature intended to remedy had been done, 29 M. 569. Even if some of the charges illegally joined have failed and the accused have been acquitted of those charges, still if the joinder of those charges was in violation of the law, the accused must have been considerably embarrassed in their defence on the remaining charges and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial, if it was illegal *ab initio*, and the *conviction on the remaining charges must be set aside*, 33 M. 502.

Three offences of same kind within year may be charged together

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences * "whether in respect of the same person or not" he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law

† "Provided that, for the purpose of this section, an offence punishable under s. 379 of the Indian Penal Code shall be deemed to be an offence the same kind as an offence punishable under s 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence"

Note.—1. Scope of the section.—S 234 does not say that at most, a trial must be limited to three charges It says it must be *limited to three offences and that the offences must be of the same kind* The "offence" as defined by the Code itself, is the act or omission made punishable The offences in this case were two in number, namely, the publication of two articles on two different dates. This two offences were, as charged, punishable under the same section of the Indian Penal Code, and were, therefore, offences of the same kind The word 'section' in the above section is not invariably to be read as singular It is not the intention of the Code, either express or implied, to exclude from the operation of s. 234, an offence because it is made the subject of more than one charge Charging one act or series of acts under more than one section of the Indian Penal Code, is a proceeding provided for in s. 235 (cl. 2) and in s 236 and is also provided for in s. 71 I P C. The Court may charge an offence twice over under two different sections, but by so doing it cannot increase the sentence which may be imposed That principle is not offended by trying together separate offences for each of which there is more than one charge.—*Per* HEATON J S 234 of the Criminal Procedure Code does not apply to a single charge under s. 401, I P C., of belonging to a gang of persons associated for the purpose of habitually committing theft. The charge relates to one offence though based on evidence of several offences of theft. The gist of the offence under s. 401 is association for the purpose of *habitually* committing *theft* or robbery, 47 C. 154.

There is nothing in the Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the *Indian Penal Code, the section or sections in either case being the same, the joinder of the charges under those* sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind —*Per* CHANDAVARKAR, J, 32 B. 77 and *see* also 33 B. 221.

2. Section applies only to the trial of a single accused.—*See* Note 3 to s. 233. Two persons accused of offences under ss. 379 and 380 I P C., for committing theft of the same complainant's property in a building and of his paddy in a field on two successive days cannot be charged with and tried at one trial under s. 234, for both the offences, 20 C. W. N. 672 = 17 Cr. L. J. 224. But *see* 20 M. L. T. 236, 17 P. R. (1917) Cr. But as under the new amendment an offence under s. 379 and s. 380 I P C., are to be deemed to be offences of the same kind, it is submitted that 20 C. W. N. 672 is no longer good law *See* also cl. (c) of section 239, 48 A. 54. *See* also

* The words "whether in ... or not" were inserted by Act XVIII of 1923
† The proviso was added by Act XVIII of 1923

Where two girls were kidnapped by accused on different dates and they were sold to a person for money and the accused were tried for all offences together, *held* that although s. 234 would allow trial of two cases of kidnapping together and s. 235 would allow the trial of kidnapping with respect to one girl and cheating with respect to the same girl in one trial, but the operations of two sections could not be combined because they are mutually exclusive and therefore the whole trial was vitiated by illegality, **24 A. L. J. 239; 48 A. 236.**

EFFECT OF MISJOINDER.

20. Joint trial of distinct offences not falling within the exceptions illegal—Privy Council view in N. A. Subrahmanya Aiyar's Case.—An accused person was tried for several distinct offences covering a period beyond 12 months from first to last at one trial. The Full Bench of the High Court considered this an irregularity curable by s. 537, but on appeal to the Privy Council it was laid down that (*a*) the disobedience to an express provision of law as to a mode of trial is not a mere irregularity which could be cured by s. 537. (*b*) Such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law (s. 234) could have been joined in one indictment. (*c*) Nor could such an illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would be to leave to the Court the functions of the jury and the accused would never have been really tried at all upon the charge arranged afterwards by the Court. (*d*) Nor can the trial be made good by confining the verdict of guilty given by the jury to such part of the charge as might have been legally joined, **25 M. 61—28 I. A. 257** which renders **14 C. 128** and **395** and **22 C. 176** good, while *overruling* **27 C. 839** and **28 C. 7** and **10** and **Ratanlal 212.** Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons and one *F* were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment. *Held*, that the trial was absolutely illegal, it having been a trial which is prohibited by the terms of this section, **14 C. 395.** *See* **11 M. 441** and **20 C. 527.** This decision was *disapproved* of in **27 C. 839 (F.B.).** But the Privy Council pronouncement in **25 M. 51** renders obsolete the Calcutta Full Bench view. A Magistrate framed two separate charges and numbered them as distinct cases, but when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges and both cases were disposed of by one judgment. *Held* that there was only one trial and joint trial offended against the provisions of s. 233 and the illegality could not be cured by s. 537, **29 M. L. J. 101 = 18 M. L. T. 95 = 16 Cr. L. J. 593 (F.B.)**; **29 C. 385** and **41 C. 722** *referred to*. *See* also **19 C. L. J. 633 = 15 Cr. L. J. 472.**

21. Fact accused did not object to misjoinder, will not validate trial.—Where, in one trial the accused was charged with (*i*) abetting the falsification of a document s. $\frac{477}{109}$ A., I.P.C.; (*ii*) fraudulent destruction of a document and the fraudulent secretion of other documents, s. 477, I.P.C.; and (*iii*) abetting criminal breach of trust, s. $\frac{408}{109}$ and it was urged on behalf of the prosecution that the different offences were alleged in the charge to have been committed at or about the same time and place and that the objection of misjoinder was not taken before the Sessions Judge. *Held*, that the conviction must be set aside, as the offences charged do not form parts of the same transaction, **26 M. 125.** *See* also **3 M. L. T. 407 = 18 M. L. J. 530 = 8 Cr. L. J. 152; 28 M. L. J. 397 = 17 M. L. T. 252 = 16 Cr. L. J. 323.** In any case it is open to question whether consent of pleaders could validate a trial which was illegally constituted, *per* BEACHCROFT, J., **19 C. W. N. 972 = 16 Cr. L. J. 641.**

22. When the conviction need not be set aside.—

(*i*) *If accused has pleaded guilty.*—If the accused has pleaded guilty and not applied to set aside the conviction and no injustice has resulted, the conviction need not be set aside, **4 L. B. R. 315 = 9 Cr. L. J. 15 (F.B.).** *See* also **4 L. B. R. 49** and **5 P. R. 1906; 35 C. 161; 1907 A. W. N. 208 = 6 Cr. L. J. 215; 7 L. B. R. 272 = 16 Cr. L. J. 44.** But in **3 M. L. T. 407 = 18 M. L. J. 330 = 8 Cr. L. J. 152,** it was *held* that an accused person cannot waive the benefit of the legal provision relating to the trial and where there has been a misjoinder, the conviction must be set aside. *See* **26 M. 125; 4 P. L. R. 1905 = 2 Cr. L. J. 30.**

(*ii*) *If the failure has only been to observe the first part of* s. 233.—Failure to observe the first part of s. 233 is only a defect in the form of charge which is covered by ss. 535 and 537. The defect is one of duplicity not of misjoinder, **41 C. 66.** What their Lordships of the Privy Council in **25 M. 61** have prohibited is if law expressly provides a particular mode of trial, disobedience of that law vitiates the whole trial. It is doubtful if the framing of charges is a mode of trial but joint trial of charges as to distinct offences would be a mode of trial. Omisison to frame two charges instead of one is an irregularity covered by s. 537, **19 C. W. N. 972 = 16 Cr. L. J. 641** (FLETCHER, J., *dissenting*).

the joint trial of the 2nd accused was bad and that it prejudiced the case against *B* on the second charge as the confession of *M* was used against him and treated as a very substantial part of the evidence in support of the second charge, **5 C. W. N. 294.** The accused persons were tried upon twenty-seven charges, comprising the offences of theft, abetment of theft, and receiving stolen property in 1872-73 similar offences in 1873-74 and 1874 75, the giving and receiving of gratifications to and by public servants in 1874-75, and finally the fabrication and abetment of false evidence in 1878. One of the accused was convicted on two heads of charge and the rest acquitted *Held*, on appeal, that the trial was irregular under s. 452, Act X of 1872, and so would be the hearing of the appeal. The High Court, however, heard the appeal in respect of offences in 1874 75 only the charge in respect of which was as follows (That you between the 31st October, 1874 and 30th October, 1875, did commit theft of certain property, *viz*, 27 524 *khandis* of wood or thereabouts, being the property of Government, from the Government forests of the villages, etc., in the Kolaba Collectorate and have thereby committed an offence punishable under s. 379 I P C.), it appearing that this course did not prejudice the accused persons who had been fully and fairly tried for those offences, **1 B. 610.** *See* also 8 C. 459 and 634, and now *see* **25 M. 61 (P.C.)** In **4 Bom. L. R. 440** *L* was tried at one trial on a charge under s. 471, I P C., in respect of one document, a charge under s. 468, I P C, in respect of another and one charge under s 477 A *Held*, that the trial was illegal. The last mentioned offence not being of the same kind as these mentioned in the other two charges, ought to have been tried separately *See* **44 P. R. 1917 Cr.**

Several accused persons were tried at one trial for offences under ss. 197 and 325, I.P C., committed on 24th January, and for offences under ss. 147, 323 and 342, I.P C., committed on the 25th of January, *held* that the whole trial was invalid and must be set aside because ss. 234 and 239 of the Criminal Procedure Code cannot be combined, **48 A. 64.**

7. Whether more than three falsifications of account can be joined together in one charge and tried?—Each act of falsification of a book of account amounts to a speparate offence s. 477 I P C and an accused person can only be charged with and tried at one trial for any number of offences of the same kind not exceeding three committed within the space of one year The explanation appended to s. 477 A, does not purport to override this section, **26 C. 560.** When a person who was sent up for trial under s. 477 A, I P C was charged with having wilfully altered and mutilated certain accounts between the years 1907 and 1909 and the evidence showed that the subject matter of the charge was practically the series of entries in certain sets of books. *Held* the charge was bad for misjoinder, **32 A. 57**; but if the several false entries are made in the course of one transaction a count charging six separate falsifications of account is illegal **(1912) M. W N. 545 = 13 Cr. L. J. 251.** *See* also **40 C. 318.** A series of alterations in accounts made to cover a defalcation might all be charged in one charge and they are not distinct offences committed by an accused person merely by reason of the fact that he makes more than one false entry to cover one defalcation But the false entries in that case can only relate to one defalcation It is impossible to take a series of false entries referring to three different defalcations in one charge, or to try a whole series of falsified accounts in one charge, **41 C. 722.**

8. Falsification of account and breach of trust are distinct offences.—When a person is tried for criminal breach of trust in respect of seventeen sums of moneys received by him between 16th March 1901 and 8th May 1901, and he was also charged with seventeen falsifications of account under s. 477 A *Held* the trial was illegal and the conviction was squashed **4 Bom. L. R. 433; 2 P. R. 1905; 26 C. 560; 30 M. 328; (1911) 2 M. W. N. 536 = 13 Cr. L. J. 21; 30 A. 331; 32 A. 57; 16 Cr. L J. 313 (A.); 12 Bom L. R. 216 = 11 Cr. L. J. 337; 33 A. 36** and *see* Note 11 to s. 222. *See* **27 Bom. L. R. 1343.**

9. Effect of s. 222 on this section.—This section must be read subject to the special provision of sub-sec. (2) to s. 222. *See* **27 A. 69; 24 A. 254; 33 A. 36** but *see* **12 Bom. L. R. 226 = 11 Cr. L. J. 337.** Where there have been defalcations in the course of twelve months in respect of different items, then the Court can try a man in respect of three offences by selecting different items, combining these items into one lump-sum, and making the selection so as to get at three sums, the appropriation of each constituting an offence by itself. S. 222 (2) modifies the general rule, that at a trial certain particulars must be given in the charge as to charges of criminal breach of trust, but does not restrict in any way the scope and object of s. 234, **12 Bom. L. R. 226 = 11 Cr. L. J. 337.** *See* Notes under s. 403.

10. Embezzlement of a gross sum is only one offence within the meaning of this section.—*See* Notes 9 and 10 to s. 222.

11. Single charge sufficient in cases of embezzlement.—*See* Notes 8 and 9 to s. 222.

29 Cr. L. J. 495. Where two persons abducted a girl and took her to the house of third person and wrongfully confined her there and all the three were jointly tried, the first two for an offence under s. 366, I.P.C. and the third under s. 368, I.P.C., *held* that the joint trial was not illegal.

3. Object of section to provide statutory limit to number of charges at single trial.—This section modifies s. 233 which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind and committed within one year of each other to be tried at the same time; but this does not mean that, if at one time or within one year a man commits fifty distinct offences of the same kind, he shall not in one day be prosecuted for more than three of such offences. This is clear from illustration (*d*), s. 235. This section simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year, **3 C. 540 = 1 C. L. R. 478.**

4. "Offences of the same kind" may be in respect of different persons.—This is a novel definition, **9 C. 371 = 11 C. L. R. 522,** where it was *held* dissenting from **4 A. 147** and **1883 A. W. N. at pp. 12** and **39,** that the words "offences of the same kind," are not limited to offences against the same person. Where a public servant dishonestly misappropriated sums of moneys placed in his hands by three different persons on three different occasions in one year, *held*, that the offences of which such person is accused being the dishonest misappropriation of public moneys (for they lost their private character on coming to the hands of the accused) such offences were "of the same kind," and that such person might be charged with and tried at one trial for all the offences, **7 A. 174 (F.B.)**; **17 Cr. L. J. 479.** S. 234 is not limited to cases were the offences have been committed against the same person, **2 Pat. L. J. 209.** It applies where the complainants are different persons, but must be used cautiously, **19 C. W. N. 557.** *See* also **Ratanlal 331,** where it was *held* that an accused charged with two offences of the same kind within the definition of sub-sec. (2) of this section, was rightly tried for both the offences at one trial, although the offences were committed against different persons. *See* also **9 C. L. J. 149 = 13 C. W. N. 507; 41 C. 66; 43 C. 13; 38 A. 457; 29 Cr. L. J. 287; 38 A. 458** where **4 A. 147** was overruled. But *see* **11 C. W. N. 1128,** where it was *held* that the joint trial of three distinct complaints of three distinct complainants though against the same is illegal, and also **13 C. W. N. 418 = 9 Cr. L. J. 277.**

5. Offences not of the same kind.—Charges of adultery and bigamy are not of the same kind, and being distinct offences, cannot be tried at one trial, **Ratanlal 4.** Murder and voluntarily causing hurt are not of the same kind, **11 A. L. J. 188 = 14 Cr. L. J. 116** and so offences under ss. 167 and 466, I.P.C., are not of the kind, **8 C. 450.** Falsification of accounts, s. 477-A, I.P.C., is not of the same kind as a criminal breach of trust, s. 409, I.P.C., **30 M. 328.** Where at the same trial an accused person was charged with two offences under s. 178, I.P.C., and two offences under s. 179, I.P.C., *held*, the case was not governed by this section and there was no I.P.C., **30 M. 328.** Where at the same trial an accused person was charged with two offences under s. 178, I.P.C., misjoinder, **35 C. 161.** *See* also **13 C. W. N. 805 = 9 Cr. L. J. 147.** *See* Note 14 to s. 233 at pp. 648 and 649 of other examples. As to theft and subsequent retention by another not being offences of the same kind, *see* **21 C. W. N. 111.** *See* also **10 S. L. R. 192.**

6. Where charge bad for multiplicity—offences unconnected with each other.—Where the accused was charged with threatening more than three persons with injury if they did not pay him bribes or with instigating the obtaining of bribes from more than three persons and was tried at one trial on such charge. *Held*, the charge was bad for multiplicity and that the trial was in contravention of this section, **Weir II, 299; 11 C. W. N. 1128.** The joinder of six charges,—one under s. 201, I.P.C., and two under s. 193, I.P.C., relating to a report and evidence about the death of one person, and similarly three charges relating to a report and evidence about the death of another person—is illegal, **14 Bur. L. R. 242 (F.B.) = 4 L. B. R. 294 = 8 Cr. L. J. 497.** A woman being a member of the dancing girl caste, obtained possession of a minor and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372 and 373 of the Penal Code. The charges related to both girls. *Held* that the two charges should not have been tried together, **12 M. 273; 11 C. W. N. 274.** *See* also **30 A. 351; 4 L. B. R. 315 (F.B.).** Where *M* was charged with three separate acts of criminal breach of trust and *B* with abetment of those acts and also in the alternative under ss. 411 and 380, I.P.C., in respect of a document said to have been found in his house which had no connection whatever with the charge of criminal breach of trust and *M* made a full confession implicating *B* therein, and it was consequently taken into consideration against him, *held* that

(*c*) *A* entices *B*, the wife of *C*, away from *C* with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under ss. 498 and 497 of the Indian Penal Code.

(*d*) *A* has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under s. 466 of the Indian Penal Code. *A* may be separately charged with, and convicted of, the possession of each seal under s. 473 of the Indian Penal Code.

(*e*) With intent to cause injury to *B*, *A* institutes criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses *B* of having committed an offence, knowing that there is no just or lawful ground for such charges. *A* may be separately charged with, and convicted of, two offences under s. 211 of the Indian Penal Code.

(*f*) *A*, with intent to cause injury to *B*, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of, offences under ss 211 and 194 of the Indian Penal Code (**7 W.R. 59; 6 C. 718; 10 B. 258**).

(*g*) *A*, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged with, and convicted of, offences under ss. 147, 325 and 152 of the Indian Penal Code.

(*h*) *A* threatens *B*, *C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with, and convicted of, each of the three offences under s. 506 of the Indian Penal Code

The separate charges referred to in illustrations (*a*) to (*h*), respectively, may be tried at the same time

to sub-section (2)—

(*i*) *A* wrongfully strikes *B* with a cane *A* may be separately charged with, and convicted of offences under ss. 352 and 323 of the Indian Penal Code.

(*j*) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property for the purpose of concealing them *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. *A* and *B* may be separately charged with, and convicted of, offences under ss 411 and 414 of the Indian Penal Code.

(*k*) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure *A* may be separately charged with, and convicted of offences under ss. 317 and 304 of the Indian Penal Code.

(*l*) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B* a public servant of an offence under s. 167 of Indian Penal Code. *A* may be separately charged with, and convicted of, offences under ss. 471 (read with s. 466) and 196 of the same Code.

to sub-section (3)—

(*m*) *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under ss. 323, 392 and 394 of the Indian Penal Code.

Notes.—S. 71, I P.C., is as follows —

Limit of punishment of offence made up of several offences —Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offenders shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

Illustrations.

(*a*) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for 50 years, one for each blow But he is liable only to one punishment for the whole beating

12. The word 'offences' not to be extended to mean three separate series of offences, each set forming a single transaction.—Where the accused was charged and convicted at one trial for (*a*) forging (s. 467), three cheques on three different dates, (*b*) cheating (s. 420) the bank by cashing the cheques on the said dates, and (*c*) falsifying account books (s. 477-A) in the course of the commission of the said forgeries and it was contended that s. 235 must be read with this section and under their combined effect, the three forgeries and the acts closely connected with each of the forgeries could be rightly tried at one trial. *Held following* **25 M. 61 (P.C.)** that the trial was bad. The word *offence* in this section cannot be held to mean not only the three offences mentioned there, but, also every act in itself an offence, which is so connected with each of those offences as to form part of the same transaction as each offence, **2 P. R. 1905** *followed in* **30 M. 328**; **32 A. 219.** *See* also **4 Bom. L. R. 433** and Note 19 to s. 233.

13. Four charges in respect of two offences under ss. 124-A and 153-A, I.P.C.—The accused was convicted of offences under ss. 124-A and 153-A of the Indian Penal Code in respect of each of two articles that appeared in his newspaper. The Magistrate, who tried the case, had framed a charge, with two heads, one bearing on each article, and each head mentioned that the accused was punishable under ss. 124-A and 153-A for publishing the article. It was contended on behalf of the accused that the trial of four offences at one trial was illegal. *Held*, that the trial was not bad as there had been no misjoinder of charges. *Per* CHANDAVARKAR, J.—'It is true that the Magistrate framed two charges, one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under ss. 124-A and 153-A, I.P.C., so that the accused had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of s. 225, **33 B. 77**; **33 B. 221** and *see* Notes 1 and 19 to s. 223.'

14. Procedure—when offences similar it is undesirable that each should be tried separately.—An accused person committed thirteen offences in the course of two months. The Magistrate, who tried him summarily, convicted him and sentenced him to two months' rigorous imprisonment for each offence. The High Court pointed out this course, though not illegal, to be undesirable, and suggested that the accused might have been tried and convicted in one trial of any three of these effences, and sentence of six months' imprisonment passed for each of those effences, such sentences running concurrently.—*Mad. H. C. Pro.*, 19th August, 1886. *See* Note 2 to s. 235.

Trial for more than one offence.

235. (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

Offence falling within two definitions.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with, and tried at one trial for, each of such offences.

Acts constituting one offence, but constituting when combined a different offence.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations.

to sub-section (1)—

(*a*) *A* rescues *B*, a person in lawful custody, and in so doing causes grievous hurt to *C*, a constable, in whose custody *B* was. *A* may be charged with, and convicted of offences under ss. 225 and 233 of the Indian Penal Code. (*See* also **31 M. 43** for joint trial of offences under ss. 183, 186, 355 and 323, I.P.C.)

(*b*) *A* commits house-breaking by day with intent to commit adultery, and commits in the house so entered, adultery with *B's* wife. *A* may be separately charged with, and convicted of, offences under ss. 454 and 497 of the Indian Penal Code.

charged with it (*Mad H C Pro*, 30th *March*, 1863). When one act or series of acts forming part of the same transaction constitutes one or more offences and the accused is charged with one offence only, and it is proved in evidence that he was guilty of another offence, he would go unpunished if the offence is not of a cognate nature, *e.g.*, a complaint was lodged against one G, under ss. 499 and 471, I P C., *i.e.*, for the offences of defamation and of dishonestly using as genuine of forged document. The alleged forgery consisted in affixing a false signature to a letter on which the charge of defamation proceeded. At the trial he was charged under s. 471, I P.C., but the Magistrate suddenly changed his mind and convicted him under s. 499 although he was not chaged with that offence, **4 C. W. N. 129.** This irregularity would have been avoided if there had been a charge also under s. 499, I P C

4. Significance of the phrase, 'same transaction.'—The expression 'same transaction' used in ss. 235 and 239, is an expression which from its very nature is incapable of exact definition, and must have been advisedly used because it had this quality In **15 B. 491**, BIRDWOOD, J, deduced from the illustration to ss. 235 and 237 the following tests for the sameness of a transaction, *viz*, that the offences (1) formed part of a continuous series of acts Illustrations (*a*), (*b*), (*c*) to s. 235 or (2) were committed at the same time. Illustrations (*d*), (*g*) (*h*), (3) were connected with the same specific criminal intent. Illustrations (*e*), (*f*) or (4) are connected by the fact that one was committed in the course of the commission of the other *see* illustrations (*b*) and (*c*) to s. 239, and *held* that s 239 cannot be applied to several different thefts committed on different dates and at different places by different members of a gang of thieves who were all out on the same marauding expedition. In 27 B 135 it was *held*, the real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose or as to cause and effect or as principal and subsidiary acts, as to constitute, one continuous action. A mere interval of time between the commission of one offence and another does not itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of the connection between the two Where, therefore, the accused was charged at one trial (*i*) under s. 486, I P C, for having sold on the 7th October a number of articles with a counterfeit trade-mark (*ii*) under s. 486, I P C., for having in his possession on the 9th October for sale a number of articles of the same description and (*iii*) under s. 484, I P C., for being in possession of instruments for counterfeiting trade-marks, on the 9th October *Held*, there was no illegality in the trial as there was a community and also community of purpose in the possession and sale, the possession of the instruments was the cause the possession of the articles and their sale, the effect, and both the possession and the sale had one intention and aimed at one result, of deceiving a buyer into purchasing what was not the genuine article. **29 B.** *I* followed the above rulings and imposed the further limitation that 'the persons to be jointly tried must have been associated from the first in the series of acts which form the transaction' and in **30 B. 49** it was *held* as follows "According to its etymological meaning the word *transaction* means *carrying through* and suggests not necessarily proximity in time, so much as continuity of action and purpose, series of acts separated by intervals of time are not excluded provided that those jointly tried have been directed throughout to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial even if incidentally one of those jointly tried has done an act for which the other may not be responsible The foundation for the procedure is the association of two persons concurring from start to finish to attain the same end. Where, therefore, two persons who were jointly in charge of a trust fund, carried out their scheme of breach of trust by successive acts done at intervals, alternately taking the benefits, this circumstance did not prevent the unity of project from constituting the series of acts 'one transaction,' *i.e.*, carrying through of the same object which both had from the first act to the last **30 B. 49 was** *followed in* **13 P. W. R. 1905 = 8 Cr. L. J. 75.** a series of acts are so connected together by proximity of time, community of criminal intent, community of action and purpose or by the relation of cause and effect as to constitute, in the opinion of the Court one transaction, then the accused may be charged with and tried at one trial for every offence committed in such series of acts. It would also include such subsidiary acts as would make the co-accused *participes criminis* or accessory after the fact. If more persons than one are accused of different offences in a series of acts so connected, they may be tried together, **1 S. L. R. 73 = 8 Cr. L. J. 191.** The word transaction in subsec. (1) suggests not necessarily proximity in time, so much as continuity of action and purpose (**30 B. 49 at p. 54**), *i.e.*, not necessary that the act should have been committed all on the same occasion, but it is sufficient that though separated by a distinct interval of time they are closely connected by continuity of purpose or progressive action towards a single object. Thus, where the prisoner, for the removal of a cart he had stolen, broke into the cattle-shed of a neighbour of the cart-owner, took out two bullocks and drove off the cart to a certain

(*b*) But if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*; here, as the blow given to *Y* is no part of the act, whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*.

Notes.—1. Scope of the section as compared with ss. 35 and 71, I.P.C.—This section should be read with ss. 35 and 71, I.P.C. Clause (1) of this section corresponds to the first clause and cl. (2) to the first part and cl. (3) to the second part of the second clause of s. 71, I.P.C. While this section prescribes rules for criminal pleading and the procedure to be followed in the trial of offences falling within its provisions, ss. 35 and 71, I.P.C., deal with the assessment of punishment of those offences. The application of sub-sec. (1) to this section and of para. 1 of s. 71, I.P.C., is illustrated by the case in **16 C. 442,** which *approves* of **6 A. 121** and *overrule* **11 C. 349.** *See* also **8 C. W. N. 344; 9 W. R. 83; 10 W. R. 63; 13 W. R. 42; 7 A. 414 (F.B.); 12 C. 495; 23 C. 174; 17 B. 260** and **23 B. 706.** Sub-secs. (1) and (2) deal with 'one series of acts so connected together as to form the same transaction,' while sub-sec. (3) deals with 'several acts.' It is very easy to raise confusion and difficulty by raising quibbles which are made possible by the infirmities of language. S. 235 must be interpreted in a broad and commonsense way; when reading the section with s. 71 we get a four-fold result. *Firstly*—A repetition in the same transaction of several criminal acts of exactly the same character may constitute one crime, *e g.*, a number of blows on one person, etc., that is a case covered by s. 71, I.P.C. *Secondly*—A single transaction may give rise to either—(1) several offences of a different character each complete in itself and distinct from the other, *e.g.*, criminal breach of trust accompanied by falsification of account—(2) several offences of the same character but affecting different persons, *e.g.*, a gunshot which injures two or more persons. Such cases come under the first sub-sec. of s. 235. Separate sentences must follow, **38 C. 453.** *Thirdly*—The same series of acts may constitute different offences. *A* may be charged for all, but only one offence can be regarded as committed for the purpose of inflicting punishment, *e.g.*, a person who sets fire to a warehouse commits offence under ss. 435 and 436, I.P.C. This falls under ss. 235 (2) and 71, I.P.C. *Fourthly*—An act in itself an offence may become either an aggravated form of that offence, or a different offence when combined with some other acts innocent or criminal. Here we have a combined offence which as well as its component minor offence may be charged under s. 235 (3) and again s. 71 controls the punishment. These provisions of law must not be confused with the provisions laid down in s. 35. *Separable offences* which come under s. 71, I.P.C., and may be charged under s. 235 (2) and (3) are not distinct offences within the purview of s. 35 while s. 235 (1) seems to refer to distinct offences which are separately punishable. *See* Notes to s. 35.

2. The provisions of this section are not imperative, but enabling.—The accused were charged with the offence of house-breaking in order to the commission of an offence and convicted under s. 454, I.P.C., though the facts showed, that they also committed theft in a dwelling-house punishable under s. 380, I.P.C. *Held*, that the accused could have been tried under two heads of a charge, **Ratanlal 307.** It is not illegal to try an accused for different offences separately, **8 C. 481; 6 A. 121; 12 Bom. L. R. 226; 31 M. 43.** The prosecution is entitled to ask the Court to go into the whole matter at a single trial, provided it takes upon itself the burden of proving that all the facts alleged against the accused forms part of one transaction or otherwise triable at a single trial under the provisions of ss. 235 and 236, **16 Cr. L. J. 795 (A.).** *See* Note 14 to s. 234, and Notes 17 and 18 to s. 233 and Note to s. 239.

3. Application and object of s. 235 (1).—Sub-sec. (*i*) applies to cases where on some of the facts so connected together as to form the same transaction one offence may be charged against an accused person and on other facts forming part of the series of acts another offence may be charged against him. *See* ill. (*b*) to s. 403. The sub-section is inapplicable when the accused is sought to be charged with another offence on the identical facts on which he was charged before with one offence, **36 M. 308.** Further, it may be noted that this section provides for (1) plurality of acts; (2) plurality of aspects; and (3) organic connection of acts with a result differing from the elements. Illustrations (*a*) to (*h*) treat of *plurality of acts* committed in the course of one transaction where, though the goal is one, different acts committed in the course of reaching it, form by themselves or in combination with others, different offences, while in illustrations (*i*) to (*l*) through the act is one, yet when seen *through different aspects* it constitutes more offences than one. Illustration (*m*) affords an instance where, although there is *organic connection between the elements* which constitute the offence of robbery, the result of their combination is neither the one nor the other, *i.e.*, it differs from its component parts; so in such a case it is necessary to charge the accused separately with the elements as well as with the offence resulting from their combination. The object of this section is that when different acts or different parts of the same act constitute an offence, the accused should be charged separately for each of such offences, so that if he is guilty of any one of them he should not go unpunished because he was not

came within the purview of s. 235 (1). *Held* the trial was void "*ab initio*," 33 M. 502. Mere interval of days will not disturb the oneness of the transaction nor necessarily the fact that different sets of persons were engaged on different occasions But if the aim of the accused on the different occasions is directed towards effecting different purposes, the transactions are different, 28 M. L. J. 397 = 16 Cr. L. J. 324. In deciding whether offences are so connected as to form one and the same transaction, the determining factor is not so much proximity in time as continuity and community of purpose and object, 19 C. W. N. 672 = 21 C. L. J. 195 = 16 Cr. L. J. 3. *See* also 17 O. C. 276 = 15 Cr. L. J. 643; 19 A. L. J. 392. *See* 43 M. L. J. 308 = 49 M. 74.

(a) *Whether the acts alleged constitute the same transaction is a question of fact*—In each case it is a question of fact whether the acts are so connected together as to form part of the same transaction and the word transaction should be read in the ordinary sense of a completed act, 7 M. L. T. 347 = 1910 M. W. N. 641 = 11 Cr. L. J. 293. A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the "*same transaction*," the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action, and community of purpose or design, 42 C. 957.

5. **Cases where facts held not to form one transaction.**—(a) Where several accused more than five in number obstructed the execution of a Civil Court decree and after holding a consultation, all of them with exception of one or two proceeded to the Kutcherry of the decree-holder in order to beat his son and the Tahsildar and took the Tahsildar to the judgment-debtor's house where they had obstructed the execution of the decree and there assaulted the Tahsildar, *held*, that the two occurrences, one of obstructing the execution of the decree, and the other of assaulting the Tahsildar, did not form one transaction and that the accused could not be tried at one trial on charges arising out of both the occurrences, 13 C. W. N. 1113 = 10 Cr. L. J. 452, but compare 6 M. L. T. 17 = 11 Cr L. J. 30. Where the accused were charged with having entered the house of the third prosecution witness with a view to coerce the deceased person and his brother to deliver certain promissory notes and receipts, and later in the evening obstructed the complainant's party when they proceeded to prefer a complaint in regard to what the accused did in the morning, *held*, that the accused cannot be charged together for their action in the morning and in the evening in one and the same trial. The joinder amounts to an illegality and cannot be cured by the application of s. 537, 28 M. L. J. 397 = 16 Cr. L. J. 323. A joinder of charges under ss. 454 and 325, I P C., is not warranted by s. 235 especially where the offence of house-trespass is clearly distinct from a subsequent attack on the complainant while on his way to inform the Police 2 L. B. R. 19 *referred to*, 5 Bur. L. T. 101 = 13 Cr. L. J. 485. *See* Note 8 under s. 233

(b) *Misappropriation and cheating*—Where an accused was directed to cash a cheque and pay the proceeds to a Railway Company for freight and take delivery of certain goods and the accused cashed the cheque and misappropriated the money and thereafter on a different day fraudulently induced the Railway Company to deliver the goods and was charged and tried in one trial under s. 408, I P C., for criminal misappropriation and under s. 420, I P C., for cheating the Railway Company *Held*, that the trial was bad for misjoinder, as the offences were not committed in the same transaction 13 C. W. N. 1089 = 10 Cr. L. J. 477.

(c) Joinder of a charge under s. 406, I P C. (criminal misappropriation), in a trial under s. 307, I.P C., 6 A. L. J. 697.

(d) *Ss 3 and 4 of the Gambling Act*—The keeping of a gambling house (s. 3 of the Gambling Act) and being present in it at the time of a Police raid cannot be said to be part of the same transaction, 35 P. R. 1916.

(e) *Murder and causing disappearance of evidence of murder*—Charges under ss 302 and 201 I.P C., cannot be combined, Weir II, 601, where 6 A. 252 and 22 C. 633 are *referred to*, 11 P. R. 1915. But *see contra* 1 S. L. R. 73 = 8 Cr. L. J. 191; 4 S. L. R. 174 = 11 Cr. L. J. 731. *See* also 20 C. W. N. 166.

(f) *Murder and grievous hurt in removing dead body*—Murder and causing grievous hurt caused in removing dead body cannot be tried together, 10 P. R. 1906 = 4 Cr. L. J. 235.

(g) *Kidnapping a minor, wrongful confinement and assault on mother*—Where *M* formed an intimacy with *H*, a widow, who took to living openly in *M*'s house and *H*'s relations attacked the house of *M*, beat him and his brothers and carried off *H* and were convicted under s. 452, I P C., and two years later they were again charged under s. 365, I P C., for carrying off and secretly confining *H*, *held* the previous conviction was no bar as the offences did not constitute parts of one transaction, 1905 A. W. N. 22 = 2 A. L. J. 2 = 2 Cr. L. J. 93. *See* also 6 C. 789. Where the accused was charged and tried at one trial with having kidnapped a minor boy, wrongfully confined him, and a day or two later assaulted the boy's mother on her demanding the

place for selling the same, *held* the two thefts constituted parts of one transaction within the meaning of this section and the circumstances of the theft of the bullocks prefaced by house-breaking, essential to the perpetration of the entire offence, could make no difference and that the two offences were therefore rightly tried together as unmistakably forming parts of one single transaction, **2 N. L. R. 147 = 4 Cr. L. J. 420** (where **27 B. 135**; **15 B. 491**; **16 B. 414**; **25 M. 61** and **15 C. P. L. R. 53**, are *referred to*). Where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals, but there was complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of s. 239, a joint trial is not only legal but is demanded in the interests of public time and convenience, **14 Bom. L. R. 972 = 1 Bom. Cr. Ca. 216 = 13 Cr. L. J. 83.** Proximity of time between acts does not necessarily constitute such acts parts of the same transaction, **5 Bur. L. T. 101 = 13 Cr. L. J. 485.** In **33 M. 502**, ABDUR RAHIM, J., *discussed* the meaning of the phrase 'same transaction.' "The idea conveyed by the words 'same transaction' seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simpler and clearer language, and generally speaking there can be very little difficulty in arriving at a proper conclusion in a concrete case. For instance in this case what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six accused in pursuance of a systematic scheme for defrauding those members of the public who joined the fund. If this contention were sound then if the company was carried on for 10 or 20 years and a hundred acts of embezzlement were committed during that period, the accused would be liable to be tried for all the offences. Obviously this cannot be the scope of s. 235. No doubt proximity of time any more than unity of place is neither a necessary nor decisive test of what constitutes the same transaction, though such proximity often furnishes good evidence of the connection which unites several acts into one transaction (*see* **26 M. 125**). I think, the effect of the decisions in **27 B. 135**; **30 B. 49**; **15 B. 491**; **16 B. 414** is that community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient, there must also be continuity of action. For it may happen that an act is done with a particular objective in view, but the final aim is abandoned for some time and pursued afterwards. For instance, supposing a man forges a document with a view to cheat a certain individual and then foregoes his intention for two years and afterwards reverts to his original intention and uses the document for the original purpose he had in mind when he committed forgery, it would be difficult to say in such a case that the offences of forgery and of cheating by means of the forged document were committed in the course of the same transaction. As regards the community of purpose it would be going far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that view part of the same transaction. If that were so, the results would be startling; for instance supposing it is alleged that *A* for the sake of gain has for the last 10 years been committing a particular form of depredation on the public, *viz.*, house-breaking and theft in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all the burglaries he committed in the 10 years. The purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of certain amount falsifies books of account or forges a number of documents." In this case six accused were charged as Directors of a Provident Fund with having committed breaches of trust in respect of three sums of money alleged to belong to the Company, *viz.*, Rs. 679 between 30th September, 1905 and 25th March, 1906, Rs. 4,639 between 25th March, 1906 and 25th March, 1907, and Rs. 5,226 between 25th March, 1907 and 18th September, 1907, the misappropriations thus covering a period of nearly two years. The 4th and 6th accused were also charged with having falsified accounts by making two false entries on two dates and these two and the 1st accused with having falsified another document on another date. The 6th accused was further charged with cheating two persons once on the 6th March and the other on the 20th March. Those among the six who were not charged with the substantive offences of falsifications of accounts and cheating were charged with having abetted the commission of those offences. All the accused were acquitted of all charges relating to falsifications of account and cheating, but were convicted of the offences of criminal breaches of trust. The joinder of charges was attempted to be justified that the Provident Fund was a bogus concern and the object with which it was set on foot by its promoters, the six accused was to defraud the public, various offences charged against them

(*v*) *Dacoity and murder may form parts of the same transaction as principal and subsidiary acts.*—A gang of dacoits, who were hiding in a jungle were accidentaly discovered by an old woman who was set upon and murdered by some of them to prevent her raising a hue-and-cry. Subsequently they committed a dacoity in a village some distance from the scene of the murder. *Held*, that the joint trial of all the accused for an offence under s. 395, I P C., and some of them in addition under s. 302, I P C. was perfectly legal as the murder was committed in order to commit dacoity and the two offences formed parts of the same transaction, **4 Bom. L. R. 789.** *See* however, **14 A. 502,** where robbery and murder did not form parts of the same transaction.

(*vi*) *Conspiracy to wage war and conceal the existence thereof ss 121 A and 123, I P C.*—When person engaged in a conspiracy within the meaning of s. 121 A, I P C. in furtherance of their object conceal the existence of their conspiracy from the authorities a charge under s. 123 I P C., may be legally joined with one under s. 121 A I.P.C., **37 C. 467; 16 C. W. N. 1105 = 15 C. L. J. 517 = 13 Cr. L. J. 609.**

(*vii*) *Extortion and false personation.*—Offences under ss 170 (false personation of a public servant) and 380 (extortion), I P C., have been *held* to constitute one transaction because but for the personation the accused would not have been in a position to commit the act of extortion complained of, **10 A. 58.** In **15 C. W. N. 732 = 12 Cr. L. J. 346,** it was *held* following **10 A. 58,** that there was no misjoinder of charges, where accused *was charged with personating a Police-officer under s. 170, I P C., and thereby, in such assumed* character, doing or attempting to do an act under the colour of his office, and was further charged with three acts of extortion in respect of three sums, and in the alternative, on three charges of cheating in respect of the three sums and finally of an attempt at extortion under ss. 384 and 511, I P C., these offences having been committed in the same transaction.

(*viii*) *Defamation and using criminal force.*—Where the accused was in the first instance charged with defamation, but the complainant in the course of his deposition further charged him with using criminal force and the Magistrate tried for both offences jointly at one trial, *held* that the procedure was legal. **3 Bom. L. R. 673.**

(*ix*) *Distinct offences of perjury may constitute but a single transaction.*—Where a witness gives false evidence before the committing Magistrate and in the Court of Session, if the statements are regarded as so connected together as to form parts of one and the same transaction this section will apply and at one trial the accused may be charged with any number of false statements. **Ratanlal 228.** *See* also Note 10 to s. 233.

(*x*) *Grievous hurt and making false entries, ss 193, 218 and 331, I.P C.*—Accused was charged with voluntarily causing grievous hurt to person with view of extorting information from him and was also charged with making a series of false entries so as to attribute another cause for the death of that person who died from the effects of the injuries inflicted by the accused. The accused was tried at one trial for offences under ss. 193, 218, 331 and 330, 114, I P C., and convicted of offences under ss 193, 218 and 331 I P C. It was contended that there was misjoinder of charges. *Held* that there was no misjoinder as the case fell within s. 235, and illustration (*f*). The act of making a series of false entries so as to attribute another cause for death was in continuation and pursuance to the transaction of causing grievous hurt with a view to extort information and the two acts formed part of the same transaction, **14 Bom. L. R. 41 = 1 Bom. Cr. 72 = 13 Cr. L. J. 137.**

(*xi*) Five accused persons *A, B, C, D* and *E* finding that a robbery had been committed and that cash and ornaments worth a very large sum had been stolen, aided and abetted each other inducing a young man *F* whom they know to be entirely innocent of the offence for the consideration of a bribe of Rs. 150, falsely to confess to complicity in the crime and to acquiesce in being prosecuted for it, the object being to share the loot with the real thieves. To this end, the accused wrongfully confined *F*, fabricated false evidence in order to procure his conviction knowingly instituted a false prosecution against him and in that prosecution gave false evidence in order to secure his conviction. *A* was charged and convicted under ss. 195, 347, 211 and 195, I P C., *B* and *C* under ss. 195/109 and 347/109, *D* under ss. 211/109 and 347/109 and *E* under s. 116 for the offence of giving false evidence *held*, that the joint trial was legal, **30 B. 49** *followed*.

(*xii*) In **33 C. 181,** it was *held* that the trial of an accused person for two offences under s. 178, I.P.C., with two offences under s. 179, I P C., was not illegal.

(*xiii*) On the 14th December certain Mahomedans who were alleged to have slaughtered a cow were wrongfully confined by the accused who fined them and realised a certain portion of the fines and released them on their promising to pay the balance of the fine three days later, but on their failing to do so they were again confined and maltreated by the accused on the 18th December. The accused were charged under ss. 347,

return of the boy. *Held*, that the trial was bad as the offences were distinct offences and the kidnapping and assault did not constitute a series of acts, so connected as to form one transaction, **26 M. 454; 27 C. 1051 (F.B.).**

(*h*) *Manufacturing, etc., and attempting to render fit for human consumption denatured spirit, Bengal Excise Act* V of 1909.—The acts of manufacturing the excisable articles seized and brought into Court bottling it, possessing it, selling from time to time various other articles not before the Court and of attempting to render denatured spirit fit for 'human consumption' do not constitute the same transaction, **41 C. 694.**

(*i*) *Preparation of balance-sheets under the Companies Act, s.* 282 (*VII of* 1913) *for two years.*—*Held* to be a case of misjoinder of charges, for the preparation for the years 1912 and 1913, could not be regarded as one transaction within the meaning of this section, **21 Bom. L. R. 732.**

(*j*) *Five murders in two sets.*—A triple murder was committed by the accused in the forenoon and a double murder in the afternoon and there was no apparent connection between the two sets of murder. The accused was charged, at one and the same trial with the commission of five murders and convicted, *held*, that the trial contravened the provisions of ss. 233, 234 and 235, and therefore, the conviction was set aside and a re-trial on charges properly framed was ordered, **17 A. L. J. 614.**

6. Cases where acts held to form one transaction.—

(*i*) *Transfer of property to several persons on one day is one transaction.*—Where a committing Magistrate framed a general charge under s. 206, I.P.C., against an accused person of several fraudulent transfers made on one and the same day, and the Sessions Judge limited the prosecution to three or four of the charges; *held*, that the proximity of time combined with the case as to intention and similarity of action and result, brought all the transfers charged as fraudulent within the words "same transaction," in this section, and that the accused should be tried for every such offence, **16 B. 414.**

(*ii*) *Single theft from several owners.*—As there appears to be a difference of practice in respect of treating thefts as single or several, if in one transaction things belonging to different owners have been stolen it is necessary to issue some instructions for the guidance of the Police when registering such cases in the Crime Register, or when sending them up for trial, and for the guidance of Magistrate when deciding whether a single trial or distinct trials are required. At the same time, nothing that is here set out can in any way control the discretion given to Magistrates by this section with regard to the framing of separate charges or the holding of separate trials, whenever it appears appropriate to do so. If the property, which it was the thief's intention (as shown by the circumstances or by his admission) to take, consisted of a number of contiguous articles, which were reached by one and the same act of trespass or which were the subject of single enterprise, the moving of each article, in the course of the removal of the whole bulk of property, cannot ordinarily be considered to be a distinct theft. *The thieving project in such a case was single*, although it may have been achieved in detail, and the fact that the spoils taken consisted of several things, whether belonging to the same or to different owners, does not necessarily break up the unity of the transaction. If, on the other hand, the property taken consisted of a number of articles so distantly or diversely situated as to require a distinct act of trespass or a distinct enterprise for the removal of each, the transaction must ordinarily be held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft.

The following examples will make the distinction clear:—

(*a*) A thief goes to a threshing floor, where the grain of four cultivators is stored, and steals a little from every heap. Unless it is shown that he had distinct designs against the several owners, it is plain that there was but one act of thieving accomplished through one and the same trespass.

(*b*) In a crowded place, a thief picks the pockets of *A*, *B* and *C*, in succession. Three thefts have been committed.—*C. P. Cr. Cir.*, Part II, No. 20. *See* also **26 P. R. 1889.**

(*iii*) *Stealing at the same time two bullocks of diffrent owners is one transaction.*—Stealing at the same time two bullocks which belonged to two different owners, and which had been tied to the yoke of a cart, constitutes one offence of theft only, **Ratanlal 927; 1881 A. W. N. 154.**

(*iv*) *Receiving stolen property and assisting to conceal.*—Receiving some property stolen on a particular occasion (s. 411, I.P.C.,) and assisting to conceal some other property stolen on the same occasion (s. 414, I.P.C.), is in course of the same transaction, **28 A. 313; 49 B. 878.**

9. Joinder of charges of criminal misappropriation or criminal breach of trust and falsification of accounts.—Where the falsification of account is made to cloak an embezzlement, then the two offences have been committed in the same transaction and under s. 235 (1) they can be tried together, **40 C. 318**; *see* also **A. I. R. 1929 Lah. 843**, but a charge of criminal breach of trust cannot be tried jointly with an independent falsification of account, **40 C. 318.** So also three distinct criminal breaches of trust, s. 409, I P C., and three distinct falsifications of account cannot be jointly tried, **30 M. 328, (1911) 2 M. W. N. 538 = 13 Cr. L. J. 21; 41 C. 722; 13 A. L. J. 1059.** *See* Note 10 (*d*) to s 233 and Note 8 to s. 234 *See* **41 A. 540.**

10 Effect of s. 222(2) on charges of embezzlement.—S. 222 provides for a charge being framed in respect of gross sums appropriated within 12 months from the first to the last and enacts that a charge so framed shall be deemed to be a charge within the meaning of s. 234, but it does not provide that acts so charged shall be deemed to be one transaction within the meaning of s. 235, **30 M. 820** *See* also **23 M. 558** and Notes to s. 222 at p. 549 and Note 8 to s. 234

11. Multiplicity of charges to be avoided unless intimate connection established.—In **30 C. 822,** the accused had executed a sale deed of lands in favour of *D* and was alleged to have forged the registration endorsement on the back thereof. Next he forged a mortgage-deed in favour of *D*, of the identical lands and got it registered by making a false statement before the Registrar Next he attempted to raise a loan from a Loan Office on the forged mortgage-deed At one trial the accused was tried for offences, ss. 467 467/109, 468, 468/109, I.P C , in respect of the endorsement on the sale-deed, under ss. 467, 467/109 and 471, I.P C., in respect of the mortgage-deed under s. 82 of *the Registration Act* in respect of the false statement and under ss. 471 and 417/109, I P C., in respect of the attempt to cheat the Loan Office *Held*, there was misjoinder The forgery of the endorsement on the sale-deed and the presentation of the mortgage-deed before the Loan Office were not parts of the same transaction, though it might be contended that the forgeries *of the endorsement on the sale-deed and of the mortgage-deed formed part of one transaction* the object of which was to deny the genuineness of the sale-deed and also the forgery of the mortgage-deed and the presentation thereof to the Loan Office was one transaction in which the object was to cheat the Loan Office. *See* **18 Cr. L. J. 739** where the trial of an accused in respect of four distinct offences committed at different times at different places and against different persons in one trial was held illegal *See* **16 P. R. 1902; 7 P. R. 1901.** But where an accused person pretending to be able to get a post for the complainant in Government service wrote letters on various pretexts obtained several sums of money and used forged documents, the various incidents extending over a period of five or six weeks and the accused was tried on seven charges three under s. 420 and the rest ss. 468, 463, 471 and 419, I P C. *held* the joint trial of all these charges was perfectly legal under this section, as the offence with which the accused were charged all formed one transaction, **11 C. W. N. 715 = 5 Cr. L. J. 434,** where **30 C. 822** and **2 Cr. L. J. 34** are *distinguished* and **27 B. 135** *followed.* *See* also **18 P. W. R. 1905 = 6 Cr. L. J. 75.**

12. Joint trial of offence committed by different accused against different persons at different times.—Four persons, members of the Police Force, were charged with ill-treating the complainant *H* his wife *R* and his son-in-law during the course of the Police investigation. They were committed for trial in two separate cases for the following offences —

(1) All the four accused persons for an offence under s. 330, I P C., committed against one Hanma, the charge covering several acts of violence alleged to have been committed against Hanma during his illegal confinement which forms the subject of the second head of the charge.

(2) All the accused for an offence under s. 348, I P C., committed against Hanma between the 5th and 18th January, 1889

(3) Accused Nos. 1 and 3 for an offence under s. 348, I.P C., committed against the deceased Rakmava wife of Hanma, on the 15th January, 1889.

(4) Accused No. 3 for an offence under s. 330, I.P C., committed against the deceased Rakmava on the 14th January, 1889.

(5) All the accused for an offence under s. 330, committed against Yellia in the interval between the 15th and 23rd January, 1889.

(6) All the accused for an offence under s. 348, committed against Yellia during the same period.

352 and 352/114, I.P.C. *Held* the occurrence that took place on 14th and the one that took place on the 18th formed part of one and the same transaction. The maltreatment after the release from the wrongful confinement was the concluding portion of the same transaction. All were confined for one purpose, namely, for the purpose of extorting money, **42 C. 760** where **30 B. 49** and **27 B. 135** were followed.

(*xiv*) *Using as genuine a forged document and the abetment of forgery.*—The series of acts beginning with the forgery and ending with the user of the forged document in a Civil Court to support the civil claim must be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, **18 Cr. L. J. 761 (B.)**.

(*xv*) Where an accused person was charged with cheating under s. 420 by giving the complainant base alloy as pure silver and also with theft under s. 380 by subsequently stealing the alloy to remove the evidence against him, and was tried at one trial and convicted: *held*, that though it was difficult to find that the two offences were committed in one series of acts so as to form the same transaction, the evidence for s. 380 would have been admissible as showing the conduct of the accused in the trial under s. 420; that the accused was not therefore prejudiced by the joinder of charges and that the sentences being concurrent accused was not otherwise prejudiced, **20 A. L. J. 324.**

7. **Conspiracy and the offences to commit which the conspiracy was entered into form one transaction.**—*A* and *B* conspire to cheat *X*; in pursuance of that conspiracy and in fulfilment of its object *A* cheats *X* on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by *A* and *B* and the offence of cheating committed by *A* alone have been committed in the same transaction, **19 C. W. N. 672 = 21 C. L. J. 195 = 16 Cr. L. J. 3** and **21 C. L. J. 201 = 16 Cr. L. J. 9** *referred to.* If *A*, *B* and *C* conspire to make, or have in their possession or under their control, an explosive substance within the meaning of the *Explosive Substances Act*, and, if in pursuance of such conspiracy *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under s. 120-B, I.P.C., and s. 4 (*b*) of Act VI of 1908, **42 C. 957.** *MM* an employee of a Railway Company, *D* a consignor and *N* his gumastha were charged that they had entered into a conspiracy to defraud the Railway in respect of freight payable on goods consigned and *MM* was further charged with receiving an illegal gratification and in consideration of that sum and in pursuance of that conspiracy he was further charged with having understated the weight of a consignment in a consignment note and defrauded the Railway of a certain sum. The charges against *MM* were under ss. 120-B, 420 and 161, I.P.C., *D* and *M* were charged under ss. 120-B, 429 and 161/109, and all the three were jointly tried. *Held* the joint trial was valid as all the offences were committed in one transaction, **19 C. W. N. 672 = 21 C. L. J. 195 = 16 Cr. L. J. 3; 49 C. 573; 46 C. 712; 49 M. 74.**

8. **Separate retention of the proceeds of the same theft or dacoity—Duty of prosecution to make out facts justifying joinder.**—Separate retainers by different persons of separate articles at different places, although the articles may have been the proceeds of one dacoity, cannot be said to be in the course of the same transaction and person charged with such retention cannot be tried jointly, **33 C. 1256.** One trial for having been found in possession of stolen properties belonging to two different persons and stolen at different times is illegal, **18 C. W. N. 418 = 9 Cr. L. J. 277.** Similarly, where two persons were charged under s. 411, I.P.C., in respect of articles at different times and without any connection with one another, **29 B. 449.** Where the accused in one count was charged under s. 411, I.P.C., with having dishonestly received or retained eight sets of cooking utensils stolen from eight different persons on eight different dates and in another Court were charged with having aided and abetted one another in the commission of the said offence. *Held*, that in the absence of evidence that the acts of receiving were so connected together as to form one transaction, the charges framed and the single trial held with respect thereto were illegal; that the mere fact that there was no evidence of separate receipt or retention did not justify the joinder of charges and that it lay upon the prosecution to establish the facts which would justify such a procedure. Further, the dishonest receipt or retention of each article constituted a separate offence and the accused could only be tried for three of such offences committed within one year, unless it were shown that the receipt or retention of all the articles were so connected as to form one transaction, **9 C. W. N. 1027.** *See* also **6 W. R. 83; 11 C. W. N. 1128; 16 Cr. L. J. 270 (O.).** *See* Note 35 to s. 239. But under clause (*e*) of the amended s. 239 what is necessary for a joinder of accused persons is, that one offender should commit theft and the other receive the stolen property. It is not now necessary that the offence of theft and the offence of the receipt of stolen property should form one and the same transaction or be the result of the same conspiracy; so the above cases, *viz.*, **33 C. 1256; 29 B. 449; 46 C. 741** are no longer good law.

regarded as cumulative, unless it be so expressly provided, **Ratanlal 506.** Accordingly, a prisoner cannot be at the same time punished for committing an offence by fire with intent to destroy a warehouse under s. 436, I P C., and for the offence of mischief by fire with intent to cause damage to property above the value of Rs. 100 under s. 435, I P C, **11 B. H. C. R. 13.** Again, the application of sub-sec. (3) is exemplified in illustration (*m*), in which the case is put of a person committing robbery on *B* and in doing so, voluntarily causing hurt to him. Here the hurt constitutes the element of force which converts theft into robbery. Lastly, it should be noted that s. 71, I P C., makes no provision for a series of acts, one part of which constitutes one offence and another part a separate offence, but which when combined do not constitute a third offence. Illustration (*b*) to this section, however, shows what should be done in such cases. This class of cases is governed by this section and separate sentences may be passed for each of such offences. *See* **10 B. 493; 12 M. 36; 23 B. 706 (F.B.).** When the trial proceeds on two separate charges for two distinct offences and convictions are recorded on both separate sentences ought to be passed **Ratanlal 369.** The accused was convicted by a first-class Magistrate of offences under ss. 467 and 380 I P C and sentenced to one and two years imprisonment for each of the offences. On a reference from the District Magistrate that sentences exceeded the powers of the trying Magistrate *viz* two years, *held* that under cl (1) of this section the accused could legally be tried at one trial for those offences and separate convictions were illegal [*see Illust.* (*b*)] inasmuch as though nothing contained in this section affects s 71, I P C, still as the accused committed distinct offences which when combined are not punishable under any single section of the I P C, s 71 does not apply, **Ratanlal 225.** *See* also **10 B. 493.** But now when read in the light of explanation to s 35 the offences under ss. 451 and 380 are not distinct offences, therefore the offender cannot be punished with a more severe punishment than the trying Court could award for any one of such offences. Where a person was convicted under s. 457, I.P.C and was also convicted in the same trial under s 354 and received separate sentences of 12 months' and 6 months rigorous imprisonments respectively *held*, that the separate sentences were not sustainable **12 C. W. N. 187.** When an accused person is convicted and punished for murder or voluntarily causing grievous hurt with a dangerous weapon he cannot also be punished by fine for rioting when all the offence formed part of the same transaction, **Ratanlal 493.** *See* also cases under s. 35. Where the charge against the accused is founded upon one single continuous transaction the first thing to be ascertained is what is the principal legal offence involved in the conduct of the accused which would subject him if convicted to the greatest amount of punishment? That being ascertained, the object of adding others is not the accumulation of punishments but to provide against the event of the evidence failing to establish the principal charges. The most convenient course (with reference to appeals is to enter up findings on all the counts).—*Mad. H C. Pro* 30*th March* 1863

16. Separate punishment cannot be awarded where offence is so compounded that the aim of one substantive offence is the perpetration of some other offence.—This section taken with illustrations, forbids two punishments for an offence so compounded that one substantive offence is the aim of the other, and evidentiary matter of the intent necessary to constitute that other. Therefore a person who has been tried and convicted under s. 369 I P C of abducting a child with the intent of dishonestly taking movable property, cannot also be punished for the theft of a part of the movable property which he intended dishonestly to take through means of abduction **7 M. H C. R. 375;** *followed* in **Ratanlal 152.** House breaking by night with intent to commit theft and theft in the building, **Ratanlal 79** and **95.** Kidnapping with intent to steal and theft, **1 Bur. S. R. 475; 11 W R. 38** or riding a horse furiously and knocking down a bystander and causing hurt to him, **Ratanlal 159.** If in the same transaction two different offences are committed separate sentences must follow, **33 C. 453.** On the question of punishment *see* **2 A. 101** and **644, 6 A. 121; 7 A. 29; 1 B. 214; 10 B. 493; 8 C. 713 = 8 C. L. R. 390; 9 A. 645; 10 A. 55 at p. 67; 10 A. 166; 32 P. R. 1883; 31 P. R. 1896; 23 B. 906; 12 C. 495** and Notes to s. 35 *contra* **1 Bur. 271.** These decisions were given with reference to illustrations (*e*) and (*h*) of s. 454 of Act X of 1872 which are not reproduced under the present section.

17. The major offence to be looked to.—Prisoner was squabbling with the husband of the witness at the door of the house. Witness remonstrated and abused the prisoner when he merely entered the house for the purpose of committing an assault upon her and in carrying out that intention caused her grievous hurt. *Held*, that his conviction for the substantive offence of grievous hurt was right, but not of house-trespass, **2 W. R. 29.**

18. For offences falling within two definitions.—*See* **10 C. W. N. 518 = 3 Cr. L. J. 388** dealing with offences under ss. 201, 202 and 176, I P C., and **16 M. L. J. 463 = 14 Cr. L. J. 214** and Notes under s. 403.

(7) Accused Nos. 1, 2 and 3 for an offence under s. 346, I.P.C., committed against Yellia between the 8th February and 9th March, 1889.

The committing Magistrate committed the accused in two separate cases, which were tried together by the Court of Session under this section and s. 239 as the same four persons were accused in "both cases and were under this section charged with different offences committed in what was virtually one transaction, *viz., a Police investigation into an alleged theft at Bagadgeri.*" On appeal to the High Court it was *held* that—

(1) Though the members of a Police Force who had conspired to maltreat suspected persons in the course of an investigation, could, under certain circumstances, be dealt with under the provisions of this section and s. 239 for a series of oppressive acts of which they were guilty in the prosecution of their common object still it would be necessary to consider carefully whether the alleged acts were, as a matter of fact, so connected together in one series as to form essentially and strictly the same transaction.

(2) If in any case either the accused are likely to be bewildered in their defence by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters and tending by its mere accumulation to induce an undue suspicion against the accused, then, the propriety of combining the charges may well be questioned.

(3) All the several acts of violence alleged to have been committed against Hanma during his illegal confinement could be rightly regarded as constituting a single transaction. But the act of violence said to have been committed against Rakmava at a different place could not be regarded as a part of that transaction. Nor was the wrongful confinement of Rakmava by the accused Nos. 1 and 3 on the 15th January a part of the transaction constituted by the hurt which was caused to her by the accused No. 3 on the previous day. In the same way, all acts of hurt caused to Yellia during his first period of wrongful confinement would, with the confinement, be a part of the same transaction. But the second period of confinement which is said to have commenced some time after the termination of the first period of confinement, would be a separate transaction.

(4) The combination of the two cases by the Sessions Judge necessarily prejudiced the accused by making it possible for the prosecution to bring forward a mass of evidence at the trial, relating to many matters some only remotely connected with relevant questions, which must, to some extent, have had the effect of embarrassing and confusing the accused.

(5) The omission to specify in the first head of charge the several hurts caused to Hanma and in the fifth head the several hurts caused to Yellia must also have added to the accused's difficulty in making their defence, **15 B. 491.**

13. Where one offence in the same transaction not cognisable for want of sanction, trial may proceed for the others.—The accused by certain acts abetted an offence under s. 122, I.P.C., and by the same acts he also abetted the offence of dacoity under s. 395, I.P.C. Though under sub-sec. (2) of this section the accused could be tried for both of those offences, yet as this section is controlled by s. 196, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried, **25 B. 90.** Where offences punishable under ss. 183 and 186, I.P.C., were committed and in committing those, offences under ss. 353 and 323 were also committed, the latter offences may under this section be separately charged and no sanction is necessary, **31 M. 43.**

14. Alternative charge in case of distinct transactions is bad.—Neither this section nor s. 236 relates to two acts which form two distinct transactions or empowers a Court to say in a charge to an accused person. "Either on one day at one place you did an act which constituted one of several offences, or on another day at another place you did a different act constituting a different offence, and therefore you are guilty of some one or other of all the offences specified," **43 P. R. 1887.**

PUNISHMENT.

15. When charges are for distinct offences, whether separate convictions and sentences are legal?—In **7 A. 757,** where the accused in the course of rioting constructively caused hurt, it was *held* that separate punishments for offences of rioting and hurt were not legal, as it was found that none of the accused had individually committed any act which amounted to voluntarily causing hurt. With reference to sub-sec. (2) it may be pointed out as a general rule that when, in the same penal statute there are two clauses applicable to the same act of an accused person, the punishments are not to be

series of acts where the facts being ascertained it is doubtful which of several sections is applicable, 43 P. R. 1887. *See* 14 A. L. J. 587. This section applies to cases in which the law applicable to certain set of facts is doubtful, by reason of the nature of the single act or series of acts done, and in which it is charged or found proved (as the case may be) that the act or series of acts constitute one or more or some one of several offences, the doubt being on a matter of law only. Therefore a person cannot be charged with murder or alternatively of culpable homicide not amounting to murder, 11 P. R. 1887; *see* also 7 Rang. 96. Where the doubt in the mind of the Judge was not whether on the facts which were held to be proved, the accused's act fell within the purview of s 302 or s. 201, I.P.C., but whether there was sufficient proof that the accused had in fact committed the murder of the deceased, or had merely been guilty of causing evidence of murder to disappear, an alternative conviction for both the offences is not contemplated by law, 11 P. R. 1913; 20 C. W. N. 166. Where the accused was charged under two heads of charge with dacoity in each of two adjacent houses, and the Sessions Judge was unable to determine into which house he entered, *held*, that he was wrong in finding him guilty upon an alternative finding. The Code only contemplates an alternative finding when the facts are ascertained and it would follow beyond doubt that the facts proved constitute one or two offences under one section of the Penal Code, or when the evidence proves the commission of an offence falling within one of the sections of the Code, and it is doubtful which of such sections is applicable. Ratanal 20. This section applies to cases in which the facts are not doubtful, but the application of the law to the facts is doubtful. Judgment in the alternative cannot be passed in cases in which it is doubtful of which of those offences the accused is guilty, 7 N.-W. P. H. C. R. 137. *See* also 12 C. W. N. 530 = 7 Cr. L. J. 382; Weir II, 301. S. 236 applies only to cases in which there is a single act or a series of acts of such a nature that it is doubtful which of several offences is constituted by the criminal act or acts. It has no application when there is no doubt as to which of several offences the accused has committed if the facts as alleged by the prosecution are established, 18 C. L. J. 574 = 15 Cr. L. J. 41, 16 Cr. L. J. 761 (B.), 5 S. L. R. 15 = 12 Cr. L. J. 224.

3. **Alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a Special Law.**—Both the provisions of the law as to judgment and punishment in the case of an alternative charge are limited to offences of the *Penal Code*. S 367 (3) contains an express limitation to that effect and s 72, I P C, is by s. 40 limited to offences under the *Penal Code*. The word offence in s. 236 includes offences under Special Laws and such offences may be charged cumulatively. But the limitations in s. 367 (3) and s. 72, I P C, seem to indicate that an alternative charge cannot be framed in respect of an offence under the *Penal Code* and an offence under a Special Law, 5 S. L. R. 16 = 12 Cr. L. J. 224. In this case the charge was in the alternative under s. 409 I P C, or s. 52 of the *Post Office Act* in that he either dishonestly converted to his own use Rs. 2 and As. 13 proceeds of the bearing letters entrusted to him or that he threw away the bearing letters.

4. **'Several offences' include offences under the same section.**—*I.e.*, not merely several offences (*i.e.* two or more) punishable under different sections, but also two or more offences punishable under the same section, whether under the same part, or under different parts of the same section, 32 P. R. 1888. The offences mentioned in this section are not in fact offences of the same kind arising out of a single act or set of acts' and committed at one and the same time, 9 C. 371 = 11 C. L. R. 522, but offences of different kinds.

5. **Mode of framing charge in case of stolen property.**—Where an accused person is found in possession of several stolen articles belonging to *A* and *B* at one and the same time, the proper course is to frame two charges, in respect of the property of *A*, one under s. 379 and one under s. 411 I P C, expressed either alternatively or cumulatively, and two similar charges in respect of property of *B*. The reason for the double charge in both cases is that the Court is not in a position to affirm positively that *C* has stolen the property rather than he received it, and reason for framing distinct sets of charges as to the property of *A* and the property of *B* is that the Court is not in a position to affirm that the property of *A* and *B*, supposing that it may have been received or retained by *C*, and not stolen by him, came into his possession by a single act of receiving. *Per* PLOWDEN, J, 28 P. R. 1889. A joint trial for offences under sections 380 and 411, I P C. is valid even though the charges are framed cumulatively and not in the alternative. 8 Pat. 731

6. **Alternative charge of murder and of causing disappearance of the evidence of the murder.**—The joinder of charge of murder, s. 302, I.P.C., and of causing disappearance of the evidence of the murder, s. 201, I P C., in the alternative is legal, 4 S. L. R. 176 = 11 Cr. L. J. 731 *following* 1 S. L. R. 73. *See*, however, 20 C. W. N. 166. In 11 P. R. 1913 it was suggested that if *in fact* it was doubtful which of two offences

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Where it is doubtful what offence has been committed.

Illustrations

(*a*) *A* is accused of an act which may amount to theft, or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft or receiving stolen property, or criminal breach of trust or cheating.

(*b*) *A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Notes.—1. Scope and application of section.—S. 236 contemplates a state of facts constituting a single offence, but it is doubtful whether the act or acts involved may amount to one or other of several cognate offences, **23 C. 171—176.** *See* also **21 C. 953; 8 M. 296** and **12 Bom. H. C. R. 1** as to construction of s. 236. *See* Note 19 to s. 233 as to whether the exceptions to s. 233 are mutually exclusive.

S. 236 is the only section under which an alternative charge can be framed. The section provides for cumulative as well as for alternative charges and in s. 403 it is contrasted with s. 235 (1) which also provides for cumulative charges. The offences under s. 235 (1) are referred to in s. 403 as distinctive offences while that expression is not used in regard to the offences falling under s. 236. Under s. 235 (1) the offences are committed in a series of acts. They are distinct offences. Under s. 236 the offences arise out of a single act or out of a series of acts. The offences are not distinct. S. 236 does not apply to distinct offences. It applies as shown by ill. (*a*) and (*d*) to s. 403 to offences of the same kind, but which differ only in degree. The difference and degree depend upon some added circumstances of aggravation, *e.g.*, that the thief was the servant of the complainant or to a difference in the intention imputed to the accused as in the case of culpable homicide amounting to murder. But both these cases are cases not for alternative charges but of cumulative charges under s. 236. An alternative charge cannot be framed in respect of distinct offences nor in respect of cognate offences when the difference is one of degree, *i.e.*, as to the intention imputed or as to some circumstance of aggravation. An alternative charge under s. 236 can be framed only in those rare cases in which the prosecution cannot establish exclusively any one offence, but are able on the facts which can be proved, to exclude the innocence of the accused and to show that he must have committed one of two or more offences. The prosecution establish a *corpus delicti* on the facts which can be proved and the facts which cannot be proved are subsidiary facts important only to this extent that they decide under which penal provision the *delictum* falls. Offences charged in the alternative arise out of the same *delictum* and are therefore necessarily cognate offences. Where the facts constituting *corpus delicti* are doubtful no charge in the alternative can be framed. *Per* PRATT, J., in **8 S. L. R. 16 = 12 Cr. L. J. 224.** CROUCH, A. J. C., however, differed from PRATT, J., and *held* that there is no authority for asserting that the alternative offences must at best be offences dealt with in the same chapter of the *Penal Code* or "cognate" in any other technical sense. The section is nothing more than a permissive rule of procedure. Whether it is expedient to frame a charge in the alternative or whether it will unfairly embarrass the accused in the conduct of his defence are two of the most important questions which should be answered satisfactorily, before the procedure is followed. The doubts are which s. 236 seeks to provide are doubts as to what inferences will be drawn from the evidence if believed. The doubt which of several offences the facts proved will constitute must arise from the very nature of the acts of which it is intended to offer evidence.

Ss. 236 and 237 are merely provisions against the defeat of justice on technical grounds. Where an offence is proved by the evidence, but its legal definition is doubtful or has been incorrectly given in the charge then s. 236 or s. 237 may be resorted to. They really deal with particular instances which the language of s. 235 might fail to cover, **9 N. L. R. 26 = 14 Cr. L. J. 135.** In **10 B. 124** the section was *held* not applicable to different transactions; *see* Note 20.

2. Section applies only where the application of law to the proved facts is doubtful and not where the facts are doubtful.—This section relates not to distinct acts, but to a single act or

15. **Effect of change of the Law.**—In a charge under s. 193, I.P.C., it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient (unless some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement at another, **7 A. 44.**

The cases in **Ratanlal 518** *and* **336** *and* **18 B. 377** *are now superseded to this extent.*

16. **Form of charge under this section.**—Form XXVIII (ii) 4 is referable to this section and is intended to be exemplar of a charge in the alternative under this section **32 P. R. 1888.**

17. **Alternative charge in cases of contradictory statements.**—Prosecution on alternative charges of persons who make contradictory statements to the Police and to a Court has its conveniences but it has also its drawbacks. It is not a prosecution to be encouraged and is justifiable only when the prosecution is unable to prove which of the contradictory statements was false, **27 P. R. 1890; 11 Cr. L. J. 734 (Burma), 3 L. B. R. 204 = 4 Cr. L. J. 469.** The accused must have been under a legal obligation to speak the truth on both the occasions, **4 C. W. N. 249; 10 B. 124; 11 B. 702; 18 B. 377; 27 C. 455.** It must be remembered that the accused might have made two statements in perfect good faith, and yet quite irreconcilable, **23 B. 533.** Where a person was convicted of giving false evidence upon an alternative charge *held* by the majority of the Court (JACKSON and PHEAR JJ., *dissenting*), that the conviction was good notwithstanding the jury had not distinctly found which of the two statements charged was false, **21 W. R. 72 = 13 B. L. R. 324 (F. B.).** But an accused should never be called upon to plead in the alternative but separately to each of the heads of a charge **Ratanlal 327.** Two distinct charges ought to be framed, one relating to each statement and such evidence as is procurable should be adduced to prove the falsity of one or the other of the statements, **Weir II, 293; Ratanlal 356.** It is only when it is found impossible to say which of the conflicting statements was false and the two could not be reconciled, the prisoner should be convicted in the alternative on a charge framed under this section **Weir II, 300,** which follows **18 B. 377.** *See* also **Ratanlal 386.** If each of the statements is found to be false then conviction should follow on both heads of the charge. *See* Note 13 to s. 233 at pp. 647 and 648

Although a statement which is made in the course of a Police investigation under s. 164 of this Code is not evidence in a stage of judicial proceedings but comes within the words "evidence in any other case" in s. 193, I.P.C., *yet it can be linked with a statement which is in evidence in a stage of the judicial* proceeding following on the investigation, so that the two can be said to be a series of acts on which an alternative charge can be framed under this section of intentionally giving false evidence under s. 193 I.P.C. *Held*, by MACLEOD, C.J., PRATT FAWCETT and SETALVAD, J. (SHAH, J. *dissenting*), **18 B. 377 (F. B.)** *overruled* **23 Bom. L. R. 1 (F. B.).**

18. **Accused should have an opportunity of explaining contradictory statements.** Where there is a trial on a charge of giving false evidence by reason of contradictory statements is of the first importance (1) that there should be clearest and most precise evidence of what the statements alleged to be contradictory really are, and (2) that accused should have every possible opportunity of explaining the statements in question and of showing that the alleged contradiction does not really exist. Where the accused had not such opportunity the High Court ordered a retrial, *Per* STRACHEY, C.J., **1899 A. W. N. 29.** Extreme care has to be taken that the accused person really understands the nature of the case against him and the circumstances which he is asked to explain. *Per* KNOX J. *ibid.* Every presumption in favour of the possible reconciliation of the statements must be made, **10 B. 124; 7 A. 44; 3 C. W. N. 81.** *See* Notes 130-132 to s. 195.

19. **The two contradictory statements might have been in the course of the same deposition.**—The *two contradictory statements might have been made in the course of the same deposition.* The accused would still be liable, **26 M. 55** *following* **10 C. 937.** But it is a well-known rule of law applied by eminent judges to cases of perjury arising out of contradictory statements, that the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable and it is the duty of the Court to see whether the statements can be reconciled or not. *Per* CHANDAVARKAR, J., **25 B. 533.**

20. **Charge in alternative of two different offences under two different sections of the Penal Code is bad in law.**—The accused was charged, in the alternative, by the trying Magistrate as follows:—

"I, W. W. DREW, Magistrate of the first class, hereby charge you, Raoji Sajabarao as follows:— That you on or about the 13th day of October, 1882, at Nandarpada, stated that you had seen Vithu Vaman and Mahadu Lakshman carrying teakwood from Gobe Forest to Narayan Ramachandra, Range Forest Officer

the accused committed, the proper course would be to give the accused the benefit of doubt of the offence of murder. *See* Note 1 above.

7. **Charge of alternative common object when allowable in rioting cases.**—In a case of an unlawful assembly, if it be the opinion of the Judge that there is ground for charging the accused with a common object different from that alleged by the prosecution, he should add a separate count or counts to the charge, so that a separate verdict could be taken upon it. This section only authorises a charge in the alternative when it is doubtful which is several offences the facts which can be proved will constitute—not when there may be a doubt as to the facts which constitute one of the elements of the offence, **21 C. 955.**

8. **Alternative charge under s. 189 or s. 211, I.P.C., if good**—In **20 P. R. 1910 = 30 P. W. R. 1910 = 11 Cr. L. J. 420**, it is *held* that offences under ss. 182 and 211, I.P.C., are essentially distinct and there could not be a charge in the alternative under these sections.

9. **Alternative charges where death is caused.**—*A* without provocation stabbed *B* with a knife which penetrated the cavity of the chest and caused *B's* death. The Sessions Judge found the case did not fall within clauses 1 to 3 of s. 300, I.P.C., and therefore acquitted *A* of the charge of murder on which she was committed, but convicted her under s. 326 of voluntarily causing grievous hurt with an instrument used for stabbing. *Held* that *A* should have been charged alternatively under ss. 302, 394 and 326, and that if the Judge found the case did not fall within any of the four clauses of s. 300, and that the exceptions to that section did not apply, he should then have considered the charge under s. 303, and found whether or not *A* knew she was likely to cause death, the charge of causing grievous hurt being altogether inapplicable to cases which a person causes death by an unlawful act which he knows likely to cause death, **1 Bur. S. R. 300.**

10. **Effect of conviction or acquittal after a trial on a charge under this section.**—This section contemplates a state of facts constituting a single offence, but where it is doubtful whether the acts or act involved may amount to one or another of several cognate offences. Where that is the case, the accused may be simultaneously charged with and tried for the commission of all or any of such offences, and after acquittal or conviction, cannot again be tried on the same facts, either for the specific offence or offences for which he has already been tried, or for any other offences for which he might then have been tried under the provisions of the section, **23 C. 174 at p. 178, 26 Bom. L. R. 440.**

11. **The reversal of verdict sets free all the charges.**—Where an accused person is charged with and tried for various offences arising out of single act or series of acts, it being doubtful which of those offences the act or acts constitute and where he has been acquitted by a jury of some of those offences and convicted of others, but the Appellate Court reverses the verdict and orders a re-trial without specifying the charges on which the re-trial is to be held, then such re-trial must be taken to be on all the charges as originally framed and the acquittal by the jury at the previous trial on some of such charges is no bar to the accused being tried on them again, **22 C. 377; 23 C. 975.**

12. **Definite finding on each count should be given.**—Where accused is charged on the same facts in the alternative on a graver and on a less serious count, the Court should record a definite finding on each count, **1 Bur. S. R. 374.**

13. **Powers of Appellate Court.**—It is not competent to a Judge in appeal to alter a charge under s. 376, I.P.C., into one under s. 366, I.P.C., because a charge under the latter section involves different elements and different questions of facts from one under s. 376, I.P.C., **8 Bom. L. R. 120 = 3 Cr. L. J. 240.**

ALTERNATIVE CHARGES IN CASES OF PERJURY.

14. **Law as to contradictory statements.**—Illustration (*b*) which is new is proposed to settle the law that contradictory statements by a witness which are irreconcilable constitute the offence of intentionally giving false evidence, though it cannot be proved which of the two statements is false. *Statement of Objects and Reasons. See* **Ratanlal 26.** The illustration adopts the Full Bench view in **21 W. R. 72 (F.B.).** *Scope of illustration* (*b*). In **16 K. L. R. 148 = 2 Cr. L. J. 590**, it is laid down that this illustration must be strictly confined to the case of two contradictory statements of the same kind and cannot be applied to statements falling under the two different parts of s. 193, I P.C. Therefore the accused making a false statement in an investigation under s. 175, and a contradictory statement before a Magistrate could not be convicted in the alternative, **18 B. 377** and **28 B. 533** relied on. This view, however, seems to be erroneous. *See* **5 M. L. T. 356; 22 A. 115; 1903 A. W. N. 73.**

be convicted of the abetment of criminal breach of trust. *See* also **A. I. R. 1923 Cal. 307 = 50 C. L. J. 472.** In **16 Cr. L. J. 676 (Burma)** the Full Bench was of opinion that it would not in all cases be illegal to convict a person of the abetment of an offence when the charge is for the offence itself. In that case the verdict of a jury convicting a person of the abetment of robbery on a charge of dacoity was upheld. *See* also **25 C. 207** where a conviction under s. 467/114 was held to be improper and the conviction was changed to s. 467/109, I P C.

3. Conviction for substantive offence when charged with abetment only.—Four persons were charged under ss 232 and 235, I P C., for coining false rupees not for the purpose of making gain by passing them off on the public as good rupees, but for the purpose of getting them secretly into the house of the coiner's house enemies against whom they were making a charge of theft to the Police accompanied by a request for search and the accused were convicted under ss. 235 and 195/107, I P C. The High Court while acquitting the accused under s. 235, I P C, altered the conviction under s. 195/107, I P C. to one under s. 195, I P C. The course was justified under this section. There can be no doubt that the accused might have been charged under *s. 195 on strength of s. 236, for the whole story of the plot to fabricate false evidence which plot I have* found proved was detailed in the case for possession and formed an integral part of that case. The accused were aware that this was a part of the case against them all through and through and they have suffered no prejudice **43 P. L. R. 1912 = 17 P. W. R 1912 = 13 Cr. L. J. 252.**

4. Conviction for offence not charged is legal, if the facts which accused would have to meet on such an offence; be the same as on the offence charged.—(*i*) *Breach of trust and cheating*.—Where a person was charged with (1) attempting to commit criminal breach of trust, (2) framing as a public servant an incorrect document to cause an injury, (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant though the Judge found that he had framed the document with a fraudulent intent *held* that he ought to have been convicted of attempting to cheat, as the facts he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, **12 B. H. C. R 1.** *See* also **8 B 200** and **17 B. 369; A. I. R. 1929 Pat. 11 = 30 Cr. L. J. 205.** (*ii*) *Receiving stolen property and theft*.—A person charged and tried under s 411 I P C., may without altering the charge be convicted of an offence under s. 379 I.P C though the proper course would be to alter the charge under s 227, **1888 A. W. N. 116** *See* also **17 M. L. J. 219 = 5 Cr. L. J 479** (*iii*) *Charges under s 124 A, conviction under s 153-A I P C*.—An accused tried and charged with an offence under s 124 A in respect of an article in a newspaper may be convicted under s. 153-A in respect of the same article even though not charged with it, **33 B. 77** and *see* also **33 B. 221.** *See* the same cases noted under s 234

5. Operation of section limited to cognate offences.—Where charges are not *ejusdem generis i.e.*, of the same nature a Magistrate should not amend them at the last stage of the inquiry. The powers given by ss. 236 and 237 do not justify such amendment so as to prejudice the case for the prosecution *Per* RANADE, J., **19 B. 51 at p. 71.** (*i*) *Murder and theft*.—This section and s. 236 refer to cognate offences but do not relate to offences of so distinct a character as murder and theft. Where therefore, a person charged with murder was acquitted of that offence but convicted of theft with reference to the provisions of this section *held* the conviction was altogether unwarranted, **1888 A. W N. 95.** (*ii*) *Rape and kidnapping*. A person charged with rape cannot be convicted of kidnapping. **8 Bom. L. R. 120 = 3 Cr L. J. 240.** (*iii*) *Ss 193 and 211 I P C.—Unconnected offences*.—A person charged with dacoity, cannot be convicted of dishonestly receiving stolen property (s. 412, I P C.) which had not been shown to be a part of the property taken in the dacoity **Ratanalal 34.** *See* **95 P. L. R. 1904, 5 C. 871; 8 B. 200; 22 C. 1006.** In the trial on a charge of abetment of forgery under s. 467, I P C, read with s. 109 I P C., the accused cannot be convicted of using a forged document under s. 471 I.P C., ss. 236 and 237 of the Code do not warrant such a conviction, the offence of abetment of forgery is complete when the document is written and signed but the user is a distinct and separate offence **30 C. W. N. 452.**

6. Where offences are distinct, trial should be separate.—(*i*) *Two sets of accused*.—Two acts of abduction separate and distinct, on one and the same girl were alleged to have been committed by two sets of persons of different dates. There were also charges against members of both the sets of having concealed the kidnapped girl and the charges were all tried together. The jury returned a verdict of "not guilty" against one person and they found the others to have abducted the girl from the guardianship of her parents and that it was not proved that the girl was below 16 years in age. *Held* that the trial of these distinct offences by separate sets of persons was illegal and must be set aside and the retrial of each of the offence with which the

and on 14th February, 1885, you stated on oath before the first-class Magistrate at Pen, at the trial of these persons, that you did not see where they had brought the wood from, and thereby committed an offence punishable under s. 182 or s. 193 of the I.P.C., and within my cognisance; and I hereby direct that you Ramji Sajabarao, be tried by the said Court on the said charge."

At the trial the accused asserted the truth of the former of these two statements, and denied having made the other The Magistrate was unable to find which of them was false, and convicted the accused, in the alternative, either under s. 182 or s. 193 of the I.P.C. *Held*, that the charge was bad in law, being an alternative charge in a form forbidden by s. 233, which directs that, for every distinct offence of which any person is charged, there shall be a separate charge. Nor could the accused be tried upon a charge framed in the alternative as in the Form XXVIII, Sch. V of the Code. For, upon the facts alleged, there was no way of charging him with one distinct offence on the ground of self-contradiction. He could not successfully be charged under s. 193, I P.C., on contradictory statements, because he only made one deposition in which there were no discrepancies; and, similarly, he could not be charged under s. 182 of the I.P.C., for he only once gave information to a public servant. *Held*, also, that having regard to ss. 225, 232 and 537 of the Code, the accused, convicted upon such a charge, must be held to have been misled in his defence, and his conviction and sentences were set aside, **10 B. 124.** *See* **16 B. 491** and **14 A. 502.**

When a person is charged with one offence, he can be convicted of another.

237. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Note.—Sub-section (2) of this section has been omitted by Act XVIII of 1923. But it is re-enacted as sub-section (2-A) to s. 238.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence. (*See* **17 M. L. J. 219 = 5 Cr. L. J. 479.**)

Notes.—1. The effect of the removal of sub-sec. (2) from this section:—section 403, (1) refers to ss. 236 and 237 of the Code. The effect of the amendment in removing sub-sec. (2) is that s. 403 does no longer apply to the case of a charge contemplated by sub-sec. (2), *i.e.*, the case of the charge of an attempt. For this *see* Note **32 A.** to s. 403 and **48 M. 774.**

2. ***Can a person be convicted of the abetment of an offence when charged with the principal offence* only ?**—Ordinarily the facts required to prove the abetment would not be included in the facts constituting the principal offence. The abetment would precede the commission of the principal offence itself where it consists of the abettor being a party to a conspiracy in or investigating the principal offence or help in the commission of it. Therefore when the charge is of the principal offence only it cannot be said that he has to meet facts which occurred before the principal offence. WEST, J., in **11 Bom. H. C. R. 240** *held* that it is not open to a Court to find a man guilty of the abetment of offence on a charge of that offence itself. "When a man is accused of murder, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting an abetment of it, which may be quite distinct from the circumstances constituting the murder itself. A charge of the offence simply as such gives no intimation of a trial to be held for the abetment." In **33 M. 264** the Court held that when a person has been charged with a certain offence (ss. 467 and 468, I.P.C.), and has been convicted of that offence, the Appellate Court cannot on finding the conviction is not sustainable, convict the accused of the abetment of that offence. *See* also **13 Cr. L. J. 203 (M.).** In **23 M. L. J. 722 = 13 Cr. L. J. 453.** SUNDARA IYER, J., *after referring* to the above cases stated as follows:—"I do not think that **33 M. 264** intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. The question is what the facts charged were. If on those facts two charges could be framed, namely, the commission of the principal offence, and the abetment thereof by virtue of provisions of s. 237, the accused may be convicted of the offence of the abetment though it was not separately charged against him. The Code lays down no specific provision with respect to the question decided here, but the principle is laid down in ss. 236 and 237. Applying that principle I come to the conclusion that in this case the accused may

respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under s 406.

(*b*) *A* is charged, under s 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under s. 335 of that Code.

Notes.—1. Scope of the section.—This section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived by mere subtraction from the former But when this is not the case, when the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter The section is not intended to apply to a collateral offence. It is not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself, **11 Bom. H. C. R. 240.** Though an accused may be charged in the alternative with either of two offences under s 236 or may be convicted under s. 237 of the second offence when charged with the other, the two sections must be read along with s. 233, **911 U. B. R. 98 = 13 Cr. L. J. 429.** But this is merely an enabling section. Its provisions are not imperative and therefore where the accused was charged and convicted under s. 454, I P C., the conviction was held good, though the facts disclosed also an offence under s. 380, I.P.C., and the accused should have been tried for charges under both the sections, **Ratanlal 307; 28 Bom. L. R. 323.** But *see* **3 Rang. 11** (*contra*).

1-A. The effect of the insertion of sub-sec. (2) (A) relating to the charge of an attempt.—For this *see* Note 32 A to s. 403 and **45 M. 774.**

2. "Minor offence."—These words are not defined by law They are to be taken not in any technical sense, but in their ordinary sense. Therefore, where the accused was charged under ss. 366 and 376, I P C., *held* that he could be convicted under s. 385, I P C., **22 C. 1006.** On a charge under s. 457, I P C a man may be convicted of an offence under s. 456, I P C., **20 C. W. N. 1075.**

3. Conviction for major offence not allowed on a charge of minor offence.—There is no provision of law which allows a conviction of a major offence on a charge of minor offence, **1 Bom. L. R. 513.**

4. Offences not falling within the scope of the section.—

(i) *House-breaking by night and theft in a dwelling-house are not included in the offence of robbery or in s 397, I P C.*—The accused were charged with and tried by the Sessions Court under s. 397, I P C, for committing robbery and using a deadly weapon (sword) at the time of committing and the jury returned a verdict of not guilty of the offence charged, but found No. 1 guilty of house-breaking by night and theft in a dwelling house, and No 2 guilty of abetting those offences. *Held*, that the verdict was bad and should be reversed, as the accused were not charged with those offences, and that as all the particulars constituting the minor offences were not included within that under s. 397, I P C, or within the definition of robbery, the accused could not be convicted under this section, **Ratanlal 211.** But *see* **1 B. 50.**

(ii) *Murder and kidnapping*—Where the accused was charged with murder, but the evidence established the offence of kidnapping from lawful guardianship with which he was, however, not charged, *held* that the latter offence was not a minor offence within the meaning of this section of which he could be convicted, **Weir II, 302.**

(iii) *Criminal trespass and dacoity or riot*—The offence of criminal trespass is no part of the offence of dacoity or riot and therefore without a specific charge of that offence a person under trial for dacoity and riot cannot be properly convicted of criminal trespass, **23 W. R. 53.** *See* also **18 Cr. L. J. 860.**

(iv) *Rioting and Assault*—A charge of rioting does not include as a minor offence any specific act of violence by an individual accused person, so as to authorise under this section, a conviction for assault, **113 I. C. 323 = 30 Cr. L. J. 891.**

(v) *Extortion and theft*—It is wholly illegal to convict and punish a man for a grave offence as extortion, s 384 I P C., involving many totally different ingredients on a charge of theft under s. 379, I.P C., only **13 Cr. L. J. 637 (C.)**.

(vi) *Sections 201 and 202, I P C.*—Where a person charged under s. 201, I P C., for giving false information as to the cause of a death was acquitted of that charge, but was convicted of a offence under s. 202,

accused were charged was ordered, **1 C. L. J. 455 = 2 Cr. L. J. 393.** *See* also **28 C. 104.** (*ii*) *Distinct offences against two persons.*—Where the accused was charged with assaulting a public servant, *viz.*, a Police constable, and in the trial a witness deposed he was assaulted by the accused, and the accused was found not guilty of having assaulted the constable, he cannot be convicted of having assaulted the witness without any complaint by the witness. Section 190 (*c*) does not authorise the Magistrate to convict him of such an offence, as in that case further proceedings must be taken under s. 191 before conviction, **8 C. W. N. 203.**

7. Charge under s. 325 read with s. 149, I.P.C.—Conviction under s. 325, I.P.C.—A person charged for offences under s. 147 and for offences ss. 304, 325 and 323 read with s. 149, I.P.C., cannot in the event of the charge not being made out, be convicted of an offence under s. 325, I.P.C., **34 C. 698; 6 C. W. N. 98; 17 C. W. N. 63; 16 C. W. N. 1077 = 13 Cr. L. J. 502.** In **13 C. W. N. 244,** a conviction was upheld on the ground that in the circumstances of that case in the offence under s. 326 was included in the constructive offence under s. 326/149: and *see* Note 10 to s. 238. *See* Note 2 to s. 232 and Notes 5 and 6 to s. 227 and also **41 C. 682.**

8. Charge under s. 141, I.P.C.—Conviction for common object different from that set out in the charge.—*See* 36 C. 865; 6 M. L. T. 17 = 11 Cr. L. J. 30; 40 C. 168; Note 1 under s. 225 and Note 13 under s 239.

9. In a case tried with assessors their opinion must be obtained in respect of the offence not charged. —It is very doubtful if this section applies to a case in which the true nature of the offence is not open to reasonable doubt, **Weir II, 301.** In this case it was further ruled that a person cannot be convicted of an offence with which he has not been charged, but which the evidence shows he has committed in a case tried with the aid of assessors, when the opinion of the assessors has not been taken with regard to such offence. But *see* Notes to s. 236.

10. Effect of ss. 237 and 238 on powers of Appellate Court.—The powers of the Appellate Court under s. 423 (*a*) are not qualified by ss. 237 and 238. The finding which an Appellate Court may alter under s. 423 (*b*) may relate either to an offence with which the accused was separately charged in the Lower Court or to one of which he might be convicted without a distinct charge. In cases not falling under ss. 237 and 238 no doubt the Appellate Court cannot convict a person of an offence which he was not charged in the first Court but where he has been charged and the first Court has recorded a finding on the charge there is no reason for holding that the Appellate Court cannot alter the finding because the offence of which he was acquitted by the Lower Court was not an offence which did not fall under ss. 237 and 238, **23 Cal. 975; 27 C. 172** *followed*, **21 M. L. J. 805 = (1911) 2 M. W. N. 106 = 10 M. L. T. 66 = 12 Cr. L. J. 269.** *See* s. 423. Where the prosecution has established the necessary facts the Appellate Court may alter charge or finding, without directing a new trial provided the accused be not prejudiced, **26 B. 863.** In **41 C. 537,** the High Court on revision quashed the conviction under ss. 46 and 52 of the *Bengal Excise Act* and convicted the accused under s. 61 of the same with which he was not charged, holding that was a case to which ss. 236 and 237 applied. *See* also **33 M. 264; 18. C. W. N. 1276 = 15 Cr. L. J. 704.**

When offence proved included in offence charged.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

*(2-A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations.

(*a*) *A* is charged under s. 487 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under s. 406 in

* This sub-section was inserted by Act XVIII of 1923.

195, 196 or 197, but for which no such sanction or complaint is given or made, and which are included in the offences charged for which no sanction or complaint is necessary. But now it is held, that the provisions of s. 195 of the Code cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, **47 A. 114.**

7. Charge under s. 149, I.P.C., conviction for the common object.—*See* Note 7 to s. 237 and Notes 4 (*x*) and 10.

8. Competency of jury to return verdict on offence proved though not independently charged.—The accused were charged under s. 149, coupled with s. 325 of the I P C, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt under s 325. *Held* that such verdict was legally sustainable, although that offence did not form the subject of a separate charge. This section enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence, **5 C. 871 = 6 C. L. R. 349.** *See* also **20 B. 215** and **3 C. 169,** where it was *held* that when the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence as provided by this section, the High Court could, on the case coming to it under s. 307, find the prisoners guilty of such offence. *See*, however **12 C. W. N. 530 = 7 Cr. L. J. 362.** There an accused person was charged with committing offences under ss. 304 and 326 I P C and tried before a jury and the latter found him *not guilty* under s. 304, but returned a verdict of "*guilty but not voluntarily*" under s 326 and the Judge without asking the jury to explain the verdict discharged them and then convicted and sentenced the accused under s. 338 of the Penal Code. *Held*, that the Judge was wrong in doing so as the verdict amounted to one of not guilty. So also in **41 C. 662** it was *held following* **34 C. 698** and **18 C. W. N. 1077** that it was not open to a jury to convict under s. 326, I P C, when the offence charged is under s. 326, with s 149, I P C. *See* Note 10 below and Notes to s. 301. **26 Bom. C. R. 610.**

9. Power of jury to return verdict on minor offence not triable by jury.—Sub-sec. (1) of this section invests a jury empanelled to try an offence triable by a jury to find as an incident that the only facts proved amount to a minor offence and return a verdict of guilty or not guilty of such offence though such offence may not be triable by jury. Sessions Judges in such case should specially draw the attention of the jury to such power, **26 M. 243**; *see* also **22 M. 15**; **24 M. 641**; **13 Cr. L. J. 739 (M.)**, **16 Cr. L. J. 676 (M.)**

10. Conviction for minor offence where evidence insufficient to prove graver offence.—If the accused are charged under ss. 304 and 325, I.P.C., they may be convicted under s. 323, I.P.C., though no charge under that section has been drawn up against them. **34 C. 325.** But when they are charged under ss. 304 and 325 read with s. 149, I P C in respect of an offence alleged to have been committed by another person and the commission of the riot is disbelieved, they should not be convicted under s. 323 in respect of their individual acts with which they are not charged and which are not imputed to them in the Judge's charge to the jury. **34 C. 325.** It is now settled law that when a person is charged by implication under s. 149, he cannot be convicted of the offence, **18 C. W. N. 1077 = 15 Cr. L. J. 502**; **41 C. 662.** *See* also **34 C. 698**; **17 C. W. N. 63** where it was *held following* **6 C. W. N. 93** that under no reasonable construction of this section or ss. 236 and 237 could causing *grievous hurt* be regarded as minor to or included in a charge under s. 325/149, I P C. *See*, however **5 C. 871** and Note 7 to s. 237 and Note 4 (*x*). When an accused was tried on a charge under s. 304 I P C he can be convicted of an offence under s. 304 A, I P C., if the facts disclose that offence, **17 Bom. L. R. 217** and **28 Bom. L. R. 610,** when an accused is tried under s. 302, I P C, he may be found guilty of an offence under s. 304 A I P C., if the evidence is justifying such a conviction, **29 C. W. N. 842.**

What persons may be charged jointly.

***239.** "The following persons may be charged and tried together, namely —

(*a*) persons accused of the same offence committed in the course of the same transaction;

(*b*) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence,

(*c*) persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months,

* This section was substituted for the original section by Act XVIII of 1923, s. 64.

I.P.C., without a charge being framed, *held* that an offence under s. 202, I.P.C., could not be treated as minor offence included in the offence under s. 201, I.P.C., as the essential ingredient of the offence under s. 20 is the legal duty of the accused to give information, and this is no part of the offence under ss. 201 and 228 of th Code does not apply and the conviction is bad, **5 S. L. R. 123 = 13 Cr. L. J. 18.**

(*vii*) *Sections* 392 *and* 458, *I.P.C.*—Where a person has been charged under s. 392, I.P.C., he canno be convicted of the offence under s. 458, I.P.C., **1911 U. B. R. I. 98 = 13 Cr. L. J. 429.** *See* also **1 L. B. R. 17.**

(*viii*) *Rape and adultery.*—An offence under s. 498 is not a minor offence or offences under ss. 363 an 366, I.P.C., and therefore even the formal addition of a fresh charge under s. 498, at a late stage of the trial, i opposed to the spirit of this section, when the trial has commenced on charges under s. 366 only, **31 B. 21**. *See* also **20 A. 166.** A person charged with rape committed on a married woman cannot be alternativel charged with committing adultery with the same woman and on the same facts, **5 A. 233** *followed* in **27 M. 61** *See* **29 C. 415.**

(*ix*) *Sections* 376 *and* 366, *I.P.C.*—It is not competent for a Judge in appeal to alter a convictio under s. 376 into one under s. 366, because a charge under the latter section would involve very different ele ments and different questions of fact from a charge under s. 376, I.P.C., **8 Bom. L. R. 120 = 3 Cr. L. J. 240.**

(*x*) *Sections* 211 *and* 182, *I.P.C.*—Can a Magistrate convict a person under s. 211, I.P.C., when he is only charged with an offence under s. 182, I.P.C.? FAWCETT, J.C., referring to **5 C. 184** and **32 C. 180**; *held* that an offence under s. 211 includes an offence under s. 182, I.P.C., while COUCH, A.J.C., stated that he was not prepared to accept that as a general rule of universal application, **8 S. L. R. 179 = 18 Cr. L. J. 104.** *See* also Note 8 to s. 236.

(*xi*) *Sections* 147 *and* 447, *I.P.C.*—A person who is charged for rioting under s. 147, I.P.C., with the common object of taking forcible possession of his neighbour's land and of assaulting him cannot be convicted of criminal trespass under s. 447 without a charge being framed, as it is not a minor offence within the meaning of sub-sec. (2). If the common object was to commit criminal trespass, then a conviction under s. 447 is good **18 C. W. N. 992 = 15 Cr. L. J. 188.** *See* Note 7 to s. 237 and Note 10.

5. **When offence is composite, the accused may be convicted on any element of it.**—The accused was charged and convicted under s. 457, I.P.C. On appeal the Appellate Court altered the conviction to one under s. 414, I.P.C. *Held*, that the offence under s. 417 being composite, the Appellate Court could record a new finding and sentence on any element of the composite offence, **Ratanlal 293.** A person charged under ss. 304 and 325, I.P.C., may be convicted under s. 323 though not charged, **34 C. 325.** So also dishonestly retaining of property in British India acquired by dacoity committed in a foreign State being included in the more comprehensive charge of dacoity; the accused could be convicted under s. 412, I.P.C., when the conviction for dacoity had to be set aside for want of jurisdiction, **1 B. 50.** Where the offence of rioting is not proved the accused may be convicted of assault, **7 M. 484.** Certain subjects of the *Gaekwar* who had committed a crime within British territory were extradited for trial before the Sessions Court on a charge of dacoity. They were acquitted of dacoity, and the Sessions Judge was of opinion that the evidence proved the accused guilty of theft, but that he had no power to try or convict the accused on any charge but that mentioned in the extradition proceedings. *Held*, that the Judge's view of the law was wrong, and that this Code was applicable as *lex fori* and that he ought to have charged and convicted the accused of the minor offence which the evidence had established, **17 B. 369.**

6. **Conviction for adultery without complaint.**—In sub-sec. (3) the word complaint means a complaint as defined in s. 4 (*h*), **30 C. 910 (F.B.).** It was *held* at one time that where the accused was charged by the husband of a woman under s. 366, I.P.C., a conviction under s. 498, I.P.C., may properly be had if the evidence be such as to justify a conviction for the minor offence and yet insufficient for a conviction for the graver offence, **20 C. 483.** But this case has been *doubted* in **22 C. 1006** and *disapproved* in **27 M. 61** *following* **5 A. 233.** *See* Notes 2 and 3 to s. 199.

6-A. **Conviction for minor offence for which complaint is necessary under s. 195 (1) (A), when such offence is included in the major offence charged.**—Sub-sec. (3) of s. 238 mentions two cases of complaints under ss. 198 and 199 of the Criminal Procedure Code, in which a conviction for offences mentioned in those sections is illegal when the offence charged includes the offence for which conviction is made; but for which complaint is necessary under ss. 198 and 199, the specific mention of ss. 198 and 199 raises the question whether section 238 authorises a conviction of minor offences, for which there ought to be a complaint on sanction under sections

abetment of the other.—*Per* PRATT, J.—Two accused could be tried together when charges in the alternative were combined against one of them, provided the offences occurred in the same transaction as the offence charged against the other accused, 1 S. L. R. 73 = 8 Cr. L. J. 11; 19 C. W. N. 121. *See* 48 A. 34.

4. What provisions in the former part of this Chapter apply to this section—Does s. 234 apply.—*See* Note 2 to s. 234. This section does not apply to a charge against several persons accused of several offences, unless the acts constituting these offences from the same transaction in respect of all these persons, 33 C. 292. Here the petitioner and others on the 22nd February entered a plot of land in the possession of the complainant and looted his linseed crop, and on the next day the same persons entered on another plot and looted his tobacco. They were summarily tried in a single joint proceeding and convicted under ss. 143 and 379, I.P.C., *held*, that the events of two different dates were not parts of the same transaction and that the trial was bad for misjoinder, 33 C. 292. Section 234 does not apply when more persons than one are tried jointly under s. 239. 153 P. L. R. 1918 = 37 P. W. R. 1911 = 12 Cr. L. J. 256; 122 P. L. R. 1911 = 28 P. W. R. 1911 = 12 Cr. L. J. 208; 7 L. B. R. 272 = 16 Cr. L. J. 44. *See* also 33 C. 1256. In such cases the Magistrate must decide whether he will make use of s. 234 or s. 239 but he must not use the two in combination. *See* the remarks of PRATT, J., in 1 S. L. R. 73 = 8 Cr. L. J. 191. In a joint trial of two accused, charges could not be combined against one accused under s. 234 for that would necessarily involve offences arising out of different transaction. In 19 C. W. N. 672 = 16 Cr. L. J. 3. The Court declined to express any opinion to enable more persons than one to be charged and tried together for more offences than one, the offences must all form part of the same transaction. S. 233 lays down the general rule. Ss. 234 to 238 apply to cases where one person may be dealt with at one trial for more than one offence. S. 239 applies to the trial of more persons than one jointly. The last words of s. 239, *viz.*, and the provisions contained in the former part of the Chapter, etc., do not mean that ss. 239 and 234 are to be read together. They only refer to the part headed "Form of charges" ss. 221 to 232 inclusive, 7 L. B. R. 272 = 16 Cr. L. J. 44. *Contra* s. 239 has this limitation attached to it that the provisions contained in the former part of this Chapter apply to all charges falling under s. 239. This s. 239 is in turn governed by s. 234 and s. 235, 11 A. L. J. 188 = 14 Cr. L. J. 116. But under the present amendment it appears that sections 234, 235 and 239 must be read together that is to say, the operation of one set of sections is governed in turn by the other. This is apparent from the enumeration of the different cases under which persons may be charged and tried together, being given in sub-secs. (*a*) to (*g*) to s. 239 by the Legislature. *See* 11 A. L. J. 188.

5. For persons to be jointly tried, the association need not be continuous from start to finish.—In 29 B. 449 and 30 B. 49, BATTY, J., laid down that the accused should have been jointly associated in the series of acts constituting the transaction from first to last, but there is no warrant for this limitation in s. 239. *See* 1 S. L. R. 73 = 8 Cr. L. J. 91; 33 M. 502 and 10 M. L. T. 23 = (1911) 2 M. W. N. 189 = 12 Cr. L. J. 258. Where the first accused seized a woman with the intention of forcibly having sexual intercourse with her and was attacked by her husband and the second and third accused thereupon appeared and assaulted the husband, *held* that in the absence of proof that the three accused were acting for a common purpose in execution of a common design, a joint trial in which the first accused was charged under s. 354 of the Penal Code and the second and third accused under s. 323 was illegal. 5 Pat. L. J. 11.

In 23 A. L. J. 5 where several people were tried together for committing different offences all committed on their own account it was *held* that they could not be tried jointly. Further *held* that the accused not having acted in the course of the same transaction (because having no intention in common) could not be tried jointly.

6. The words 'accused for the same offence' imply that all accused should have acted in concert.—The words imply that all the accused should have acted in concert or association. They do not apply to a case in which the allegations against the accused are mutually exclusive. Where two accused were tried together on a charge of having caused grievous hurt to a person and the allegation was that either one or the other committed the crime, and the Magistrate discharged one of the two accused and convicted the other, *held* that the joint trial was bad. The two men should have been separately tried, 7 L. B. R. 68 = 8 Bur. L. T. 191 = 14 Cr. L. J. 563. *See* Note 30.

APPLICATION OF SECTION.

7. Section does not apply to preliminary inquiries.—This section does not deal with joint inquiries. There can be no objection to proceedings prior to commitment being joint, 7 Bom. L. R. 457. Ss. 233 to 239 of the Code apply to the *trial* of the accused and not to preliminary inquiries and commitment. The Sessions

(*d*) persons accused of different offences committed in the course of the same transaction;

(*e*) persons accused of an offence which includes theft, extortion or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of property, possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence;

(*f*) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and

(*g*) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin or of abetment of or attempting to commit any such offence;
and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges."

Note.—S. 239 is thoroughly re-drafted. The actual changes made by the new amendment are the addition of clauses (*c*), (*e*), (*f*) and (*g*). Under the old Code, s. 234 applied only to the case of one accused person committing several offences of the same kind within a year; but where several persons committed several offences of the same kind such persons could not be tried jointly under the old law. Under the new section several dacoits jointly committing three dacoities on three different dates within a year and at separate places may be now charged and tried together under clause (*c*) of s. 239. So cases like **19 A. L. J. 796** holding to the contrary are, it is submitted, not good law now.

Notes—1. Same transaction.—*See* Notes 3, 4 and 6 under s. 235.

CONSTRUCTION OF SECTION.

2. **Section 239 is merely an enabling section.**—Section 239 is merely an enabling section and does not in any way trammel the discretion of the Court, **21 C. L. J. 195 = 19 C. W. N. 672 = 16 Cr. L. J. 3.**

It is open to the Court even when the names of all the conspirators are known and are even mentioned in the charge to place the co-conspirators on their trial separately, the trial of some without the others is not vitiated, **42 C. 957,** where reference is made to *Russell on Crimes* (1909) 149, 180 and other authorities. *See* Note 18 to s. 233 and Note 2 to s. 235.

3. **First two clauses are not mutually exclusive—Two accused may be jointly charged with the same offence and one with a different offence in the same transaction.**—The opinion of Mr. MAYNE in the Criminal Law, 2nd edn., p. 941, that, " In order to enable several persons to be tried together under the second clause of s. 239, it is necessary to show that they were engaged in the same transaction with such a common intention as would make each person liable for the acts of the other under s. 34, I.P.C.," does not seem to be warranted by the section. *See* ill. (*b*). The two clauses of s. 239 are not mutually exclusive. If *A* induced *B* to cheat and *B* attempted to cheat in consequence, *A* and *B* may clearly be tried together for abetment of, and attempted to cheat respectively. If, in the course of the same transaction, *A* committed the separate offence of criminal breach of trust in furtherance of the conspiracy to cheat, *A* may clearly be charged with that offence at the same trial, **38 C. 453.** *See* illustrations (*b*) and (*c*). Accused who was a ticket-collector in the East Indian Railway at Sheoraphuli was charged with criminal breach of trust under s. 408, I.P.C., for having handed over used tickets to the second accused, who was his friend, and with abetment of cheating under s. 420 read with s. 109, I.P.C., for employing the second accused, to claim a refund on those tickets at Haripal, the station where these tickets were issued, by representing that they were purchased in the morning and had not been used; and was tried jointly, with the second accused, who was charged with attempt at cheating under s. 420, I.P.C., read with s. 511. It was contended that there had been misjoinder of charges; *held*, that the transaction was clearly one and fell within the purview of s. 239, **38 C. 453.** *See* also **42 C. 957; 19 C. W. N. 121.** Although s. 239 is the only section which refers to the joinder of two accused in one trial, yet even in that case charges against each accused may be combined under the preceding sections subject only to the condition imposed by s. 239, that the offences charged arise out of the same transaction or that the one offence was the attempt to commit or

opium, allowed another who had no license to sell the drug, their joint trial and conviction under s. 9 of the *Opium Act* was held good, the transaction in respect of which the accused were convicted being the same, **113 P. L. R. 1906 = 4 Cr. L. J. 178.**

14-A.—There could be no objection to a joint trial of the Printer and the Publisher of a pamphlet under section 124 A, I P C., but more objection could be raised to the joint trial of an author with the Printer or Publisher, **30 Bom. L. R. 320.**

15. Paying bribe through another.—Where an illegal gratification was given to accused No. 2 and accepted by accused No 1 and they were charged under ss. 162 and 161, I P C., respectively, *held* the joint trial was good, as the offences formed part of the same transaction, **7 Bom. L. R. 637.** Accused Nos. 1, 2 and 3 were tried on charges under ss 120-B, 161 and 163, I P C, and accused Nos. 4 to 10 on charges under these sections and under s. 114, I P C It was objected that the joint trial was invalid because the transactions set out in the charges covered a period of five months and were alleged to have occurred at two different places *held* that the trial was neither invalidated by the plurality of offences charged nor vitiated by the improper joinder and joint trial of the accused persons charged, **53 Bom. 479.**

16 Joint trial of the keeper of a gaming-house and a player therein.—The offences of the keeper of a gaming house and a player therein arise out of facts so inseparably connected together as to form a single transaction and, therefore, the house-keeper who commits one offence in that transaction and his customer who commits another are clearly within the purview of s. 239 and may be jointly tried, **9 N. L. R. 68 = 14 Cr. L. J. 293** where **5 P. W. R. 1910 = 11 Cr. L. J. 211** was *dissented* from. *Contra.*—The keeping of a gaming house and being present in it at the time of a Police raid cannot be said to form part of the same transaction The joint trial of a person or keeping a gambling house under s. 3 of the *Gaming Act*, 1867, with others under s. 4 for frequenting it is illegal, **35 P. R. 1914 = 16 Cr. L. J. 220; 5 P. W. R. 1910 = 11 Cr. L. J. 211.**

17. Joint trial of thief and receiver of stolen property.—Where two persons are charged, the one with theft and the other with receiving the stolen property knowing it to be stolen they may be tried together under this section, **8 C. L. R. 245; 6 Bom. L. R. 361.** Twenty five persons were charged with dacoity—s 395, I P C, and two more for abetting the same, s. 395/109, and there were further alternative charges under ss. 411 and 412, I P C, against three of the accused for having dishonestly retained articles stolen in the dacoity and all the 27 were jointly tried and convicted, *held*, that the fact that three of the accused were also charged under ss. 411 and 412 on the strength of an incident which is part of the evidence against them on the charge under s. 395 could not vitiate the trial, **11 C. L. J. 182 = 11 Cr. L. J. 244;** *see* also **6 Pat. 583.** Similarly, the joint trial of a person who commits a criminal breach of trust and of the persons who dishonestly receive the stolen property, the proceeds of the breach of trust is good The receiver's knowledge of belief that the property comes through the tainted channel of theft or criminal breach of trust, which is an essential ingredient of the offence connects him with the transaction of theft or criminal breach of trust so as to make him a *particeps criminis* and that connection is sufficient to constitute both the theft or criminal breach of trust and the receipt one transaction whether the two acts take place simultaneously or not, **6 Bom. L. R. 517,** which is *followed* in **29 B. 449.** Ordinarily theft and the disposal of the proceeds would be parts of the same transaction and as proximity of time between two acts does not necessarily constitute them parts of the same transaction, an appreciable interval of time between the two acts otherwise connected, does not prevent them from continuing to be parts of the same series of connected events, and hence it is not necessary to show that the theft and disposal occurred within a few hours or even a few days of each other **1907 U. B. R. 5 = 14 Bur. L. R. 35 = 8 Cr. L. J. 28; 4 Bur. L. T. 263 = 13 Cr. L. J. 59;** *see* also Note 37 It is stated in **33 A. 331** that the practice in that province is the same as prevails in Bombay, namely, that when practical the thief and the person who receives the stolen property are tried together and such trial does not contravene the provisions of s. 239 **44 A. 276.**

Contra—For joint trial, receipt should be immediately after theft.—The offence of dishonestly receiving stolen property from a person who has stolen that property cannot be regarded as an offence committed in the same transaction as the theft itself unless it be in a case where simultaneously with the offence of theft the offence of receiving stolen property is committed, **1 C. W. N. 35; 23 C. 10; 23 M. L. J. 381 = 16 Cr. L. J. 398; 27 C. 839; 23 C. 7.** Where five persons were jointly tried, four of them on a charge of theft, and the fifth for receiving stolen property, the act of receipt not being simultaneous with the theft, *held* that the offences of stealing and receiving stolen property were not parts of the same transaction and that the joint trial was illegal, **3 P. R. 1903 = 31 P. L. R. 1903 = 2 Cr. L. J. 37; 1916 M. W. N. 331 = 15 Cr. L. J. 256.** *See* also the footnote under **3 P. R. 1903; 5 P.**

Court is competent to try separately prisoners who have been committed together as if there had been two or more commitments, **26 M. 592; Ratanlal 918; 11 W. R. 16; (1900) A. W. N. 206.** *See* Note 22 to s. 233; *see* **42 M. 561.**

8. Section has been applied to security proceedings—Chap. VIII.—The provisions of this section are applicable to cases under s. 107, **9 A. 452; 8 C. W. N. 180.** Where more persons than one are called upon to show cause why they should not execute bonds for good behaviour each person arraigned should be tried separately, **Ratanlal 585; 14 C. 358.** Where two persons were brought before a first-class Magistrate under s. 109 and they were tried together and discharged under s. 119; *held*, that the said two persons should not have been tried together, **Ratanlal 556.** *See* Notes at p. 171, under Heading VI.

9. Section does not apply to trial of cross-cases.—But where two cross rioting cases were instituted before the same Magistrate and tried, almost simultaneously, a few witnesses in each case being examined every day, *held* the trial was not bad, **31 C. L. R. 275; 8 C. W. N. 344,** where **25 M. 61 (P.C.)** is *distinguished. See* also **6 C. 96; 1881 A. W. N. 28; 12 C. W. N. 153; 9 A. 452—462.**

9-A. Trial with the aid of assessors of an offence triable with the aid of assessors—Accused found guilty of a minor offence triable by jury—Conviction for minor offence valid.—On the trial of an accused by a Sessions Judge with the aid of assessors for an offence so triable, it is competent to the Judge to convict the accused of a minor offence, though the minor offence is triable only by a jury, **45 B. 619 = 22 Bom. L. R. 1241.**

EFFECT OF MISJOINDER.

10. Misjoinder renders the trial illegal.—The joint trial of several accused renders the trial invalid except in the cases falling under s. 239, **4 N. L. R. 71 = 8 Cr. L. J. 11.** A trial which takes place in defiance of the express provisions of s. 239 must be held to be a void trial, **15 Cr. L. J. 420 (O.).** The disregard of a plain duty cast by law cannot be condoned with reference to s. 537, **28 M. L. J. 381 = 16 Cr. L. J. 298.** *See* also **25 M. 61 (P.C.)** and Notes under s. 233. There can be no waiver, **6 C. 96; 4 Bom. L. R. 53; 26 M. 125.** *See* also **1910 M. W. N. 65 = 7 M. L. T. 299 = 11 Cr. L. J. 258; 11 A. L. J. 188 = 4 Cr. L. J. 116.**

11. Illegality of misjoinder not cured by waiver.—Where three persons were tried and convicted at one trial, one for an offence under s. 457, I.P.C., and the other two for an offence under s. 411, and no objection to the illegality was taken before the Magistrate or the Sessions Judge, nor did it appear that the thefts and the receipt of stolen property were parts of the same transaction, *held*, that the illegality cannot be cured by s. 537, in spite of the fact the accused did not raise the objection in the Court below, **4 P. L. R. 1905 = 2 Cr. L. J. 30; 97 P. L. R. 1914 = 15 Cr. L. J. 172** and *see* Note 22 under s. 233.

12. The trial to be separate not only in form but in substance.—Where four persons were accused of having given false evidence in the same proceeding and the Sessions Judge while professing to try each accused separately, heard the witnesses only once; *held*, that this was substantially trying the four prisoners together, and was an improper mode of procedure, **10 C. 405; 15 B. 491; 3 M. H. C. R. Appx. XXXII; Weir II, 304; Ratanlal 31.** *See* **29 M. L. J. 101 = 18 M. L. T. 95 = 16 Cr. L. J. 593 (F.B.)** and Note 20 to s. 233.

CASES WHERE JOINT TRIAL HELD VALID.

13. Joint trial of persons taking part in a riot with different common objects.—In a case of riot, one set of accused were charged under ss. 141 and 142, I.P.C., for taking part in the riot with the common object of setting fire to public buildings, and another accused was charged with being member of the unlawful assembly with the common object of closing by force a college and all the accused were jointly tried and convicted. It was contended that the trial was illegal on account of misjoinder and as there was a difference in the common object the transaction was not the same; *held*, by BENSON and MUNRO, JJ., that the proceedings of the mob consisting of several minor transactions from first to last showed such continuity of purpose and of action, and were united in such proximity in time as to form one transaction within the meaning of ss. 234 and 239 of the Code so as to render all the rioters liable to be tried at the same trial for the acts done by each of them. SANKARAN NAIR, J. *Contra.*—That the closing of the college and setting fire to public buildings were different common objects and did not form the same transaction and the conviction should be quashed, **6 M. L. T. 17 = 11 Cr. L. J. 30** and *see* also **1883 A. W. N. 28.**

14. Joint trial of principal and agent—principal and abettor.—S. 239 clearly allows an agent to be tried in the same trial as the principal. A licensed vendor who is punishable by implication under s. 56 of the *Bengal Excise Act*, 1909, may be tried together with his agent who commits the offence. The case is one of abetment by implication, **15 C. L. J. 692 = 13 Cr. L. J. 255.** Where a person who had a license for the sale of

different times and Nos. 4 to 10 with having offered the same *held* that there was no misjoinder of charges for the whole transaction was one although there were two parties to it and separate offences might be said to have been committed in respect of it but the common object which all the accused had in view, was that the Police investigation which accused No 3 had in hand should be conducted by him not on its merits but corruptly in accordance with the illegal gratification paid. The expression "in the course of the same transaction" must be understood as including both the immediate cause and effect of an act or event and also its collocation or relevant circumstances, the other necessary incidents of its occurrence connected with it at a reasonable distance of time, space and cause and effect. **31 Bom. L. R. 545.**

CASES WHERE JOINT TRIAL HELD ILLEGAL.

23. Fight between contending parties not one transaction.—In case of a fight between two opposing parties the law as contained in this section is that opposing parties cannot regularly be charged in one and the same trial, 20 C. 537. Where the members of opposing factions are charged with rioting each party must be tried separately, **6 C. 96 = 6 C. L. R. 521; 1881 A. W. N. 28, 8 W. R. 47, 9 W. R. 33; 12 W. R. 75; 22 an 126 P. R. 1881; 5 P. R. 1906 = 4 Cr. L. J. 75.** Where two parties are arraigned against each other in a riot it cannot be said that the offence of rioting was committed by both the parties in the same transaction within the meaning of this section so as to justify a joint trial of the persons on both sides. The offence of rioting committed by each side forms a separate transaction, **15 P. R. 1882; 5 P. R. 1906 = 4 Cr. L. J. 75; 14 C. 358.**

24. Conversion of counter-cases of assault into a single case of affray.—Where complaints and cross-complaints of hurt or assault are instituted (the complainant in the one case being the accused in the other and *vice versa*) and, after taking in each case the evidence in support of the prosecution, the Magistrate is of opinion that the accused have jointly committed an affray, he cannot convict them of that offence on the evidence so recorded. He may call upon them to show cause why they should not be convicted of affray, but should they deny the commission of the offence, then it must be proved in the regular way and without reference to the evidence previously recorded.—*C. P. Cr. Cir.*, Part I, No. 6.

25. Defamation and publication thereof.—*A*, *B* and *C* passed certain resolutions defamatory of the complainant and published those resolutions and *D* transmitted the resolutions to a newspaper. All the four persons were tried together and convicted. But it was not shown that *A*, *B*, *C* instigated *D* to write the letter to the paper or that they had any common purpose nor was it shown that the offences were committed in one and the same transaction, *held* the trial was bad, **7 M. L. T. 127 = 11 Cr. L. J. 135.**

25-A. Joint trial for offences under ss. 500 and 501 of the I.P.C.—A joint trial of the author of a book under s. 500, I.P.C., and of the printer is illegal when there is no evidence to show that there was conspiracy between them. **50 C. 159.**

26. Distinct offences of contempt of Court.—It is illegal to try conjointly in one trial several persons accused of distinct substantive offences of contempt of Court. Such procedure is obviously prejudicial to the accused, for they are precluded from calling each other as witnesses in support of their various and distinct pleas of not guilty, **1883 A. W. N. 25.**

27. Joint trial for giving false information bad.—Where a Deputy Collector acting under *the Land Acquisition Acts*, laid a charge against the lessor and lessees of certain lands that they had given false information in certain written statements, *held* that though the complaint was laid against the parties jointly any offence committed by each is a distinct and separate offence and should be tried separately. **27 C. 955.** But where a false charge of stealing goats was made by one accused on one day, and by the other accused on the following day and they were both convicted in a joint trial, the Madras High Court *held* that they were properly tried together as the offence, *viz.*, a false charge that certain persons stole certain goats was the same, **27 M. 127.**

28. Joint trial of several accused for perjury.—Where two persons are severally charged with giving false evidence in their depositions in a certain trial, their offences are distinct and they must be tried separately under the provisions of s. 233 unless a conspiracy is proved and s. 239 applies. **3 M. H. C. R. Appx. XXXII; 2 N. W. P. H. C. R. 21; 6 M. 252; 4 A. 293; 5 A. 17; 1881 A. W. N. 53; 1882 A. W. N. 44, 64 and 160; 1885 A. W. N. 28; 11 W. R. 18; 39 P. R. 1888; 28 M. 592; 3 L. B. R. 231 = 4 Cr. L. J. 482; 5 S. L. R. 123 = 13 Cr. L. J. 33.** A lie by a witness is none the less his own particular lie and it is his own and not another's lie that can alone be used against him or be the subject of a prosecution on that account, **7 S. L. R. Appx. LXVI = 16 W. R. 47.** Not even the consent of the accused can, having regard to **25 M. 61 (P.C.)** legalise such a joint trial, **4 Bom. L. R. 53.** But

R. 1900; 7 P. R. 1903. *See* also **17 Cr. L. J. 477.** But under the present amendment it will be seen that the receipt of stolen property and theft though not parts of the same transaction may be joined together in one trial under clause (*e*) of s. 239. Therefore the above cases holding to the contrary have become obsolete.

18. Joint trial of disposer and receiver of stolen property.—The offences under ss. 412 (criminally disposing of stolen articles) and 411, I.P.C., may be jointly tried, the offences forming part of the same transaction and having occurred at the same time and places, **6 Bom. L. R. 361.** Thus where two persons were jointly tried and convicted under ss. 411 and 414, I.P.C., both of them being charged in respect of a currency note for Rs. 500 and also each of them in respect of a different note for Rs. 100, *held* that though in respect of the note for Rs. 500, the accused might be tried together, the other charges in respect of the two notes for Rs. 100 each could not be tried together as the transactions were separate and distinct. The conviction was therefore annulled for misjoinder of parties and re-trial ordered, **28 C. 104.** *See* also **4 A. 147; 14 C. 395** and **15 B. 491.** But now under cl. (*f*) of this section, **28 C. 104** and **49 C. 565** are no longer good law.

For the joint trial of persons charged with dacoity and persons charged with the receipt of property stolen in the dacoity. *See* **45 A. 223.**

19. Joint trial for possession and delivery of counterfeit coin.—*C* who was in possession of 104 counterfeit coins, delivered 50 of them to *P* to pass off for him. At one trial *C* was tried under s. 240, I.P.C., and *P* under s. 243, I.P.C.; *held*, that the joint trial was perfectly valid under this section read with sub-sec. (1) of s. 235, *supra* inasmuch as *P* received the coins with the deliberate intention of fraudulently passing them off as genuine, **31 C. 1007.** *See* cl. (*g*) of s. 239.

20. Murder and causing disappearance of evidence.—Accused 1 to 3 were charged under s. 302 for murder and accused 3 was further charged in the alternative under s. 201, I.P.C., for helping accused 1 and 2 in disposing of the corpses with the intention of screening the offenders; *held*, the trial was not illegal for misjoinder of persons, **1 S. L. R. 73 = 8 Cr. L. J. 191.**

21. Joint trial of persons habitually associated for the purpose of dacoity—s. 400, I.P.C.—Fourteen persons were tried at one trial and convicted of an offence under s. 400 for having formed a gang for the purpose of habitually committing dacoity between 7th March, 1908 and 15th December, 1909, four serious dacoities, having been committed at four different places and, the accused, it was alleged and proved, took part in one or more of those dacoities, *held* that the joint trial of all the accused though not illegal, was improper, **68 P. L. R. 1911 = 12 Cr. L. J. 260.**

22. Joint trial in cases of conspiracies.—*See* Note 7 to s. 235.

(*i*) *Sections* 121-*A*, 121 *and* 126, *I.P.C.*—Where about twenty accused were all alleged to have been members of a secret society, with its headquarters in Manicktolla in the suburbs, and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise, and with others known and unknown, to have conspired to wage war or to deprive the King of the sovereignty of British India, and to have collected arms and ammunition with such intent and to have actually waged war. *Held*, that joint trial of the accused on charges under ss. 121, 121-A, 122 and 123, I.P.C., was not bad for misjoinder of persons or charges, **27 C. 367; 16 C. W. N. 1105 = 15 C. L. J. 517 = 13 Cr. L. J. 609; 11 P. W. R. 1915 = 16 Cr. L. J. 354.**

(*ii*) It is legal to try together charges of conspiracy and offences committed in carrying out the objects of the conspiracy. The transaction is not completed as soon as the offence is committed. It is clear that so long as the conspiracy continued, the transaction which began with the forming of the common intention continued and the offences committed in the course of the same transaction, **16 Cr. L. J. 19 = 19 C. W. N. 706 = 21 C. L. J. 201.**

(*iii*) But it should be observed that if a conspiracy is entered into in district *A* and acts are committed in pursuance of the conspiracy in district *B*, the Magistrate of district *A* can try the offence of conspiracy, but cannot try the accused in the same trial for offences committed outside his district. S. 239 of the Code cannot give jurisdiction to a Magistrate who has no jurisdiction to try the offence under the provisions of Chapter XV of the Code, **28 C. W. N. 975.**

(*iv*) *See* **16 A. 88.**

(*v*) *Perjury.*—*See* Notes 28 and 29.

22 A.—Joint trial of receivers of illegal gratification and of those who offer the same held to be legal.—Where accused Nos. 1 to 3 were charged with having received illegal gratification in different sums at

by the complainant and some of the rescuers snatched away some clothes from the person of the complainant, and the Magistrate tried all the accused jointly, two of them on charges under ss. 225 and 379, I P C., and two on a charge under s. 379, I P C., and two on a charge under s. 225, I P C., *held*, that the trial was bad for misjoinder of charges and two trials were directed one for the original theft and the other for rescuing and theft committed in course of the rescuing, **13 C. W. N. 804 = 9 Cr. L. J. 147.** It is illegal to try a person for grazing cattle in a reserved forest with others for rescuing the cattle soon after they were impounded, **7 M. L. T. 357 = 11 Cr. L. J. 293.** *See* also **30 C. 821; 6 Bom. L. R. 725; 13 C. W. N. 1113.** *See* also **19 C. L. J. 633 = 15 Cr. L. J. 472.**

33. If each offence is a completed act and there is no continuity, joint trial bad.—Where the appellant obtained in August certain currency notes by committing offences under ss. 420, 471 and 468, I.P C., and in January following, he in conjunction with another tried to obtain goods in exchange for one of the notes and two were jointly tried, the appellant for the offence committed in August and his co-accused for the offences committed in January, *held* that the transactions of August and January did not form part of one and the same transaction, and therefore the joint trial was bad in law, though they ought to have been tried jointly for the offences committed in January, **31 C. 1053.** On the commitment of four persons on a charge of murder the Sessions Judge framed another charge against them of causing grievous hurt to one *W*, on the act that some time after the alleged murder, three of the accused tried to convey off the body of the victim and when *W* objected, caused grievous hurt to him. At the conclusion of the trial, all of them were acquitted of murder, but three of them were convicted of causing grievous hurt to *W*, *held*, the whole trial was vitiated by misjoinder of charges, since the murder might have been committed by one set of men with one object, and the attempt to carry off the body might have been made and the grievous hurt caused therein by another set of men with a different object and the two offences were not such as must have been committed in the same transaction with the meaning of this section so as to be charged and tried at one trial. **10 P. R. 1906 = 4 Cr. L. J. 235,** where **30 B. 49** is *referred to*. Where two accused persons were jointly tried in respect of an offence committed on a particular day in which both were concerned and one was also charged at the same trial with another offence committed on another day with which his co-accused had no concern, the joint trial was held bad, **31 C. 1053.** Similarly where several accused persons were jointly tried for having on two separate dates, committed two offences of the same kind, *viz.*, looting linseed crops in one field and cotton crops in another, but not forming parts of the same transaction, the trial was held illegal, **33 C. 292;** joint trial of four accused for two offences of dacoity committed on two different dates and not forming part of same transaction is illegal, **8 M. L. T. 236 = 11 Cr. L. J. 474; 13 C. W. N. 1067 = 10 Cr. L. J. 469.** So also where each offence is a completed act in itself and the original design was accomplished so far as that act was concerned before the next offence was embarked upon, then there is no community, **33 M. 502;** section 368, I P C., only applies where abduction or kidnapping has been completed and the wrongful concealment follows upon such completed abduction. Joint trials therefore, of different persons under ss. 368 and 366, I.P C., is bad the two acts not forming part of the same transaction. **A. I. R. 1929 Lah. 498; 122 P. L. R. 1911 = 23 P. W. R. 1911 = 12 Cr. L. J. 203.** In this case the acts of cheating were held to be wholly distinct. *See* also **13 C. W. N. 1067 = 10 Cr. L. J. 469; 10 C. W. N. 53 and 520.**

34. If offences are distinct and separate, joint trial illegal.—Where four persons were tried together at one trial, two of them being convicted under s. 188 I P C read with s. 3 of the *Epidemic Diseases Act*, while the remaining two were convicted under s. 419 I P C., for attempting to cheat by personation an entirely distinct offence not at all connected with the former, *held* that the trial was illegal, **3 L. B. R. 216 = 4 Cr. L. J. 479.** But where *A*, *B* and *M* were jointly tried for having committed three dacoities on the same day and *M* was further tried for an offence under s. 302 I P C., and for rescuing a prisoner from Police custody the charges being kept separate and the opinion of the assessors separately recorded on the charges which affected *M* only as distinct from the charges which affected all of them, *held*, that the trial was illegal, but the illegality was cured by s. 537 as the accused were not prejudiced, **7 P. R. 1901,** where **18 A. 502** is *followed*. This was before **28 M. 61 (P.C.)** A Magistrate held a joint investigation in the case of four accused persons who were charged with different offences and committed them all for trial on charges under ss. 211 114 465 and 109 I P C. On quashing the commitment, the High Court considered the Magistrate's action to be illegal and prejudicial to the accused, and directed him to make fresh inquiry, remarking that the charges against all the accused being under ss. 211 and 114 can only form the subject of a joint trial, while in the other cases the trial must be separate, **Ratanlal 925.** In one charge two persons were charged with causing hurt to three others with a *dao* but there was no case of hurt by *dao* by one of the accused and he was convicted under s. 352, I P C., for using a *lathi* against two of the complainants, *held* that the charge was improper and must have prejudiced the accused, **17 C. W. N. 419 = 14 Cr. L. J. 212.** The act of a trespasser in entering into a factory and on being ejected there-

where there was one sustained and continuous plot for a certain purpose, *viz.*, of exposing an innocent man in a false charge and to secure this end various means had to be resorted to and one of such was to person giving false evidence, *held* they could be jointly tried, **14 Bom. L. R. 972 = 1 Bom. Cr. Ca. 216 = 13 Cr. L. J. 833.**

29. Mere allegation of conspiracy will not validate joint trial for perjury.—Where the accused were convicted at one trial of giving false evidence in a case of dacoity on the ground that they had conspired to give such false evidence and they were neither charged with nor convicted of so conspiring, *held* that the joinder of accused was illegal, since the words, *the same transaction* in this section cannot embrace the examination of all the witnesses throughout a trial, but could apply only to the examination of each witness as such separately, **3 L. B. R. 231 = 4 Cr. L. J. 489,** where **25 M. 592** and **1 L. B. R. 268** are *referred to.* Similarly, where two persons were jointly tried one on a charge under s. 471, I.P.C., and the other for giving false evidence in the suit in which the forged document was used, the trial was held bad for misjoinder of accused, **1883 A. W. N. 188.** But where several persons jointly filed a written statement signed by all and one of them gave evidence in support thereof it was *held* the joint commitment of them all, the deponent under s. 193, I.P.C. and the others under s. 193/207, I.P.C., was good, **1884 A. W. N. 52.**

30. Joint trial of two accused not desirable when each tries to throw blame and responsibility upon the other.—Two persons *A* and *B* were jointly tried under s. 408, I.P.C., for criminal breach of trust and each tried to throw responsibility upon the other and charges were framed against both. The cross-examination on behalf of *A* was conducted first and then it was conducted on behalf of *B*, and on what was elicited at this latter examination *B* was acquitted without being called to enter upon his defence, and the statements so elicited in this latter cross-examination were used against *A* without his having had an opportunity of explaining them, or further cross-examining the same witness on those new points; *held*, that though it cannot be said that the accused were not properly tried in one case, still in the circumstances of the particular case *A* had been prejudiced at this trial held jointly with another, **3 C. W. N. 277.** *See* Note 6. Such trials are not necessarily illegal, **168 P. L. R. 1911 = 12 Cr. L. J. 266.**

31. Sameness of charge cannot justify joint trial of several accused.—(*i*) Where fifteen persons were jointly tried and convicted of distinct offences of committing nuisance, *held* that the conviction was illegal as the accused must have been prejudiced in their defence, **5 M. 20; 33 C. 292.**

(*ii*) Where there was no joint action on the part of the accused and each acted independently of the rest and made different defence; *held*, that the joinder of a number (*viz.*, 62) of charges against 62 persons in one charge was a material irregularity which rendered necessary the setting aside of the conviction, **Weir II, 303.** But where the charges involve a conspiracy between the several accused, they may all be jointly tried, **16 A. 88.**

(*iii*) Where the complaint was that the coolies in a colliery had decamped with the tools supplied to them and they were all jointly tried under s. 408, I.P.C.; *held*, that the trial was bad, **13 C. W. N. 131.** *See* also **13 C. W. N. 151.**

31-A. Joint trial of persons with joinder of charges.—Where all the accused were charged in one count with the murder of seven persons, to support which there was no evidence against any of them; in two counts with the murder of two others, committed only by two of them, respectively; and in another count with mischief by fire caused by another accused only. Held even though ss. 235 and 239 of the Code justify joinder it should not be resorted to if there is risk of embarrassment, charges of murder of several persons and of arson must embarrass the accused in their defence and confuse the jury, **52 C. 253 = 29 C. W. N. 173.**

32. Joint trial of an offender and those that rescue him from custody.—Where the offence of each of the accused is separate and there is no common offence in which all join, it is quite irregular to try all the accused together. A person charged with the offence of theft and another charged with rescuing him from lawful custody, cannot be tried together in one trial, **11 M. 441.** To enable the Court in the same trial, to try more persons than one, the offence must be (*i*) the same, or (*ii*) if different must still be in the same transaction or (*iii*) must be connected by abetment or attempt to commit such offences. *See* also **14 C. 395; 6 W. R. 83; 8 A. 252.** Where an accused was arrested in the act of throwing clods on a Railway line, punishable under s. 128 of *the Railway Act*, and two others were jointly tried with him for having rescued him from Police custody, *held* the joint trial was illegal, the different offences not having been committed in the same transaction, **29 C. 385;** the joint trial of a person who committed an offence under s. 456, I.P.C., with others who were charged with wrongfully confining the complainant and rescuing the first accused from custody was *held* illegal, **12 C. W. N. 15.** Where one of the accused caught in the act of theft was rescued by others while being taken to the *thana*

I.P C., *held*, that the joint trial was illegal and that when the Magistrate found that s. 458 was not applicable to one of the accused, he should have tried the two separately, **31 P. R. 1905 = 165 P. L. R. 1905 = 3 Cr. L. J. 78.** Again, where the petitioner and four others were jointly tried under s 454, I.P C., the other four convicted of an offence under that section and the petitioner of the abetment of that offence, but on appeal, the conviction of the petitioner was altered to one under ss. 411 and 414, I P C., *held* that the conviction could not be sustained because the petitioner could not have been tried under ss. 411 and 414, I P C. jointly with four others charged under s. 454, I P C., and the power conferred on Appellate Courts by s. 423 (1) (*b*) of altering the finding while maintaining the sentence, does not empower it to act in contravention of the provisions of this section, **33 P. R. 1905 = 115 P. L. R. 1905 = 2 Cr. L. J. 694**; but *see* **15 Cr. L. J. 680 (M)** as to the powers of Appellate Court.

MISCELLANEOUS.

37. Charge need not set out that the transaction is one and the same.—It is not necessary that the charge should contain the statement as to unity of transaction. It is sufficient for the purpose of justifying a joint trial, that the accusation alleges that the offences committed by each accused, to have been committed in the same transaction. It is the tenor of the accusation and not the wording of the charge that must be considered as a test, **30 B. 49.**

38 Where joint trial involves questions of jurisdiction as to same.—Questions of jurisdiction might arise when several persons are charged in the same proceedings for having committed different various offences in the same transaction and some of such cases may be covered by Chapter XV If the charges can properly be made in the same proceedings, the irregularity as to jurisdiction might be within s 531 or s. 532 **18 A. 350.** But in a case where the 1st accused was charged with criminal breach of trust the 2nd with abetment of that offence and the 3rd with receiving the property the subject thereof. It appeared that the abetment and the receiving took place outside the territorial jurisdiction of the Magistrate though the breach of trust took place within it *held*, that the Magistrate had no jurisdiction to try the 2nd and 3rd accused, **A. I R. 1923 Mad. 833**

39. Charge where several persons are suspected of a single act of misappropriation or breach of trust.—Where the charge is one for criminal misappropriation this section has no application because the misappropriation of the actual money must be the act of a single person. To be tried under this section the charges against the two persons must be of misappropriation in the case of one and of abetment in the other, and it is open to the Court to frame charges in the alternative, *i.e.*, of misappropriation or it abetment, **16 C. W. N. 600 = 13 Cr. L. J. 508**, *see* Notes to s. 222.

40. Misjoinder of parties to be carefully avoided where one of the accused makes a confessional statement which would be evidence against his co-accused.—*M* was charged with three separate acts of criminal breach of trust and *B* with the abetment of those acts and also in the alternative under ss. 411 and 480 I.P C. in respect of a document said to have been found in his house and which had no connection whatever with the charge of criminal breach of trust. Both the accused were jointly tried and *M* made a full confession implicating *B* and it was consequently taken into consideration against him, *held*, that the joint trial of the two accused was bad and that it prejudiced the case against *B* on the second charge as the confession of *M* was used against him and seems to have been treated as a very substantial part of the evidence in support of the second charge, **5 C. W. N. 294.**

41. Joint trial of approver and other accused.— An approver whose pardon was forfeited may be tried along with the other accused, **5 A. L. J. 691 = 1908 A. W. N 259 = 8 Cr. L. J. 443.** But *see* Notes under s. 339

42 Judgment in cases of joint trial.—The judgment must show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as may be necessary to show that the Court has devoted judicial attention to case of each accused, **35 C. 136.**

Withdrawal of remaining charges on conviction on one of several charges.

240. When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction be set aside, in which case the said Court (subject to the order of

from, his act in assembling men to force an entry into it are acts unconnected with each other and do not form the same transaction, **16 Cr. L. J. 695 (M.).** Where the illicit position of cocaine by *A* is unconnected with its illicit sale by *B*, the joint trial of *A* and *B* under ss. 48 and 53 of the *Excise Act* XII of 1896 is illegal, **97 P. L. R. 1914 = 15 Cr. L. J. 336.** The offence of keeping a gambling den and the offence for frequenting the den (ss. 3 and 4 of the *Gambling Act*) are distinct offences, **35 P. R. 1914.** The accused persons were tried at one trial by a Joint Sessions Judge on the following charges:—All the accused on a charge under s. 401, accused Nos. 3 and 4 on joint charges under ss. 328 and 380. No. 4 on two separate charges under s. 411, No. 1 on charges under ss. 23 and 380, Nos. 1 and 2 on two joint charges under ss. 328 and 380 of the I.P.C. The Judge tried all these charges together, as s. 235 seemed to him to favour such a course. *Held*, (1) that the trial of all the accused on all the heads of the charge was opposed to this section, (2) but that, though it was unnecessary for the Judge to try the accused on the separate heads of (charge under ss. 328, 380 and 411 of the I.P.C., it was not only permissible, but even necessary to record evidence under those heads in order to prove the charge under s. 401, I.P.C., **Ratanlal 509 ; 46 C. 712.** Where five dacoities were committed by several persons and persons implicated in one dacoity were not in the other and the dacoities did not amount to the same transaction. *Held*, that they could not be tried jointly, **19 A. L. J. 610.** So where two persons were tried jointly one for murder under s. 302 and the other for omission to give information in respect of the same murder it was held *held* that the joint trial was illegal as the two offences were not committed in the same transaction, **19 A. L. J. 915.**

So also, three persons, each of whom is found in separate possession of some article or other of property stolen during a certain burglary, none of the articles being in their joint possession cannot be tried together at one trial under s. 411, I.P.C., **19 A. L. J. 815.**

35. Joint trial of several receivers of stolen property from different persons at different times and places illegal.—Where the first accused received stolen property from certain thieves and delivered over to the second accused a portion of the same in satisfaction of a debt and accused No. 3 was found in possession of other property identified to be stolen, but there was nothing to show when and from whom he received it and the three accused were jointly tried at one trial on charges under s. 411, I.P.C.; *held per* BATTY and RUSSELL, JJ. (ASTON, J., *dissenting*), that the three offences charged against the three accused were distinct offences, which could not be regarded as forming parts of the same transaction within the meaning of this section and that the joint trial of the three accused was illegal being in contravention of this section and s. 233, **29 B. 449,** where **6 Bom. L. R. 361** is *distinguished* and **15 B. 491** is *followed*. *See* also **28 C. 104 ; 2 C. 23 ; 3 B. L. R. 20.** Where the case for the prosecution was not that the persons charged with possession of stolen property had actually taken part in the commission of the burglary but only that each of them was in possession of same property stolen during the commission of the burglary, and it was possible that disposals were separate and unconnected with each other, *held* the joint trial was illegal, **16 Cr. L. J. 270 (O.).** *See* also **33 C. 1256** where it was also *held per* HARRINGTON and STEPHEN, JJ. (BRETT, J., *dissenting*), that separate retention by different persons of separate articles at different places, although the articles might have been the proceeds of the same dacoity cannot be said to be in the course of the same transaction and that persons charged with such retention cannot be tried jointly. The Madras High Court held that where all the accused are charged jointly with theft and in the alternative with receiving stolen property and are tried together the trial cannot be said to be illegal, having regard to s. 237 and even if there be any defect, s. 531 would cure it, **17 M. L. J. 219 = 5 Cr. L. J. 479.** In **4 Bur. L. T. 263 = 13 Cr. L. J. 59** where four persons were tried together, *P* under s. 380, *M* under ss. 386, 411, I.P.C., and *K* and *T* under ss. 411, and 414, I.P.C., and it was contended on the authority of **29 B. 449** that the conviction of *P* and *M* was bad for misjoinder, *held* that in this case all the stolen property for receiving or disposing of which the four accused were charged had been traced to the possession of first accused and that the possession by the first accused *P* as stolen property not long after the theft took place and the disposal of it by the agency of *M* to *K* and *T* were parts of one and the same transaction and **14 Bur. L. R. 38 = 6 Cr. L. J. 28** was *followed*. *See* Note 8 to s. 235. In **3 C. L. R. 16 = 6 Cr. L. J. 411,** the joint trial of three accused for the retention of one item of stolen property and of two of the accused for retention of another item of stolen property to another occasion was *held* to be bad. *See* also Note 17. But now under the recent amendment the two offences of theft and receiving stolen property need not be committed in the same transaction or as a result of one concerted action. It is enough under cl. (*e*) that one offender should commit theft and the other should have received the stolen property for charging and trying them jointly. So it is submitted that the above rulings have become obsolete.

36. Receiving stolen property and lurking house-trespass.—Two persons were charged by the Police under s. 458, I.P.C., and tried jointly, one of them being convicted under s. 411, I.P.C., and other under s. 458,

High Court confirmed the conviction and directed that no proceedings against the accused in any criminal Court in respect of the offences be taken, **9 C. L. J. 257 = 10 Cr. L. J. 482.**

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES

Procedure in summons-cases.

241. The following procedure shall be observed by Magistrates in the trial of summons-cases

Notes.—1. Summons-cases not to be committed to Court of Session.—In **1906 A. W. N. 28,** it was *held* that the commitment to the Court of Session of a summons-case under ss. 352 and 447 I P C should be quashed *first*, because there is no warrant for such commitment, it being a summons-case and, *secondly* because the Magistrate can adequately punish the offender

2. Chapter not applicable when warrant-case and summons-case are jointly tried.—In the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction one of which is a summons-case and the other a warrant-case the procedure should be that for warrant-cases **11 C. 91; 2 L. B. R. 113 = 3 Cr. L. J. 350** A warrant-case being a graver offence cannot be tried under this Chapter, as it deals with the trial of summons-cases only **7 M. 434.** *See* Note 4 to s. 251

Effect of trying a warrant case under this Chapter.—See Note 4 to s. 251

3. Chapter is applicable when warrant-case is added without any foundation.—*See* **1885 A. W N 43; 22 W. R. 40** and also **7 M. 434.**

4. Accused not to be prejudiced by application of this Chapter when trial began as a warrant-case.—Where an inquiry commenced as in a warrant-case and the accused curtailed their cross-examination of the prosecution witnesses under the impression that they could have a further opportunity of cross-examining them but no offence triable as a warrant-case having been disclosed, the Magistrate closed the case and convicted the accused, *held*, that it was the duty of the Magistrate to allow the accused an opportunity of completing their cross-examination before proceeding with the case **16 Cr. L. J. 250 (M.).** Where a Magistrate, while trying a summons-case and a warrant-case against certain accused in one trial, dismissed the complaint in respect of the warrant-case and proceeded with the complaint in respect of the summons-case and where on being requested by the accused to re-call the prosecution witnesses for their further cross-examination refused to do so, *held* that refusal was illegal and that the accused must certainly have been prejudiced by the same, *held* further that the privilege conferred by s 256, was a substantial one, and when denied it was for the prosecution to show that there was no prejudice, **18 M. L. T. 92 = 16 Cr. L. J. 540.**

Substance of accusation to be stated.

242. When the accused appears or is brought before the Magistrate, the particulars of the offences of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted but it shall not be necessary to frame a formal charge

Notes.—1. Points necessary to be explained to the accused—It is very often urged in appeal that the accused did not understand what he was required to disprove or was not asked what evidence he could give to rebut the case for the prosecution. These points should be as clearly explained to persons accused of criminal offences as are the issues to the parties in a civil suit, and all Magistrates should devote particular attention to this matter in future.—*Pun Cir*, p. 241 It is necessary that the accused should have a clear statement made to him (*a*) that he is about to be put on his trial and (*b*) as to the offence or facts constituting the offence with the commission of which he is accused. Where certain persons had been brought before the Magistrate for other purposes while he was in camp and these circumstances were not made known to them, their conviction was quashed as improper, **3 C. L. R. 87.**

2. Substance of accusation to be explained to accused.—When an accused person is called upon to make his defence, if such accused person is undefended by competent counsel the trying officer should explain the strong points against him, and ascertain whether he fully comprehends them in order to give him a fair opportunity of rebutting or refuting the charge.—*Oudh Cr Dig*, p. 11

the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Notes.—1. Scope of the section.—This section applies only to charges formally framed under Chapter XIX of this Code, **10 C. P. 1.** This section applies to a case where a person is accused of several offences and not to a case where several formal charges have been drawn up by the Court against him. It may also apply to a case when there are charges of several distinct offences constituted by separate acts or series of acts, *e.g.*, charges falling under s. 234 or s. 235, sub-sec. (1). But it does not apply when there are several formal charges founded upon the same act or series of acts regarded in different aspects as, *e.g.*, charges under s. 235, sub-secs. (2) and (3) or s. 236. In the two former instances, *i.e.*, under ss. 234 and 235, sub-sec. (1) the charges really are distinct and are capable of being tried separately; in the latter instances, *i.e.*, under s. 255, sub-secs. (1) and (2) and s. 236 there is really but one charge with several distinct heads of charge collected under it, either cumulatively or in the alternative, and there can be but one trial. In the first head of cases each charge depends upon different evidence, in the latter the evidence is the same. Therefore, where any accused person was charged under ss. 204 and 409, I.P.C., and the Magistrate upon a conviction of the former offence considered the proceedings under the latter as withdrawn, *held* that the Magistrate having convicted the accused under s. 204, I.P.C., it was open to him to convict or acquit under s. 409 according as he considered the offence under that section proved or not proved, but there was no proper occasion for taking action under this section, **24 P. R. 1889.** The authorities responsible for carrying out the prosecution of offenders should not be compelled by the Court to revive a prosecution which they may not consider it expedient to revive or to carry it out in a particulur way, **4 N. L. R. 71 = 8 Cr. L. J. 11.**

2. **Permission of withdrawal is allowable in the same case only.**—The permission to withdraw one of several charges against an accused person allowed by this section only applies to charges against an accused in the same case and not to separate charges of dintinct offences in different cases. Therefore, where an accused person was tried by the Sessions Judge and was sentenced to three years' rigorous imprisonment under ss. 380 and 75, I.P.C., and the Public Prosecutor with the consent of the Court withdrew another charge under ss. 511 and 457, I.P.C., against the same accused in another case, the order was reversed, **Ratanlal 362;** and therefore it is illegal for a Court to stay the trial in a case, pending appeal against the conviction in another case, **6 M. L. T. 90 = 9 Cr. L. J. 495.** Accused was sent up for trial by the Police on eight distinct charges, three of which were for an attempt to rob or extort when armed with a deadly weapon, and five for robbery, the accused being in each case armed with deadly weapon. The first-class Magistrate inquired into two of the latter cases, convicted the accused of two offences under s. 392, I.P.C., and stayed the inquiry into the other six cases purporting to act under this section, *held*, that this section only applied to charges in the same case and had no application to separate cases, **Ratanlal 977.** As to necessity for consent by the Court for withdrawing charges, *see* **19 P. R. 1888.**

3. **Charge cannot be withdrawn after verdict is given.**—Where the accused were found guilty by the jury of offences under ss. 366, 380 and 323, I.P.C., and the Judge passed sentence on them under s. 366 only, the other charges being withdrawn, *held* that the charges under the other sections could not properly be withdrawn after the accused had been found guilty on those charges. Concurrent sentences would have been proper in such a case, **Ratanlal 288.**

4. **Charge ought not to be withdrawn from jury after taking evidence and hearing pleaders.**—This section applies to cases where more charges than one are made against an accused person. If he is convicted on one of those charges before the other charges are tried, such other charges may be withdrawn. But when the evidence on all the charges is recorded and the pleaders heard, the Sessions Judge must under s. 297, sum up the whole of the evidence, and the jury should then be required, under s. 303, to return a verdict on all the charges, **Ratanlal 286.**

5. **Best course to convict on all heads and pass concurrent sentences.**—When a Court considers the evidence sufficient to convict an accused person under more than one head of the charge, and considers a certain term of imprisonment adequate to meet the offence under each head, it should not record a formal conviction under the first head and drop the others, but its best procedure is to convict on each head of the charge and pass concurrent sentences, **Ratanlal 19.** But concurrent sentences are opposed to s. 397 when the trials are separate, though held on the same day, **15 C. P. R. 57.**

6. **High Court may on appeal direct withdrawal.**—Where the accused was charged with ten offences of the same nature under s. 408, I.P.C., and was tried and convicted for only three of them. On appeal the

6. Willingness of person directed to furnish security to be duly recorded.—An admission by a person required to furnish security under Chapter VIII, expressing willingness to furnish security should be duly recorded under this section, 17 M. L. J. 433 = 6 Cr. L. J. 332. *See* Note 44 to s. 123 at p. 190.

244. (1)*" If the Magistrate does not convict the accused under the preceding section or " if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence.

Procedure when no such admission is made

† "Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court."

(2) The Magistrate may if he thinks fit, on the application of the complainant or accused, issues "a ‡ summons to any witness directing him to attend or to produce any document or other thing

(3) The Magistrate may, before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial, be deposited in Court.

This section does not make the examination of the complainant in a summons-case absolutely necessary 25 C. W. N. 199

Notes.—1 Magistrate must examine complainant and his witnesses.—When a case has not been disposed of under s. 203 and the complainant's witnesses have been summoned the Magistrate is bound to examine the witnesses tendered by the complainant and is not entitled to acquit the accused on a consideration of complainant's statement alone 20 M 333. It is not open to a Magistrate under this section to dispense with any witness whom a complainant may wish to examine Weir II, 305. The acquittal of the accused without examining the complainant and his witnesses is illegal, Ratanlal 5.9; 2 B. L. R (S.N) 15; 18 A. 221

2. Dismissal of complaint on failure to pay process fee—When a complainant fails to pay fee for summoning witnesses, the Magistrate must deal with the case on such evidence as he may have before him. He cannot dismiss it for default, 5 M. 160.

3. Duty of complainant to prove his case.—Where an accused person denies the truth of the complaint made against him, the Magistrate ought, under this section to hear the complainant and his witnesses in support of the complaint and also the accused and his witnesses in his defence 6 W R. 75.

Prosecution must examine all persons having knowledge of the offence—It is *prima facie* the duty of the prosecution to call all the witnesses who prove their connection with the transaction connected with the prosecution and who must be able to give important information. If such witnesses are not called without sufficient reason being given, the Court may properly draw an inference adverse to prosecution 8 C. 121; 14 A. 521; 14 C. 245; 15 A. 6 No corresponding inference can be drawn against the accused 7 A. 934; 8 C. 121 In conducting a case for prosecution all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined 10 C. 1070 unless they are known to be false witnesses 16 A. 84.

4. Magistrate must examine defence witnesses.—A Magistrate is bound to examine all the witnesses whom an accused person may produce for his defence, 13 W. R. 63. *See* also 18 A. 221; 4 M. H. C. R. Appx. XXIX. Where a Magistrate refused to allow the examination of a witness who had been tendered on behalf of the accused *held* that the conviction was bad and must be set aside, 6 B. L. R. Appx. LXXVII = 13 W. R. 77.

5. Magistrate has ample discretion as to issuing process.—A complainant in a case who mentioned the names of several witnesses on his behalf was required to produce them on a certain date. But he produced only two witnesses and they were examined *Held*, that the Magistrate was not wrong in law in deciding the case only on the evidence of the two witnesses, 15 W. R. 57. He is not bound to issue process to the other

* The words "If the Magistrate ... preceding section or" were inserted by Act XVIII of 1923.

† This proviso was added by Act XVIII of 1923.

‡ The words "a summons ... to produce" were substituted for the words "process to compel the attendance of any witness or the production of" by Act XVIII of 1923

3. Rules as to joinder of charges to be observed in the trial of summons-cases also.—The provisions of s. 233 as to joinder of charges apply to summons-cases as well, because a charge is an essential element in any trial and although no formal charge need be framed in writing, if the provisions as to joinder of charges do not apply to summons-cases, there are no other provisions of law to guide the Magistrate, **3 L. B. R. 52 (F.B.)**. *See* Note 3 to s. 233 and **19 C. L. J. 53.**

4. Charge for summons-case necessary to be reduced to writing, if tried jointly with a warrant-case.—When a warrant-case is being tried, if it is intended to proceed against the accused also for an offence triable as a summons-case, that offence should also form part of the charge. Where, therefore, the accused who were summoned for offences under ss. 143 and 379, I.P.C., were tried on a charge drawn up only for the offence under s. 379, but were convicted only of the offence under s. 143, the conviction was set aside as bad, as the accused were misled in their defence by the absence of a charge under s. 143, **29 C. 481.**—*See* also Note 12 to s. 235.

5. Charge must be framed when accused is an European British Subject.—*See* s. 451 (4).

6. Section applies to security proceedings under s. 117.—The procedure laid down in this section should be followed in proceedings under s. 117. *See* Note 30 at pp. 186-187

Conviction on admission of truth of accusation.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate* "may convict" him accordingly.

Notes.—1. Compare cases under ss. 255 and 271 for 'plea of guilty.'

2. Magistrate bound to convict on plea of guilty.—Where the accused pleads guilty and there is nothing to show that the plea was not an unreserved and voluntary one, the accused must be convicted, **8 S. L. R. 213 = 16 Cr. L. J. 238.**

2-A. Plea of guilty by a pleader or estate agent.—Where the Court dispenses with the personal attendance of the accused and permits him to appear by a pleader under s. 205 of the Code. It can act upon a plea given by his pleader in a case falling under ss. 242 and 243 of the Code. Where the personal appearance of an accused is dispensed with and he appears by his pleader or by his estate agent, the fact of such appearance should be taken note of by the Court. Under the new amendment of the definition of pleader by Act XXXV of 1923 it is competent to an accused person to appoint his estate manager to appear in his stead and to plead and do other acts on his behalf in the case against him. It is equally open to the Court to permit an estate manager to represent the accused as a pleader provided that such fact is clearly noted on the record, **50 B. 260.**

3. Admission by accused must be recorded at the time of the trial.—The admissions of the accused should be recorded at once at the time of the trial and not afterwards from rough notes, nor from Magistrate's memory, **15 M. 83.** When a written defence is tendered in a case tried under this Chapter, the Magistrate is not bound to take down the defence of the accused by personally examining him, **15 W. R. 53; 2 P. R. 1890.**

4. Importance of taking down accused's statement in his own words.—It is of the utmost importance that the terms of this section shall be most strictly complied with, because the accused's right of appeal depends on whether he has really pleaded guilty or not. *See* s. 412. It was no doubt for that reason that the Legislature required that the exact words used by the accused in his plea should, as nearly as possible, be recorded, **1889 A. W. N. 81.** When an accused person makes an exculpatory statement before the framing of a charge, Magistrates would do well to take down the plea of guilty in the form of question and answer and in the exact words used by the accused in answer to the charge. It is desirable that the plea or guilty should be so recorded as far as possible to save all misapprehension and mistake, **5 Bom. L. R. 999; 2 P. R. 1880.** *See* also **A. I. R. 1928 Cal. 243.**

5. Section not applicable to a warrant-case.—When a Magistrate tried a warrant-case (under s. 9 of *the Opium Act* I of 1878) without recording any evidence in support of the prosecution as required by s. 252 and merely calling upon the accused to plead to the charge, convicted him on his own admission as under s. 243 without even framing a formal charge; *held*, that the procedure adopted was more than a mere irregularity and the conviction was set aside on the ground it had occasioned a failure of justice to the accused, **29 M. 372.** *See* also **17 P. R. 1887.**

*Substituted for the words "shall convict" by Act XVIII of 1923.

go unconditionally, he acquits him though he may style his order of acquittal an order of discharge and tack on to it the number of section of the Code which deals with discharges. The accused is none the less in law, acquitted, for the Code contemplates no other order in summons-cases. That being so, the Sessions Judge has no power to take action under s. 437 against a person alleged to be discharged, **8 M. L. T. 78 = 11 Cr. L. J. 355.**

4. Order of acquittal under this section cannot affect a warrant-case.—An order of acquittal, passed under this section cannot operate in regard to an offence which is triable only as a warrant-case, **1888 A. W. N. 250.**

5. Further inquiry under s. 437 cannot be directed in case of an order under this section—Powers of High Court.—*See* Notes to s 437 and as to the powers of the High Court to revise orders of acquittal *see* Notes to s. 439

6. Award of Court-fee to complainant upon conviction of accused.—Under the provisions of s. 31 of the *Court Fees Act* if a person is convicted of an offence other than an offence for which Police-officers may arrest, without warrant, the Court *must* order him to repay the fee paid by the complainant on his petition or on reduction of his examination into writing, as the case may be, as well as the fee, if any, paid by the complainant for service of process.—*Oudh Cr Dig*, p 11, **1 Bur. S. R. 409.** A general order to pay costs in addition to fine is bad. The precise amount should be specified, **1 Bur. S. R. 616.**

7. On conviction the Magistrate must pass some sentence.—When a Magistrate convicts the accused *he is bound to pass some sentence, if only a nominal one,* **4 M. H. C. R. Appx. LXVI; 2 Bom. L. R. 611.** *This is* no longer the invariable rule now, *see* s. 562 and proposed amendment.

8. Order of acquittal cannot be passed without taking evidence for prosecution.—Where a Magistrate passed an order of acquittal without examining the complainant and his witnesses, the High Court reversed the order of acquittal and directed the Magistrate to inquire into the case according to law, **Ratanlal 339.** *See* Note 2 *et seq* to s. 243.

9. Procedure on conviction of certain classes of Government servants, etc.—Where any Government officer is judicially convicted of an offence, a copy of the decision should be sent to the Head of the Department in which he is employed in order that such action as may be deemed proper may be taken at once—*Government of India*, 7th August, 1863.

Whenever any officer, enlisted soldier or sepoy is sentenced in any Criminal Court to a fine of Rs. 200 or upwards or to imprisonment, otherwise than in default of paying a fine not amounting to Rs. 200, the Court should *pro prio motu* send a copy of its final order to the superior of the person convicted—*Government of India*, 3rd October, 1871

If a recruit of the Native Army is sentenced by any Criminal Court to imprisonment for any term exceeding three months, a report should be sent to the Officer Commanding the Reserve Centre—*Government of India* 6th July, 1895

Finding not limited by complaint or summons.

246. A Magistrate may, under section 243 or section 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

Notes.*—1. *Scope of this section.—This section enables the Magistrate to proceed in regard to any other offence, *prima facie* established by the evidence for the prosecution. But if the Magistrate in the exercise of his discretion thinks fit to do so he must proceed as set out in s. 242 and state to the accused the particulars of such offence, so as to enable him to make out his defence, if any *See* **12 W. R. 40.**

2. Magistrate may convict of other offence forthwith without re-opening trial.—It is open to a Magistrate to convict the accused of the offences of assault (s. 352, I. P. C.), and mischief (s. 426, I. P. C.), although they had been summoned to answer a charge of criminal trespass only (s. 447, I. P. C.). The Magistrate is not bound, when he thinks that other offences have been proved, to re-open the trial and follow the procedure of ss. 243 and 244. Such a view would necessitate a re-hearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the Legislature, **26 C. 662.** PRINSEP's view to the contrary, stated in his commentary, was not approved. *See* also **22 Bom. L. R. 231.**

witnesses, **4 M. H. C. R. Appx. XXIX.** It is the duty of the accused to produce his witnesses on the day of trial. If he requires process for their attendance he should apply beforehand, so that the witnesses may be present on that day. *The law leaves it to the discretion of a Magistrate to issue a process or not,* **14 W. R. 76.** *See* also **36 A. 13.** The Magistrate must either grant or refuse the application and not merely "*file*" it, **6 C. W. N. 543.** There is no provision of law obliging a party to a case to make a written application for the summoning of witnesses or to put in a *written* list of witnesses, **L. B. Ct. Manual (1905) O. 167.**

6. **No such discretion as to *compelling the attendance of witnesses already* summoned.**—This section does not give a discretionary power to refuse to compel the attenance of a witness upon whom the Court has already issued process, **30 C. 121.** The party at whose instance the process was originally issued has a right to call upon the Court to compel their attendance, **6 C. W. N. 548.**

7. **Power of making accused pay *for processes to his witnesses to be exercised with* caution and discretion.**—An order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused, although legal, should be passed very sparingly; and it is an improper order in a case where the accused is unable or unwilling to deposit the money, and the result is, he is convicted without his witnesses being heard, especially if the case is one in which a severe sentence is inflicted, **7 P. R. 1898.**

8. **When accused to be allowed opportunity to summon absent witnesses.**—The accused is primarily responsible for the production of his evidence on the day of hearing, but the Court should, as a matter of precaution at the conclusion of the case for the prosecution, ascertain from the accused whether he has any witness, and not refuse to give him a further opportunity of bringing or summoning witnesses who may not be present in Court, unless it appears that they are not material, or that the accused has been wilfully negligent in the matter. In every summons-case in which no witnesses are produced for the defence, the Court should record either that the accused does not wish to call witnesses, or that for reasons stated he has been refused an opportunity of doing so—*Punj. Cir.*, p. 231. But where there was nothing on the record to show that any inquiry was made from the accused as to whether they had evidence to produce, the Chief Court set aside the conviction and directed the Magistrate to take defence evidence, **7 P. R. 1884.**

9. **Evidence of seemingly perjuring witness to be taken at length.**—When, during the investigation of a complaint it may appear to the Magistrate that a witness is giving false evidence, so that criminal proceedings against such witness are likely to be necessary, the Magistrate will exercise a sound discretion in taking down under s. 359 at least the evidence of this particular witness at length in the manner prescribed in ss. 356, 357 and 360.—*Wilkins*, 112.

10. **Statements made out of Court are not to be relied upon.**—It is extremely improper for a Magistrate in disposing of a case, to rely in any way on statements made to him out of Court, **14 B. 572.**

11. **Power to require payment of the expenses of citing witnesses is confined to summons-cases only.** —*See* 8 **N. L. R. 65 = 13 Cr. L. J. 554,** and Note under s. 256.

245. (1) If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty he shall record an order of acquittal.

Acquittal.

(2) * Where the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Sentences.

Notes.—1. *See* Form XXIX, Schedule V for form of a warrant of commitment, s. 250 for compensation.

2. **No discharge in summons-case.**—In a summons-case, a Magistrate is bound to proceed under this section, **24 C. 429.** If a Magistrate does not find the accused guilty he must record an order of acquittal. No order of discharge can be passed in a case coming under this section, **19 P. R. 1900.**

3. **Discharge in summons-case tried as a warrant-case amounts to acquittal.**—If a Magistrate trying a summons-case, whatever the procedure he adopts, finds no case made out against the accused, and lets him

* This sub-section was substituted by XVIII of 1923.

7. **Is the complainant bound to be present at every adjourned hearing?**—Where a complainant failed to appear on a date to which a trial had been adjourned to secure the attendance of defence witnesses and the Magistrate dismissed the complaint, it was *held* that the discretion vested in the Magistrate by the section had been misapplied. Where a complainant has done all that is necessary for him to do to establish his case the complaint ought not to be dismissed in default of his attendance unless the Magistrate had specially required his attendance on the adjourned date, **Weir II, 206**. A Magistrate may dismiss the complaint if the complainant does not appear on the day to which the hearing has been duly adjourned, even though the complainant and his witnesses have been examined and their further attendance seems unnecessary, **22 W. R. 40**, and this case was followed in **18 C. W. N. 884 = 15 Cr. L. J. 163** where the case was adjourned merely for argument and the High Court refused to set aside the acquittal though it was pointed that there was no provision in the Code for the hearing of argument in summons-cases.

8. **Appearance by Vakil.**—Unless the Court has otherwise specially allowed the same the appearance of the complainant's Vakil is not equivalent to the appearance of the complainant within the meaning of this section, **Weir II, 209**.

9. **Dismissal of complaint when complainant is 'present in Court.'**—A case having been transferred from the file of one Magistrate to that of another, was on the day fixed called on for hearing but the complainant not appearing the case was dismissed under this section. It appeared that the complainant and his witnesses, though not in attendance in the Magistrate's Court, were present in another Court in the same Court house, being under the impression that the case had been transferred to the Magistrate of that Court. *Held* that the complainant having been present in the Court house, the provisions of this section had been improperly applied, **13 C. L. R. 303**. *See* also **24 C. L. J. 444** and **47 C. 147**.

10. **Dismissal of complaint for failure to pay process fee.**—*See* s. 204 and Note 3 to s. 244.

11. **Dismissal improper when summons not served on accused.**—When summons has not been served on the accused, a complaint cannot be dismissed on the ground that the complainant has not appeared on the day fixed for the hearing, **Weir II, 207**, and *see* also **36 M. 315**. *See*, however, Note 5 above.

12. **Power of acquittal for default of prosecution may be exercised at any stage.**—The fact that a Magistrate might have disposed of a case at the first hearing, does not deprive him of his power to acquit the accused under this section if at the adjourned hearing the complainant again fails to appear, **Weir II, 208**.

13. **Magistrate not bound to wait for complainant.**—In case of complainant's default a Magistrate is not bound to wait until Court is about to close for the day, **7 M. 356**.

14. **Cases under s. 195 cannot be dismissed.**—The direction as to dismissal of a complaint on the non-appearance of the complainant is not applicable to cases instituted under s. 195, **Ratanlal 137**.

15. **Procedure in composite cases.**—In the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons-case and the other a warrant-case the procedure should be that prescribed for warrant-cases. Therefore in such a case if the complainant be absent the Magistrate ought to pass an order of discharge under s. 253 and not of acquittal, **11 C. 91; 41 M. 727**.

16. **Compensation for vexatious complaints after hearing the whole evidence of complainant.**—Section 250 authorises the payment of compensation in cases where the accused had been acquitted under section 245 after the whole evidence in the case had been recorded, **10 B. 199** *following* **8 M. 331**. *See* also **6 C. 581; 14 P. R. 1884; 6 B. L. R. 296 = 15 W. R. 9** and **30 C. 123 (F. B.)**. But *see* **46 M. 51** which held that an order for compensation under s. 250 without hearing all the evidence was not illegal but one that should only be made under very exceptional circumstances, **39 M. L. J. 454**.

16-A. **Absence of complainant on the day to which case adjourned for delivery of judgment.**—Such a case does not fall within the provision of this section, **29 C. L. J. 337; 46 C. 687**.

EFFECT OF ACQUITTAL.

17. **Acquittal under this section bars trial on the same facts.**—When the accused appears and answers to the charge according to s. 242, he is said to be tried, although the case may be dismissed for non-appearance of the complainant, and the result is that he cannot be tried again upon the same facts and for the same offence at the complaint of another person.—*M. H. C. Pro., 27th March* 1880, 1883 **A. W. N. 43**. The

Non-appearance of complainant.

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

Notes.—1. Magistrate ought to reasonably exercise his discretion in adjourning cases.—In a case where the complainant is prevented from attending by circumstances beyond his control, as for instance by a heavy flood, the Magistrate ought to exercise his discretion and postpone the hearing, **24 W. R. 64; 5 W. R. 51; 1882 A. W. N. 229.** In a trial under this Chapter it is not an irregularity to adjourn a trial for the purpose of allowing the accused to secure the attendance of his witnesses, **16 W. R. 21.** But if it is refused, the High Court may not interfere, **10 W. R. 36.**

2. **On non-appearance of complainant complaint must be dismissed.**—The section is peremptory. On non-appearance of complainant, the Magistrate ought to acquit the accused; he is not entitled to record the order "struck off," **10 Bom. L. R. 628 = 8 Cr. L. J. 139.** Nor should he adjourn the hearing unless for some reason he thinks proper to adjourn the hearing to another date. The fact that the accused has been guilty of the contempt of the processes of the Court is no good reason for proceeding with the case, **17 C. W. N. 159.**

3. **"Struck off" does not amount to disposal.**—A summons-case was, owing to the absence of the complainant, ordered to be struck off by the Magistrate, under s. 247 of the Cr. P. C. A fresh complaint was filed; but the Magistrate acceded to the argument that he could not entertain it as he had already once passed an order under s. 247 in the case, and acquitted and discharged the accused; *held*, that neither order was correct in form. The Magistrate was not entitled under s. 247 to record the order "struck off" nor was he in a case which he had not tried, entitled to record the order of acquittal on the second complaint. The most he could do would be to record an order of discharge, **10 Bom. L. R. 628 = 8 Cr. L. J. 139.**

4. **Must the accused be acquitted on death of complainant?**—On a complaint made by a servant for maiming his master's elephant, the Magistrate without inquiring whether the animal had been actually maimed or not issued process under s. 426, I.P.C., and when the case came up for disposal, dismissed the complaint and acquitted the accused though he knew the complainant was dead. A fresh complaint was made on the same facts by another servant; *held*, the order of acquittal was wholly without jurisdiction and did not operate as a bar to the trial of the accused on the second complaint, **18 C. W. N. 1211 = 15 Cr. L. J. 726.** In **19 C. W. N. 334 = 16 Cr. L. J. 323**, however, it was *held* that where a complainant, of an offence under s 352, I.P.C., died, the Magistrate ought to have dismissed the complaint under this section even though some one had applied to be brought on the record in place of the deceased. In **20 C. W. N. 862** it was doubted whether s. 247 applied to a case where the complainant was dead.

The death of a complainant in a non-cognisable case, *e.g.*, under ss. 143 and 426, I.P.C., does not put an end to the prosecution, the trying Magistrate has a discretion in a proper case to allow the complaint to continue by a proper and fit complainant if the latter is willing. **28 Bom. L. R. 288.**

5. **Dismissal of complaint in the absence of parties on an adjourned date of which they had no notice is improper.**—When the order of adjournment is not made in the presence and hearing of the parties, *held* that the order of dismissal of complaint is illegal, **8 M. H. C. R. Appx. V.** Where a case whas adjourned *sine die* and in consequence of the absence of the complainant on the day on which it was resumed the accused was acquitted under this section, the order of acquittal was set aside as illegal, **16 W. R. 58.** An order of dismissal passed on a date which was not fixed for the hearing and on which date the complainant is necessarily absent is no order at all, **Weir II, 307;** when such an order is entered by mistake, the Magistrate may disregard the order and proceed with the trial, **18 C. W. N. 1180 = 16 Cr. L. J. 148.**

6. **Adjournment for the production of defence witnesses is not irregular.**—In a trial under this Chapter it is not an irregularity to adjourn the trial for the purpose of allowing the accused to secure the attendance of his witnesses, **16 W. R. 21.**

of the complaint if he finds the elements of an offence, on the facts set forth in the complaint, 8 C. W. N. 563 and 322; 6 M. 318.

2. Complaint cannot be withdrawn in warrant-case—Magistrate is bound to proceed with the case.—One Manekbai being arrested on a complaint of theft, was brought before a Magistrate, who allowed the complaint against her to be withdrawn and made her a witness against one Lilidhar Oodhowjee a co-accused in the same case. *Held* that the offence with which Manekbai was charged not being one in which pardon could be tendered (s. 337) or in which the Magistrate could permit the withdrawal of the complaint under this section her evidence was not legally admissible, **Ratanlal 661.** This section applies only to a summons-case. Where the offence charged is a warrant-case, a Magistrate ought to proceed with the inquiry or trial in spite of the withdrawal of the complaint, if he finds the element of an offence on the facts set forth in the complaint, **13 B. 600.** It is not competent to him to enter an order of acquittal, **37 B. 349** where **Ratanlal 380** and **1 B. 64** are explained and distinguished.

3. Does the section apply to a withdrawal before process issues to the accused?—Having regard to the language of s. 242 the words 'at any time before any final order is passed' do not apply to a time before the accused has been ordered to appear. An order of acquittal passed on a withdrawal application before issue of process is unmeaning and of no avail **36 M. 315.**

4. Complainant alone can withdraw.—In cases of contempt of the lawful authority of a public servant, the complainant referred to in this section is the public servant whose authority has been resisted and without whose sanction no criminal proceedings can be instituted against the offender, and not the person injured by the resistance, **2 B. 653.** Where a Municipal Secretary authorised under s. 280 of the *Madras District Municipalities Act* IV of 1884, instituted a complaint, *held* the Municipal Council was not competent to withdraw the same, **27 M. L. J. 617 = 15 Cr. L. J. 293.**

5. Withdrawal of complaint by person setting the Police in motion.—Having regard to the next section it is certain that this section is to be limited to cases instituted upon *complaints* in the strict sense. Where a Magistrate took cognisance of a complaint upon Police Report made in consequence of information supplied to the Police by one *R* and passed an order under this section permitting the complaint to be withdrawn on the application of *R*, it was *held* that the order allowing withdrawal was bad, for the reason that there was no *complaint* in the case as defined in s. 4 (*h*) and consequently the Magistrate in purporting to act under this section, acted in excess of his powers, **23 M. 626.**

6. District Magistrate cannot revive a withdrawn complaint.—Where a Deputy Magistrate allowed a complaint to be withdrawn, a District Magistrate has no jurisdiction to revive the case against the accused **25 W. R. 64,** *see* also **10 C. 551.** The same principle applies when the case has been compounded under s. 345. An order of discharge under this section amounts to an acquittal. *See* **25 B. 412.**

7. Where Magistrate had no jurisdiction, withdrawal of complaint no bar to re-entertainment of fresh complaint.—Where a Magistrate took cognisance of complaint without previous sanction, when such sanction was required, and *discharged* the accused *held* he was competent after sanction had been obtained to re-entertain the complaint and that the previous order of discharge did not operate as an acquittal **22 B. 711.**

8. Award of compensation on withdrawal of a complaint.—Formerly compensation could not be awarded to an accused person acquitted under this section upon a withdrawal of the complaint **Ratan at 462.** *See*, however, s. 250 which does not limit the award of compensation (like the repealed s. 250 of Act X of 1882) to acquittals, under s. 245 or s. 247, therefore this ruling will not now prevail and a Magistrate can now award compensation even if the acquittal takes place by withdrawal of complaint. *See* also **36 P. R. 1887; 19 P. R. 1885** and **30 P. R. 1910.**

9. Withdrawal of complaint and composition of offence compared.—The withdrawal of a complaint ought to be distinguished from the compounding of offences. A withdrawal must be by application to the Magistrate holding the trial and is permissible only in a summons-case, **21 C. 103.** *Withdrawal of complaint* is the act of only one party to the proceedings, *viz.*, the complainant whereas the composition of an offence obviously requires the co-operation of both parties, for a person is said to compound an offence when he forbears to prosecute the offender in consideration of some reward or advantage for his forbearance. It is quite intelligible therefore, why in the former case, *viz.*, the withdrawal of a complaint, the Legislature should have imposed the necessity of obtaining the permission of the Magistrate. Had such a restriction not been imposed, a person

dismissal of a complaint under this section is a bar to a subsequent trial on the same facts, even if good cause is shown for non-appearance of the complainant, as where such non-appearance has been procured by the fraud on the accused The Code does not permit the Court which made the order to vacate it on proof of fraud, **26 M. L. J. 160 = 15 Cr. L. J. 286.** But a dismissal of the complaint when the proceedings have been substantially so irregular as to amount to no trial, will not operate by virtue of this section as an acquittal, **Weir II, 307,** so as to bar a revival of the proceedings, **Ratanlal 69.** Where, however, the case is called on a date not fixed for hearing and dismissed, such an order is no order and may be ignored, **18 C. W. N. 1180; 40 M. 976.**

An acquittal under s. 247 of the Code bars further proceedings by virtue of s. 403 of the Code. **45 A. 58;** *see* also **53 Bom. 693.**

18. Effect of order of dismissal on revival of proceedings.—Where a Magistrate dismisses a summons-case on account of non-appearance of complainant under s. 203, the effect of the order of dismissal is to bar all subsequent proceeding on the same complainant or based on the same facts until the order of dismissal is set aside by a competent authority, **3 C. W. N. 760.** But where an application under s. 1 of the *Workman's Breach of Contract Act*, 1859, is dismissed for default before an order is passed under s. 2 of the Act, the dismissal does not amount to an acquittal as no offence has yet been committed and does not bar further proceeding, **7 L. B. R. 35 = 14 Cr. L. J. 404.** *See* Note 20 below.

19. District Magistrate has no power to set aside acquittal by Subordinate Magistrate.—Where under s. 423 (1) (*a*) a District Magistrate entertained an appeal from an order of acquittal under this section by a second-class Magistrate, reversed it and directed a re-hearing on the ground that the complainant and his *vakil* had appeared before the Court shortly after the cases had been dismissed by the second-class Magistrate. *Held*, that the order of the District Magistrate was illegal, **7 M. 213.** Similarly, in **Weir II, 308** it was *held* that the District Magistrate had no power to order the entertainment of a complaint dismissed for the non-appearance of the complainant by a Subordinate Magistrate.

20. Misapplication of procedure—Dismissing complaint for default in warrant-case.—A case under s. 420, I.P.C., cannot be dismissed for default, as by so doing the Magistrate applies to a warrant-case the procedure prescribed for summons-case only, **4 C. W. N. 26; Ratanlal 16** and **23.** Such an order is illegal and a Presidency Magistrate who passes such an order can revive the complaint at the instance of the complainant, **28 C. 652 (F.B.)** which *follows* **28 C. 211** and **1 C. W. N. 49.**

21. Effect of order of dismissal for default when the accused is also absent.—Section 403 bars a fresh trial of an accused who has been acquitted under this section even if he was absent though served with the summons. Dismissal of a case resulting in the acquittal of one of the two accused under this section, on the ground of complainant's absence, and purporting to be a termination of all proceedings relating to that matter, will operate also against a co-accused whose attendance could not be obtained and against whom the trial did not proceed, **4 C. W. N. 346.** There is nothing in the language of this section limiting the effect of an acquittal only to cases in which the accused appeared in answer to the summons when the case has been dismissed under this section, **34 M. 263.** *See* also **7 C. W. N. 711** and **493.**

22. Effect of order of dismissal of complaint on charges not tried.—Where a Magistrate issued processes against and summoned accused persons for one of several offences alleged against them and acquitted them of the offence for which they were summoned, no fresh process could in view of s. 403, cl. (1) be issued against them in respect of all the offences alleged against them on the previous occasion including the one for which they were summoned and acquitted, **2 C. L. J. 622 = 3 Cr. L. J. 115,** where **5 C. W. N. 633** and **15 C. 608** are *distinguished*. *See* Note 15 above.

248. If a complaint, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

Withdrawal of complaint.

Notes.—1. Section applies only to summons-cases.—The only sections of the Code which contemplate the termination of a criminal prosecution by private arrangement are ss. 248 and 345. S. 248 is confined to Chapter XX which deals with summons-cases only, **37 B. 369.** Therefore where the offence charge is a warrant-case, and not a summons-case, a Magistrate ought to proceed with the inquiry or trial in spite of the withdrawal

Frivolous Accusations in Summons and Warrant-cases

False, frivolous or vexatious accusations.

250. *(1) If, in any case instituted upon complaint or upon information given to a Police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid

(2) The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded direct that compensation to such an amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class not exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them

(2-A) The Magistrate may, by the order directing payment of the compensation under sub-sec. (2) further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.

(2 B) When any person is imprisoned under sub-sec. (2-A) the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply

(2 C) No person who has been directed to pay compensation under this section shall by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter

(3) A complainant or informant who has been ordered under † sub-sec. (2) by a Magistrate of the second or third class to pay compensation ‡ "or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees" may appeal from the order in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3) the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order

§ * * * * * *

Note.—Referring to the amendment of this section the Select Committee say —

"We think that the words "or to a Magistrate" near the beginning of this clause were left out on the ground that information to a Magistrate from any person other than a Police-officer must be a complaint. We

* Sub-sections (1) to (2-C) have been substituted for old sub-secs. (1) and (2) by the Cr. Pro. (Amendment) Act of 1923.
† The word and figure in the inverted commas were substituted for the word and figure "sub-section (1)" by Act XVIII of 1923.
‡ These words in inverted commas were substituted for the words "to an accused person" by ibid.
§ Sub-section (5) has been omitted by Act XVIII of 1923.

might be harassed by a perfectly vexatious criminal proceeding from which the complainant having put the accused to as much inconvenience and degradation as he could, might then calmly withdraw. To prevent the processes of Criminal Courts from being thus abused, and at the same time of placing a ready means of summary redress in the hands of the Magistrate trying the case, the Legislature enacted ss. 248 and 250, the provisions of which contain a reasonable protection for accused persons.

But the case of "*composition*" stands on totally different grounds. The Legislature having determined to allow certain offences which principally concerned the injured person as an individual, and not the public at large, to be compounded, the composition as the act of both parties concerned works its own end, and there is no such abuse of process to be guarded against as in the case of simple withdrawal. As soon as a composition (where permissible) is voluntarily effected it operates (*vide* s. 345) as an acquittal of the accused, and the Magistrate has no power to deal any further with the case. But an acquittal under s. 345 is a very different thing from an acquittal under either s. 245 or s. 247, and it is only in acquittals under one or other of the sections last mentioned that the Magistrate has been empowered to award compensation. An acquittal under s. 245 or s. 247 is the result of a purely magisterial act, but an acquittal under s. 345 results by an operation of law upon the act of composition, and is thus quite irrespective of any magisterial decision. *Per* RATTIGAN, J., in **19 P. R. 1888.** *See* also **20 C. W. N. 1209.**

10. Magistrate alone competent to authorise withdrawal.—This section does not empower any Police-officer to entertain an application for the withdrawal of a complaint. The permitting of a complainant to withdraw is a judicial act, the exercise of which is vested in the Magistrate by this section and the Police have no authority to interfere in such matters, **Ratanlal 91.**

Under s. 248 of the Code a Magistrate alone is competent to authorise withdrawal and can even refuse application for withdrawal filed by the complainant, so it was held in **30 C. W. N. 698** that no absolute power of withdrawal is given to the Calcutta Corporation under s. 537 of the Calcutta Municipal Act unless the withdrawal is permitted by the Magistrate.

11. Accused against whom case is withdrawn, competent witness against co-accused.—*See* **24 B. 422.**

12. Whether withdrawal of complaint against one amounts to a withdrawal of the complaint against all.—Where the complainant withdrew his complaint against one of the five accused and the Magistrate proceeded against the other four, held in revision by the High Court that though the complainant used the phrase 'withdraw the complaint' he in fact meant that the offence had been compounded with the accused concerned. Further held that under cl. (6) of s. 345 of the Code as amended a composition has the effect of an acquittal of the accused with whom the offence has been compounded, but does not affect the case as against the other accused, **6 Lah. 239.**

249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or, with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Power to stop proceedings when no complainant.

Notes.—1. Scope of section.—This section applies only to cases instituted otherwise than on a complaint, **9 P. R. 1913 = 8 P. W. R. 1913 = 13 Cr. L. J. 860.** The section though occurring in Chapter XX seems to be applicable to warrant-cases also. But *see* **5 Patna 243** which holds that the section does not apply to warrant-cases, and that an order under s. 249 in a warrant-case would be quite illegal and void.

2. Stop order does not bar re-trial.—The order under this section is specifically excluded by the explanation to s. 403 from being an acquittal and further proceedings in accordance with law are not barred, **9 P. R. 1913 = 13 Cr. L. J. 360.**

3. No further inquiry under s. 437 in case of a stop order.—As an order under this section does not amount to a dismissal of a complaint or a discharge, no order under s. 437 can be passed directing further inquiry, **9 P. R. 1913 = 13 Cr. L. J. 860.**

the accused as the complaint was at any rate partly true. *In order to enable a Magistrate to pass an order for* compensation, there must be complete discharge or acquittal 24 C. 53. But a complaint may be well founded as regards some of the accused and frivolous or vexatious as regards the others so as to render the complainant liable to make compensation to those others, 5 M. 381; 15 P. R. 1877. But the substitution of the word "*heard*" for "*tried*" renders a complete trial no longer necessary. An order under this section may be made after hearing only part of a case, but evidence must be heard, 10 W. R. 61. *See* Note 16 to s. 247, 44 M. 51; 40 A. 610. *See* also 51 Mad. 337 = 29 Cr. L. J. 114. Where it is *held* that though a Magistrate could discharge the accused at any stage yet it is only after the examination of all the evidence that the complainant wants to adduce that he can come to the conclusion that the case is false and vexatious and award compensation to the accused.

6 **Framing of charge no bar to compensation.**—The fact that a Magistrate has framed a charge under s. 254 against an accused person does not of itself prevent him from holding after full inquiry that the charge is frivolous and vexatious under this section, Ratanlal 734. But *when a Magistrate considers evidence sufficient* to justify the framing of a charge and subsequently changes his opinion, he must give reasons for so changing. Compensation for a frivolous and vexatious complaint may be awarded after the evidence for the defence had been heard, because it is quite possible that the Magistrate might not be able to detect the frivolous or vexatious nature of the complaint until the defendant has had an opportunity of explaining the real circumstances in making his defence, Weir II, 316; 10 B. 199.

7. **Compensation may be directed on acquittal.**—An order for compensation against a complainant may be made on an order of acquittal, 6 C. 531. The fact that the accused was tried and acquitted is no bar to the award of compensation, 5 M. 381. This case was followed in 10 B. 199. *See* also 6 C. 531; 14 P. R. 1884; 6 B. L. R. 298 = 15 W. R. 9 and 30 C. 123.

Compensation on withdrawal of complaint.—See Notes 8 and 9 to s. 248.

Compensation when acquittal owing to absence of complaint.—See 1884 A. W. N. 115; 1891 A. W. N. 120, 63; 14 P. R. 1888.

8. **Award of compensation illegal when acquittal results from composition.**—Though the composition of an offence under this section has the effect of an acquittal yet it is not such an acquittal as brings the case within the provisions of this section. Therefore, where on an offence under s. 323, I P C, being compounded the trying Magistrate ordered the complainant to pay one of the accused Rs 25 as compensation, his order was reversed as illegal, Ratanlal 937; 19 P. R. 1888; 30 P. R. 1910 = 44 P. W. R. 1910 = 11 Cr. L. J. 634. Where the conduct of the accused has not been straightforward throughout, the order awarding compensation is liable to be set aside, 65 P. L. R. 1901. Where an offence is compounded under s. 345, compensation under this section cannot be awarded, as there is neither a discharge nor an acquittal but only a composition. This section does not apply so as to enable the Magistrate to award compensation to the accused, 7 C. P. 2 and Ratanlal 937 and 700, and 10 Bom. L. R. 1056.

9. **Compensation may be awarded in cases tried summarily.**—S. 262 renders applicable in the case of summons-cases tried summarily, all the provisions of s. 250 and it is open to a Magistrate to award compensation in all cases whether tried summarily or not in which he acquits and his opinion that the complaint was frivolous or vexatious, 11 M. 142.

IN RESPECT OF WHAT CASES COMPENSATION MAY BE ORDERED.

10. **In cases either frivolous or vexatious.**—It is sufficient to support an order under this section that the complaint is either frivolous or vexatious and whether it is the one or the other is a question of fact. Thus, where a complainant, not satisfied with the conviction and punishment by a Village Magistrate of the person complained against, complained to a second-class Magistrate in the same matter it was *held* that the compensation was rightly awarded inasmuch as the complaint whether frivolous or not, was certainly vexatious and improper, Weir II, 319. But under the new amendment s. 250 is applicable to cases which must be false and either frivolous or vexatious also.

In 23 A. L. J. 1034 it appears to have been held that for the application of s. 250 as amended the complaint should be false, frivolous or vexatious.

But in a later decision in 24 L. J. 161 it was held that under the alteration made in the old Code in respect of s. 250 it is now necessary for the award of compensation under the new section it is necessary that the complaint should be false and either frivolous or vexatious.

think that this view overlooks the words "with a view to his taking action under this Code," which occur in the definition of "complaint." We also think that there is some force in the fact pointed out by the Calcutta High Court that s. 190 (1) (c) seems to draw a distinction between information received and a complaint. We have, therefore, restored the words "or to a Magistrate."

"Sub-sec. (1) as re-drafted does not provide for the case where the complainant is absent at the time judgment is delivered and we think power should be given in such a case to summon him to appear and show cause."

"We think that there is some anomaly in enabling a Magistrate who cannot impose a fine of more than Rs. 50 to award compensation up to Rs. 100 and we have, therefore, proposed to reduce the amount of compensation which third-class Magistrate can award to Rs. 50."

"In view of s. 547, we do not see any necessity to provide in the new sub-sec. (2-A) that compensation should be recoverable as if it were a fine."

"We have re-drafted the proposed addition to sub-sec. (4) to make the intention clearer."

"We discussed at some length the various merits of the phrases—"frivolous or vexatious" as in the present Code, "false and either frivolous or vexatious" as in the Bill and "false or vexatious, to the knowledge of the party" as in Act IX of 1922 recently passed to provide for compensatory costs in respect of false claims and defences. On the whole, we are in favour of the Bill as drafted. We do not think that the procedure of s. 250 should be used in every false case unless the case is also either frivolous or vexatious. In more serious cases it is desirable that the Magistrate should act under s. 476 with a view to the institution of a prosecution."

Notes.—1. *See* s. 545 as to payment of expenses and also compensation in cases not provided for by this section, and s. 547 for power to enforce refund of compensation.

2. History of section.—This section which was originally s. 250 in the Code of 1882 was repealed and replaced by Act IV of 1891, s. 2 as s 560 in the 1882 Code. It is now re-transferred to its old place capped with the present heading. The section which originally applied to Sessions cases was made applicable to all cases except such as are triable exclusively by a Court of Session of High Court. In the present Code "*heard*" has been substituted for the word "*tried*" and the heading is new. In the 1861 Code the words were "frivolous *and* vexatious."

OBJECT OF SECTION.

3. Object of section not punitive—Compensation not fine.—The object of this section is not to punish the complainant, but to award by a summary order some compensation to the person against whom a frivolous or vexatious complaint is brought, leaving it to him to obtain further redress against the complainant by a regular civil suit or criminal prosecution.—*Per* BANERJEE, J., in **30 C. 123 at p. 129 (F.B.).** An order of compensation is not a fine and if passed by a Magistrate of the first class is not appealable, whatever the amount awarded. Such an order passed in the form of a sentence of fine, the amount of which was to be paid as compensation to the accused, was held to be legal in substance though illegal in form, **8 C. P. Cr. 13.** The compensation which the Court is empowered to award is not a fine, but is in the nature of damages for malicious prosecution although it is made recoverable in a summary manner as if it were a fine, **26 M. 127.** A Magistrate cannot award compensation by way of fine, **2 N.-W. P. H. C. R. 430**; though the amount is recoverable in the same way as fine, **18 A. 96; A. 112.** In awarding compensation the Magistrate must be strictly guided by the loss or inconvenience which the accused person has obtained, **1881 A. W. N. 167.**

AT WHAT STAGE COMPENSATION MAY BE ORDERED.

4. No compensation where case dismissed before issue of process.—Compensation cannot be awarded in cases in which complaint is dismissed without issue of process for compelling the attendance of the accused. It is a condition precedent to the grant of compensation under this section that the case shall have been heard by the Magistrate and that he shall have discharged or acquitted the accused, **8 and 14 P. R. 1897; 29 A. 137.** Compensation can be awarded only where there had been a discharge or acquittal after a frivolous or vexatious charge had been heard. Where a complaint was dismissed under s. 203, the fact that the accused was present with a pleader at the inquiry under s. 202 will not enable the Magistrate to award compensation, **3 P. R. 1906 = 84 P. L. R. 1906 = 4 Cr. L. J. 36.**

5. Complete discharge or acquittal necessary to grant compensation.—When the accused is charged with offences, *e.g.*, ss. 352 and 379, I.P.C., and one only of them is proved, compensation cannot be given to

a Police-officer, 21 C. 979; 5 C. W. N. 370; 7 C. W. N. 206; 7 M. 583 and 1901 A. W. N. 142 and 6 A. 98. But where a case is ultimately instituted upon a Police report but is originally based on information given to a Police-officer, *held* that the person who gave the information to the Police-officer may be dealt with under s. 250, 14 C. W. N. 326 = 11 Cr. L. J. 201. No compensation can be ordered against a person whose statement in an inquiry instituted by the Police formed the basis of the further proceedings, 1 Patna L. J. 106 = 17 Cr. L. J. 336.

15. No compensation for cases instituted under s. 476.—Where a case is sent for trial under s. 476 to a Magistrate, the Magistrate cannot pass an order under this section directing the person at whose instance the case was sent to pay compensation as no case was instituted either by complaint or by information given to a Police-officer or to a Magistrate, 14 Bom. L. R. 116 = 1 Bom. Cr. Ca. 237 = 14 Cr. L. J. 1.

15-A. Compensation can be awarded in a case originated by a complaint before a Village Magistrate.—1917 M. W. N. 155.

15-B. A complaint under s. 26 of the Bombay Public Conveyances Act, 1853, is not a complaint in respect of an offence within the meaning of s. 250, Cr. P. C. The Court has therefore, no power to make an order under s. 250, 45 B. 463.

WHO MAY BE MADE TO PAY COMPENSATION.

16. Compensation for information given subsequent to complaint.—The accusation against the accused was not made on the information on which the case was instituted but the arrest of the accused was due to clues subsequently furnished by the complainant or other persons interested in the case and it was argued that it was only the accusations in the first information that could be dealt with under this section. *Held* that though the original complainant may not be liable for all accusations made by others interested in the case in its course, yet where the original complainant himself is the author of the subsequent accusations he may be dealt with under s. 250, 14 C. W. N. 326 = 11 Cr. L. J. 201.

17. Person giving information to Village Magistrate, which the Village Magistrate is bound to pass on to Police.—A man who complains to a Village Magistrate of a non-bailable offence, knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the Police gives information to the Police just as effectively as if he went in person to the Police station and if the Police charge the case it is a case instituted on information given to a Police-officer within the meaning of s. 250. The case would be different if the information was not a matter which the village headman is bound to pass on 27 M. L. J. 37 = 1916 M. W. N. 804 = 15 Cr. L. J. 431 where 25 M. 667; 22 M. L. J. 133 = 10 M. L. T. 550 = 13 Cr. L. J. 29 and Cr. R. C. 827 of 1913 were dissented from on the authority of 32 M. 258 (F.B.). *See* also 16 Cr. L. J. 243 (M.) 17 Cr. L. J. 503; 32 M. L. J. 78. *See* Note 14 45 M. L. J. 255.

18. A person who institutes a complaint under the orders of a superior officer cannot be ordered to pay compensation.—A Magistrate can order compensation to be paid by a person to the accused only when the prosecution of the accused was on the complaint of that person or on information given by that person to a Police-officer or to a Magistrate within the meaning of this section. (i) A *karkun* or a process server on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ, and a report was thereupon made by the Court to a Magistrate, with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused and ordered the *karkun* to pay the accused compensation under this section. *Held* that such last mentioned order was wrong, the *karkun* not being a complainant within the meaning of this section. In such a case as the above the Subordinate Judge should be regarded as the complainant, and he having acted judicially, was not liable to the penalty provided in the section, 1 B. 175; 20 C. 431; 28 A. 183, where 20 C. 431 is *followed*, 25 P. R. 1910 = 11 Cr. L. J. 634; Weir II, 318. (ii) Where on the sanction of an Assistant Superintendent of Police to prosecute for an offence, a Station House Officer prepared a charge sheet which was presented to the Magistrate by a constable, and the Magistrate while discharging the woman made an order under this section directing the constable to pay compensation, *held*, that the order was illegal. The constable was not in such circumstances "the person upon whose complaint or information the accusation was made," 1 B. 175 *referred to*, 21 M. L. J. 844 = 10 M. L. T. 191 = 12 Cr. L. J. 452.

19. Person complaining under the authority of an executive body may be made to pay compensation.—The accused was charged by a municipal peon under the sanction of the municipality with the offence of easing herself within municipal limits of S. The trying Magistrate acquitted the accused, and ordered the

11. Accusation must be the committing of an "offence."—*See* definition of complaint, s. 4, at pp. 6—10 and **36 A. 378; 45 A. 363.**

(*i*) *No compensation for false information under ss.* 107 *and* 110.—To justify the application of this section, a person must be accused before a Magistrate of an offence triable by a Magistrate which an institution of proceedings under s. 107 for taking security to keep the peace, is not, **25 B. 48** which *follows* **15 A. 365; 4 P. R. 1896; 37 P. R. 1884; 16 P. R. 1893; 33 P. R. 1902.** *See* also **7 A. L. J. 743 = 11 Cr. L. J. 446** and **36 A. 382; 39 All. 750** and Note 149 at p. 216, **20 A. L. J. 624; 21 A. L. J. 207.**

(*ii*) *No compensation where application is for maintenance under Chapter XXXVI.*— An application for maintenance is not a complaint of an offence or an accusation of an offence and no order for payment of compensation can be made under this section, **6 M. L. T. 261 = 11 Cr. L. J. 156** and *see* also Heading I to s. 488.

(*iii*) *No compensation where complaint is as to the use of a house as a brothel.*—Section 41 of the *Bombay District Police Act* does not make the use of a house as a brothel an offence; so in a case where such a complaint is made and dismissed, no compensation can be awarded, **6 S. L. R. 254 = 14 Cr. L. J. 320.**

(*iv*) *No compensation for cases under Act XIII of* 1859 —Compensation cannot be awarded under this section to a person against whom a complaint has been made under cl. (1) of s. 2, Act XIII of 1859, for, as neglect or refusal to perform work according to a contract is not made punishable by that clause, a complaint of such neglect or refusal is not a complaint of an offence under s. 4 (*h*) and this section, **Ratanlal 617; 4 C. W. N. 253; 4 M. 234; 17 A. L. J. 165.**

(*v*) *No compensation for a complaint under the Public Conveyances Acts, s.* 28.—Such a proceeding is not a complaint of an offence within s. 250. Hence no compensation can be awarded, **22 Bom. L. R. 195.**

12. Compensation may be granted only in cases ordinarily triable by a Magistrate and not in Sessions Cases.—The words *triable by a Magistrate* mean triable under s. 28 and the provisions of this section are confined to cases specified in the 8th column of Schedule II as triable by a Magistrate. Hence a Magistrate who is specially empowered under s. 30 is not competent to make an order for compensation under this section in a case triable by a Court of Session as specified in column 8, Schedule II, **26 P. R. 1903; 1 P. R. 1919 (Cr.)** and **15 P. R. 1919 (Cr.).** Similarly, even where a Magistrate discharges the accused in a case triable exclusively by the Court of Session, he has no power to order the complainant to pay compensation, **Weir II, 315.** Although a first-class Magistrate discharges the accused under this section on account of the charge being vexatious, yet if the offence charged be triable exclusively by the Court of Session, the Magistrate cannot award compensation under this section to the accused, **Ratanlal 961; 14 P. R. 1902; 91 P. W. R. 1910 = 11 Cr. L. J. 396; 19 Bom. L. R. 60; 18 A. L. J. 466; 20 A. L. J. 433 = 40 A. 615.** But *see* **45 M. 29** where a Magistrate tried an accused person for an offence under a less serious section of I.P.C, when really the offence fell under a more serious section which was beyond his competence, his proceedings were not illegal and an award, of compensation under s. 250, Cr. P. C., was not illegal although the offence was really exclusively triable by a Court of Session = **41 M. L. J. 398; 43 A. 166 = 26 A. L. J. 1056.**

13. Compensation may be ordered for false complaint of wrongful seizure of cattle.—It was formerly held that on the dismissal of a complaint of wrongful seizure of cattle, it is not competent to a Court to act under this section and award compensation to the person against whom complaint is made, **18 A. 353; 23 C. 248; 9 M. 102** and **374.** These cases were decided under the Code of 1882. Now the definition of the word "offence" is made to "include any act in respect of which a complaint may be made under s. 20 of *the Cattle Trespass Act*, 1871;" therefore, dismissal of a complaint of wrongful seizure of cattle is equivalent to discharge or acquittal and consequently it seems compensation is now awardable. The distinction should, however, be kept in mind between compensation under this section and under s. 22 of *the Cattle Trespass Act*, under this section compensation is to the accused, while under s 22 it is to the complainant and an appeal lies under s 407. From an order under this section, there is no appeal under s. 407, **29 M. 517.**

13-A. When there were two charges and there was conviction as to one and acquittal as to another; *held*, that to order compensation to be paid in respect of the charge as to which there was an acquittal is illegal **16 A. L. J. 499.**

14. No compensation for cases instituted on Police report.—The operation of this section is restricted to cases instituted by complaint as defined in the Code or upon information given to a Police-officer or Magistrate, and consequently it has no application to a case instituted on a Police-report, or on information given *by*

therefore be made by the Original Court 1932 A. W. N. 53; 23 A. 615; *contra* 14 C. W. N. 212 = 11 Cr. L. J. 48. But the Full Bench of the Calcutta High Court (JENKINS, C.J., *dissenting*) reconsidered the decision in 14 C. W. N. 212, and overruling it, *held* that this section being confined by its terms to the Courts of Magistrates trying cases in the first instance does not confer on the Appellate Court the power to order compensation to accused. It is not an order "consequential or incidental" to an order under this section but is a special power given to an original Magistrate alone, 39 C. 157 (F.B); 45 A. 80, 7 Lah. 152. It seems doubtful whether the High Court has jurisdiction to pass an order for compensation under this section when the matter comes up in revision. 28 A. L. J. 328 = 29 Cr. L. J. 274.

PROCEDURE IN SECTION TO BE STRICTLY FOLLOWED.

27. Complainant must be called on to show cause and his objections recorded.—In a proceeding under this section, the procedure provided by cls. (*a*) and (*b*) should be strictly followed. An order directing payment of compensation ought not to be made without calling on the complainant to show cause against it as required by cl. (*a*) of this section and the Magistrate should record and consider any objection which the complainant may urge against the making of the direction **Ratanlal 726, 3 Bom. L. R. 556 and 777; Weir II, 310; 5 C. W. N. 214; 11 C. W. N. 62; 9 A. L. J. 170 = 13 Cr. L. J. 268; 33 C. 302.** The provisions relating to summary do not justify a Magistrate in omitting to record the complainant's objections to his order directing payment of compensation under this section and the omission to comply with the proviso to this section is more than a mere irregularity which could be cured by s. 537, **1906 U. B. R. Cr. Pro. 51 = 5 Cr. L. J. 291; 2 S. L. R. 4 and 14 = 10 Cr. L. J. 220 and 229.** *See* also **8 S. L. R. 25 = 15 Cr. L. J. 666.** Where owing to the absence of the complainant the Magistrate made the order absolute stating 'complainant is absent. His brother verbally shows cause which is insufficient,' *held*, the order was bad as the complainant was in fact given no opportunity of showing cause **18 C. W. N. 1277 = 15 Cr. L. J. 707; 24 Bom. L. R. 805;** but *see* **20 A. L. J. 369** (*contra*)

It is not a condition precedent to the making of an order for compensation under s. 250 of the Code, that the Magistrate should issue a formal notice to the complainant to show cause (**9 A. L. J. 170,** *distinguished*) **45 A. 474.**

But where the Magistrate believing that the complainant has deliberately absented himself on the day judgment was delivered, ordered the complainant to pay compensation under s. 250 without giving him an opportunity to show cause against the order *held* that the order was illegal and must be set aside, **24 A. L. J. 170.**

28. Magistrate bound to record his reasons.—A Magistrate in ordering a complainant to pay compensation under this section should state his reasons why he deems the complaint to be vexatious and should also state in his judgment the facts of the case with a criticism of the incidents involved in it. The statement that, in his opinion, the prosecution evidence is highly unsatisfactory and that upon the evidence and the written statement and documents he has no hesitation in saying the case is vexatious, is not sufficient, **10 C. W. N. 844 = 3 Cr. L. J. 390.** The reasons must be contained in the same order discharging or acquitting the accused, **16 P. W. R. 1913 = 14 Cr. L. J. 45.** As to what would be a sufficient compliance with the law as enacted by clauses (*a*) and (*b*) of the proviso *see* **8 Bom. L. R. 847 = 4 C. L. J. 423.**

29. Complainant cannot adduce further evidence nor is he entitled to an adjournment.—The words "*consider any objection which complainant may urge*" do not entitle the complainant to adduce further evidence to prove that the charge was a true one. The direction to pay compensation should be part and parcel of the order of discharge or acquittal. This clearly shows that there is not to be a separate inquiry, nor does the section require that a separate proceeding should be *held* and further evidence taken, **1895 A. W. N. 155.** It was not the intention of the Legislature that a complainant should be entitled to an adjournment to enable him to show cause, much less to an opportunity of producing further evidence, **28 A. 193.** *See* also **34 A. 334; 7 S. L. R. 123 = 15 Cr. L. J. 505; 31 Bom. L. R. 531.**

30. Whether order for payment of compensation must form part of the order of discharge or acquittal.—It should be noted carefully that under the newly amended s. 250 it is only the order calling upon the complainant to show cause why he should not pay compensation which has to be contained in the order of discharge, and not the order for payment of compensation which has necessarily to be a subsequent order. So now the order for the payment of compensation cannot form part of the order of discharge or acquittal, **7 Lah. 121; 22 Cr. L. J. 653.** One of the two accused was discharged and the case was against the other accused was adjourned when he was acquitted and the Magistrate called upon the complainant to show cause against an order for compensation being passed and directed the complainant to pay compensation to each of the accused that under

peon to pay one rupee as compensation to the accused. The District Magistrate referred the case to the High Court on the authority of the case in **1 B. 175** for reversal of the order of compensation. *Held*, that this case differed from the one cited, as there the complaint was preferred by a Judge acting judicially. An executive body cannot authorise a servant to prefer a wrongful complaint and so screen the complainant from the legal penalty, **Ratanlal 309.** But this section was held inapplicable where a Municipal *Jamadar* arrested a person whom he considered to be committing in his presence an offence, the person arrested having been sent up for trial in the usual manner by the Police and having been acquitted, **1901 A. W. N. 142.**

20. Judicial officer acting as such cannot be ordered to pay compensation.—*See* Note 18 above.

21. Liability of Public officers to pay compensation.—Public officers are not exempted from liability to make compensation for vexatious and frivolous complaints, **Weir II, 317.** But where a public servant only gave evidence as a witness where the proceedings were instituted on the information of his official superior, an order directing the public servant who gave evidence to pay compensation was *held* bad, **Weir II, 318.** As to Police-officers, *see* Note 14 above.

22. Police-officers may be made to pay compensation.—Where a Police-officer is not permitted by this Court to make a report, *e.g.*, in a *non-recognisable* case, he may initiate proceedings by laying information before the Magistrate just as any other complainant might do. Such information will be a complaint within the meaning of this section and compensation may be awarded if the complaint is vexatious, **26 B. 150 (F.B.)** which *overrules* **22 B. 934.** Following this case it was *held* that where a Police-officer lays information under s. 68 (*c*) of the *Bombay District Police Act*, it is a complaint and a Magistrate has jurisdiction to grant compensation if he decides that the case was frivolous, or vexatious, **6 S. L. R. 83 = 13 Cr. L. J. 752.** *See*, however, Note 14.

23. Can a servant be made to pay compensation?—Where a servant complained on behalf of his master, it was *held* that the servant was not liable to pay compensation under this section, **17 P. R. 1879** and **24 P. R. 1869,** but it would be different now. *See* **14 C. W. N. 326 = 11 Cr. L. J. 601,** where it was *held* that the question whether a servant can be *held* responsible for information lodged on behalf of his master was a question on fact and depended on the question whether the servant is merely the mouthpiece of the master and is merely giving expression to his master's accusation or whether he joins personally in the accusation himself.

24. Guardian of minor cannot be made to pay compensation.—A guardian or next friend of a minor complainant cannot be ordered to pay compensation to the accused, **1 P. W. R. 1912 = 83 P. L. R. 1912 = 13 Cr. L. J. 136.**

24-A. Where a person gives information to another to the effect that a certain constable has committed extortion intending that a complaint should be made on his behalf and the complaint is dismissed as frivolous, *held* that such a person is liable to make compensation to the accused, the fact that he employed another in giving the information being immaterial, **151 A. L. J. 879; 40 A. 79.**

WHO MAY ORDER COMPENSATION.

25. It is only the Magistrate that hears the case that can award compensation.— When a Magistrate acquitted the accused and was of opinion that compensation should be awarded, subject to complainant showing cause and was transferred before passing final orders and his successor awarded compensation, *held* the order was bad as the successor had not heard the case, **1892 A. W. N. 58; 33 C. W. N. 861.**

25-A.—Magistrate by whom the case is heard.—Whether Magistrate who decided the case, but has not heard whole of the evidence, can order compensation? Where part of the evidence was heard by one Magistrate and then the case was made over to another Magistrate under s. 346, Cr. P. C., the latter Magistrate heard the rest of the evidence and decided the case, *held* that such Magistrate was competent to order compensation under s. 250, **19 A. L. J. 651.**

26. Appellate Court cannot award compensation.—The special provisions of this section are applicable only to original trials. 'The Magistrate by whom the case is heard' does not include the Court of Appeal. Therefore a District Magistrate cannot on appeal while setting aside the order of the Subordinate Magistrate convicting the accused, direct the complainant to pay compensation, **3 Bom. L. R. 841; 7. Bom. L. R. 998 = 3 Cr. L. J. 83; 8 M. H. C. R. Appx. VII.** The Appellate Court in reversing a conviction is not competent to make an order under this section. In view of the express terms "*Magistrate by whom the case is heard,*" s. 423 (1)(*d*) cannot be taken to confer such power on the Appellate Court. The order for compensation must

therefore be made by the Original Court, 1892 A. W. N. 58; 23 A. 625; *contra* 14 C. W. N. 212 = 11 Cr. L. J. 48. But the Full Bench of the Calcutta High Court (JENKINS, C.J., *dissenting*) reconsidered the decision in 14 C. W. N. 212, and overruling it, *held* that this section being confined by its terms to the Courts of Magistrates trying cases in the first instance, does not confer on the Appellate Court the power to order compensation to accused. It is not an order "consequential or incidental" to an order under this section but is a special power given to an original Magistrate alone, 39 C. 157 (F.B); 45 A. 80, 7 Lah. 152. It seems doubtful whether the High Court has jurisdiction to pass an order for compensation under this section when the matter comes up in revision. 26 A. L. J. 328 = 29 Cr. L. J. 274.

PROCEDURE IN SECTION TO BE STRICTLY FOLLOWED.

27. Complainant must be called on to show cause and his objections recorded.—In a proceeding under this section, the procedure provided by cls. (*a*) and (*b*) should be strictly followed. An order directing payment of compensation ought not to be made without calling on the complainant to show cause against it as *required by cl (a) of this section, and the Magistrate should record and consider* any objection which the complainant may urge against the making of the direction, Ratanlal 726, 3 Bom. L. R. 586 and 777; Weir II, 310; 5 C. W. N. 214, 11 C. W. N. 62; 9 A. L. J. 170 = 13 Cr. L. J. 268; 38 C. 302. The provisions relating to summary do not justify a Magistrate in omitting to record the complainant's objections to his order directing payment of compensation *under this section* and the omission to comply with the proviso to this section is more than a mere irregularity which could be cured by s 537, 1908 U. B. R. Cr. Pro. 51 = 5 Cr. L. J. 291; 2 S. L. R. 4 and 14 = 10 Cr. L. J. 220 and 229. *See* also 8 S. L. R. 25 = 15 Cr. L. J. 666. Where owing to the absence of the complainant the Magistrate made the order absolute, stating 'complainant is absent. His brother verbally shows cause which is insufficient,' *held*, the order was bad as the complainant was in fact given no opportunity of showing cause 18 C. W. N. 1277 = 15 Cr. L. J. 707; 24 Bom. L. R. 805; but *see* 20 A. L. J 369 (*contra*)

It is not a condition precedent to the making of an order for compensation under s. 250 of the Code, that the Magistrate should issue a formal notice to the complainant to show cause (9 A. L. J. 170, *distinguished*) 45 A. 474.

But where the Magistrate believing that the complainant has deliberately absented himself on the day judgment was delivered, ordered the complainant to pay compensation under s. 250 without giving him an opportunity to show cause against the order, *held* that the order was illegal and must be set aside, 24 A. L. J. 170.

28. Magistrate bound to record his reasons.—A Magistrate in ordering a complainant to pay compensation under this section should state his reasons why he deems the complaint to be vexatious *and should also* state in his judgment the facts of the case with a criticism of the incidents involved in it. The statement that, in his opinion, the prosecution evidence is highly unsatisfactory and that upon the evidence and the written statement and documents he has no hesitation in saying the case is vexatious, is not sufficient, 10 C. W. N. 844 = 3 Cr. L. J. 310. The reasons must be contained in the same order discharging or acquitting the accused, 16 P. W. R. 1913 = 14 Cr. L. J. 48 As to what would be a sufficient compliance with the law as enacted by clauses (*a*) and (*b*) of the proviso *see* 8 Bom L. R. 847 = 4 C. L. J. 423.

29. Complainant cannot adduce further evidence nor is he entitled to an adjournment.—The words "*consider any objection which complainant may urge*" do not entitle the complainant to adduce further evidence to prove that the charge was a true one. The direction to pay compensation should be part and parcel of the order of discharge or acquittal. This clearly shows that there is not to be a separate inquiry, nor does the section require that a separate proceeding should be *held* and further evidence taken, 1895 A. W. N. 198. It was not the intention of the Legislature that a complainant should be entitled to an adjournment to enable him to show cause, much less to an opportunity of producing further evidence, 38 A. 192. *See* also 34 A. 354; 7 S. L. R 123 = 13 Cr. L. J. 504; 31 Bom. L. R. 531.

30. Whether order for payment of compensation must form part of the order of discharge or acquittal.—It should be noted carefully that under the newly amended s. 250 it is only the order calling upon the complainant to show cause why he should not pay compensation which has to be contained in the order of discharge, and not the order for payment of compensation which has necessarily to be a subsequent order. So now the order for the payment of compensation cannot form part of the order of discharge or acquittal, 7 Lah. 121; 29 Cr. L. J. 630. One of the two accused was discharged and the case was against the other accused was adjourned when he was acquitted and the Magistrate called upon the complainant to show cause against an order for compensation being passed and directed the complainant to pay compensation to each of the accused that under

peon to pay one rupee as compensation to the accused. The District Magistrate referred the case to the High Court on the authority of the case in **1 B. 175** for reversal of the order of compensation. *Held*, that this case differed from the one cited, as there the complaint was preferred by a Judge acting judicially. An executive body cannot authorise a servant to prefer a wrongful complaint and so screen the complainant from the legal penalty, **Ratanlal 309.** But this section was held inapplicable where a Municipal *Jamadar* arrested a person whom he considered to be commiting in his presence an offence, the person arrested having been sent up for trial in the usual manner by the Police and having been acquitted, **1901 A. W. N. 142.**

20. **Judicial officer acting as such cannot be ordered to pay compensation.**—*See* Note 18 above.

21. **Liability of Public officers *to pay compensation.*—**Public officers are not exempted from liability to make compensation for vexatious and frivolous complaints, **Weir II, 317.** But where a public servant only gave evidence as a witness where the proceedings were instituted on the information of his official superior, an order directing the public servant who gave evidence to pay compensation was *held* bad, **Weir II, 318.** As to Police-officers, *see* Note 14 above.

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26. **Appellate Court cannot award compensation.**—The special provisions of this section are applicable only to original trials. 'The Magistrate by whom the case is heard' does not include the Court of Appeal. Therefore a District Magistrate cannot on appeal while setting aside the order of the Subordinate Magistrate convicting the accused, direct the complainant to pay compensation, **3 Bom. L. R. 841; 7. Bom. L. R. 998 = 3 Cr. L. J. 88; 8 M. H. C. R. Appx. VII.** The Appellate Court in reversing a conviction is not competent to make an order under this section. In view of the express terms "*Magistrate by whow the case is heard,*" s. 423 (1)(*d*) cannot be taken to confer such power on the Appellate Court. The order for compensation must

complainant to show cause, was followed by an adjournment, the complainant showed cause but did not impugn the jurisdiction of the Court and finally an order for compensation was passed, *held* that in spite of the adjournment there had been in substance one single proceeding, **1905 A. W. N. 214 = 2 Cr. L. J. 522.** *See* also **(1916) 2 M. W. N. 159 = 4 L. W. 32 = 12 Cr. L. J. 314, 22 Bom. L. R. 184.**

31. Imprisonment in default of the payment of Compensation.—Under the old law it was *held* that the order for imprisonment in default of payment of compensation could not be made until some attempt was made to recover the compensation But under the new amendment by the addition of sub-sec. (2)(A) the Magistrate is empowered to further order that in default of payment of compensation the person ordered shall suffer simple imprisonment not exceeding thirty days and this can be done now by the order directing payment of compensation under sub-sec. (2) So the following cases holding that imprisonment in default cannot be awarded in the order for payment of compensation have become obsolete, **22 C. 586, 23 C. 231, 19 A. 73, 14 P. R. 1902, 22 C. 139 at p 143. 18 P. R. 1903, Ratanlal 611.**

31-A. Whether term of imprisonment to be undergone in the whole or in respect of each accused.—Where under the provisions of s. 250 (2) of the Code, the Court orders the complainant to pay compensation to each of the several accused persons separately and in default to suffer imprisonment, imprisonment may be awarded for default of each such separate payment as ordered. **3 Rang. 93.**

32. Warrant of distress to precede order for imprisonment.—A Magistrate in making an order for compensation is ordinarily bound, if the amount be not paid, to proceed to the recovery of it by distress and sale of the movables of the person ordered to pay It was formerly held that if such person admits that he has no goods and thereby waives the right to have the amount levied by distress, the Magistrate may proceed, to imprison him in jail, and the imprisonment will run out the term ordered unless the sum be sooner paid *i.e* unless the imprisoned person pays it. But the warrant of distress cannot have currency simultaneously with the imprisonment, because the alternative permitted in case of failure to realise has already been adopted **23 W R. 64.** *But it has now been ruled that even if the person ordered to pay, pleads inability the issue of a warrant* under s. 386 is a condition precedent to the making of the order for imprisonment, **26 M. 127.** This section construed with s. 388 (2) makes the issue of a warrant for the levy of the amount of the compensation by distress and sale of the movable property of the complainant a condition precedent to the carrying out of the sentence of imprisonment, **3 L. B. R. 32.** *See* also **28 C. 164.**

APPEAL AND REVISION.

33. Are appeals under this section governed by Chap. XXXI?—S. 250 (3) does not declare what the powers of the Appellate Court are in disposing of appeals, it is therefore necessary to invoke the aid of s. 423 for this purpose. S 250 is not self-contained, **28 M L. J. 204 = 16 Cr. L. J. 128.** A Sessions Judge is not competent to set aside in appeal the order granting compensation passed by a first class Magistrate under this section, **1 Bom. L. R. 350.**

33-A. Scope of sub-sec. (3) of s. 250.—Sub-sec. (3) of s. 250 of the Code means that whenever a complainant or informant has been ordered under sub-sec. (2) to pay compensation exceeding Rs 50 the right of appeal is given, whether the compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs. 50. **26 Bom. L. R. 1243 = 49 B. 450;** *see* also **24 A. L. J. 187.**

34. On appeal, notice should go to accused and Public Prosecutor—*See* s. 422. Though there is no express provision of law that notice should be given to the accused in an appeal from an order of compensation under s. 150 it is disirable that notice should go to the accused as he will be the party prejudiced **22 M. 137;** but the order on appeal will not be set aside merely because no notice is given to the accused, **33 M. 89** But on general principles '*audi alteram partem*' it would be improper to make an order without notice to the accused, **28 M. L. J. 204 = 16 Cr. L. J. 128.** It is, however, imperative that notice of the appeal should be given to the Crown under s. 422 **19 M. 187; 6 Lah. 565.** In **27 M. L. J. 629 = 16 M. L. T 425 = 15 Cr. L. J. 646,** it was pointed out that under the rules of practice notice should go to the District Magistrate, but the Court declined to interfere with an order passed without such notice as no one had been prejudiced. When a complainant has been ordered to pay compensation to a person accused by him but acquitted such latter person is not the accused within the meaning of cl. (2) of s. 422, and has no right to be heard in a proceeding relating merely to the order for compensation It is rather the complainant who is the accused within the meaning of that clause, he being virtually accused, that is convicted and sentenced for making a frivolous or vexatious complaint.

complainant to show cause, was followed by an adjournment, the complainant showed cause but did not impugn the jurisdiction of the Court and finally an order for compensation was passed, *held* that in spite of the adjournment there had been in substance one single proceeding, **1903 A. W. N. 214 = 2 Cr. L. J. 522.** *See* also **(1916) 2 M. W. N. 159 = 4 L. W. 32 = 12 Cr. L. J. 315; 22 Bom. L. R. 184.**

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s. 250 as now amended the procedure adopted was now illegal. The case against the accused who was discharged was at an end when the order of discharge was made and the order to show cause under s. 250 so far as payment of compensation to him was concerned should have been made along with the order of discharge. **29 C. W. N. 127.** In view of the latest amendment as the order for the payment of compensation cannot form part of the order of discharge or acquittal, the following cases have lost much of their force.

A Magistrate in making an order under this section must do so in passing the order of discharge or acquittal. Where a Magistrate happened to make an order by way of separate proceedings on a date subsequent to the date of the discharge of the accused, *held* that the order was made without jurisdiction, as there is nothing in the Code which authorises the Magistrate to hold an inquiry on a subsequent date and make an order under this section, **25 A. 315; 34 A. 354.** An order or compensation passed not at the time of the discharge of the accused but days after, at the time when the co-accused was acquitted, is made without jurisdiction, **10 N. L. R.**
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31. Imprisonment in default of the payment of Compensation.—Under the old law it was *held* that he order for imprisonment in default of payment of compensation could not be made until some attempt was nade to recover the compensation. But under the new amendment by the addition of sub-sec. (2)(A) the Magistrate is empowered to further order that in default of payment of compensation the person ordered shall suffer imple imprisonment not exceeding thirty days and this can be done now by the order directing payment of compensation under sub-sec. (2) So the following cases holding that imprisonment in default cannot be awarded n the order for payment of compensation have become obsolete, **22 C. 586, 23 C. 251, 19 A. 73, 14 P. R. 1902, 22 L. 139 at p. 143. 18 P. R. 1903, Ratanlal 611.**

31-A. Whether term of imprisonment to be undergone in the whole or in respect of each accused.—Where under the provisions of s. 250 (2) of the Code, the Court orders the complainant to pay compensation to ach of the several accused persons separately and in default to suffer imprisonment, imprisonment may be warded for default of each such separate payment as ordered. **3 Rang. 93.**

32. Warrant of distress to precede order for imprisonment.—A Magistrate in making an order for *compensation is ordinarily bound, if the amount be not paid, to proceed to the recovery of it by distress* and sale of the movables of the person ordered to pay It was formerly held that if such person admits that he has no goods and thereby waives the right to have the amount levied by distress, the Magistrate may proceed, o imprison him in jail, and the imprisonment will run out the term ordered, unless the sum be sooner paid *i.e.* unless the imprisoned person pays it. But the warrant of distress cannot have currency simultaneously with the mprisonment, because the alternative permitted in case of failure to realise has already been adopted, **23 W. R. 55.** But it has now been ruled that even if the person ordered to pay, pleads inability the issue of a warrant under s. 386 is a condition precedent to the making of the order for imprisonment, **26 M. 127.** This section construed with s. 388 (2) makes the issue of a warrant for the levy of the amount of the compensation by distress and sale of the movable property of the complainant a condition precedent to the carrying out of the sentence of imprisonment, **3 L. B. R. 32.** *See* also **28 C. 164.**

APPEAL AND REVISION.

33. [illegible] under this section governed by Chap. XXXI?—S. 250 (3) does not declare what the powers of th[illegible]
this purpose [illegible]
to set aside [illegible]
1 Bom. L. R. 350.

33-A. Scope of sub-sec. (3) of s. 250.—Sub-sec. (3) *of s. 250 of the Code means that whenever a com*plainant or informant has been ordered under sub-sec. (2) to pay compensation exceeding Rs 50 the right of appeal *is given, whether the compensation has been awarded only to one accused or has to be distributed* amongst a number of accused in sums not exceeding Rs. 50. **26 Bom. L. R. 1243 = 49 B. 450;** *see* also **24 A. L. J. 187.**

34. On appeal, notice should go to accused and Public Prosecutor.—*See* s. 422. Though there is no express provision of law that notice should be given to the accused in an appeal from an order of compensation under s. 250 it is desirable that notice should go to the accused as he will be the party prejudiced, **29 M. 187;** but the order on appeal will not be set aside merely because *no notice is given to the accused,* **33 M. 69.** But on general principles '*audi alteram partem*' it would be improper to make an order without notice to the accused, **23 M. L. J. 204 = 18 Cr. L. J. 123.** It is, however, *imperative* that notice of the appeal should be given to the Crown under s. 422, **29 M. 187; 8 Lah. 563.** In **27 M. L. J. 629 = 16 M. L. T 425 = 15 Cr. L. J. 618** it was pointed out that under the rules of practice notice should go to the District Magistrate, but the Court declined to interfere with an order passed without such notice as no one had been prejudiced. When a complainant has been ordered to pay compensation to a person accused by him but acquitted, such latter person is not the accused within the meaning of cl. (2) of s. 422, and has no right to be heard in a proceeding relating merely to the order for compensation. It is rather the complainant who is the accused within the meaning of that clause, he being virtually accused, that is convicted and sentenced for making a frivolous or vexatious complaint.

s. 250 as now amended the procedure adopted was now illegal. The case against the accused who was discharged was at an end when the order of discharge was made and the order to show cause under s. 250 so far as payment of compensation to him was concerned should have been made along with the order of discharge. **29 C. W. N. 127.** In view of the latest amendment as the order for the payment of compensation cannot form part of the order of discharge or acquittal, the following cases have lost much of their force.

A Magistrate in making an order under this section must do so in passing the order of discharge or acquittal. Where a Magistrate happened to make an order by way of separate proceedings on a date subsequent to the date of the discharge of the accused, *held* that the order was made without jurisdiction, as there is nothing in the Code which authorises the Magistrate to hold an inquiry on a subsequent date and make an order under this section, **25 A. 315; 34 A. 354.** An order of compensation passed not at the time of the discharge of the accused but days after, at the time when the co-accused was acquitted, is made without jurisdiction, **10 N. L. R. 8 = 15 Cr. L. J. 290.** Where a Magistrate discharged the accused in the absence of the complainants and on a subsequent date after procuring their attendance made an order under this section awarding compensation, *held* that the order was illegal and that the proper course would have been for the Magistrate simply to adjourn the case without discharging the accused, with a view to secure the attendance of the complainant, **57 P. R. 1905 = 3 Cr. L. J. 123; 16 P. W. R. 1913 = 99 P. L. R. 1913 = 14 Cr. L. J. 48.** *See* also **23 M. L. J. Sh. N. 21.** A Magistrate in the same order discharged the accused and called on the complainant to show cause why he should not pay compensation of Rs. 20 and subsequently after hearing him made an order for payment of Rs 10, *held* though the procedure seemed to be perfectly fair and reasonable it did not fulfil the requirements of s. 250. What that section evidently contemplates and expressly requires is that before a Magistrate makes it the ground for discharging a person complained against, on a ground that the complaint was frivolous or vexatious, he shall hear the complainant on that aspect of the case and unless he does this the whole proceeding is void, **38 C. 302.** Where, however, a Magistrate by the same order discharging the accused, declared the case to be vexatious and directed the complainant to pay a compensation of Rs. 50 to the accused, subject to any cause to be shown by him and on the following day made the order absolute, *held distinguishing*, **38 C. 302,** that the requirements of s. 250 has been strictly complied with. The provisions of this section are complied with if the Magistrate fixed the compensation in his order of discharge. If the complainant was not in Court at the time the order of discharge is passed, the Magistrate would not be justified in keeping the accused in custody with the charge hanging over him while the complainant is being fetched to show cause. It might be that the complainant could not be procured for a month. The proviso to the section contemplates that the direction in the first paragraph of the section is conditional or in the nature of a rule and that the rule shall not be made absolute until the complainant has shown cause, **18 C. W. N. 702 = 15 Cr. L. J. 150.**

It is enough if the order for compensation is substantially a continuation of the order of discharge or acquittal and part of the same proceedings.—The trying Magistrate signed and dated his order of discharge, then recorded an order calling on the complainant to show cause why he should not be directed to pay compensation, recorded and considered the complainant's objections and at once passed an order that compensation should be paid. The entire proceedings followed one another on the same date, *held* that the order for payment of compensation was substantially incorporated in and made a part of the order of discharge, **8 Bom. L. R. 847 = 4 Cr. L. J. 423.** The trying Magistrate incorporated in his order of discharge an order directing the complainant to show cause, then adjourned the proceedings and after considering the complainant's representations passed an order directing compensation, the order of discharge having been passed four days previously, *held* that even though the proceedings were irregular, there had been a substantial compliance, **36 A. 132.** The intention of the Legislature in including the words "*by his order of acquittal*" was not so much to secure that the Magistrate should pronounce the order of acquittal and compensation in one breath as might be supposed from the cases cited, as to make it clear that the order of compensation should be passed in the same proceedings and not in further independent proceedings involving the recalling and re-examination of witnesses and in fact all the labours of a fresh trial. The result of following the cases in **25 A. 315; 34 A. 354** and **38 C. 302** would be that the trial would have to be indefinitely protracted if the complainant either could not or would not appear on the day fixed for judgment. Where, therefore, the complainant was absent owing to illness on 14th June when the case came to a conclusion and the accused was acquitted and in the order of acquittal it was stated that the case was frivolous and notice was ordered to the complainant why compensation should not be directed and on the 28th June the final order directing payment of compensation was passed, *held* following **8 Bom. L. R. 847 = 4 Cr. L. R. 423,** that s. 250 had been substantially complied with, **7 S. L. R. 123 = 15 Cr. L. J. 504.** *See* **18 C. W. N. 702 = 15 Cr. L. J. 150** above. An order of discharge in which was incorporated an order calling on the

Magistrate is of opinion that the complaint is wilfully and maliciously false, and that the complainant should be prosecuted for an offence under s. 211, I P C. To sanction or direct a prosecution *and also* to proceed to award compensation is an improper use of discretion, **26 C. 181.** By such action the Magistrate, in fact, prejudges the issue of the charge which he was submitting for trial **22 C. 586.** Also **13 P. R. 1898** But this view has not been generally accepted elsewhere *See* Notes 38 and 39

41. The total amount of compensation to be paid under this section —Under s. 250 sub-sec. (2) all that is prohibited is that compensation to the accused or each of them where there are more than one should not exceed Rs. 100 in amount. The section does not mean that if there are a number of accused persons, the total amount awarded to them must not exceed the maximum, **24 A. L. J. 221.**

CHAPTER XXI

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES

Magistrates must follow the Code and not any usage of their own.—The provisions of the Code have to be followed and Magistrates are not at liberty to substitute for the procedure of the Code, a procedure which has arisen by usage, however convenient the latter may be. A trial conducted in a mode materially different from that prescribed by law is not a proper trial, **17 Bom. L. R 490 = 3 Bom. Cr. Ca. 59 = 16 Cr L. J. 533.**

Procedure in warrant cases.

251. The following procedure shall be observed by Magistrates in the trial of warrant cases

Notes —1. Procedure to be observed by Presidency Magistrates.—A warrant-case must be tried by a Presidency Magistrate in the manner provided by this Chapter subject only to the special provisions of s. 362 as to the mode of taking down the evidence, **Ratanlal 539.**

2. Procedure—Combination of summons and warrant-cases.—Two charges were made against the accused arising out of exactly the same state of facts and under the same circumstances. One charge was of voluntarily causing hurt and the other of theft. In such a case when no order is made for a separate trial it is plain that the *mode of trial applicable to such a case is that which is applicable to the greater of the two charges*, *i.e.*, the procedure should be that prescribed for warrant-cases, **11 C. 91, 18 M. L. T. 92 = 16 Cr. L. J. 540; 3 L. B. R. 113 = 3 Cr. L. J. 350.** *See* also **29 C. 431** and Note 2 to s. 241

3. Trial of summons-case commenced as warrant case.—*See* **16 Cr. L. J. 250 (M)** and **18 M. L. T. 92 = 1915 M. W. N. 546 = 16 Cr. L. J. 540** and Note 4 to s. 241

4. Trial of a warrant-case as a summons-case illegal.—Where a Magistrate tried a warrant-case (under s. 9 of *the Opium Act* I of 1878) without recording any evidence in support of the prosecution as required by s. 252 and merely calling upon the accused to plead to the charge, convicted him on his own admission as under section 243 without even framing a formal charge, *held* that the procedure adopted was more than a mere irregularity and the conviction was set aside on the ground it had occasioned a failure of justice to the accused, **29 M. 372.** *See* also **17 P. R. 1887.** If a Magistrate tries a warrant-case as a summons-case and professes to deal with it as a summons-case, his procedure is wholly irregular and in such trial, if he passes an order of acquittal under s. 245, such order can at best be regarded only as one of discharge under s 253 and may be dealt with as such under s. 437 **1886 A. W. N. 96** and **260.** The mere fact that a summons instead of a warrant had been issued in a case falling under this Chapter will not justify the procedure as in summons-case **10 W. R. 31**; *see* also **5 M. L. T. 204; 7 M. 454.**

5. Trial—When commences.—In one case seven persons were charged by the Police with theft in a building of dishonest receipt and disposal of stolen property The Magistrate took evidence against all the seven, discharged two and having come to the conclusion that the disposals of property by the appellant and the remaining accused did not form one transaction, he framed separate charges and tried the appellant separately from the other accused, but without re-hearing the evidence for the prosecution separately, a though portion of the evidence which were relevant against the remaining accused, had no connection with the case of the appellant. *Held*, that the word "trial" includes the taking of evidence in support of the prosecution, as also the whole of the subsequent procedure laid down in Chap. XXI of the Code for the trial of warrant-cases and that the appellant should be tried *de novo*. The words "claims to be tried" in s. 256 no doubt give colour to the argument that no trial commences until after the accused refuses to plead or does not plead or claims to

He is the person who has to make a defence, in such a proceeding, and not the person who, though once accused, has been acquitted and whose acquittal is not in question, **14 P. R. 1888; 41 M. L. J. 172.**

35. **Revisional jurisdiction of the High Court.**—An order under this section made by a first-class Magistrate may be revised by the High Court under ss. 435 and 439, and when compensation ordered has been paid, the amount paid may be recovered under s. 547, if the High Court sets aside the order, **29 P. R. 1903**; **12 P. R. 1885** and *see* also **10 Cr. L. J. 569 (M.).**

36. **Death of accused or complainant pending revision of order.**—When a Magistrate awarded compensation under this section to an accused who afterwards died and the complainant in revision applied to the High Court to call for and revise the records, it was *held* that as the accused was dead, no order could be made, because none could be passed to the prejudice of a person who could not be served with a notice, **Ratanlal 634.** In a similar case where pending revision against the order awarding compensation the complainant-petitioner dies, the application does not abate, but can be prosecuted by his legal representatives, **24 P. R. 1908 = 9 Cr. L. J. 103.**

MISCELLANEOUS.

37. **Award of compensation followed by granting of sanction to prosecute the complainant is not bad.**—In acquitting the accused on a charge of theft which the Magistrate found to be false and malicious, he awarded compensation to be paid to each of them by complainant. Subsequently one of the accused applied for and obtained sanction to prosecute complainant under s. 211, I.P.C., and it was granted. *Held*, that the order was not illegal, **21 M. 237** *following* **6 B. L. R. 296 = 15 W. R. 9; Weir II, 311.** The passing of the order of compensation does not prevent the Magistrate from granting a sanction to prosecute the complainant under s. 211, I.P.C, **37 B. 376,** where **21 M. 237** is followed and **26 C. 181** is *dissented from.*

38. **The grant of sanction no bar to granting compensation.**—A Magistrate, by granting or by expressing an intention to grant sanction to prosecute the complainant under s. 211, I.P.C., is not precluded from awarding under this section reasonable compensation to the accused, **30 P. W. R. 1907.** In **21 M. 237** the Court *dissented from* the case in **22 C. 586,** and remarked: "We do not think that there is anything in s. 250 to justify the conclusion that a Magistrate who grants sanction to prosecute for offence punishable under ss. 211 and 193, I P.C., *ipso facto* debarred from also granting compensation under that section to the person falsely accused. The sanction to prosecute for making a false charge is granted on the grounds of public policy for an offence against public justice. The compensation is granted partly in order to deter a complainant from making vexatious and frivolous complaints and partly in order to compensate the accused for trouble and expense to which he has been put by the complainant. We can see no ground in law or reason why compensation should not be granted in a case in which the Magistrate also directs prosecution for making a false charge. The case in **6 B. L. R. 296 = 15 W. R. 9** appears to be an authority directly opposed to their conclusion," *followed* **18 P. R. 1901.** There is nothing in the Code which makes it illegal for a Magistrate who takes proceeding under s. 476 to award compensation under this section, **7 S. L. R. 10 = 14 Cr. L. J. 437; 10 S. L. R. 162.** *See* also **6 P. R. 1904.** Failure to make an order under this section does not preclude the Magistrate from directing the prosecution of the complainant, **4 Bur. L. T. 246 = 12 Cr. L. J. 521.**

39. **Discretionary with the Magistrate what course to adopt in any case.**—The question whether the discretion given by this section has been rightly exercised, must always depend upon the acts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy, it may well be that a Magistrate would exercise his discretion wrongly if, instead of sanction a prosecution, he awarded compensation. If the false charge is one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a Magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly, **27 M. 59.** In **1 S. L. R. 28 (F.B.) = 9 Cr. L. J. 268,** it was *held, following* **27 M. 59,** and *overruling* **1 S. L. R. 12 = 9 Cr. L. J. 255** that in every case it must in the first instance be left to the discretion of the Magistrate to decide whether a charge which he finds to be false is also vexatious so as to authorise him to award compensation. The words "frivolous" or "vexatious" used in this section are not used *ejusdem generis.* They are applied to the accusation and not to the offence which it alleges. *See* **37 B. 376.** *See* also **29 C. 479,** where the order under this section was set aside on the ground that the complaint was of a serious offence, without prejudice to the Magistrate granting sanction for a prosecution under s. 211, I.P.C.

40. **Calcutta view—Sanction to prosecute and award of compensation cannot be made at one time.**—It was never intended that recourse should be had to the provisions of this section in a case in which the trying

proper one, that the prosecutors should come to Court with their case fully prepared and thought out. After the witnesses produced in support of the prosecution are heard, it is the duty of the Magistrate to see that the prosecutors are not allowed to set the Court on to a roaming inquiry, summoning persons in the hope that something may be elicited which would help their case and cases which ought to be heard within a fortnight are spoken out to a period of six weeks and more to the inconvenience of all concerned. There is no section in Code which authorises a complainant to file a fresh list of prosecution witnesses, **12 A. L. J. 15 = 14 Cr. L. J. 682**, but *see* **11 Bom. L. R. 1153 = 10 Cr. L. J. 580.**

9. Magistrate bound to examine all witnesses tendered by the prosecutor.—*See* Note 2 to s. 253

10. Duty of prosecution in criminal trials.—Although it is for the accused in a criminal trial to establish in his defence any exception on which he relies, it is nevertheless the duty of the prosecution to throw all the light in its power upon all controverted facts relevant to the main issue, **1 P. R. 1884, 14 A. 321; 14 C. 285; 15 A. 6; 16 A. 84; 3 S. L. R. 200 = 11 Cr. L. J. 410.** No adverse inference can be drawn against the accused for not having called any particular witness. *See* Notes 1 and 2 under s. 243.

11. Magistrate must examine complainant.—*See* Note 3 under s. 253

12. Magistrate bound to compel attendance of witnesses summoned—complainant not bound to pay process-fees.—If, at the instance of one of the parties, a witness has been summoned as a witness and served with process, he has a right to call upon the Court to compel his attendance, **6 C. W. N. 548.** Where a Magistrate has once issued summonses for the attendance of witnesses, he is bound to have the processes enforced before disposing of the case. *See* **35 C. 1093; 4 M. 329; 10 C. 931.** There is nothing in this Code which enables a Magistrate to demand even from a complainant the expenses to be incurred by his witnesses though such a power is conferred by s. 244 (3) in a summons-case, **8 N. L. R. 65 = 13 Cr. L. J. 275.**

13. No power to issue a warrant against a witness before issuing summons.—There is no legal sanction for a Magistrate taking cognisance of a complaint under s. 498, I P C, to issue a warrant to compel the complainant's wife to attend as a witness, without first requiring her to attend by a summons as laid down by this section and it is only when the summons is neglected that severe measures can be taken. **22 P. W. R. 1907 = 6 Cr. L. J. 275.**

14. Duty of Magistrate before summoning witnesses—witnesses not to be unnecessarily summoned.—On the 10th December, the complainant produced certain witnesses who were examined. On the 28th December, the complainant of his own accord filed a fresh list mentioning the names of 30 witnesses for the prosecution all of whom were summoned but not one was examined. The Magistrate relied on s. 540 as justifying his action in summoning witnesses. KNOX, J, while strongly condemning the action of the Magistrate observed that it is the duty of the Magistrate to ascertain from the complainant or otherwise the names of the persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution. The Magistrate must exercise his discretion in selecting out of such witnesses, those who seem to be necessary and those who seem to be unnecessary. "A witness is not an inanimate being and is not to be moved about as if he were a stick or stone. He is a living person who has his work to do and whose convenience has to be considered. For a Magistrate to send for any person whom the complainant names in a supplementary list is a thoughtless act and in some cases causes very serious inconvenience to persons who ought not to be subjected to such inconvenience." Under s. 540 it was not intended that the Magistrate should exercise his powers at the bidding of any person but the powers are given to prevent any danger of miscarriage of justice just because some particular witness has not been called, **12 A. L. J. 15 = 14 Cr. L. J. 482** where **23 A. 202; 19 A. 502; 21 W. R. 61** and **2 C. W. N. 702** *referred to.*

Discharge of accused.

253. (1) If, upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Note.—*See* Notes to s. 208 as to the duty of a Magistrate in Sessions cases, 340 for examination of accused, s. 259 when complainant is absent.

be tried, but the words do not really raise any doubt that a trial under Chap. XXI commences when the accused appears or is brought before a Magistrate under s. 252, **3 L. B. R. 280 = 5 Cr. L. J. 417.** But *see* Note (2) under s. 4 (*k*) at p. 12, **38 M. 585** and **29 P. R. 1914 = 16 Cr. L. J. 81.**

Evidence for prosecution.

252. (1) When the accused appears or is brought before a Magistrate such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produceed in support of the prosecution :

* Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any person likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Notes.—1. Magistrate may issue summons or dispense with the appearance of the accused.—A Magistrate has under s. 204 discretion in warrant-cases to issue a summons instead of a warrant for the attendance of the accused. *See* also **6 S. L. R. 206 = 14 Cr. L. J. 272.**

2. **Magistrate not competent to examine how accused "is brought before the Court."**—There is no provision of law which requires the Magistrate to examine the question as to how the accused came into the hands of the Police. Therefore, where a foreigner after committing an offence in British Indian territory, fled to his country and was pursued and arrested there by British Police and brought before the Court and convicted, *held* that the conviction was legal and valid, **6 P. R. 1899 ; 7 Bur. L. R. 66 at p. 68.** *See* Note 15 at p. 84 and Note 1 at p. 441.

3. **Accused cannot be remanded to custody unless there be sworn testimony.**—*See* ss. 167 and 344 and Notes thereunder. A prisoner arrested under a warrant should be brought promptly before a Magistrate, who has then no authority to detain him further in custody or to remand him to prison without *some reason* being made manifest to him either in the shape of sworn testimony given before him, or in *some other form* which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison, and there to be detained for a limited period for further examination, a period which is never in any case to exceed fifteen days, **11 B. L. R. Appx. VIII = 20 W. R. 23 ; 6 M. 69 ; 36 C. 174,** and Notes thereunder.

4. **Evidence against accused to be recorded as early as practicable.**—An accused person has a right to have the evidence against him recorded at as early a period as possible, and the fact that there is or may be a great body of evidence forthcoming against him is not a ground for detention for inordinate period, **6 M. 63.**

5. **Accused entitled to inspection of documents filed as exhibits but cannot call for fresh documents.**—In a case of criminal breach of trust complainant produced several documents as evidence against the accused and they were admitted as exhibits. The Magistrate refused their inspection by the accused, though he allowed him to take certified copies thereof ; *held*, that the accused was entitled to inspection of all documents filed as exhibits in the case, **1 Bom. L. R. 433.** After the examination-in-chief of the witnesses for the prosecution had concluded and before any charge was framed, the Magistrate at the instance of the accused made an order requiring the complainant to produce certain records ; *held*, the Magistrate was wrong in making such an order at that stage of the case. The accused's right to call evidence, either witnesses or documents does not arise until after the charge has been framed The right is given to him by s. 257 and is subject to the limitations enjoined by that section, **8 S. L. R. 267 = 16 Cr. L. J. 245.** *See* Note 3 to s. 257.

6. **Warrant-case cannot be dismissed for non-payment of process-fee.**—The dismissal of a complaint for non-payment of process-fee is illegal, **Weir II, 323.** A complainant in a warrant-case is not bound to produce his own witnesses.

7. **Right of accused to cross-examine witnesses before framing of charge.**—Opportunity to cross-examine the witnesses for prosecution should be given to the accused if they should so desire, even though the charge may not be framed, **8 C. W. N. 838.** *See* Note 5 to s. 256.

8. **Duty of prosecution to come fully prepared to prove their case.**—Under s. 252 the prosecutor is given full opportunity of substantiating the whole case. But it is expected, and the expectation is a right and

* The proviso to sub-sec. (1) has been added by Act XVIII of 1923.

(iv) *Want of jurisdiction.*—A Magistrate who finds he has no jurisdiction to try a case cannot discharge the accused under this section, but should proceed under s. 346, **Weir II, 323.**

9. When reasons for discharge to be recorded.—It is only where a Magistrate discharges without examining all the witnesses for the prosecution that he is bound under sub-sec. (2) to record his reasons for the discharge. The Legislature does not render the writing of reasons necessary where an accused person is discharged *after* the trying Magistrate had heard all the evidence *for* the prosecution. *It is, however, desirable* that the Magistrate should record all his reasons for discharge, having regard to the fact that the order is not final, **9 Bom. L. R. 250 = 5 Cr. L. J. 255.**

10. Taking evidence for defence without framing charge illegal.—A Magistrate, after examining the witnesses for the prosecution and the accused, drew no charge, but taking evidence for the defence discharged the accused under this section finding the offence not proved. *Held*, that the Magistrate acted contrary to law and most unfairly towards the accused who therefore ought to be treated as acquitted under s. 258, **29 P. R. 1883, 1891 A. W. N. 180; 1886 A. W. N. 260, 13 Cr. L. J. 1006.**

11. Accused has no right to call for evidence until after charge has been framed.—*See* **8 S. L. R. 257 = 16 Cr. L. J. 245,** Note 5 to s. 252.

12. Further inquiry in cases of discharge.—As to powers of Sessions Judges and District Magistrates, *see* ss. 436 and 437. As to the powers of the High Court, *see* s. 439.

13. What a District Magistrate can or cannot do.—A Magistrate of the district has power to order a Subordinate Magistrate to revive a case in which the accused has been discharged even though no additional evidence is forthcoming, **32 M. 220 (F.B.), 14 M. 234; 20 W. R. 46, 18 Cr. L. J. 706,** though it is legal for a District Magistrate to order a re-trial on the same evidence, such an order is opposed to principle as it is seriously prejudicial to the accused, **8 P. R. 1909; 8 P. R. 1900; 2 P. R. 1901,** but he cannot pass an order of remand directing a Subordinate Magistrate to proceed with the case from the stage at which he left it, **20 W. R. 47; 4 C. 647.** Nor is he competent to withdraw a case adjourned by a Deputy Magistrate for the purpose of framing a charge and then discharge the accused, **30 C. 693.** Nor has he jurisdiction to set aside an order directing that the accused should not be proceeded against (*see* Note 3, *supra*) and direct a re-trial of the accused, as it was not an order dismissing a complaint or discharging the accused, **12 C. W. N. 63.** In exercise of the power to order further inquiry the District Magistrate cannot himself frame the charge or direct the Subordinate Magistrate to frame the charge and to try the accused, **32 M. 220 (F. B.),** but he may himself make the further inquiry and frame the charge.

14. Re-arrest without notice of accused discharged by another Magistrate illegal.—If after the discharge of one of the accused, the case of others is simply transferred by the District Magistrate to another Magistrate, such Magistrate cannot direct the re-arrest and trial of the accused who have been previously discharged as no notice was given to them, **1 Bom. L. R. 782.**

15. Issue of warrant before setting aside order of discharged is bad.—When a District Magistrate had issued notice to the accused to show cause why his case should not be further inquired into, he cannot issue warrant for the arrest of the accused until the order of discharge is set aside and the case is taken on his own file, **15 P. R. 1893.**

16. Competency of a Presidency Magistrate to revive a discharged case.—There is nothing in the Code to the effect that the dismissal of a complaint or the discharge of an accused shall be a bar to a fresh complaint being entertained so long as the order of discharge remains unreversed. Hence a commitment by a Presidency Magistrate on fresh evidence is legal, although the accused might have been previously discharged by another Presidency Magistrate and the order of discharge had not been set aside **25 C. 211,** where **1 C. W. N. 42** is *followed*, **24 C. 528** *dissented from* and **23 C. 983** *distinguished*. *Semble*, on the same evidence no re-hearing should be made of a case which has been disposed of by an order of discharge by a Magistrate of co-ordinate jurisdiction, except where there has been manifest error or miscarriage of justice, **29 M. 126 (F.B.).**

17. Jurisdiction of Magistrate to re-entertain fresh complaint.—A Magistrate who has discharged an accused person may re-entertain a fresh complaint on the same facts. It is not necessary to get the first order of dismissal set aside. *See* Note 3 to s. 437. *See also* **31 Bom. L. R. 146.**

18. Magistrate has power to revive proceedings after discharge and to commit.—There is nothing to prevent a Magistrate, after he has discharged an accused person under this section from inquiring again into the

Notes.—1. Magistrate has discretion to summon witnesses, but he is bound to examine those present.—It is not incumbent on the Magistrate to summon every person named as a witness by the complainant. This section must be read with s. 252 which vests a discretionary power in the Magistrate, **23 W. R. 9.** But he is not justified in discharging an accused person under this section without examining all the witnesses for the prosecution who were present and ready to give evidence, **11 C. W. N. 83.** A person accused under s. 408, I.P.C., cannot be discharged on the sole ground that the complaint was a mere matter of account.

2. Order of discharge not to be ordinarily made until all the prosecution evidence is taken.—An order of discharge cannot ordinarily be passed until the evidence of all the witnesses named for the prosecution has been taken, **4 M. 329; 20 W. R. 67; 22 W. R. 25; Ratanlal 21; 3 P. W. R. 1908 = 7 Cr. L. J. 272.** In **(1911) 1 M. W. N. 149 = 99 M. L. T. 302 = 12 Cr. L. J. 105** it was *held* that **4 M. 329** was passed at a time when the Code had no provision similar to sub-sec. (2) and therefore a Magistrate does not act illegally in discharging the accused without examining all the prosecution witnesses. A Magistrate, however, should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution, **3 C. 389; 3 A. 447.** But this section and s. 209 (2) relieve the Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has already been deposed that a criminal charge cannot be sustained, **Ratanlal 201. 24 A. L. J. 512.**

3. Order without hearing complainant that accused should not be proceeded against is illegal.—On the acquittal of a co-accused, the other accused against whom warrants had been issued surrendered before the Deputy Magistrate who had acquitted the co-accused: the Deputy Magistrate passed an order at once directing that the accused should not be proceeded against and that the warrant should be withdrawn, *held* that this order of the Magistrate was bad in law and should be set aside. The proper course for him was to send a notice to the complainant requiring him to proceed with the case and then dispose of the case according to law, **12 C. W. N. 68 = 6 Cr. L. J. 367.** Failure to examine complainant before discharging the accused is an error of law, **A. I. R. 1929 Cal. 479 (2).**

4. Discharge after full inquiry not desirable.—Where there is a body of evidence which if believed justifies conviction, it is far better as a rule to draw up a charge and dispose of the case finally, **18 P. W. R. 1909 = 11 Cr. L. J. 110.** *See* **8 A. L. J. 707 = 12 Cr. L. J. 471,** where KNOX, J., characterises the procedure of delaying to frame a charge till all the evidence has been recorded as old-fashioned and exploded. *See* Note 3 to s. 254.

5. Not proceeding further against accused after issue of warrant amounts to a discharge.—Where after the issue of warrant of arrest against certain persons the Magistrate does not think it proper to proceed further, *held* that the termination of proceedings against them is in effect an order of discharge, **4 C. W. N. 242.**

6. Discharge without considering the evidence on record is illegal.—Where a Deputy Magistrate withdrew to his own file a case which had been sent by him for trial to a Bench of Magistrates who had already recorded some evidence and on the day of hearing *no evidence being produced;* the *Deputy Magistrate* discharged the accused without taking into consideration the evidence already adduced, *held* the discharge was illegal as he should have disposed of the case on the evidence already on record, **38 C. 828.**

7. In cases of doubt, discharge under this section would be the proper course.—Section 254 requires a charge to be framed only when the Magistrate is of opinion that there is ground for presuming that the accused has committed the offence. But if the evidence recorded does not raise any such presumption, but merely leads to a doubt, the Magistrate ought to discharge under this section and if he framed a charge in the circumstances, he would be acting contrary to the spirit of s. 254, **2 P. R. 1906 = 37 P. L. R. 1906 = 3 Cr. L. J. 345.**

8. What are not proper grounds for discharge.—

(*i*) *Absence of complainant.—See* s. 259. In a warrant-case, in which, although the complainant's witnesses and accused were present, the Magistrate discharged the accused on the report of a Police-officer; *held*, that this procedure was illegal, as the Magistrate was bound to take the evidence of the complainant before discharging the accused, **24 W. R. 9.** In a warrant-case, where the offence is not compoundable, the absence of the complainant would not justify a discharge, **10 C. 671 = 13 C. L. R. 408; Ratanlal 524.** Where a Presidency Magistrate dismissed a warrant-case for non-appearance of the complainant, *held* the order of dismissal was bad, **4 C. W. N. 26 and 46; 1 C. W. N. 57.** *See* s. 248 and Notes thereto. *See* also **20 C. W. N. 698 = 17 Cr. L. J. 193.**

(*ii*) *Withdrawal of complaint.—See* **15 Bom. L. R. 61 = 14 Cr. L. J. 77.** *See* s. 249 and Notes 1 and 2 thereto.

(*iii*) *Illegal arrest by Police.*—A Magistrate is not justified in discharging an accused person merely because he has been illegally arrested by the Police without a warrant issued on complaint for a non-cognisable offence, **Ratanlal 73.** *See* also **17 P. R. 1906 = 60 P. L. R. 1907 = 5 Cr. L. J. 89,** and Note 2 to s. 252.

(iv) *Want of jurisdiction.*—A Magistrate who finds he has no jurisdiction to try a case cannot discharge the accused under this section, but should proceed under s. 346, **Weir II, 323.**

9. When reasons for discharge to be recorded.—It is only where a Magistrate discharges without examining all the witnesses for the prosecution that he is bound under sub-sec. (2) to record his reasons for the discharge. The Legislature does not render the writing of reasons necessary where an accused person is discharged after the trying Magistrate had heard all the evidence for the prosecution. It is, however, desirable that the Magistrate should record all his reasons for discharge, having regard to the fact that the order is not final, **9 Bom. L. R. 250 = 5 Cr. L. J. 255.**

10. Taking evidence for defence without framing charge illegal.—A Magistrate, after examining the witnesses for the prosecution and the accused drew no charge, but taking evidence for the defence discharged the accused under this section finding the offence not proved. *Held* that the Magistrate acted contrary to law and most unfairly towards the accused who therefore ought to be treated as acquitted under s. 258, **29 P. R. 1883, 1891 A. W. N. 180, 1886 A. W. N. 260, 18 Cr. L. J. 1006.**

11. Accused has no right to call for evidence until after charge has been framed.—*See* **8 S. L. R. 267 = 16 Cr. L. J. 245,** Note 5 to s. 252.

12. Further inquiry in cases of discharge.—As to powers of Sessions Judges and District Magistrates, *see* ss. 436 and 437. As to the powers of the High Court, *see* s. 439.

13. What a District Magistrate can or cannot do.—A Magistrate of the district has power to order a Subordinate Magistrate to revive a case in which the accused has been discharged even though no additional evidence is forthcoming, **32 M. 220 (F.B.), 14 M. 234; 20 W. R. 46, 18 Cr. L. J. 706,** though it is legal for a District Magistrate to order a re-trial on the same evidence, such an order is opposed to principle as it is seriously prejudicial to the accused, **8 P. R. 1909; 8 P. R. 1900; 2 P. R. 1901,** but he cannot pass an order of remand directing a Subordinate Magistrate to proceed with the case from the stage at which he left it, **20 W. R. 47; 4 C. 647.** Nor is he competent to withdraw a case adjourned by a Deputy Magistrate for the purpose of framing a charge and then discharge the accused, **30 C. 693.** Nor has he jurisdiction to set aside an order directing that the accused should not be proceeded against (*see* Note 3, *supra*) and direct a re-trial of the accused as it was not an order dismissing a complaint or discharging the accused **12 C. W. N. 63.** In exercise of the power to order further inquiry the District Magistrate cannot himself frame the charge or direct the Subordinate Magistrate to frame the charge and to try the accused, **32 M. 220 (F.B.),** but he may himself make the further inquiry and frame the charge.

14. Re-arrest without notice of accused discharged by another Magistrate illegal.—If after the discharge of one of the accused, the case of others is simply transferred by the District Magistrate to another Magistrate, such Magistrate cannot direct the re-arrest and trial of the accused who have been previously discharged as no notice was given to them, **1 Bom. L. R. 782.**

15. Issue of warrant before setting aside order of discharged is bad.—When a District Magistrate had issued notice to the accused to show cause why his case should not be further inquired into, he cannot issue warrant for the arrest of the accused until the order of discharge is set aside and the case is taken on his own file, **15 P. R. 1893.**

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3. Order without hearing complainant that accused should not be proceeded against is illegal.—On the acquittal of a co-accused, the other accused against whom warrants had been issued surrendered before the Deputy Magistrate who had acquitted the co-accused: the Deputy Magistrate passed an order at once directing that the accused should not be proceeded against and that the warrant should be withdrawn, *held* that this order of the Magistrate was bad in law and should be set aside. The proper course for him was to send a notice to the complainant requiring him to proceed with the case and then dispose of the case according to law, **12 C. W. N. 68 = 6 Cr. L. J. 367.** Failure to examine complainant before discharging the accused is an error of law, **A. I. R. 1929 Cal. 479 (2).**

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7. In cases of doubt, discharge under this section would be the proper course.—Section 254 requires a charge to be framed only when the Magistrate is of opinion that there is ground for presuming that the accused has committed the offence. But if the evidence recorded does not raise any such presumption, but merely leads to a doubt, the Magistrate ought to discharge under this section and if he framed a charge in the circumstances, he would be acting contrary to the spirit of s. 254, **2 P. R. 1906 = 37 P. L. R. 1906 = 3 Cr. L. J. 345.**

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(*iii*) *Illegal arrest by Police.*—A Magistrate is not justified in discharging an accused person merely because he has been illegally arrested by the Police without a warrant issued on complaint for a non-cognisable offence, **Ratanlal 73.** *See* also **17 P. R. 1906 = 60 P. L. R. 1907 = 5 Cr. L. J. 89,** and Note 2 to s. 252.

intends, if he is of opinion that the accused is guilty, to submit the proceedings to the District or Sub-divisional Magistrate to pass sentence, 1905 U. B. R. 33 = 2 Cr. L. J. 454. But it is a Magistrate's duty to draw a charge in accordance with the offence disclosed, and not to consider such consequences as whether he himself has or has not jurisdiction to try the offence or whether a particular charge will or will not require a committal to the Sessions. In drawing a charge there is one consideration and one only to be entertained and that is what is the offence disclosed, 5 P. R. 1901; 2 P. R. 1906 = 3 Cr. L. J. 345. (ii) *When the Magistrate is of opinion that case ought to be committed*—*See* as to procedure, ss. 347 and 207. This section must be taken to qualify the meaning of the words "ought to be tried in ss. 207 and 347 of the Code," 4 Bom. L. R. 85; 24 C. 429. When a Magistrate is of opinion that the accused cannot be adequately punished by him he can commit him to the Court of Session although the case may be exclusively triable by the Magistrate 24 C. 429. The Magistrate has to exercise a discretion in the matter which is subject to the Appellate and Revisional Powers of Superior Courts, 16 B. 580 at p. 585. But *see* 42 M. 83 (*contra*). 3 Rang 42 dissents from 24 C. 429 and follows 42 M. 83.

5. Effect of framing charge.—(i) *Charge turns inquiry into trial*—So long as a case continues in the stage of inquiry, the duty of the Magistrate is confined to ascertaining whether there is anything that the person accused ought to be called upon to answer but when the charge has been framed and the plea of the accused recorded, the inquiry is turned into a trial and evidence in support of the charge already recorded becomes evidence on that trial, subject to the right of the accused as declared in ss. 256 and 257, 9 A. 52 (F B) 38 M 585. (ii) *Magistrate cannot dismiss the case or acquit the accused without hearing evidence*—When, on examining the complainant, the Magistrate frames a charge, and thereby indicates that a *prima facie* case exists against the accused, he cannot then dismiss the case and acquit the accused without hearing the evidence on behalf of the prosecution or of the defence. He is bound to proceed with the case, 7 C. W. N. 521. Where there are two distinct charges against distinct individuals, a Magistrate is not entitled to pass one order so as to affect both (iii) If charge is of a compoundable offence, the accused is entitled to an acquittal immediately a composition is filed 29 P. R. 1914 = 16 Cr. L. J. 81 (F.B).

6. Omission to prepare a charge does not invalidate acquittal—A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. *Held*, that such omission did not invalidate the order of acquittal of such person, and render such order equivalent to an order of discharge, 3 A. 129.

7. Charge in joint trial of warrant and summons-cases.—When a case is being tried as a warrant case and a charge is drawn of an offence which is triable as a warrant-case, if it is intended to proceed against the accused also for an offence triable only as a summons-case, that offence should form part of the charge and if the accused had been prejudiced by the absence of such a charge the conviction is liable to be set aside, 29 C. 481. Where the complainant charged the accused with defamation (a warrant-case) but in her evidence charged him with using criminal force to her (a summons-case) and the Magistrate tried the accused for both the offences and convicted him of *assault*, but acquitted him of defamation, *held* the procedure was perfectly legal, it appearing from the record that the accused understood the new charge, cross-examined the witnesses with reference to it and had ample opportunity of meeting it 3 Bom L. R. 675. *See* Note 4 to s. 233.

8. Court can inquire into offence different from that charged if evidence discloses it.—If on the evidence, a Magistrate finds that an offence different from the one charged had been committed, he has power expressly to inquire and proceed against the accused with regard to the other offence without a fresh complaint being made to him, 5 B. H. C. R. Cr. Ca. 100, and if the other offence is a summons-case he may proceed to try the same in the manner pointed out for the trial of summons-cases, 7 M. 454. If the Magistrate finds that the facts disclose an offence other than, or in addition to, that complained of he is bound to adjudicate on the original charge and should not dismiss it with leave to the prosecution to institute a fresh and a more comprehensive complaint, 8 W. R. 82. Thus in 27 A. 69 a complaint was laid against the accused of an offence under s. 409 I P C., and he was tried and convicted of that offence by a Magistrate of the first class. It was contended on behalf of the accused that the Magistrate had no jurisdiction as the evidence disclosed an offence under s. 403 I P C., triable exclusively by the Court Session. *Held, per* KNOX, J., that the complaint give the Magistrate jurisdiction to try the accused for the offence complained of and if it was established, to convict him and that the Magistrate was not bound to commit merely because the evidence disclosed another offence triable exclusively by a Court of Session. *See* also 21 A. 263.

9. Power of Court to examine witnesses.—A Magistrate cannot properly resort to s. 540 in order to avoid the responsibility of making up his mind as to the value of the evidence for the prosecution. The power

case against him. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry. There is jurisdiction still vested in all Magistrates, including the one who made the previous inquiry just as before. But all Magistrates, and especially the one who formerly discharged the accused, are bound to exercise due discretion, to take that discharge into account, and to avoid any such oppressive proceedings as may either expose them to punishment under s. 219 or s. 220, I.P.C., or to a civil action on the part of the accused, **Ratanlal 330; 7 M. 454; 31 M. 543.** *See*-the remarks of PRINSEP, J., in **28 C. 652 at p. 658.** *See* also **29 C. 726,** where **23 C. 983** and **24 C. 286** are *overruled.* As to similar powers of a Presidency Magistrate, *see* **28 C. 652** (F.B.), GHOSE, J., *dissenting.*

Charge to be framed when offence appears proved.

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

Notes.—1. Charge should be so framed as not to cast upon the prosecution any unnecessary burden.—According to the Code, the duty of framing a charge, in all cases where a charge is necessary, rests primarily with the Court and not with the prosecutor. And the charge when properly framed upon the materials mentioned in this section, while it should allege all that is necessary to constitute the offence charged, and all that is requisite in order that the accused may have notice of the matter with which he is charged, ought not to allege positively anything of which the allegation in a positive form is not justified by the materials before the Court. It must be remembered that while the prosecution is in all cases bound to prove so much of the matter charged as is necessary to constitute the offence charged, it is not bound to prove, and cannot, by reason of want of care on the part of the Court in framing the charge, become bound to prove more than this, and may, therefore, very reasonably insist that the charge be so framed by the Court as not to cast upon it any unnecessary burden. *Per* PLOWDEN, J., in **26 P. R. 1889.**

2. *Object of framing a charge at an early stage is to enable the accused to cross-examine the prosecution witnesses on their first attendance.*—The alteration in this section which enables a Court to frame a charge at any previous stage of the proceedings is intended to enable the accused to cross-examine the prosecution witnesses on their first attendance. This procedure is applicable in the trial of warrant-cases. But where one of the offences with which the accused is charged is triable exclusively by the Court of Session, the proceedings would be in the nature of an inquiry under Chapter XVIII and s. 208 requires that an opportunity should be given to the accused for cross-examining the witnesses for the prosecution before the stage of proceedings is reached at which it might be found necessary to draw up a charge. If, after framing a charge, the Magistrate finds on the cross-examination of the prosecution witnesses, that no case is made out, he can cancel the charge under s. 213 (2), **5 C. W. N. 110; 27 C. 370.**

3. When charge must be framed.—Section 254 in mandatory terms imposes on the Magistrate the duty of trying any warrant-case which he is competent to try and which in his opinion can be adequately punished by him, **8 S. L. R. 23 = 15 Cr. L. J. 664.**—(*i*) *Charge should be framed only when offence made out.*—It is only when the prosecution has proved all the facts necessary to constitute the offence charged against the accused, that a charge should be framed. *See* **(1911) 2 M. W. N. 576 = 10 M. L. T. 506 = 12 Cr. L. J. 585; 2 P. R. 1906 = 3 Cr. L. J. 345.** (*ii*) *Magistrate ought not to wait till the prosecution case is completed.*—The moment the stage has been reached when there is ground for presuming that an accused person has committed an offence triable under the charge, the examination of the accused should be taken up and the charge-sheet drawn up and the remaining witnesses for the prosecution should be examined, cross-examined and re-examined, **8 A. L. J. 707 = 12 Cr. L. J. 471.** The procedure of taking the whole case for the prosecution and then drawing up the charge is old-fashioned and exploded. *See* **18 P. W. R. 1909 = 11 Cr. L. J. 110.** In a petty case under the Penal Code where the offence committed is within the Magistrate's cognisance the accused should not be committed to the Sessions on the ground that the Magistrate was a witness to the identification proceedings. **21 A. L. J. 420.**

4. When charge not to be framed under the section.—(*i*) *If he cannot adequately punish.*—A Magistrate ought not to frame a charge under this section if he be of opinion that he cannot adequately punish the offence, **Ratanlal 499.** It is not irregular for a Magistrate of the second or third class to frame a charge against an accused person in a case which he has jurisdiction to try, even though at the time of framing the charge he

***255-A.** Procedure in case of previous convictions. In a case where a previous conviction is charged under the provisions of section 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may after he has convicted the said accused under section 255, sub-section (2), or section 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.

Note.—" It was suggested to us that the new section 255-A is unnecessary, on the ground that though a procedure or the proof of previous conviction is necessary in a Sessions Court to prevent the jury or the assessors from being prejudiced by anything they may hear as to the accused's previous record, yet in warrant-cases the same considerations do not apply On the whole however, we think the new section may serve a useful purpose and we have retained it, *Report of the Select Committee*, 1922.

256. Defence. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state "† at the commencement of the next hearing of the case or if the Magistrate for reasons to be recorded in writing so thinks fit forthwith " whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken If he says, he does so wish, the witnesses named by him shall be recalled, and after cross-examination and re-examination (if any), they shall be discharged The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they also shall be discharged The accused shall then be called upon to enter upon his defence and produce his evidence

(2) If the accused puts in any written statement, the Magistrate shall file it with the record

Notes.—1. Scope of the section.—' After careful consideration we have adopted the re-draft of these clauses suggested by the Judges of the Calcutta High Court Even under these amended clauses the right of cross-examination may be abused and witnesses unnecessarily harassed, but we think, on the whole that the possible abuse of the system does not justify us in making any severer restriction on the existing right of the accused.'— *Sel. Com. Rep* The procedure laid down in this Chapter does not govern the inquiry in cases triable by a Sessions Court. In such cases the intention of s. 208 is that as each witness is examined for the prosecution he should then and there be cross-examined, and re-examined and allowed to go home, **10 A. L. J. 144 = 13 Cr. L. J. 443.** *See* Note 11 under section 208

2. Section inapplicable to proceedings under s. 110.—This section has no application to a case under s. 110 and a person called upon to show cause under that section has no right to further cross-examine the prosecution witnesses under this section, **33 C. 243.** *Contra* **12 Cr. L. J. 89 (Bur),** *see* also **1 P. R. 1916** *See* Note to s. 119

Section not applicable to proceedings under cl (8) of the Letters Patent as they are not in the nature of criminal proceedings in the sense that the rules of procedure applicable to a Criminal trial are applicable to them and therefore the respondents' (legal practitioners) written statement could not be received. Under this special jurisdiction under cl. (8) of the Letters Patent the High Court is bound to give a proper notice and reasonable opportunity to be heard to the legal practitioner concerned. **4 Lah. 271.**

3. Claims to be tried.—As to the meaning of the expression "*claims to be tried*" *vide* **1906 U. B. R. 61 = 5 Cr. L. J. 293; 3 L. B. R. 250 = 5 Cr. L. J. 417** noted under s. 251

4. Right of prosecution to call fresh witnesses.—The words "*any remaining witnesses,*" do not limit the witnesses only to those named under s. 252 (2). It is wide enough to include any witness who, according to the prosecution, is able to support its case though he has not been summoned, provided he is not sprung on the defence and sufficient opportunity is given to cross-examine him, **11 Bom. L. R. 1153 = 10 Cr. L. J. 530.** See Note 8 to s. 252 and *see* also **10 A. L. J. 383.**

* Section 255-A has been added by Act XVIII of 1923.

† The words " at the commencement ... ... thinks fit forthwith" were inserted by s. 3 of Act XVIII of 1923.

conferred by that section upon a Court to summon a witness does not extend to witnesses named for the prosecution or for the defence, **11 P. R. 1886.**

10. Duty of Police to test exculpatory statement made by accused.—It is the duty of the Police officials, when an accused person makes an exculpatory statement, to test the truth or falsity of such statement without delay, and to lay before the Court any evidence which tends to establish its truth or falsity, **1 P. R. 1888.**

Plea.

255. (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

Notes.—1. Charge must be explained to the accused.—Magistrates should pay special attention to this direction of the law. Where an offence falls, *e.g.*, within a section like s. 397, I.P.C., which on account of the existence of aggravating circumstances provides a minimum punishment for the offence, the existence of such aggravating circumstances should be set forth in the charge so that the accused person may know what it is to which he pleads guilty and the full effect of such plea, or in the event of his pleading not guilty, may know what the material facts are which he is called upon to rebut, **Ratanlal 65 ; 7 C. 96 = 8 C. L. R. 471 ; 5 C. 826 ; 9 M. 61.**

2. The accused must be asked and not his pleader.—No pleader can be called upon to plead "*guilty*" or "*not guilty*" on behalf of his client and it is improper for a Magistrate to act on such plea, though made in the presence and hearing of the accused. It would be more regular in form, if the Magistrate were to call on the accused to say with his own lips whether he denies the truth of the complaint, **6 Bom. L. R. 861.** But when an order under s. 205 has been made, it involves that the pleader may perform all acts which devolve upon the accused in the course of the trial, such as pleading or refusing to plead under this section, **6 S. L. R. 206 = 14 Cr. L. J. 272.**

3. Conviction on a plea of guilty in a warrant-case.—There is nothing in the Code to preclude a Magistrate in a warrant-case from convicting the accused on his own plea of "*guilty*," **3 L. B. R. 279 = 5 Cr. L. J. 416**; but a plea "*guilty*" can be recorded only after the prosecution has made out a *prima facie* case and the Magistrate has drawn up a charge on the evidence on record. It is highly improper in a warrant-case to convict an accused on his own admission alone, **29 M. 372,** where **27 M. 238** is *followed*. *See* also **19 M. L. J. 271 = 4 M. L. T. 324 = 8 Cr. L. J. 421,** where it was *held* that a conviction which is illegal cannot be sustained merely on the plea of guilty. The Magistrate is empowered to act under this section and record the plea only after he has followed the procedure laid down in the preceding sections of this Chapter. *See* also **(1911) 2 M. W. N. 576 = 10 M. L. T. 506 = 12 Cr. L. J. 585** and Notes under ss. 342 and 271.

4. Mode of recording pleas—What kind of admission amounts to a plea of "guilty."—*See* s. 271 and Notes thereunder. An admission which does not admit all the elements of the charge is not a plea of "*guilty*" to the charge, **25 W. R. 23.** Therefore, where a person accused of murder, acknowledged having struck his victim but repudiated the intention to murder, it was *held* the acknowledgment cannot be accepted as a plea of guilty, **4 B. L. R. Appx. CI.** In recording the plea, the Court must record the actual words used and not merely record a narrative of what occurred and of the statement of the prisoner, **7 C. 96 = 8 C. L. R. 471.** In trying a case under s. 143, I.P.C., the Magistrate declined to take evidence, remarking "the accused all admit facts that make them out to be members of an unlawful assembly" and convicted them of the offence. *Held*, reversing the conviction and sentence, that an accused person may admit some or even all the facts alleged by the prosecution, but if he pleads "not guilty," the Court trying him is bound to proceed according to law, by examining the witnesses and giving an opportunity to the accused to cross-examine the witnesses for the prosecution, and adduce his own evidence, **9 Bom. L. R. 1346 = 6 Cr. L. J. 424.** Cases have come before this Court, in which it has been recorded that the accused person pleaded guilty, and in which it appeared that the Magistrate had misapprehended the facts necessary to constitute the offence with which the accused was charged and of which he was convicted on his own plea. It is expedient that the plea of the accused should be recorded as nearly as possible in the words used by him, so that it may be shown clearly that the accused admitted the facts necessary to constitute the offence with which he was charged—*C. P. Cr. Cir., Part II, No.* 22.

5. Accused throwing himself on mercy of Court.—Where the accused did not formally plead guilty, the fact that he threw himself on the mercy of the Court ought not to prejudice him, **12 C. W. N. 140 = 6 Cr. L. J. 434.**

refuse to issue process for the attendance of witnesses for such purpose except on payment by the accused of the costs of their attendance. Such an order can be passed only under s. 257, when the application for recall is made after the accused has entered upon his defence, **2 C. L. J. 17.** Where in order to suit the convenience of the Court or for reasons connected with the discharge of other public business, the witnesses for the prosecution are allowed to leave before the charge has been framed or the right conferred by this section exercised, they must be required to attend again and ordinarily any expenses which may be allowed to them on this score should be paid by Government, **8 N. L. R. 66 = 13 Cr. L. J. 554.** *See* also **43 M. 411.**

9. Right to further cross-examine when the cross-examination before charge was on the understanding that witnesses were not to be recalled.—Where the cross-examination of the witnesses for the prosecution before the framing of the charge was on the distinct understanding that the accused would not require the recall of the witnesses for further cross-examination after charge, and the Magistrate refused a subsequent application made in violation of this understanding, *held* that the Magistrate was by law bound to recall the witnesses. But in the circumstances of the case the accused were directed to pay the expenses incidental to the recall, especially as they offered to pay the same, **8 C. W. N. 424.** A Magistrate is not competent to refuse to recall the witnesses for prosecution to be cross-examined by the accused, and it is not necessary for the accused that he has reasonable grounds for his application, **21 W. R. 29.** A Magistrate cannot refuse to allow witnesses, whom he allowed to be cross-examined by the accused previous to the preparation of a charge to be recalled and cross-examined after the accused has been put upon his defence under this section, treating them as witnesses for the prosecution, **17 W. R. 51.** *See* also **27 C. 370.**

10. Discharge of prosecution witnesses.—*Procedure to be adopted on adjournment.*—A Magistrate should not, of his own motion, discharge the witnesses for the prosecution until the accused person has exercised or waived the right of cross-examination given him by this section. Where it becomes necessary to adjourn the hearing, the Magistrate should, in all cases, inquire of the accused if he desires to exercise his right of recalling the witnesses for the prosecution, or consents to the discharge of all or any of them. If the accused consents to their discharge, he is not entitled to have them re-summoned as a matter of right. Where it becomes necessary to adjourn the hearing and the Magistrate did not call upon the accused to exercise his right under this section and there was no sufficient proof that the accused consented to the discharge of the witnesses for the prosecution, it was *held* that the accused was entitled to have the witnesses whom he desires to cross-examine at the further hearing re-summoned, **6 N.-W. P. H. C. R. 284; 25 W. R. 43.** *Witnesses ought not to be unnecessarily kept on attending.*—The word "recall" is very significant and does not mean re-summon, **8 A. L. J. 707 = 12 Cr. L. J. 471.** The procedure contemplated by the Code in warrant cases is that the prosecution witnesses should be examined-in-chief, the accused examined, the charge framed and the prosecution witnesses cross-examined alone, hearing continued, if necessary from day to day and the said witnesses should not be discharged until the Court has ascertained whether their cross-examination after the charge will be desired, **8 N. L. R. 65 = 13 Cr. L. J. 554.** *See* also **10 A. L. J. 144 = 13 Cr. L. J. 443.**

11. Each accused entitled to cross-examine the complainant of his own right.—Where there are several accused jointly tried and some of them have cross-examined the complainant, the right of the other accused to have the complainant recalled for further cross-examination is not in any way lost as the accused have each a right to cross-examine the complainant, **11 C. W. N. 140.**

12. Accused entitled to adjournment for cross-examining prosecution witnesses.—Where an accused against whom a charge was framed without any previous intimation, stated in reply to a question put by the Magistrate under this section as follows: "Time should be granted to me for engaging a Vakil on my behalf and for cross-examining witnesses. I have no question now" and the Magistrate thereupon closed the case stating that 'the accused refused to say whether he wished to cross-examine the prosecution witnesses: they will not be summoned' and refused subsequently an application by the accused's Vakil for cross-examining the prosecution witnesses and convicted the accused, *held* that the conviction was not merely irregular, but illegal. It is not giving an accused person a reasonable opportunity to ask him immediately after the charge is framed to cross-examine the witnesses. The application for adjournment was reasonable and ought to have been granted, **(1911) 2 M. W. N. 192 = 12 Cr. L. J. 548.** *See* also **1895 A. W. N. 40; 28 C. 594; 33 Bom. 578.** *See*, however, **8 A. L. J. 707 = 12 Cr. L. J. 471,** where KNOX, J., was of opinion, that it is a distinct mistake to give time for cross-examination: "If the pleader for the defence who had heard the evidence-in-chief is not prepared to cross-examine them and thereafter the charge-sheet has been drawn up, he hardly deserves the name and rank

CROSS-EXAMINATION OF PROSECUTION WITNESSES.

5. **Section does not prohibit cross-examination before framing of charge.**—Opportunity should be given to the accused should be so desire, to cross-examine the prosecution witnesses even though the charge is not framed, **8 C. W. N. 838.** This section does not prohibit cross-examination before a charge is framed; it permits a further cross-examination, expressly directed to the case framed and embodied in the charge and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time, subject to a discretion given to the Magistrate by s. 257, **21 C. 642.** *See* Note 7 to s. 252 and Note 2 to s. 254.

6. **Accused is entitled to have prosecution witnesses recalled after charge before commencement of defence—Magistrate has no discretion.**—On the date when charge was drawn up, the accused applied to recall and cross-examine the witnesses for the prosecution. The application was refused in these terms: "The prosecution witnesses have already been cross-examined at a reasonable length considering the importance of the case, and it is needless in my opinion to recall them, refused." *Held*, this section gives the Magistrate no discretion in such a matter. The accused is entitled to have the witnesses recalled for purposes of cross-exmination. The fact that there has been already some cross-examination before the charge has been drawn up does not affect this privilege, **27 C. 370; 20 C. 469; 14 Cr. L. J. 383 = 6 Bur. L. T. 67.** In **2 Bom. L. R. 842,** a conviction without allowing the accused to further cross-examine was set aside as illegal. *See* also **7 C. L. J. 240 = 7 Cr. L. J. 313** and **8 M. L. T. 367 = 11 Cr. L. J. 520,** where the conviction was set aside and a re-trial ordered by a different Magistrate.

7. **Magistrate bound to ask whether accused wishes prosecution witnesses to be recalled.**—After a charge has been framed, it is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine the prosecution witnesses already examined, **27 C. 370.** The provisions of this section as amended by Act XVIII of 1923 are peremptory, the accused should ordinarily be asked, at the commencement of the next hearing of the case, if he wishes to cross-examine witnesses for the prosecution. He can even be asked about it forthwith on the day the charge is framed, provided the trying Magistrate records his reasons in writing, for the course adopted, **31 Bom. L. R. 593.** Where a Magistrate trying a case under s. 358, I.P.C., after framing a charge omitted to ask the accused whether he wished to have the prosecution witnesses or any of them recalled for cross-examination, and rejected an application made by the accused with that object on the ground that it was too late, *held* that it was impossible to say that by being barred from cross-examining the witnesses called against him the accused did not suffer a substantial injury, **1902 A. W. N. 5.** The claim to recall the witnesses for the prosecution is very different from the request made by the accused person to summon a witness under s. 252, **19 W. R. 53,** and an accused is entitled to this privilege, even though he does not call any witnesses of his own. Nor does the fact, that there has already been some cross-examination before the charge was drawn up, affect the privilege, **20 C. 469; 6 Bur. L. T. 67 = 14 Cr. L. J. 388.** The record should show whether the accused wished to cross-examine any of the witnesses for the prosecution already examined, **4 Bur. L. T. 24 = 12 Cr. L. J. 89.**

Right of accused in proceedings under section 110 *of this Code.*—A person proceeded against under this section has no right to further cross-examine prosecution witnesses under this section, **8 Lah. 265.**

Right of accused when summons-case is tried under this Chapter.—*See* Note 4 to s. 241.

Effect of omission to ask the accused.—It has been usually *held* that the omission to follow s. 256 involves remand and re-trial of the case from the point of drawing up of the charge, **11 P. R. 1914 = 16 Cr. L. J. 146.** In **16 Cr. L. J. 5 (M.)** it was *held* that the omission was a mere irregularity and the conviction was not set aside as the accused had not been prejudiced. *See* **6 Lah. 554.**

8. **Magistrate bound to recall witnesses for cross-examination and cannot call on the accused to defray expenses.**—It is the duty of the Magistrate to recall the prosecution witnesses which must be done presumably at the public expense. A conviction without allowing the accused an opportunity to examine the prosecution witnesses on the ground that the accused had not paid the necessary expenses for recalling the prosecution witnesses is illegal, **12 P. R. 1907 = 6 Cr. L. J 339.** After a charge is drawn, the accused is entitled to claim as a matter of right under this section to recall and cross-examine any witness for the prosecution, although he had an opportunity of cross-examining such witness before. Where, therefore, a Magistrate refused to re-summon a medical officer for cross-examination unless fees for his attendance were paid, the High Court set aside the conviction and sentence and directed the Magistrate to allow process to be issued for the attendance of such witness, **4 C. W. N. 351.** The re-calling of witnesses for cross-examination must be done presumably at the public expense, **12 P. R. 1907 = 32 P. W. R. 1907 = 6 Cr. L. J. 339.** As a general rule, a Magistrate cannot

cross-examination, the High Court directed the Magistrate to re-open the case from the stage where he made the formal charge and to allow the accused such opportunities of calling and recalling witnesses as the law gives, **Ratanlal 723, 14 C. W. N. 280.** But it lies upon the party who thinks himself aggrieved to show that the ends of justice have in some way been frustrated in consequence of the refusal to recall the witnesses for the prosecution for cross-examination **20 C. 469.** When an application for re-summoning witnesses for the prosecution was made not on the day the accused were called upon to make their defence, but on the following day, *held* that the delay of one day was in itself no sufficient reason for refusing the application **4 C. W. N. 241.** *See* also **Ratanlal 723,** where it was *held* that the refusal to re-summon would render it necessary to re-open the case from the stage of the drawing up of the formal charge *See* also **5 Pat. L. J. 94**

(*iv*) *Right of cross examination may be waived when the accused fails to cross-examine when opportunity is given.*— The object of this section is clearly to secure to the accused the opportunity of cross-examining the witnesses for the prosecution after he has been informed as to the nature of the specific charge which he is required to answer Until he knows this he is not in a position to decide on what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of recalling the witnesses If the witnesses for the defence are in attendance they are to be examined and after that the accused shall be allowed to recall and cross-examine the witnesses for the prosecution If he refuses to exercise this right *after he has entered on his defence* he cannot demand as of right the recall of the witnesses for the prosecution, if the case be adjourned because he has not produced his witnesses. He has had the opportunity intended by the section '—*Per* SPANKIE, J **2 A. 253 at p 258** The accused elected to reserve the cross-examination of the prosecution witnesses till charge should be framed After charge was framed the application of the accused, that the case should be committed to the Sessions was refused and the accused who had pleaded not guilty was called on to enter on his defence He then declined to say anything and represented that he reserved his statement to the Court of Sessions whereupon the Magistrate again informed the accused that the case would not be committed and called on him to cross-examine the prosecution witnesses. The accused again declined and the Magistrate closed the case and adjourned it for judgment. Before judgment was delivered, the accused applied that the case may be proceeded with in the usual course, but the Magistrate deemed the application unreasonable and vexatious and gave judgment convicting the accused *Held* that the accused was not entitled to recall the witnesses for cross-examination after case had been closed **21 M. L. J 293 = 1911 M. W. N. 327 = 12 Cr. L. J. 150 ; 1912 M. W. N. 1121 = 13 Cr. L. J. 828.**

(*v*) *Waiver by counsel does not prejudice the right of the accused under ss 256 and 257* —Section 256, Cr Pro Code confers an absolute and unqualified right on the accused to recall for further cross-examination such witnesses as are still before the Court. After the charge had been framed, the accused pleaded not guilty and mentioned to the Court that he had witnesses to examine. *Held*, that he had entered upon his defence and an application for further cross-examination of a witness discharged from attendance must be deemed to have been made under s. 257 Waiver by counsel of further cross-examination in case a charge is framed cannot prejudice the right of the accused under ss. 256 and 257 **43 M. 411; 5 Pat. 110.**

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice Such ground shall be recorded by him in writing

Process for compelling production of evidence at instance of accused.

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice

(2) The Magistrate may, before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

DEFENCE EVIDENCE.

Scope of the section —The provisions of this section apply to summons-cases, **29 Cr. L. J. 305.**

of pleader. Cross-examination is intended for testing the accuracy and credibility of the witnesses, not for building up a case for the defence, and the witnesses should then and there after cross and re-examination have been discharged and they would have been discharged with a minimum of inconvenience."

13. Right of accused to have prosecution witnesses recalled at a later stage.—

(*i*) *Right to have witnesses recalled for cross-examination may be exercised at any time—No waiver.*— Section 256 merely lays down that after the plea of the accused is taken, he shall be required to state whether he wishes to cross-examine any, and if so, which of the prosecution witnesses whose evidence has been taken, but it does not state at what particular time he is to be asked this question, nor up to what time he has this right. Therefore where the accused was asked the question at the time of framing the charge and he could not at that instant answer, but subsequently before the case has been closed, he applied for recalling some of the prosecution witnesses for cross examination and the Magistrate refused the application on the grounds that the accused had waived his right and the witnesses were sufficiently cross-examined before the charge; *held*, that the order was against the terms of s. 256 and the conviction was set aside, **37 C. 236.** It is submitted that the right is expressed too broadly and is in conflict with other decisions and does not attach sufficient weight to the discretion given to the Magistrate by s. 257. No doubt it is open to a Magistrate, even after a case has been closed and at any time before judgment has been pronounced to give an opportunity to the accused to cross-examine the prosecution witnesses and to examine witnesses in defence even if the accused had failed to avail himself of such opportunity which he had at an earlier stage of the proceedings. But it always depends upon the circumstances of each case whether a belated application should be granted or not, **21 M. L. J. 283 = 10 M. L. T. 84 = 1911 M. W. N. 327 = 12 Cr. L. J. 150.** The accused may after the charge is drawn up and the witnesses for the defence have been examined, recall and cross-examine the witnesses for the prosecution, **4 M. 130.** Where the trying Magistrate charges the accused at an early stage so as to prevent the necessity for recalling the witnesses for further cross-examination, the accused has no further right to cross-examine the prosecution witnesses after the close of the prosecution case, **63 P. L. R. 1901.**

(*ii*) *It is in the discretion of the Magistrate to recall the prosecution witnesses at a later stage.*— As a rule, the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence, though a Criminal Court has discretionary power to allow the accused person to recall and cross-examine the witnesses for the prosecution at any period of the defence, when the Court may think such a course right and proper, **22 W. R. 44.** Reading ss. 255 and 256 of this Code together, it appears that, if an accused person desires to recall and cross-examine the witness for the prosecution, the time at which he should express such desire is when the charge is read over to him and he is called upon to make his defence: and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled, **7 C. 28.** There is no absolute right of cross-examination which would enable the accused to recall and cross-examine the witnesses for the prosecution, no matter how completely and fully they have already been examined. Where, therefore, witnesses for the prosecution were fully cross-examined and a charge framed against the accused, and the witnesses for the defence were examined and cross-examined and on the day on which judgment was to be delivered an application was made on behalf of the accused asking that process should issue for the witnesses for the prosecution to be recalled and further cross-examined; *held*, that the Magistrate was right in refusing the application if he was of opinion that it was made for the purpose of vexation, etc., **20 C. 469.** Where witnesses for the prosecution were subject to a very lengthy and strict cross-examination upon the matter of the complaint and with the the exception of a petition which had nothing to do with their evidence, no fresh evidence was afterwards adduced, the Magistrate, after framing a charge declined to re-summon these witnesses being of opinion that the application was not *bona fide*, but made "for the purpose of vexation, etc.," *held*, that the right to test the truthfulness of the witnesses by cross-examination must not be abused, and that under the circumstances the Magistrate was justified in declining to re-summon these witnesses, **Ratanlal 930.**

(*iii*) *Proper reasons must be given for refusing to recall—Slight delay not a sufficient ground.*—The mere fact that the witnesses for the prosecution had already been cross-examined is not a sufficient reason for refusing to re-summon them, unless the Magistrate expressly records his opinion that the application for the second cross-examination is for the purpose of vexation or delay, etc., and an order refusing to re-summon witnesses without assigning any such reasons is not proper, and the High Court will set aside the conviction and the sentence and direct the re-opening of the trial, **4 C. W. N. 241.** Where a trying Magistrate, after a charge had been framed against the accused, refused to re-summon the complainant and his witnesses for

10 C. 931; 6 C. W. N. 548; Ratanlal 591; 28 P. R. 1884. An adjournment beyond the day fixed by the summons issued is however, discretionary, **9 C. W. N. 229** and therefore the issue of any further summonses to witnesses not named at the time the defence is entered upon is not obligatory, **7 B. L. R. 584.** When a Magistrate refuses to issue summons, he is bound to record his reasons, **4 C. W. N. 241,** with respect to each witness, **4 Bom. L. R. 33.** Summons was ordered to be issued for the attendance of a certain defence witness on a certain day, but owing to some delay the summons was not served, and consequently the witness did not attend. The Magistrate refused to re-summon the witness on the ground that in his opinion the witness was named for the purpose of delay and not in good faith. *Held*, that the Magistrate was bound to make a further attempt—the first attempt being merely nominal—to secure the attendance of the witness, **4 A. 53.** *See* also **35 C. 1093.** Even when a witness appears after the case is closed and the Magistrate is about to deliver judgment, it is incumbent on the Magistrate to record and consider his evidence, **7 B. L. R. 584.** *See* **19 A. L. J. 943; 5 Pat. L. J. 94.**

6. Refusal to examine defence witness.—Though it is competent to the Magistrate to decline to summon witnesses for the defence under this section, it is not competent for him to decline to examine the defence witnesses cited on the ground that their evidence is not necessary, **14 Bom. L. R. 360 = 1 Bom. Cr. Ca. 123 = 13 Cr. L. J. 523.** Magistrate should always be chary of taking upon themselves the duty of deciding on behalf of the parties which witnesses shou'd be examined, **28 M. L. J. 134 = 16 Cr. L. J. 156.** *See* also **35 C. 243, 3 Pat. 591.**

7. Right to cross-examine when prosecution witnesses subsequently called as defence witnesses.—On a Magistrate refusing to re-summon prosecution witnesses for cross-examination, the accused cited them on his behalf and then requested the Magistrate to allow them to be cross examined. This application was refused. *Held*, that under the circumstances the right of accused to cross-examine these witnesses was not curtailed, **1 C. W. N. 19.** *See* also **17 W. R. 51; 25 W. R. 37; 4 M. 130** and **28 C. 594.** In the last mentioned case when the accused were called upon to cross-examine the witnesses for the prosecution, they applied for an adjournment as their counsel was absent, which was refused. Subsequently on the day fixed for the defence evidence the prosecution witnesses were re-summoned, but the Magistrate refused to allow them to be cross-examined on the ground that they were now summoned as defence witnesses. *Held*, that the Magistrate was wrong and counsel for the defence was entitled to cross-examine them.

7-A. Right of accused for process for cross examination of prosecution witnesses.—Under s. 257 of the Code the accused is entitled after he has entered upon his defence to have the prosecution witnesses summoned for cross examination unless the Magistrate thinks that the application is merely for purposes of vexation and delay. Omission to record such ground is an illegality vitiating the conviction. The death of the witness does not affect the illegality of the Magistrate's order, **51 C. 1049.**

8. The trying Magistrate may himself be cited as a witness.—The words "any witness" would include the trying Magistrate also. In a transfer application under s. 526, the applicants urged that the evidence of the trying Magistrate would be required by the accused touching certain matters connected with the case. *Held*, that inasmuch as the Magistrate was bound under this section to issue a summons unless he considered that the application was made for the purpose of vexation or delay or defeating the ends of justice it was not proper to leave the decision of this point to the Magistrate whose evidence was required and the case was accordingly transferred, **26 A. 536.**

9. Accused entitled to examine witness present in Court.—It is not open to a Magistrate to refuse to examine a witness for the accused when the witness is present in Court, **4 Bom. L. R. 451.**

10. Right of accused to cross-examine any witness examined by the Court.—The accused obtained process for the attendance of a witness but before the appearance of the witness, the accused asked the Court to countermand the order for his attendance, which the Court refused to do. When the witness attended, the accused refused to examine him, but the Court examined him and refused to let the accused to cross-examine him. *Held*, that the witness cou d not be regarded as a witness for the defence and that the accused were entitled to cross-examine the witness, **19 C. 337.** *See* also **1 C. W. N. 19.**

11. Right of accused person to cross-examine the witnesses of a co-accused.—One accused person may cross-examine a witness called in his defence by another accused in the same trial when the defence of one accused is adverse to that of the other, **21 C. 401; 1 C. W. N. 19; 28 C. 594.** But *see* **12 W. R. 75.**

Notes.—1. Taking defence evidence without framing charge is illegal.—*See* Note 10 to s. 253.

1-A. Accused to enter upon defence after cross-examination.—An accused person ought not to be called on to enter on his defence before he has cross-examined the witnesses for the prosecution, **8 N. L. R. 65 = 13 Cr. L. J. 654.**

2. Accused entitled to adjournment for calling witness—Dilatoriness.—In a warrant-case tried summarily, though a *formal* charge need not be framed, the accused person cannot be called dilatory, if he delays to name his witnesses until he has heard the evidence for the prosecution, and found that the Magistrate considers that evidence a substantial basis for charging him, **Ratanlal 768.** Under this section and the next, the accused is entitled as of right to a postponement of the case so as to allow him an opportunity of adducing evidence in support of his defence, **1 C. W. N. 313,** even though the case is tried summarily under s. 262 (*1*), **5 L. B. R. 20 = 9 Cr. L. J. 583.** *See* Notes to s. 262.

3. Refusal to summon defence evidence, when to be exercised.—It is only after the accused has entered upon his defence that the Magistrate can in his discretion refuse the application of the accused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice, **27 C. 370.** *See* Note 5 to s 252.

4. Magistrate bound to summon defence witnesses unless he records reasons for refusing to summon.—Where a Magistrate trying an offence rejected the application by the accused that a certain person might be examined on his behalf, without recording his reasons for refusing to summon such person. *Held*, that the conviction of the accused must be set aside, **3 A. 392; 1895 A. W. N. 40.** It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case and he ought not to determine beforehand, what credit he would give to their evidence, **6 B. L. R. Appx. LXXVIII.** Refusal to summon on the ground that the witnesses were implicated in the charge, vitiates the trial and conviction, **6 B. L. R. Appx. LXV.** The language of this section is imperative. The Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused for any of the reasons specified in the section and which he is bound to record. The Magistrate, therefore, must issue summonses for such witnesses named in the list, unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or for defeating the ends of justice. The case of each witness must be dealt with individually. The Magistrate has no right arbitrarily to limit the number of witnesses to be called on each point, **26 B. 418; 2 S. L. R. 5.** Where an accused put in a list of 72 witnesses and the Magistrate ordered him to cite only any 12 of them; *held*, that the order was not only irregular, but illegal and incurable by s. 537 as it showed that the Magistrate had no objection to any 12 of the 72 of the list on the ground of its being frivolous or vexatious. The Magistrate must base his refusal in regard to any particular witness on the grounds mentioned in the section, **31 M. 131.** Where a Magistrate declined to summon the defence witnesses saying that they could not give any reliable evidence one way or the other and it did not appear what means he had for forming this opinion; *held*, that conviction must be set aside. It is more than an irregularity, **(1911) 2 M. W. N. 192 = 12 Cr. L. J. 548.** Where the accused who was charged with recruiting three coolies from a district, prohibited under the Assam Emigration Labour Act applied for summonses to the coolies to prove his defence that they did not come from the prohibited area, but the Magistrate characterised the application as vexatious and convicted the accused; *held*, that the application should not have been refused and the conviction was set aside, **(1911) 2 M. W. N. 472 = 12 Cr. L. J. 566.** But it is a sufficient compliance with sub-sec. (1) of this section if a Magistrate while rejecting an application for summoning further defence witnesses, states facts which have led him irresistably to the conclusion that the application was for no other purpose than that of vexation or delay or defeating the ends of justice, although he does not say expressly that the application was for that purpose, **11 C. W. N. 789 = 6 Cr. L. J. 1.** Once the requirements of ss. 256 and 257 have been complied with and the accused refuses to state whether he wishes to cross-examine prosecution witnesses or cite defence witnesses, there is no provision requiring the Magistrate to again offer an opportunity to the accused to cite his witnesses, **(1912) M. W. N. 1121 = 13 Cr. L. J. 828.** Where also a Magistrate rejects an application after recording on it 'too late' *held*, that the Magistrate's reasons though irregularly recorded was a sufficient compliance with this section and could not be set aside as the accused has not been prejudiced, **39 C. 781; 45 M. L. J. 305; 3 Pat. 591.**

5. Refusal to re-summon defence witnesses.—When a Magistrate has once granted processes for the attendance of the witnesses of the accused, he cannot refuse to re-summon them on the ground that being friends of the accused they would have come to Court if the accused had desired them to do so. Having once granted the processes, he was bound to assist the accused in enforcing the attendance of the absent witnesses,

Magistrate had not framed any charge against the accused *Held*, that the terms of s. 460, Act X of 1872 (s. 403 of this Code), barred any further trial so long as the acquittal remained in force, **3 C. L. R. 131; 9 B. H. C. R. 170**

3. Dismissal of complaint or discharge after charge amounts to acquittal.—An order dismissing a complaint after a charge is framed amounts to an acquittal, **5 C. L. R. 359.** Once a charge has been framed and trial begun, the charge cannot be treated as cancelled by reason of a recommencement of the trial under s. 350 the Magistrate who framed the charge having been transferred. Even if the succeeding Magistrate re-hears the witnesses and discharges the accused it must be treated as an acquittal, **33 M. 583,** where **14 P. R. 1903 = 175 P. L. R. 1903** is *followed*, **17 Cr. L. J. 1 (M.).**

4. Sameness of Magistrate.—It is not necessary that the conviction or acquittal should be by the Magistrate who drew up the charge, **3 C. 495.**

5. Effect of an order of acquittal on other persons charged, but not sent up for trial.—*See* Note 12 to s. 403

6. Passing sentence on conviction.—It was formerly held that when a Magistrate convicts the accused he is bound to pass some sentence if only a nominal one, **4 M. H. C. R. Appx. LXVI.** But now *see* s. 562. *See* **1 B. 214** as to the sentence to be passed when accused is convicted under two different sections of the I P C. *See* also **7 M. H. C. R. 875.**

7. Conviction not obligatory if charge is framed.—Although a Magistrate has in a warrant-case thought fit to frame a charge, he is not required to convict the accused person merely because, the latter does not produce any rebutting evidence. He is bound to acquit if, at the time of giving judgment, he has reasonable doubt of the guilt of the accused, **Ratanlal 854.** A prisoner must be convicted upon the strength of the case made against him, and not in consequence of his inability to bring forward proof of his innocence **Ratanlal 5.**

Absence of complainant.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, *"or is not a cognisable offence" the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused

Notes.—1. *See* s. 345 and Sch II, col. 6 for compoundable offences. A Magistrate cannot act under this section if he took cognisance on a Police report

2. Issue of summons does not make a summons-case.—In a warrant-case the mere fact of a summons having been issued in the first instance, instead of a warrant, does not bring the case within the purview of Chapter XX, and thus allow a Magistrate to dismiss the complaint on account of the none-attendance of the complainant on the day fixed for hearing, **10 W. R. 31.**

3. Discharge under this section a discretionary power.—Before discharging under this section the Magistrate is bound to see whether there is a *prima facie* case If he arbitrarily discharges for the sole reason that the complainant is absent, his order is liable to be set aside, **1891 A. W. N. 116.** The primary reason for the order is that the absence of the complainant, raises a presumption that the complainant does not wish to proceed with the prosecution, **12 Cr. L. J. 184 (Sindh).**

4. Discharge of accused in the absence of complainant at the hearing in a trial of both offences in one trial one being a summons-case and the other a warrant-case.—Where a complaint was preferred against a person for offences under ss. 352 and 504 and the Magistrate discharged the accused owing to the absence of complainant on the day of hearing and a fresh complaint was preferred in respect of the same offences, *held* that the procedure in such a trial must be that provided for the trial of a warrant-case and that the discharge of the accused did not amount to an acquittal under s. 352 and was not a bar to the subsequent trial for the same offence. **41 M. 727** *following* **22 B. 711.**

5 Dismissal of complaint in warrant-cases on absence of complainant is improper.—A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant-cases not coming within this section, except in cases coming within the last clause of s. 253, **10 C. 67 = 13 C. L. R. 405.** *See* also **13 C. L. R. 303** for an instance of improper discharge under this section. There is no

* The words "or is not a cognisable offence" were inserted by Act XVIII of 1923.

12. **Procedure when it is impossible to procure the evidence of a witness.**—When it is impossible to procure the evidence of a defence witness, as by reason of his absence out of British India, the Magistrate would not be justified in acquitting the accused, the proper course to be adopted being for the Magistrate to pronounce judgment on the evidence on record, **1881 A. W. N. 38.**

13. **Accused not to be convicted on charge framed, merely because he adduces no evidence.**—In a warrant-case a Magistrate is not bound to convict the accused after he had pleaded to the charge and claimed to be tried, merely because no evidence is adduced to rebut the evidence for the prosecution. He is bound to acquit, if, at the time of giving judgment, he has reasonable doubt as to the guilt of the accused, **Ratanlal 854.** A prisoner must be convicted upon the strength of the case made against him and not in consequence of his inability to bring forward proof of his innocence, **Ratanlal 5.**

14. **Right of accused to call witnesses to rebut evidence called by the Court after conclusion of trial.**—In a prosecution, the case on both sides having been closed, the Magistrate summoned a witness to give evidence, whereupon the accused prayed to have certain witnesses summoned to rebut the evidence of the Court witness. *Held*, that the Magistrate was bound to summon such witnesses and that the fact that the accused at the close of his case had stated that he did not wish to examine any more witnesses was no reason to refuse to summon witnesses to give evidence to rebut that of the Court witness, **6 C. 714 = 8 C. L. R. 70.**

15. **Reserving cross-examination of defence witnesses.**—There is no provision in the Code which enables the cross-examination of defence witnesses to be deferred. Deferring cross-examination of defence witnesses until the examination-in-chief of other defence witnesses is wrong, **3 L. B. R. 109 = 3 Cr. L. J. 23.** In **6 M. L. T. 259 = 11 Cr. L. J. 156**, it was, however, *held* that a Court has discretion for sufficient reason to allow the cross-examination of defence or prosecution witnesses to be reserved, until the chief examination of all of them is over, there being no provision of law to the contrary; but where a charge is framed, the defence has the right under s. 256 to recall and cross-examine any of the prosecution witnesses.

16. **Right of reply depends on what is done and not on what may be said.**—So far as the trial of warrant-cases is concerned, there is no provision in the Code under which the accused is asked if he means to call witnesses or not. After the charge is framed, the accused is called on to enter on his defence and to produce his evidence, but he is not asked whether he means to call evidence. The right of reply would seem, therefore, to depend, not on what may be said, but on what is done, and if no evidence is produced, there should be no right of reply by the prosecutor, **Ratanlal 938.** *See* s. 292.

17. **Magistrate must be guided by judgment of Sessions Court in matters of procedure.**—The Magistrate being subordinate to the Court of Session, must treat its judgments with respect, and be guided by them on such matters of procedure as arise on the section or as relate to the acts of the Magistrate himself, **Ratanal 854.**

18. **Construction of an accused's written statement.**—There are no pleadings in a criminal case similar to those in civil proceedings which are conclusive against the party making them. The prosecution has to prove all the facts necessary to constitute the charge against the accused. *Quære* whether if an admission were contained in the accused's written statement, that would relieve the prosecution from the defect in letting in evidence of the facts admitted, **10 M. L. T. 506 = (1911) 2 M. W. N. 576 = 12 Cr. L. J. 585.** *See*, however, Notes under s. 342.

Acquittal.

258. (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Conviction.

*(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Notes.—1. *See* s. 403 for effect of acquittal and Schedule V, Form XXIX for form of sentence.

2. **Order of acquittal without framing a charge.**—No judgment of acquittal can be recorded unless a charge has been drawn up, **22 W. R. 25**; but *see* **3 A. 251.** A person accused of theft was acquitted by a Deputy Magistrate. The District Magistrate, at the instance of the Police, ordered the case to be re-tried, as the Deputy

* Sub-section (2) has been substituted by s. 73, Act XVIII of 1923.

(c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the Local Government, may, if he or they think fit, try in a summary way all or any of the following offences —

(a) offence not punishable with death, transportation or imprisonment for a term exceeding six months,

(b) offence relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code,

(c) hurt, under section 323 of the same Code,

(d) theft, under sections 379 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees,

(e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees,

(f) receiving or retaining stolen property under section 411 of the same Code where the value of such property does not exceed fifty rupees,

(g) assisting in the concealment or disposal of stolen property under section 414 of the same Code, where the value of such property does not exceed fifty rupees,

(h) mischief, under section 427 of the same Code,

(i) house-trespass, under section 448 and offences under sections 451, 453, * 454, * 456 and 457 of the same Code,

(j) insult with intent to provoke a breach of the peace, under section 504 and criminal intimidation, under section 506 of the same Code,

(k) abetment of any of the foregoing offences,

(l) an attempt to commit any of the foregoing offences when such attempt is an offence

(m)* offences, under section 20 of the Cattle Trespass Act, 1871

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code

Notes.—1. Powers under the Chapter to be exercised with great caution.— The responsibility thrown on Magistrates, entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record is not made more summary than the law has laid down.'—*Per* KNOX, J 21 A. 183, p. 192

2. Any Magistrate of the first class specially empowered.—In Madras every Sub-divisional first-class Magistrate has been invested with the powers under this Chapter *Fort St George Gazette* 1874 p. 1136. In the United Provinces, all Magistrates of the first class who are or have been officiating as Joint Magistrates and also all Assistant Commissioners of the first class have been similarly empowered.—*Gazette* 1888, p. 93.

As to powers of Magistrates in (1) Upper Burma, see *the Upper Burma Criminal Justice Regulation* V of 1892, Sch., s. v, (2) in British Baluchistan, see *British Baluchistan Criminal Justice Regulation* VIII of 1896, Sch. s. v

* Whose figures were inserted by the Repealing and Amending Act I of [illegible] See Part II of the Second Schedule.

warrant in the Code for passing an order saying "struck off." Such an order passed on the absence of the complainant will not amount to a discharge if the offence (s. 211, I.P.C.) was one which could not be lawfully compounded, **17 O. C. 18 = 15 Cr. L. J. 230.**

6. **Magistrate not bound to wait till the end of the day.**—A Magistrate, it has been *held*, is not bound to wait till the Court is about to close for the day, in order to give an absentee complainant an opportunity of appearing before acting under this section, **7 M. 350** and **213; 10 C. 551.**

7. **Procedure when complainant absent after charge has been framed.**—In a warrant-case when a charge is framed and a day fixed for the hearing of the case, it is not legal for the Magistrate to acquit the accused or discharge him without hearing the evidence for the defence, merely on the ground that the complainant did not appear to prosecute the charge on the day fixed. He ought to admit the accused to bail and enforce the attendance of the complainant and his witnesses under s. 92, **Ratanlal 524** and **847** and **4 C. W. N. 26.** He should not discharge the accused without considering the evidence already on record, **12 Cr. L. J. 184 (Sindh).**

8. **Withdrawal from prosecution in a warrant-case.**—In a warrant-case in respect of a non-compoundable offence, it is not competent to a Magistrate to enter an order of acquittal on a private complainant offering to withdraw from the prosecution, **37 B. 369.** An order of acquittal would only be pronounced if after the framing of a charge the Magistrate is of opinion that the evidence is sufficient to justify a conviction.

9. **In case of improper discharge, District Magistrate should deal with the case himself and not refer it to High Court.**—A complaint not being heard on the day fixed, the parties were told to come the next day, no particular hour being mentioned. The case was not taken up on that day and the parties were again told to come the next day. On the third occasion the case was called on early, but neither parties being present the accused was dicharged. *Held*, on reference, that the District Magistrate was competent to deal with the case under s. 437 if he thought the accused was improperly dicharged, **Ratanlal 988, 76** and **145; 32 M. 220 (F.B.).** A District Magistrate is competent to direct a further inquiry, even when no fresh evidence is forthcoming, **15 C. 608 (F.B.); 9 A. 52 (F.B.); 14 M. 334 (F.B.); 10 B. 131.** The powers of revisional Court under s. 437 are not limited to the consideration of the materials before the Magistrate or directing a further inquiry. Where a complainant was prevented from appearing by flood the order of discharge may be set aside, **12 Cr. L. J. 184 (Sindh).** S. 369 must be read as controlled by s. 437 and a Magistrate has power under the latter section to revise a complaint dismissed under this section, **28 C. 102.** *See* Notes 13 and 17 under s. 253.

10. **Power of dicharging Magistrate to re-hear without an order for further inquiry.**—A Magistrate who has made an order of discharge under this section has jurisdiction to re-hear the case on a fresh complaint. The order of discharge under this section has not the effect of an order of acquittal, **28 M. 310; 28 C. 652; 29 C. 726; 4 C. W. N. 46** having been *overruled.* *See* also **26 P. W. R. 1908; 29 A. 7; 8. S. L. R. 196 = 16 Cr. L. J. 174; 31 M. 543** and cases noted in Notes 13 and 17 under s. 253. A Presidency Magistrate has the same powers in this respect as a Provincial Magistrate. In the Full Bench case in **29 M. 126,** WHITE, C.J., and BENSON J., *held*, that there was no distinction between the powers of re-hearing when the discharge had been under this section or under s. 203 or s. 253 while MOORE, J., declined to express any opinion on the point. *See* also **18 M. L. J. 561 = 4 M. L. T. 140 = 8 Cr. L. J. 208,** where WHITE, C.J.'s opinion was followed.

10-A. **Restoration.**—If a Magistrate discharges the accused for non-appearance of the complainant and subsequently excuses that non-appearance he must proceed *de novo*, **115 I. C. 64 = A. I. R. 1929 Mad. 260.**

11. **Revisional powers of High Court.**—*See* **36 C. 994,** Notes 30 and 31 at p. 588 and ss. 437—439, **12 Cr. L. J. 184 (Sindh);** *see* also **6 Rang. 664.**

CHAPTER XXII.

OF SUMMARY TRIALS.

Power to try summarily.

260. (1) Notwithstanding anything contained in this Code:—

(*a*) the District Magistrate,

(*b*) any Magistrate of the first class specially empowered in this behalf by the Local Government and

tried and convicted the accused for an offence under s. 323, I.P.C., the conviction was set aside and re-trial ordered on the ground that the Magistrate was not under this section competent to try the case summarily, 21 P. L. R. 1907. So too a first-class Magistrate cannot give himself jurisdiction to try an offence under s. 211, I P C., by treating it as an offence under s. 182 I P C Ratanlal 670 Where a complaint is made under s. 452, I P C., and there is nothing in the complainant's examination on oath to justify the Magistrate thinking that an offence under s. 451 was committed, the Magistrate acts without justification in trying the case under this chapter, 8 Bur. L. T. 137 = 14 Cr L. J. 462. *See* also 5 C. W. N 252. The offence charged in a complaint was one under s. 325, I.P.C., and all the facts alleged therein and the evidence, including a medical certificate, sought to be adduced, went to show that grievous hurt was actually caused The trying Magistrate, however, treating the offence as one under s. 323, tried it in a summary way *Held* that in the absence of any reason recorded by the Magistrate why he treated the offence as one under s. 313, and tried it in a summary way, or of a statement by him that he discredited any of the allegations in the complaint, he was not justified in trying the case in a summary way, and convicting the accused under s. 323 Ratanlal 988. Similarly, where the offence charged in the complaint on which process was issued was rioting and the examination of the complainant was to the effect that 17 or 18 persons attacked and beat him and the Magistrate tried the case summarily *Held* that as on examination of the complainant there was no reason to believe that the complaint was exaggerated or false and process was issued, the Magistrate was bound to proceed and regulate his proceedings at the trial, as for the offence made up of the facts complained of and not reduced it so as to give him jurisdiction to try the case summarily 5 C. W. N. 110. But where a complaint alleged an offence under s 189 I P C and it was clear from the complaint and the sworn statement of the complainant that the facts stated only amounted to an offence under s. 186, I.P C. *Held* that the Magistrate had jurisdiction to try the case summarily, 35 C. 67 where 23 C. 403 is explained

12. Improper to try summarily by arbitrarily reducing value of property stolen.—Where the accused was charged with having stolen a box worth annas 8 and rupees 50 in cash contained therein *held* that the Magistrate had no authority, without taking evidence as to the value of the box, to throw it out of consideration and thus assume jurisdiction to try the case summarily Such evidence should have been taken in the same way as the evidence upon the merits of the case, and as the Magistrate failed to do this, his proceedings were *ultra vires*, 22 W. R. 65. Since a tenant is entitled to exclusive possession of the whole produce till it is divided under s. 71 of Beng T Act, his complaint against landlord for theft for having cut paddy worth Rs 88 and carried it away, cannot be tried under this section as the value of the property in such a case must be regarded as Rs. 88 and not Rs. 44 to which the tenant was entitled under the Act. 20 C. W N 1212 = 1 Pat. L. J 230 = 17 Cr. L. J. 473.

13. Magistrate not to mis state nature of offence with a view to speedy disposal—Where a charge of wrongful confinement (s. 342, I.P C.) was substantiated against certain prisoners and the Magistrate treated the case as one of unlawful assembly (s. 143 I P C., with the object of disposing of it summarily *held* that the Magistrate was not justified in trying the case summarily 24 W. R. 21 and 45 Offences should be truly described and not mitigated merely for the purpose of introducing a different jurisdiction or a lower scale of punishment by applying the summary mode of procedure, 5 P. R. 1858.

14. Magistrate cannot split up a charge so as to give himself jurisdiction.—The powers conferred upon Magistrates by this Chapter not to have been intended to give them the power of altering a charge brought against an accused person so as to bring the case within its provision but when a charge of a serious offence (s. 457, I P C)., one which the Magistrate is not competent to inquire into summarily is preferred it is the plain duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict, or acquit or commit for trial the person implicated. The procedure under this Chapter is to be followed only when an offence is plainly and directly one of those specified in this section, 23 W. R 29; 25 W R. 3; 5 C. W. N. 252; also 2 C. L. R. 374; *contra see* 6 N.-W. P. H. C. R. 254. But when a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences, 16 C. 715; 1 Bom. L. R. 653. The Bombay High Court in 13 B. 502 and the Madras High Court in 24 M. 675 have on revision refused to set aside proceedings of a Magistrate as without jurisdiction, in which he had convicted a person within his jurisdiction, although the evidence showed the commission of an offence triable only by the Court of Session. *See* also 2 M. L. T. 435 = 7 Cr. L. J. 315.

3. **Summary procedure not applicable to Presidency Magistrates.**—The provisions of this Chapter do not apply to trials before Presidency Magistrates, **Ratanlal 539.** But all offences under *the Cotton Duties Act* XII of 1896, are, by virtue of s. 26 of that Act, triable summarily by a Presidency Magistrate, the special form of procedure prescribed by that Act, not being affected by the Code. The procedure of Presidency Magistrates is regulated by s. 362.

4. **Proceedings of Magistrates not empowered void.**—If any Magistrate, not being empowered by law in that behalf, tries a case summarily, his proceedings shall be void. S. 530, cl. (*q*). *See* Note 9 under s. 15.

5. **Inspection of registers of summary trial.**—District Magistrates should satisfy themselves from time to time that the law regarding summary trials is properly observed and especially that Magistrates do not exceed their jurisdiction—a duty which may most conveniently be performed by an occasional and not infrequent examination of the registers of summary trials. *Wilkins*, 113.

6. **Trial summary only in respect of record.**—A summary trial is summary only in respect of the record of its proceedings and not in respect of the proceedings themselves which should be as complete and as carefully conducted as if they were recorded at length.—*C. P. Cr. Cir.*, Part II, No. 23.

7. **Framing of charge if necessary—misjoinder of charges.**—It does not follow that because a case is tried summarily, a charge is not necessary. No formal charge need be drawn up, but the accused must be called upon to answer to the particulars of the offence charged, whether the proceedings be summary or otherwise. The offence complained of must be so specified as to give the accused notice of what is charged against him. The same rules of law as apply to charges in warrant-cases must apply to the particulars set out in s. 263 in a summary record. It cannot be said that in a summary trial misjoinder of charges can be made without remedy, **16 C. W. N. 696 = 13 Cr. L. 224.**

8. **Formalities of this Chapter must be strictly observed.**—It is absolutely necessary that Magistrates who act under the provisions of this Chapter should most strictly observe the scanty formalities which it provides, **22 W. R. 28.** Where the Magistrate fails to ask the accused his plea, or fails to record such plea, if any, the conviction is bad, **9 C. W. N. 76.** Where the procedure is of a summary nature, the length and carefulness of the record and decision does not take it out of that category, **24 W. R. 66.**

9. **Nature of procedure adopted, to appear on the face of the record.**—Whenever the procedure of summary trial is observed, it must clearly appear on the face of the conviction that the case was dealt with as one of those which come under the purview of this section. In cases of theft, the real value of the property alleged to be stolen should be stated, **20 W. R. 17.**

10. **Jurisdiction determined by the nature of complaint.**—In a case where the accused were first charged under s. 395, I.P.C., and the proceedings were first conducted under this Chapter; but during the progress of the case the charge under s. 395 was lost sight of, and the accused were charged under s. 143, I.P.C., for being members of an unlawful assembly. *Held*, that as the complaint was on a charge of dacoity under s. 395, the Magistrate had no jurisdiction to try the case summarily, but should have inquired into it in a regular manner, **21 W. R. 89.** Whether a case is triable summarily or not, must be determined by the complaint, not by an estimate formed by the Magistrate (*e.g.*, of the property which the accused is charged with having stolen), after evidence has been recorded and such estimate cannot retrospectively warrant a mode of trial which was originally illegal, **25 W. R. 19.** Whether a case is to be tried summarily or not must be determined by *the offence complained of* and not by *the offence proved*. In **36 C. 67** it was *held* that the facts stated in the petition of complaint as well as the sworn statements of the complainant must be taken into consideration in determining whether a case is triable summarily. Where accused were charged with two separate offences of theft under s. 379 in which the value of the property stolen did not exceed Rs. 50, *held* that it was a case within s. 260 (1) (*d*), **21 A. L. J. 276.** *See* next Note.

11. **Magistrate acts without jurisdiction in reducing a grave offence into a minor offence so as to try it summarily.**—Where the complaint disclosed certain serious offences not triable summarily, but the Magistrate in examining the complainant recorded only certain statements and issued processes charging the accused with certain minor offences summarily triable and thereupon the accused were summarily tried and convicted. *Held*, that the conviction must be quashed as the Magistrate acted without jurisdiction. The offences complained of were not summarily triable and the examination of the complainant which was not properly recorded did not show that the offence complained of had not been committed, **29 C. 409.** Similarly, where the complainant laid a complaint under s. 392, I.P.C. (robbery with violence), and the Magistrate summarily

demand of toll under Act VIII of 1851, 22 W. R. 76. (*c*) *Maintenance cases under* s. 488, 20 C. 331; 14 W. R. 61. (*d*) *Breach of contract by artificers*—The inquiry to be made under s. 2 of Act XIII of 1859 (*Punishment for breach of contract by artificer, &c*) is not an inquiry into an offence as defined in this Code which may be tried summarily, 4 M. 234; 20 M. 233 at p. 233; 16 B. 363; 27 C. 131; 33 B. 22 and 33 B. 23; 6 S. L. R. 165; 14 Cr. L. J. 256; 5 P. R. 1912 = 13 Cr. L. J. 194, *contra see* 11 A. 262; 43 A. 281. *See* also 4 C. W. N. 231 and 253 where it was *held* that the breach is not an *offence* (*e*) *Offences under the Press Act*—The offence of keeping printing press, without making the declaration prescribed by s. 4 of Act XXV of 1867 cannot be tried summarily, 9 P. R. 1889. (*f*) *Preferring a false charge*—The trial of a complainant for an offence under s. 211, I P C., in a summary manner is altogether improper and open to serious objection. The proper course is for the Magistrate to institute proceedings for an offence under s. 211, I P C, or to grant sanction under s. 195 on an application by the accused, 28 C. 231. (*g*) *Theft of property valued at more than Rs* 50 21 W. R. 65; 20 W. R. 17 and 23 W. R. 19; 14 N. L. R. 190. (*h*) *Opium Act*, 1878, s. 9—An offence under s. 9 of this Act being punishable with one year's rigorous imprisonment cannot be tried summarily, 4 Bur. L. T. 271 = 13 Cr. L. J. 58. (*i*) *Cattle lifting*—This is a serious offence and ought not to be tried summarily, 6 S. L. R. 101 = 13 Cr. L. J. 783.

19-A. District Magistrate and Justice of the Peace in Bangalore cannot try European British subject summarily.—G O No 680/2-B, dated 19th March, 1912 which regulates the powers of Justices of the Peace beyond British India in regard to European British subjects does not confer power of trying European British subjects summarily on Justices of the Peace. A trial of an European British subject summarily is therefore illegal, 16 Cr. L. J. 773 (M.).

20. Under what circumstances summary trial undesirable though legal.—There are many cases in which though the summary procedure is strictly legal, it is inappropriate, and should therefore not be employed, such are

(*a*) cases which are *prima facie* likely in the event of a conviction to call for more severe punishment than can be awarded on summary trial as cases of cattle theft and cases against previously convicted offenders 30 Cr. L. J. 505 = A. I. R. 1929 All. 267 (2),

(*b*) cases which are *prima facie* likely to be long and complicated,

(*c*) cases arising out of disputes as to title,

(*d*) cases in which, for any particular reason, it is desirable that there should be a full record of the evidence for future reference, as cases in which Government servants of any rank are concerned as accused persons.—*C. P. Cr Cir., Part II, No* 23.

(*i*) *Government servants.*—Summary procedure though legal is most inappropriate in cases in which Government servants, no matter what their rank, are concerned as accused persons, 15 P. W. R. 1911 = 184 P. L. R. 1911 = 12 Cr. L. J. 143. Thus, where a case is complicated and a conviction may entail further serious consequences as for instance, where the charge is under s. 202, I P C., against a person who is a *Talukdar Kukurni*, summary trial is not the procedure which a Magistrate, in his discretion, should use, Rataelal 778 and 784. Similarly, where a Head Constable of Police of many years service was charged with criminal intimidation with a view to prevent a person from giving evidence against serious offenders and the District Magistrate tried the case under this section, *held* that the Magistrate did not exercise a sound discretion in trying the case summarily and depriving the accused of the privilege of an appeal, 6 M. 356.

(*ii*) *Complicated cases.*—Where a great deal of correspondence has to be gone into and the case is by no means of a simple character it is not advisable to try the case summarily, 33 A. 173. A Magistrate errs in adopting a summary procedure in case involving the decision of questions of title and production of documentary evidence especially when such a procedure has the effect of practically preventing either party from prosecuting the case on appeal, 13 Cr. L. J. 771 (Sindh).

(*iii*) *Trial lasting long time—(six weeks) is not summary*—Where a case of theft (s. 379, I P C.) was tried summarily, but the proceedings lasted from the 20th March to 12th June, and in the course thereof a local inquiry had to be made, and where the value of property stolen was above Rs. 50, *held* that this was not a case which should have been tried summarily, Ind. Jur., Nov. 1891, p. 707; 1891 A. W. N. 183; *dissented from* in 1892 A. W. N. 30. Summary trial implies speedy disposal of a case which can be tried and disposed of *at once* *See* also 15 W. R. 65.

15. Splitting up permissible only when some of the component parts unbelievable.—No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself the summary jurisdiction. If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggeration and not to be believed. Therefore, a Magistrate when he has before him a person charged with having been armed with a deadly weapon, while a member of an unlawful assembly, is not at liberty to disregard that part of the charge which charges the prisoner with having been armed with a deadly weapon, and so to give himself jurisdiction to try the case summarily and then, by inflicting a sentence of imprisonment not exceeding three months, to deprive the prisoner of his right of appeal, **4 C. 18 = 3 C. L. R. 41**; also **1 C. L. R. 431**; **2 C. L. R. 374**; **27 C. 983**; **11 C. 236**; **23 W. R. 19**; **21 W. R. 89**; **5 C. W. N. 372**; **6 C. W. N. 253.** But if during inquiry under ss. 147 and 324, I.PC., the Magistrate after hearing evidence, is of opinion that an offence under s. 323, *i.e.*, one triable summarily, is committed, he may adopt the summary procedure, **22 M. 459** which *dissents* from **4 C. 18.** *See* also **26 C. W. N. 831.**

16. Procedure when summary offences charged with other offences.—Where an accused person is charged with offences, one of which is triable summarily, and the other not so triable, it is not open to a Magistrate to discard the latter charge and to proceed to try the case summarily, **11 C. 236.** The facts that the Magistrate had jurisdiction over both offences, and the accused is not prejudiced by being tried only for the lesser offence, does not meet the objection that the prejudice lies in the different procedure which dispenses with a formal record of the evidence and a formal judgment and abridges the privilege of appeal, **5 P. R. 1888.**

17. Complaint including charge not summarily triable, does not necessarily oust summary jurisdiction.—The mere circumstances of a complaint charging an accused person with offences not summarily triable along with other offences so triable, would not necessarily oust the summary jurisdiction of a Magistrate under this section. Whether a complaint affords sufficient grounds for a summary trial, or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. *Per* MAHMOOD, J., in **10 A. 55.**

18. Offences triable summarily.—(*a*) *Under Bengal Abkari Act.*—(*a*) An offence under s. 49 of *Bengal Abkari Act* XXI of 1856, can be tried summarily by a Magistrate under this section; the confiscation provided for by s. 49 is merely a consequence of the conviction, not forming part of the punishment for the offence, **3 C. 366 (F.B.) = 1 C. L. R. 412** *overruling* **22 W. R. 43** and **23 W. R. 33.**

(*b*) *Cotton Duties Act* II of 1896.—All offences against *Cotton Duties Act* (No II of 1896) may be tried summarily by a District Magistrate or Presidency Magistrate or Magistrate of the first class. These offences are mentioned in s. 25 of the said Act, and s. 26 of Act II of 1896.

(*c*) *Offences under Municipal Acts, e.g.*—Proceedings before a Magistrate for the recovery of Municipal cesses and taxes, under s. 84 of Bombay Act VI of 1873 as amended by Bombay Act II of 1884, is a criminal prosecution, and must be conducted in the manner prescribed by this Chapter, **17 B 731.**

(*d*) *The Indian Railways Act* IX of 1890, s. 121, **1902 A. W. N. 24.**

(*e*) *Indian Forest Act*, 1878.—*See* s. 65 of Act VII of 1878.

(*f*) *Indian Companies Act*, 1882.—That the Directors of a Joint Stock Company did not file the balance sheet with the Registrar of Joint Stock Companies. An offence under s. 74 of Act VI of 1882 may be tried summarily, **35 A. 173.**

(*g*) *Mischief combined with theft.*—A charge of mischief, even if combined with theft, is triable summarily under this section, **25 W. R. 5.**

(*h*) *Criminal trespass and mischief.*—A person may be tried summarily for criminal trespass and mischief, unless there is a *bona fide* claim of right depriving the Magistrate of jurisdiction, **10 C. 408** *following* **21 W. R. 38.**

(*i*) *Stamp Act.*—An offence under s. 75 (*a*) for failure to grant a receipt for money paid, though demanded, **Weir I, 906.**

19. Offences not triable summarily.—(*a*) *Where there is a previous conviction.*—The offence of theft under s. 379, s. 380 or s. 381, I.P.C., when combined with a charge of a previous conviction of an offence punishable under Chap. XVII, I.P.C., is not triable summarily, **Weir II, 324**; **1 Bur. S. R. 386.** (*b*) *Charge of an illegal*

(*b*) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month "with or without fine," *

(*c*) abetment of any of the foregoing,

(*d*) an attempt to commit any of the foregoing offences, when such attempt is an offence.

Notes.—1. Section 277—Fouling the water of a public spring as reservoir 278—Voluntarily vitiating the atmosphere so as to make it noxious to the health of the neighbourhood. 279—Rash driving or riding on a public way 285—Negligent conduct with respect to any fire or combustible matter 286—Negligent conduct with respect to any explosive substance. 289—Negligence with respect to any animal. 290—Commission of a public nuisance. 292—Sale, etc., of obscene books. 293—Having in possession obscene books for sale or exhibition 294—Singing obscene songs to the annoyance of others. 323—Voluntarily causing hurt. 334—Voluntarily causing hurt on grave provocation. 336—Rashly or negligently endangering human life or the personal safety of others 341—Wrongful restraint. 352—Using criminal force otherwise than on grave provocation. 426—Mischief. 447—Criminal trespass.

2. Conservancy clauses of Police Acts.—As to conservancy clauses, see *the General Police Act* V of 1861, s. 34 and s. 61 of *the Bombay Police Act*, No IV of 1890 Offences under s. 48 of *the Madras Police Act* (ss. 3 and 4 of *the Towns Nuisances Act*) are within the cognisance of a Bench of Magistrates coming under cl. (*b*) of this section, **13 M. 142.**

3. Offences a Bench of Magistrates may try—A Bench of Magistrates cannot try any offence, except those mentioned in s. 260 and this section, **21 W. R. 12; 9 C. 96.** They cannot take proceedings *e g* for *security to keep the peace*

4. Summary powers of Benches in Madras.—In Madras any Bench of Magistrates exercising powers of the first or second class has been empowered to act under this section. *Fort St. George Gazette*, 1891 Pt. I p 279

262. (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases except as hereinafter mentioned

Procedure for summons- and warrant cases applicable.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter

Limit of imprisonment.

Notes.—1. Procedure in summary trial of warrant cases.—To a warrant-case tried summarily, the rules about warrant-cases apply under this section. In such a case though a formal charge need not be framed, the accused person cannot be called dilatory, if he delays to name his witnesses until he has heard the evidence for the prosecution and found that the Magistrate considers the evidence a substantial basis for charging him **Ratanlal 768.** In a warrant-case tried summarily the Magistrate ought to grant an adjournment if desired by the accused to enable him to summon the witnesses for the defence under s. 257 unless the application is made for purposes of vexation or delay or for defeating the ends of justice **5 L. B. R. 20 = 9 Cr. L. J. 583.**

2. Appeal.—An appeal lies under s. 407 from a conviction by a Bench of Magistrates invested with second- or third-class powers, **9 M. 34,** but not from a Bench with first-class powers, **9 C. 96.**

3. High Court can enhance sentence up to two years.—When an accused has been summarily tried the High Court as a Revision Court can enhance the sentence up to two years, *i.e.*, the limit to which a first class or Presidency Magistrate can pass sentence, **Bom. H. C. Cr. Rul., 30th July, 1883 (F.B.).**

4. Limit of imprisonment in summary trials.—A sentence of six months rigorous imprisonment in a summary trial is illegal as no sentence exceeding three months can be passed in such trials, when an adequate sentence cannot be passed, the case ought not to be tried summarily, **4 L. B. R. 333 = 9 Cr. L. J. 23.**

* Words in inverted commas were added by Act XVIII of 1923.

(*iv*) *Deaf and dumb accused.*—A deaf and dumb man ought not to be tried summarily, **Bom. L. R. 849 = 4 Cr. L. J. 444.**

21. Impropriety of summary trial where the Magistrate takes cognisance on his own personal knowledge.—The holding of a summary trial upon inadequate materials by a Magistrate who was himself a principal witness, and without allowing the accused time to consider their defence and the passing of a non-appealable sentence is illegal, **3 C. W. N. 341.** In another case where the petitioner was convicted of an offence under s. 6 of Act XI of 1890, the conviction being based on the trying Magistrate's own observation of the condition of certain houses belonging to the petitioner and on no other evidence. *Held*, that the conviction was *illegal and that the omission to follow the procedure laid down in ss. 190 (e) and 191 cannot be cured by s. 537* and that the brevity permitted in a summary trial does not mean that there should be no trial at all or that an accused can be heavily fined at a Magistrate's discretion on a personal knowledge, notwithstanding that the law gives the accused the right of demanding that the case should be tried by another Court, **1905 P. L. R. 31 = 2 Cr. L. J. 187.** A District Magistrate in a private conversation with his assistant and the Police Superintendent learnt that some persons were committing acts which, in their opinion, endangered the safety of a large public embankment. He directed some inquiry to be made, and followed up that order by personally visiting the place next morning, and found that they had cut away a portion of the embankment for the purpose of erecting a house and extending a mango garden, and thereby committed mischief under s. 425, I.P.C. He tried them summarily and sentenced them to two months' rigorous imprisonment each. *Held*, that as it did not appear that any information was laid by any person against the accused, and that as the case was commenced without complaint and at the instance of the Magistrate himself, he should not have dealt penally with the case and considering the important nature of the case according to the Magistrate's own view he should not have acted under the summary procedure, **24 W. R. 69.** *See* also **1900 P. L. R. 52,** where the Punjab Chief Court interfered with the severe sentence of 8 days' rigorous imprisonment awarded on a summary trial by a Cantonment Magistrate for a trivial offence. A Deputy Magistrate being also the Chairman of a Municipality, without issuing process or making a record of proceedings or dismounting from a pony on which he was riding, convicted and fined an inhabitant of a town, who admitted that he had raised the level of a road within the limits of the Municipality which was considered by the Magistrate to amount to the offence of causing an obstruction in a public way. *Held*, the Magistrate's procedure was illegal, and the conviction should be set aside, **15 M. 83,** presumably because he could not have kept the record contemplated by s. 263 while riding on a pony.

22. Record must show that charge was explained to the accused.—All Magistrates trying cases under Chapter XX must be careful not only to state the charge to the accused, but to explain it to him. The record must show that this has been done, and must give the answer as nearly as possible in the words used, **1 Bur. S. R. 594.**

23. Nature of re-hearing under sub-section (2).—The re-hearing must be *de novo*, as the proceedings hitherto are void under s. 530 (*q*), **23 W. R. 3.**

24. Compensation is awardable in summary trials.—The provisions of s. 250 are applicable to summons-cases tried summarily, **11 M. 142.**

25. Interpretation of cl. (*a*)—Clauses (*b*) to (*k*) (of s. 200 of Act X of 1882) being precisely expressed are not to be governed by cl. (*a*) but may be given their full effect, **Ratanlal 600.**

26. Revision.—When the record does not show that any evidence was taken to prove the ingredients of the offence charged, the High Court has power to set aside the conviction even in a summary trial, **35 A. 136.** In this case it was *held* that a conviction under s. 188, I.P.C., could not be set aside as it was not proved that the order of the public servant was duly promulgated.

Power to invest Bench of Magistrates invested with less power.

261. The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences :—

(*a*) offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504 ;*

* S. 504 added by Act XVIII of 1923.

section, 3 L. B. R. 3 = 2 Cr. L. J. 375. Where in such a case the record omitted to show what account, if any, the accused at the time of his arrest gave of himself and no reason was given for considering such amount to be unsatisfactory, the conviction was set aside, 12 Cr. L. J. 280 (Bur.).

2. Record must be sufficiently exact and sufficiently full to enable the Judges of the Revisional Court to say whether the law has been complied with or not on the points to be recorded.—The three things required under this section to be recorded, *viz*, (*i*) the offence charged, (ii) the offence, if any, proved, and (iii) the reasons for convicting must be recorded and recorded in such a way as to enable the Court of Revision to say yes or no from within the four corners of the record itself whether the offence charged is an offence in point of law and whether the reasons for conviction are good and sufficient reasons, 10 C. W. N. 79 = 2 C. L. J. 565 = 3 Cr. L. J. 178; Ratanlal 778; 26 A. L. J. 109 = 29 Cr. L. J. 265 (1), 49 All. 131.

3. Brief reasons for conviction should be recorded.—Although a Magistrate is not required to record any evidence, he should, in recording his reasons for the conviction state them, so that the High Court, on revision, may judge whether there were sufficient materials before him to support the conviction. Where they were not so stated, the High Court on motion, set aside the conviction, 6 C. 579 *followed* in 13 B. 97; 3 C. W. N. 281; 6 C. W. N. 40; 2 S. L. R. 3; 1899 A. W. N. 81; 10 A. L. J. 231 = 13 Cr. L. J. 703 'A Magistrate may be very well satisfied in his own mind of the guilt of a person who has been brought before him but what he should do, and what we must take care he does, is to leave upon records some brief but intelligible reasons for the conclusions at which he has arrived, so that our superintendence of his proceedings may not be defeated.'—*Per* STRAIGHT, J, in 1883 A. W. N. 114; 1885 A. W. N. 213; 1888 A. W. N. 183, 7 P. R 1889; 21 A. 189; 16 O. C. 357 = 14 Cr. L. J. 594. *See* 31 C. 983; 3 L. B. R. 3. 'I think it distinctly desirable that Magistrates should set out under the column reserved for the purpose so much of the reasons that have influenced them as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded and that, while this should be recorded with brevity the brevity should not be such as to tend to obscurity There is no question in my mind from the language used by the Legislature that the intention was that in case of this kind the procedure should be summary and the record should contain the barest particulars. I am therefore not prepared, if I find compliance with these requisites, to interfere and to lay down that facts and reasons should be set out at such length as to make the Court of Revision more or less a Court of Appeal so far as facts are concerned The law intended the procedure to be summary, and it is not for this Court to lay down otherwise than the law has directed *Per* KNOX J, 21 A. 189 at p. 191; 9 S. L. R. 69 = 16 Cr. L. J. 713 *see* Note 8 to s. 260. *See* however, 46 M 253.

But in 26 Bom. L. R. 1236 it is held that the mere omission to comply with the provisions of cl (4) of s. 263 on the part of a Bench of Magistrates, amounts to an irregularity which can be cured under s 537 especially where the case is a non-appealable one and there is clear evidence justifying the conviction.

4. Record in appealable cases.—In case where no appeal lies, a Magistrate is bound to record a brief statement of his reasons for convicting the accused 8 C. 195. But he need not record the evidence of witnesses to justify his order, 1905 A. W. N. 143 = 2 Cr. L. J. 336, where 27 C. 450 is *distinguished*. But where a Magistrate of the first class passes a *sentence of imprisonment for one month* and fine, his order is *appealable* He cannot, therefore, in such a case make up his record in the manner prescribed by this section, 2 C. L. R. 511.

4-A. Record in appealable cases.—Section 253 of the Code applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no exemption in a case tried summarily in which an appealable sentence is passed, 27 C. W. N. 923.

5. Refusal to hear evidence is illegal—Recording evidence is not same as hearing evidence.—This section does not excuse a Magistrate from hearing the evidence of all witnesses. It excuses him from recording the evidence of any of the witnesses. But it is an elementary point that recording evidence is not the same as hearing evidence. In all criminal cases, if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence, an order of acquittal made without hearing evidence offered by the complainant is clearly illegal, 33 C. 931.

6. Omission may be remedied subsequently.—An omission by a Magistrate to comply with the requirements of cl. (A) of this section, in a case in which no appeal lies may, in some cases, be remedied at a subsequent period, 6 C. L. R. 273. But where no reasons are given, it was recently *held* in 9 C. W. N. 75 that the defect cannot be cured by the explanation of the Magistrate sent to the High Court in pursuance of a rule issued on him, 26 Bom. L. R. 1236; but *see* 46 M. 253.

5. **Limit of three months applicable to substantive sentence only.**—The limit of three months mentioned in the last para. applies only to substantive sentences of imprisonment and not cases where simple imprisonment is ordered as a process for enforcement of fine, **6 A. 61.**

6. **Solitary confinement.**—It is not illegal to impose solitary confinement as a part of the sentence in a case tried summarily. The section does not interfere with a Court's power to order solitary imprisonment under s. 73, I.P.C., or with similar powers given by s. 32, **6 A. 83.**

7. **Security for keeping the peace.**—Magistrate trying summarily is competent to require security for keeping the peace under s. 106, **1886 A. W. N. 181.**

8. **Fine of any amount may be imposed.**—There is nothing in Chapter XXII which limits the amount of fine that may be imposed in a summary trial, **35 A. 173.**

Records in cases where there is no appeal.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Local Government may direct the following particulars:—

(*a*) the serial number;

(*b*) the date of the commission of the offence;

(*c*) the date of the report or complaint;

(*d*) the name of the complainant (if any);

(*e*) the name, parentage and residence of the accused;

(*f*) the offence complained of and the offence (if any) proved, and in cases coming under clause (*d*), clause (*e*), clause (*f*) or clause (*g*) of sub-section (1) of section 260 the value of the property in respect of which the offence has been committed;

(*g*) the plea of the accused and his examination (if any);

(*h*) the finding, and in the case of a conviction, a brief statement of the reasons therefor;

(*i*) the sentence or other final order, and

(*j*) the date on which the proceedings terminated.

Scope of the section.—Sections 263 and 355 of the Cr. Pro. Code must be read together. If the Magistrate is unable at the commencement of the trial to determine whether the proper sentence to be passed should be an appealable one or not he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. But if he can at this stage determine that the sentence will be, in any event, non-appealable, he need not record the evidence. If, however, he actually does so, the notes of the evidence form part of the record of the case and cannot be destroyed by him. Where a Magistrate destroyed such record the High Court being unable to form an opinion of the propriety of the conviction set it aside, **48 C. 218.**

Notes.—1. Record must be explicit about the nature of the offence and its ingredients.—The accused has a right to be informed of the precise nature of the offence with which he is charged. The record should state the offence clearly and distinctly and should be complete in all particulars, **1882 A. W. N. 59.** A bare reference to the section of the Penal Code is not sufficient In a summary trial of a summons-case the Magistrate must be careful not only to state the charge to the accused, but to *explain* it to him, **1 Bur. S. R. 594.** The facts found by the Magistrate must show what offence has been committed by the accused, **3 C. W. N. 281; 7 P. R. 1887; 5 P. R. 1889.** Where after a summary trial the petitioner was convicted of being in possession of a bundle of clothes and there was no evidence to show he had any guilty knowledge, the conviction was quashed on the ground that the proceedings did not disclose any offence against the petitioner. Further, it was *held* that the Magistrate's record in summary trial however brief, must show the necessary ingredients of the offence charged. It is not necessary even where an appeal lies, for a record of evidence to be made, but under s. 264, the substance of the evidence must be embodied in the judgment as well as the particulars referred to in that

265. (1) Records made under Section 263 and judgments recorded under section 264 shall be written by the presiding officer, either in English or in the language of the Court or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother tongue.

Language of record and judgment.

(2) The Local Government may authorise any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings

Bench may be authorised to employ clerk.

(3) If no such authorisation be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment

Note.—A separate judgment may be recorded, even though the sentence be unappealable.

When the judgment of a Bench of Magistrates is prepared by the presiding officer it is sufficient if he alone signs it.

But in a case the presiding officer wrote the judgment and signed and delivered it after the other members of the Bench had left the Court, *held* that the judgment was not proper and the conviction was set aside **53 M L J, 578.**

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

Notes.—1 Application of Chapter to trials under Criminal Law Amendment Act.—The provisions of this Chapter are applicable to the trials held under the *Indian Criminal Law Amendment Act* XIV of 1908. *See* s. 14 (2) —"When holding a trial under s. 11 the special Bench shall apply the provisions of Chap. XXIII with such modifications as may appear necessary to adopt those provisions to the case of a trial before the High Court without a jury" But s. 14 (1) of that Act lays down that the provisions of the Code shall not apply to proceedings thereunder in so far as they are inconsistent with the special procedure prescribed in that Act.

2 Application to Courts of Session in Burma and Baluchistan.—As to Courts of Session, in (1) Upper Burma *see* Reg V of 1892, Schedule, s. 2, but as to European British subjects, *see* s. 22, *ib* and in (2) British Baluchistan, *see* Reg. VIII of 1896 Schedule, s. 7.

A—Preliminary

266. In this Chapter, except in sections 276 and 307, and Chapter XVIII the expression "High Court" means a High Court of Judicature established[1] * * * under the Indian High Courts Act, 1861,[2] (or the Government of India Act 1915, and includes[3] (the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sindh and)[4] * * * [5] * * * such other Courts as the Governor General in Council may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this Chapter[6] (and of Chapter XVIII)

"High Court" defined.

Note.—*See* 4 (*j*) as to the meaning of "*High Court*" when used in this Code elsewhere than in this Chapter The words in brackets were substituted for the words "*Court of the Recorder of Rangoon*" by the *Lower Burma Courts Act* VI of 1900, s. 47 and first Schedule

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1 The words "or to be established" were omitted by s. 2 and Sch. of the Amending Act, 1916 (XIII of 1916)

2 Three words and figures were inserted by s. 2 and Sch. of the Amending Act, 1916 (XIII of 1916).

3 Three words have been inserted by Act XII of 1923.

4 The words "the Chief Court of the Punjab" were repealed by Act XVIII of 1919.

5 The words "the Chief Court of Lower Burma and" were repealed by Act XI of 1923.

6 Three words and figures were added by Act XVIII of 1923.

7. Accused must be examined and plea recorded.—There must be examination of the accused under s. 342 in all warrant-cases. S. 263 does not give the Magistrate discretion whether he will examine the accused or not. The words 'if any' do not apply to warrant-cases, **41 C. 743.** Where a Magistrate altogether omitted to record the plea of the accused, the conviction was set aside, **9 C. W. N. 76.**

8. When deposition may be proved by oral evidence.—In a summary trial the Magistrate need not record the evidence and where no obligation is laid upon the Judge or presiding officer to reduce depositions or statements to writing, they may be proved by persons who heard them made, in order to establish the fact that they were made, **Ratanlal 334.**

9. Record must be written by Magistrate.—The record in non-appealable cases must be written by the Magistrate. He is not authorised, in such cases, to depute that duty to a clerk, nor to affix his signature to the record or judgment by a stamp, **6 M. 396 ; 8 A. 293.**

Record in appealable cases.

264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

(2) Such judgment shall be the only record in cases coming within this section.

Notes.—1. Contents of judgment in appealable cases.—The judgment required to be drawn up in *appealable cases* under this section is to contain particulars mentioned in s. 263, and something more, *viz.*, the substance of the evidence on which the conviction was held. But it is not to be entered in the *Register of non-appealable cases*, and is evidently intended to be in a separate form, so that, when necessary, it may be submitted to the Court of Appeal, *Wilkins*, 113. A judgment which does not satisfy these particulars is liable to be set aside, **Ratanlal 725.** The substance of the evidence is a matter quite distinct from the facts which may be considered as proved by the evidence. It should also be recorded in such a way that the Court of Appeal will be able to form an opinion whether the evidence is sufficient to support a conviction. When the record does not fulfil these requirements a conviction cannot be properly upheld on appeal, **4 L. B. R. 338 = 9 Cr. L. J. 23**; *see* also **30 Bom. L. R. 954.**

2. Practice of mutilating registers is highly objectionable and illegal.—In appealable cases a Magistrate should not make the record required by this section as an entry in the register prescribed by s. 263 and then, on the Appellate Court calling for the record of the trial, cut out and send up the portion of the register containing this entry. The practice of mutilating official registers is open to the gravest objection, and is strictly prohibited. There is no warrant for it in law, *Wilkins*, 113.

3. General substance of evidence sufficient.—A Magistrate is not bound to record the substance of every separate deposition, but to state generally what is the substance of the witness's evidence, **25 W. R. 6.**

4. Appellate Court must quash conviction if evidence not sufficient.—When a Sessions Judge on appeal is unable, even with the aid of the Magistrate's finding to form an independent opinion as to the guilt of the prisoners, and when the evidence which came before him is not sufficient to satisfy him reasonably that the prisoners were rightly convicted, *held* that he ought to have acquitted them, **11 B. L. R. 33 = 20 W. R. 13**; *contra see* **1 A. 680.** There, under similar circumstances, it was *held* that the Court should not have quashed the conviction merely by reason of such defect, but if it found impossible to dispose of the appeal because of such defects, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose to have ordered re-trial with that view. As to when a re-trial is to be ordered, *see* **2 P. R. 1874.** *See* s. 537 inserted for the first time in the 1882 Code after the Rulings above.

5. Judgment must be written by Magistrate and not by clerk.—The judgment in appealable cases must be written by the Magistrate. He is not authorised to depute that duty to a clerk, nor to affix his signature to the record or judgment by a stamp, **6 M. 396.**

6. Record to be made up before passing sentence.—The record should be made up at the time of the trial and not at its close from memory or from some rough note, **15 M. 83.**

7. Notes of evidence made by the Magistrate.—In a summary trial the Magistrate can destroy his notes of evidence, **49 All. 562**; under this section the judgment is the only record in cases which are tried summarily and in which an appeal lies. The rough and incomplete notes of evidence taken by the Magistrate cannot and should not be attached to the record. **29 Bom. L. R. 710.**

Local Government may order trials before Court of Session to be by jury

269. (1) The Local Government may, [1]* * * * * * by order in the *Official Gazette* direct that the trial of all offences or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion, so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Sessions, with the aid of the jurors as assessors for such of them as are not triable by jury

Notes.—1. Trial of European British subject.—As regards European British subjects this section must be read subject to the provisions of s 451

2. Interference with right of trial by jury is not ultra vires of the Indian Legislature.—The Code in so far as it interferes with the mode of trial by jury is not *ultra vires* under the proviso to s. 22 of the *Indian Councils Act* (24 and 25 *Vict., c* 67) *King Emperor* v. *Kartik Chundra Dutt followed*, *Ameer Khan* **6 B. L. R. 392** and **459** *approved* **37 C. 467** at **pp. 483** and **516-517.**

3. Particular classes of offences.—Soon after the Shanar riots in Tinnevelly the Madras Government notified that whereas by orders previously made, the trial of persons charged with certain offences should be by jury in the Tinnevelly district and that in the Anti Shanar riots of Madura-Tinnevelly in 1899 certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith the Governor in-Council with the previous sanction of the Governor-General in Council directed under this section that the previous orders be revoked as regards the persons referred to and that such persons should be tried with the aid of assessors and not by jury Certain persons having been so tried for offences under ss. 148 454, 395 and 323, I P C., were convicted and sentenced and on appeal it was contended that the *class of offences* referred to in this section, must be ascertained according to some classification recognised by the Legislature—such as is found in the Penal or Procedure Codes, *e g.*, offences against the State, against the person etc , or bailable offences, cognisable offences, etc., *held*, that there was no reason shown for putting this narrow construction on the words "*class of offences*" But offences might be classified according to the persons who committed them *i e*, the offenders or according to the person or property against whom or which the offences are committed or in regard to the particular occasion in connection with which they are committed. The fact of offences having been committed by old offenders or members of criminal tribes, or against women or against public property would afford reasonable ground for a classification and so would offences connected with an outbreak directed against a certain section of the community and that hence the offences connected with the particular outbreak had been rightly treated as a "*class of offences*" and that it was competent to the Madras Government to revoke the previous notification so far as it related to that class **23 M. 632.**

4. Procedure at a trial where some of the charges are triable by jury and some with aid of assessors.—The accused were tried by a jury for an offence under s. 335 I P C., and by the Judge with the aid of the same juror as assessors for offences under ss. 330 and 337, I.P C. Exception was taken to the conduct of the trial in that the accused were prejudiced by the simultaneous disposal of a charge triable by a jury and of charges triable with the aid of [illegible] s. 269 (3), **18 Cr. L. J. 717 (M.)** [illegible] the other was not triable by ju[illegible] Court. *Held*, that he should have first recorded the opinion of the jury as assessors regarding the charge not triable by jury and the High Court could treat the verdict on the latter charge as valid. **Ratanlal 600.** Again, where at a trial by jury for an offence under s. 337, I.P C., and with the aid of assessors for an offence under s. 307, I.P C., the accused were acquitted of these offences but the Judge convicted the accused of the offence of causing hurt by a dangerous weapon under s. 324, I.P C., without requiring the jury as assessors to give their opinion

[1] The words "with the previous sanction of the Governor-General in Council" were omitted by Act XXXVIII of 1920

Trials before High Court to be by jury.

267. All trials under this Chapter before a High Court shall be by jury; and notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Court Act, 1861, *(or the Government of India Act, 1915), the trial may, if the High Court so directs be by jury.

Notes.—1. Trial in case transferred to High Court.—Where, under s. 526 or s. 449, a case is transferred for trial, before the High Court in its original criminal jurisdiction and no order under this section is made to the contrary the trial shall be with the aid of assessors, if that is the mode of trial in the Court from which the case is transferred.

2. **No jury in trials under the Indian Criminal Law Amendment Act XIV of 1908.**—It is enacted by the said Act, s. 11 (2) that no trial under that Act before the Special Bench of the High Court shall be by jury. *See* Appendix XII.

Trials before Court of Session to be by jury or with assessors.

268. All trials before a Court of Session shall be either by jury, or with the aid of assessors.

Notes.—1. Trial in Sessions Court ordinarily with assessors.—Under this section in the absence of any notification under s. 269 a trial in a Court of Session must be with the aid of assessors. **18 P. R. 1898.**

2. **Distinction between trial by jury and trial with assessors.**—A trial by jury or with the acid of assessors begins only when the charge has been read and the accused claims to be tried, **15 B. 514.** *See* also **25 B. 694; 21 A. 106,** and **32 M. 220.** In a trial by jury, the jury is the real tribunal and is aided by the Judge and in certain matters directed by the Judge. Whereas in a trial with the aid of assessors the Judge is the sole tribunal aided by each of two assessors. Though assessors do not form *members of the Court*, yet it is mandatory that a trial with the aid of assessors should commence with at least two assessors and at least one assessor must attend the trial throughout and give his opinion. The jury form a tribunal or body with a foreman and the verdict is the verdict of the body and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body. But in the case of a trial with the aid of assessors, the assessors do not form a body and each acts and expresses his opinion individually, and the Judge is to invite the opinion of each separately and record it. The Judge is the sole Judge of law and fact and the responsibility of the dscision rests solely with him, though in the decision of the case he is expected to take into consideration the opinion of each assessor. *Per* BHASHYAM AYYANGAR, J., in **24 M. 523** at **p. 536.** While the individual opinion of each assessor is taken, the individual opinions of the member of a jury are never intended to be disclosed, **36 M. 585.** *See* also **13 A. 337** and **6 C. W. N. 715.**

(*i*) *Difference in procedure.*—The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors, except as to the summing up in the case of the former, and the manner in which the verdict in the former and the opinion of the assessors in the latter are respectively taken, **38 B. 423.**

(*ii*) *Judge's position therein.*—In a trial by jury, the Sessions Judge is exactly in the same position as the jury in dealing with the evidence properly given before him, and he is bound to confine his attention solely to that evidence, **27 C. 295.** In a trial with assessors, the assessors are, no doubt to assist the Judge but they have no power to appreciate the evidence so as to bind the Judge. The opinion of the assessor must have, no doubt, regard paid to it but after all it is the Judge who has to decide the case on the facts as well as law. His is the final responsibility, **14 Bom. L. R. 710 = 1 Bom. Cr. C. 169 = 13 Cr. L. J. 677.**

3. **Evidence ought not to be taken in the absence of juror and assessors.**—When evidence is taken after discharging assessors, it is recorded *coram non judice, i.e.*, before a tribunal which has no authority to record it and conviction based upon such evidence will be reversed, **15 A. 136; 7 Bom. L. R. 978.** *Section* 537 does not cover such an irregularity. In only one instance is a Court of Session authorised to record evidence in the absence of jury or assessors, and that is when additional evidence is called for by the Appellate Court under s. 428, *see* **43 A. 226.**

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* The words and figures "or the Government of India Act, 1915," were inserted by Act XIII of 1916.

with s. 75, I P C., the punishment awardable is death, transportation for life or imprisonment for a period of ten years or upwards, and also all abetments or attempts to commit any of the offences above described are to be tried by jury

(*d*) **United Provinces and Oudh.**—Trial by jury is extended to Allahabad, Benares and Lucknow in the case of the following offences under the Indian Penal Code —(1) Kidnapping and abduction—Sections 363 to 369 (both inclusive), 372 and 373, I P C, (2) Rape—Section 376, (3) Theft—Sections 379 380, 381 and 382, (4) Robbery and dacoity—Sections 392 to 395 (both inclusive), 397, 398, 399 and 401, (5) Criminal misappropriation—Sections 403 and 404, (6) Receiving stolen property—Sections 411 to 414 (both inclusive) (7) Mischief—*Sections 428 to 432 (both inclusive) 434 435 436 and 440*, (8) *House-trespass—Sections 448 450 to 462 (both inclusive)*, (9) Offences relating to marriage—Sections 493 to 498 (both inclusive), (10) Abetments of and attempts to commit any of the abovementioned offences—Chapters V and XXIII of the Indian Penal Code

(*e*) **Burma.**—Trial by jury has been extended to Rangoon town, district of the Pegu division and the Moulmein sub-division of the Amherst district. See *Burma Gazette* 1900 Part I p. 321 for notification issued for the Tenasserim Division.

(*f*) **Assam.**—See *Assam Gazette* 1903, Part II, p. 170, for the notification for the Assam Valley Sessions Court.

Trial before Court of Session to be conducted by Public Prosecutor

270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor

Notes —1. Public Prosecutor.—For definition, *see* s. 4 (*t*). It is highly undesirable for the prosecution in Sessions Court to be conducted by officers of Police. **13 W. R. 18.** *See* Chap. XXXVIII for other provisions dealing with Public Prosecutors.

2. Position of private pleader engaged by party.—If any private person instructs a pleader to prosecute in any Court any person in a case of which the Public Prosecutor has charge, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions—section 493. The Public Prosecutor may avail himself of the services of the pleader engaged by the complainant, **11 B. H. C. R. 102** and the special authorisation of the District Magistrate, is not necessary **23 W. R. 14.**

3. Omission in the appointment of Public Prosecutor.—This section can only be reasonably constructed as directory The absence of a Public Prosecutor in a particular case before a Sessions Court whether by reason of an omission on the part of the Government or of the District Magistrate, is at most an irregularity which is capable of being cured by s. 537 **35 P. R. 1887.**

4 Private Prosecutor cannot conduct Prosecution.—In a criminal prosecution on indictment the prosecutor has no right to address the jury or to conduct the prosecution *R* v *Brice* **2 B.** and **Ald. 606**, *R* v *Gurney* **11 Cox. 414.**

B—Commencement of Proceedings

Commencement of trial

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried

Plea of guilty

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon

Notes.—1. Court to be careful to see that the charge has been fully explained.—*See* s. 341 for procedure when accused does not understand proceedings. When arraigning an accused person and before receiving his plea, the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead, **5 C. 826; Weir II, 336** and **339; 3 Bom. L. R. 439.** Simply reading out the charge to the prisoner is not sufficient, but it must be explained to him. Where the charge is not explained the conviction will be quashed, especially in cases of trial for life, **9 M. 61.** *See* also **13 A. L. J. 442.**

with reference thereto and recording such opinion as required by s. 309. *Held*, that the conviction was bad, **Weir II, 334.** In **9 Bom. L. R. 1057 = 6 Cr. L. J. 236,** the accused were tried by the Judge with jury on charges, under ss. 304 and 325 of the Penal Code. The jury found the accused guilty with respect to the charge under s. 325 : with this verdict the Judge disagreed, and he referred the case to the High Court under s. 307. *Held*, that the case should be sent back to the Judge who tried it, with a direction, that he should pass orders and dispose of it as in a case tried by him with the aid of assessors on the minor charges against the accused, under s. 325. In **23 M. 15** the accused was charged with dacoity (s. 395—jury case) and murder in dacoity (s. 396—assessors case) and it appeared from a perusal of the preliminary register that the accused were either guilty under s. 396, I.P.C., or not guilty at all, but the accused were nevertheless tried by the Sessions Judge and a jury and on the jury finding the accused not guilty of dacoity the Sessions Judge disagreeing with the verdict referred the case to the High Court ; *held*, that the procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors. *See* also **23 M. 632 ; (1911) 2 M. W. N. 197 = 12 Cr. L. J. 488.**

5. **All the members of the jury are to be constituted assessors and their opinion taken.**—Where the accused were tried at one trial for two offences, one of which alone was triable by jury and the Sessions Judge after taking the verdict of the jury on that charge, took the opinion of two of the jurors only as assessors on the other charge and convicted the accused on both the charges. *Held*, that the conviction on the latter charge must be set aside as the Sessions Judge was bound under sub-sec. (3) of this section to take the opinion of all the jurors as assessors and that his failure to do so cannot be treated as mere omission or irregularity curable under s. 537, **26 M. 598.** The accused were charged under s. 395, I.P.C., an offence tiable by jury and also with offences under s. 147, I.P.C., and other sections triable by a Judge with the aid of assessors and were jointly tried ; five gentlemen were selected to form a jury and two of them were chosen to help as assessors. In respect of the latter offences the Judge differing from the two assessors convicted them of rioting; *held*, that the Judge was bound to constitute all the members of the jury as assessors from trying the non-jury offences and the Judge not having done so, the conviction was illegal, **26 M. 598** *followed*, **21 M. L. J. 520 = 10 M. L. T. 22 = 12 Cr. L. J. 239.** *See* also **13 M. 426.**

6. **Trial with assessors of a jury case may be valid if no objection taken.**—When a jury case was tried with assessors and no objection was taken at the trial ; *held*, on appeal that the omission to take the objection at the trial before the Court of Session was fatal to the contention. Section 536 (2) applied, **23 M. 632.**

7. **Trial by jury of case triable with the aid of assessors is legal and valid.**—When an offence triable with the aid of assessors is tried by jury such a trial is a legal and valid trial, *see* s. 536, **4 C. L. R. 405.** Unless the accused intervenes before the verdict is delivered and gets the procedure applicable to trial with the aid of assessors enforced, he cannot be heard to complain, **33 B. 423.** *See* also **25 C. 555 ; 9 M. 42 ; 3 C. 765.** In these cases it was *held*, that a Sessions Judge, after he has erroneously taken the verdict of the jury on a charge of an offence not triable by jury but with the assistance of assessors cannot correct his mistake by treating the verdict as opinion delivered by assessors. *See* **23 B. 696 ; 1 Bom. L. R. 115 ; 25 M. 243 ; 6 M. L. J. 14 = 25 M. 243** (*footnote*). In such a case, an appeal lies only on a matter of law and not on a matter of fact, **25 B. 680 (F.B.)** *followed* in **33 B. 422.** But *see* **24 W. R. 18 and 30 ; 3 C. 765 ; 26 M. 243** (*per* BENSON, J.) and **13 M. 626 ; 27 Bom. C. R. 1416.**

8. **Offence triable by jury—(a) Bengal.**—Trial by jury has been extended to the district of 24 Pur-gannas Hooghly, Burdwan, Moorshidabad, Nuddeah, Patna and Dacca in the case of offences under Chapter VIII, XI, XVI, XVII, XVIII, *Calcutta Gazette*, 27th March, 1893, and to offences under Chapter XX, I.P.C., abetments of and attempts to commit such offences. *Ibid.*, March, 1895. Trial by jury has been extended to the districts of Chittagong, Mymensing, Rajashahi and Jessore in the case of offences abovementioned.—*Calcutta Gazette*, 19th April, 1897.

(*b*) **Madras.**—Trial by jury is extended to all Courts of Sessions in the Madras Presidency, except those in the Agencies of Ganjam, Godavari and Vizagapatam to the following offences under the I.P.C., ss. 379, 380, 382, 392—395, 397—402, 411, 412, 414, 451—459 and 461. G. O. of 20th March, 1883, *Fort St. George Gazette*, Part I, p. 110. It is also extended to attempt to commit and abetments of offences under the above-mentioned sections of the I.P.C., in all the districts, except those abovementioned. *Ibid.*, G. O., 28th September, 1894, *Fort St. George Gazette*, 1894, Part I, p. 1198.

(*c*) **Bombay.**—Trial by jury has been extended to the districts of Thana, Belgaum, Surat and Karachi City, in case of all offences punishable with death, transportation for life or imprisonment of ten years, while in Ahmedabad district only offences punishable with death shall be tried by jury. In Poona district all offences for which under Chapter VIII or XI or XII or XXI or XXIII or under any of the said Chapters taken in connection

makes a long rambling statement more or less admitting guilt, it would be much safer if the Judge recorded a formal plea of 'not guilty' and proceeded to try the case in the ordinary way recording the evidence, **1938 A. W. N. 54 = 5 A. L. J. 157 = 7 Cr. L. J. 295.** *See* also Notes 11 and 12 below

11. Statement of accused must be taken as a whole.—It is not the duty of the Sessions Judge at the time of recording the plea to decide whether any statement which accompanies it, is true or false—any such statement must be regarded as explanatory of the plea **Ratanlal 532.** In **11 C. 410,** an accused person in answer to a charge of murder stated that he had killed his wife, but that he had done so in consequence of his having discovered her in an act of adultery on the previous day *Held*, that such a statement did not amount to a plea of guilty on the charge, and that it was the duty of the Court to try whether the provocation, therein disclosed, was sufficiently grave and sudden to reduce the offence. Also where the prisoner admitted that he had accompanied the dacoits for a short distance but that he had turned back almost immediately and had had nothing to do with the dacoity that afterwards took place and did not know that such an offence was in contemplation, *held* that the statement does not amount to a plea of guilty **7 W. R. 39** Where a person accused of murder acknowledged having struck his victim but repudiated the intention to murder and the Sessions Judge accepted this acknowledgment as plea of guilty and omitted to record any further evidence *held* that the Judge was bound to accept the statement of the accused as a whole if it was taken as a confession at all **25 W R 23; 14 B 564** A prisoner stated before the committing Magistrate that he committed the homicide with which he was charged because of his body being then possessed by the goddess Warsubai Before the Court of Session though he pleaded guilty, he informed the Judge in reply to the first question put to him that he committed the homicide because he was subject to epileptic fits. *Held* on appeal that the prisoner could not be held to have pleaded guilty and could not therefore be convicted on that plea **Ratanlal 678.** When a prisoner pleads guilty but goes on to say that he did not commit the offence with which he is charged, the plea is really one of *not guilty*, **11 W. R. 53.** *See* also Note 4 to s. 255

12. Code exhaustive as to 'pleading'—plea of 'not guilty' not recognised by the Court.—Ss. 271 and 272 contain all that is necessary as to pleading and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead guilty under s. 271, he can claim to be tried or he can refuse to plead which is taken to be same as claiming to be tried. The plea of not guilty is thus one not recognised by the Code. This is intentional and designed to get rid of a great mass of English law relating to criminal pleading It is open to the accused to make any answer to an indictment except guilty or a claim to be tried **41 C. 1072.**

13. Where a plea of guilty is upon a specific charge, conviction upon another charge is bad in law.—Where an accused person pleads guilty to the specific offence with which he is charged he cannot, on such plea be convicted of an offence other than that specifically charged **Weir II, 335 (1891).** Thus where an accused person was charged with the offence of murder and the charge was not proved but the Court convicted her of the offence of concealment of birth which it considered was admitted by her in her examination by the Court, it was *held* that such conviction was illegal A charge of concealment of birth should have been framed and the accused tried thereon, **Ratanlal 356.** Again where an accused person pleaded guilty to the charge of culpable homicide not amounting to murder but the Sessions Judge having regard to the evidence before the committing Magistrate convicted him of grievous hurt instead of culpable homicide not amounting to murder on his own plea It was *held* that the Sessions Judge should have tried the case It was illegal to convict the accused of an offence of which he did not plead guilty and for which he was not tried **Ratanlal 413.**

14 Plea of guilty of the offence of murder is not sufficient to establish offence of culpable homicide not amounting to murder.—Where accused has pleaded guilty to a charge of murder conviction of culpable homicide not amounting to murder is illegal, **3 S. L. R. 53 = 10 Cr L. J 5.** Where there is clear *prima facie* case of murder a Sessions Judge cannot legally without trying the case, accept a statement made by the accused who is charged with the offence of murder as sufficient to establish his plea of guilty of the offence of culpable homicide not amounting to murder on the ground of grave and sudden provocation and convict and sentence him accordingly for such offence on his own plea, **Ratanlal 410.**

15. Trial does not end with the plea of guilty—Discretionary with Court to continue trial or accept plea.—If the Judge does not think fit to convict the prisoner on the charge to which he has pleaded guilty, he should proceed to try him and thereupon he will have to take all the evidence in order to determine whether the prisoner has committed the offence to which he had pleaded guilty or any other offence with which he is charged,

2. **The record must show that charge has been read over and explained and plea taken.**—The record must contain the usual entry as to the charge being read over to the accused and as to his plea, though the absence of same will not affect the validity of the trial, if it is referred to in the judgment, M. H. C. Ref. trial 17 of 1906; **21 Cr. L. J. 410.**

3. **Effect of not recording plea.**—If the accused pleads guilty, the plea should be recorded. Where no such plea appears on the record, the conviction is bad, and must be set aside and a new trial ordered on the charge, **5 M. L. T. 75; 5 A. L. J. 157 = 1908 A. W. N. 54.**

4. **Accused's statement to be recorded in the language conveyed to the Court.**—It is not necessary that the statement of the accused made in a foreign language should be taken down in the words of that language. The language in which it is conveyed to the Court by the interpreter is the language in which it should be recorded, **5 C. 826.**

5. **Accused must state his plea by his own mouth.**—The accused should plead by his own mouth and not through his counsel or pleader, **15 W. R. 42.** No pleader can be called upon to plead on behalf of his client "guilty" or "not guilty" and it is improper for a Magistrate to act on such plea, **6 Bom. L. R. 861.** *See* Note 2 under s. 255.

6. **Admissions by pleader appointed by Court not binding on accused.**—Admissions made by a pleader appointed by Court to help the accused in his defence are not binding on him. The position of a pleader so appointed to defend a prisoner accused of murder is not the same as that of a pleader appointed by the accused, **2 Bom. L. R. 751.**

7. **A confessional statement at the close of a trial is not a plea of guilty.**—After a prisoner has claimed to be tried, all the evidence, whether the statement of witnesses or admission of the prisoner, should be laid before the jury. Such an admission made at the end of a trial is not a plea of guilty upon which a Sessions Judge could record a finding without taking a verdict of the jury, **Weir II, 334; 7 Bom. L. R. 731.**

8. **The accused should never be called upon to plead in the alternative but separately upon each head of charge.**—The accused was charged with the offence of culpable homicide not amounting to murder or in the alternative with the offence of grievous hurt. On the charges being read over to the accused, he pleaded guilty to the second head of the charge only, *viz.*, that of causing grievous hurt. The Sessions Judge accepting this plea sentenced him. *Held*, that the accused should never be called to plead in the alternative, but separately to each of the heads of charge, **Ratanlal 327.** *See* also **10 B. 124.**

9. **Plea of guilty must be distinct admission of each and every fact necessary to constitute the offence charged.**—Unless the accused distinctly admits each and every fact necessary to constitute the offence, and unless the Judge himself finds on the admissions made that the offence charged is legally established, he should take the evidence and come to a decision thereon. Where it appeared that the accused had admitted throughout that he beat deceased (his wife) and that she died, but it appeared open to question whether he admitted the existence of any connection between the beating and the death, or of any intention to cause such bodily injury as was likely to cause death. *Held*, that the conviction on the plea of guilty of culpable homicide not amounting to murder could not be sustained, **Weir II, 336.** If an accused pleads guilty, the Court ought to satisfy itself that he confesses the full offence charged in the indictment, *R.* v. *Golathan*, **C. C. A. 11 Cr. Ap. R. 79.**

A prisoner pleaded guilty to an indictment charging him in first count with stealing horses and in the second count with receiving the horses knowing them to have been stolen. On being asked whether he had anything to say why sentence should not be passed upon him, he said that he was guilty of taking the horses not knowing that they were stolen. He was then sentenced:—*Held*, that the plea of 'guilty' was wrongly entered and all proceedings at the trial consequent on that plea were bad; that a plea of 'not guilty' must be entered, and the case must go back for trial. *Rex.* v *Ingleson*, **(1915) 1 K. B. 512.**

10. **Plea of guilty must be unequivocal and properly taken.**—A prisoner charged under s. 211, I.P.C., with having brought a false charge with intent to injure, by accusing *A* of having caused the death of a person under s. 304-A, I.P.C., stated at the trial that the original complaint made by him was false, and that he made it unthinkingly. The Sessions Judge treated this statement as a plea of guilty, and convicted him. No record of the prisoner's plea appeared on the proceedings, nor did it appear that the charge had been explained as well as read to the prisoner, and the Judge considered that the original complaint did not amount to a false charge of an offence under s. 304-A. *Held*, that the conviction was bad, **7 C. 96 = 8 C. L. R. 471.** In case where an accused person when called upon to plead to a charge before a Court of Session, instead of pleading guilty,

into consideration under s. 30 of *the Indian Evidence Act* against any other person who was being jointly tried with him for the same offence, **23 M. 151.** But if the plea of guilty is accepted, the accused pleading guilty is not jointly tried along with others and this confession cannot be taken into consideration against the others, **15 P. R. 1911 = 12 Cr. L. J. 605.** *See* also **11 P. R. 1900; 37 A. 237.**

19. It is unfair to postpone conviction on plea of guilty solely with the view of using the confession against a co-accused.—*It is unfair to defer the conviction of the accused solely with the view of having his* confession considered againt his co-accused who have pleaded 'not guilty,' **23 A. 53.** But it could not be properly *held*, that the accused who confessed before a Magistrate and had pleaded guilty before the Sessions Court was under trial with the others, so as to make his confession admissible under s. 30, *Indian Evidence Act* against them, **15 B. 68; 19 B. 195; 4 C. 483 (F.B.), 2 C. W. N. 742; 17 A. 524; 22 A. 445; 7 M. 102; 22 M. 491** and **11 P. R. 1900.** It is against the spirit of law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence and thus create an opportunity for the purpose of allowing the statements he may have made to be considered against the co-accused, **33 A. 640; 13 C. W. N. 522 = 9 C. L. J. 291 = 10 C. L. J. 454; 12 A. L. J. 1233 = 16 Cr. L. J. 103.**

20. Test for finding whether plea accepted or not.—The question whether an accused who pleads guilty was being jointly tried with the other accused who did not plead guilty, so that his evidence could be taken into consideration against them under s. 30, *Indian Evidence Act* appears to depend upon whether the Judge accepted the plea of guilty or not. The test seems to be whether in fact, the trial proceeded as against the accused who had pleaded guilty as if he had not done so, *i.e.*, whether for instance he cross-examined or was given the opportunity of cross-examining the witness, whether he was examined himself (and, in a case where there are assessors), whether their opinion was taken as to guilt, **U. B. R. (1913) 2nd Qr., 170 = 14 Cr. L. J. 566.** The test is whether the Judgment discussed the guilt of the person pleading as an open question to be decided on the evidence on record, **15 P. R. 1911 = 12 Cr. L. J. 605.**

21. Effect of partial plea of guilty.—When a person is charged with having made two contradictory statements, he may plead guilty of having falsely made one statement. Here both statements may be false so that because the prisoner pleaded guilty to one charge he should not of necessity be acquitted of the other. Looking at the special nature of such charges, the prisoner ought not to be allowed to elect which statement he shall admit to be false. The fact should be tried, as under s. 272, it is optional with the Court to do so, **8 W. R. 5 (Cr. Let.)**

22. *Where plea, in effect, is one of not guilty, conviction upon a confession before the committing* Magistrate is bad.—A Sessions Judge, after a prisoner upon his trial has pleaded what in effect amounts to a plea of not guilty, is not justified in convicting the prisoner solely upon a confession made before the committing Magistrate, **2 N.-W. P. H. C. R. 479.** Some corroborative evidence is necessary to warrant the Court of Session in acting upon a confession made before the committing Magistrate, but retracted at the trial, **1886 A. W. N. 21; 23 B. 316.**

23. Plea of guilty when no assessors.—Where the accused pleads guilty, his conviction is valid, although there are no assessors, **10 W. R. 43 = 2 B. L. R. 23 (F.B.), 5 W. R. 21 (Cr. Let.)** but the plea must be recorded, **5 M. L. T. 216.**

24. Form of proceedings in trials before the Court of Session, *see B. H. C. Cr. Cir. p. 26. Hutkins 220.*

Refusal to plead or claim to be tried.

272. If the accused refuses to, or does not plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case.

Trial by same jury or assessors of several offenders in succession.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

Notes.—1. If the accused refuses to, or does not plead.—When the accused person makes no answer to the enquiry whether he is guilty or has any defence to make, it should be ascertained whether he is obstinately mute, or dumb *ex visitatione Dei*. If, he be found to be obstinately mute, the plea of "not guilty" should be recorded and the trial should proceed. If he be found to be dumb *ex visitatione Dei*, an enquiry should

4 B. L. R. Appx. CI. Thus there need not necessarily be a conviction on the plea. The Code draws a clear distinction between conviction and sentence, **5 B. 85; 7 A. 160.** After a plea of guilty a trial may be continued to ascertain the actual part taken by the accused in order to assess the punishment, **23 A. 53.** The trial of an accused person does not necessarily end if he pleads guilty, but evidence may be taken (especially in cases of murder), as if the plea had been one of not guilty, and the case decided upon the whole of the evidence including the accused's plea. A trial does not strictly end until the accused has been either convicted or acquitted or discharged, **23 M. 151.** *See* also **19 B. 195;** and **13 C. W. N. 552 = 9 C. L. J. 291 = 10 Cr. L. J. 434; 37 A. 247.**

16. In capital cases, desirable not to accept plea of guilty.—'It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death.' Where on a trial for murder the accused was put some questions in answer to which he said he hit the deceased and the Sessions Judge, treating the statement as a plea of guilty convicted the accused of murder, it was *held* (*i*) that it was not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death and (*ii*) that a man may plead that he hit someone who thereby died without necessarily admitting that he committed murder, for murder under the Penal Code requires a certain intention or a certain knowledge, **8 Bom. L. R. 240.** In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and not to convict solely on the plea of the accused, **19 A. 119.** A plea of guilty should not be accepted in capital offences. **54 P. R. 1905; 19 Bom. L. R. 356; 20 A. L. J. 320.**

17. Trial to be full and complete, where accused not convicted on his plea.—In a trial by jury the plea of the accused was recorded by the Judge as follows:—"The accused makes a statement admitting the fact, but alleging provocation." Jurors were selected and after some adjournment, one witness was exmined for the defence and pleaders on both sides heard and the Judge in charging the jury observed "the evidence for the accused was so overwhelmingly strong that I had no hesitation in accepting his full statement of the facts given by the accused in this Court. . . ." The jury returned a verdict of guilty and the accused was convicted. *Held*, that there was no legal trial and that the conviction must be set aside. If the Judge was of opinion that the plea of the accused was one of guilty, he ought to follow the procedure laid down in this section; but if he decided that the plea did not amount to a plea of guilty, the trial ought to have proceeded in the usual way under s. 272 and the verdict of the jury ought to have been taken upon the evidence and not upon the Judge's view of the strength of the evidence, **6 Bom. L. R. 671.** Where a prisoner had admitted before the Court of Session that he had killed his wife, no assessors were empanelled. At the end, however, of his confession he stated that he was not in his right mind at the time. The Judge, therefore, proceeded to record medical and other evidence on the point, and having come to the conclusion that there was no reason to doubt from the prisoner's conduct, either prior or subsequent to the murder, that in committing the murder, he knew that he was doing a wrong act, convicted the prisoner. *Held*, that the plea, was, in effect, one of 'not guilty,' and that the trial should not have proceeded without assessors, and that it should be quashed, **5 N.-W. P. H. C. R. 110.** In another case, the accused confessed having killed his wife and pleaded guilty at his trial for murder. The Sessions Judge recorded briefly the evidence of two prosecution witnesses to determine whether the offence committed was or was not culpable homicide amounting to murder. He found the offence was murder and sentenced the accused to transportation for life on the ground that the accused, "without being actually insane so as not to be aware of what he was doing, appears to be decidedly a man of weak intellect." On appeal it was urged that the accused was insane or at any rate incapable of understanding the charge against him and the Chief Court accordingly set aside the conviction and ordered a re-trial and an inquiry under s. 465, **54 P. R. 1905 = 3 Cr. L. J. 80.**

18. Practice if plea not accepted.—When a Judge decides to try a case in spite of the plea of guilty, it is better if the practice in England is followed and the accused is directed to enter a plea of not guilty. The recording of the plea of guilty after the Judge decides to try the case is meaningless, unless he accepts it. If, on the other hand, he accepted it there was nothing in issue between the Crown and the prisoner, which he had to try, **9 C. L. J. 55 = 10 Cr. L. J. 329; Weir II, 335 (1866); 19 B. 195; 23 A. 53; 13 C. W. N. 552 = 9 C. L. J. 291 = 10 Cr. L. J. 434.** The proper course to be adopted when an accused person who is tried with others pleads guilty is either to convict him on his plea and remove him from the dock, in which case his trial would manifestly be at an end, so as to warrant his being called as a witness either for or against any person who has been accused along with him; or to allow the trial to go on as if the plea had been one of 'not guilty' in which case the trial does not end with the plea of guilty and therefore any confession made by the person so pleading could be taken

Notes —1 The numbers fixed by Government Notification to be strictly adhered to.—Where the Local Government has by notification fixed the number of the jury at five a trial had before a so-called jury composed of seven was held bad as it was before a tribunal not properly constituted **26 A. 311**

In a murder case not less than eighteen jurors should be summoned where only fourteen were summoned and eleven were present and seven jurors were empanelled held that there was no proper compliance with this section and section 326 of this Code and that the trial was therefore vitiated **33 C. W N 692.**

2. Number of jury—In *Bengal* where the accused is not an European or American the jury should consist of five persons in the *United Provinces of Oudh and Agra* of seven persons in *Madras* of five In *Punjab* nine In the Districts of *Lahore, Delhi Rawalpindi* and *Peshawar* five In the Districts of *Ambala Multan* and *Sialkot* and in the other districts three in *Bombay* before the *Poona* Court of Session of offences under Chapters VIII IX XII XVII XVIII I P C. the jury must consist of five persons. But in *Bombay* five has been fixed as the number for the jury in which an European (not being an European British subject) or an American is the accused person.

***275.** (1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall if such person before the first juror is called and accepted so requires consist, in the case of an European British subject of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

Jury for trial of European and Indian British subjects and others.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than European British subject) or an American a majority of the jury shall if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans

Notes —1. The most difficult question for the Committee to decide is that of trial by jury of European British subjects. This is the point on which non-official European opinion is most emphatic namely that it is essential that a mixed jury should be retained. We have decided accordingly that the mixed jury should remain both in the High Court and in the Sessions Court in all cases which are to be tried by jury under our proposals, subject however to certain provisions and safeguards, namely —the same law as to the composition of the jury shall apply to Indians as to Europeans, that is to say the majority of the jury if an Indian accused so desires, shall consist of persons who are not Europeans or Americans. This is already the law in Sessions Courts, and s. 275 should be so amended as to make it apply to the High Court also Report of the Racial Distinctions Committee, paragraph 25

A Judge is not bound to try a Native Christian with the aid of Christian jury **1 W R 2**

2 See for the meaning and scope of this section and ss. 443 and 446 and for the meaning of the phrase " Ordinary course In the proviso to s. 446 **5 Lah. 515.**

276. The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct

Jurors to be chosen by lot.

Provided that—

first pending the issue under this section of rules for any Court the practice now prevailing in such Court in respect to the choosing of jurors shall be followed

Existing practice maintained

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court be chosen from such other persons as may be present ,

Persons not summoned when eligible

* S. 275 has been substituted for the old s. 275 by Act XII of 1923.

be made as to whether he is sane or insane or incapable of being tried. If found sane, a plea of 'not guilty' shall be recorded, and the trial should proceed; but if found to be insane, the procedure laid down in Chap. XXXIV should be followed, **Ratanlal 19.**

2. Commencement of trial.—The actual trial does not begin until the charge has been read and the accused claims to be tried, **16 B. 514; 25 B. 694** and *see* **32 M. 220** (*see* Note 5 to s. 251). If the accused refuses to plead or claims to be tried, the Court must proceed to try the case; and where the trial is not by jury, it must be conducted with the aid of two or more assessors as members of the Court, **2 B. L. R. 23 (F.B.).** The accused person shall not be examined by the Sessions Judge *immediately* after he has been called upon to plead, if his plea be 'not guilty,' **3 Agra H. C. R. 85.**

3. Where there is no evidence for prosecution Judge is bound to find not guilty.—In trials before a Sessions Judge with assessors, when the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty, **4 M. H. C. R. Appx. XXXIX,** *see* also **16 W. R. 19.**

4. Jury cannot try two cases simultaneously.—"*By the same jury may try as many cases, etc.,*" we understand that one trial is to follow the other, *i.e.,* that on the conclusion of one trial the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding, no jury ought to be placed in such an embarrassing position. "It is only fair to the prisoners that the sole issues on which they are to be tried, and the evidence bearing upon those issues, should be laid before the jury, and that the minds of the jury should not be encumbered by the consideration of foreign and irrelevent matter."—*Per* PRINSEP, J., in **6 C. 96, p. 99 = 6 C. L. R. 521.**

5. Plea of 'not guilty' not recognised by the Code.—*See* Note 12 to s. 271.

Entry on unsustainable charges.

273. (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

Effect of entry.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Notes.—1. Effect of an entry under this section.—An entry under this section has not the effect of an acquittal for the purpose of s. 403; but it cannot be revised by the High Court under ss. 435 and 439. Applications to the High Court under this section, should be disposed of by it in the exercise of its ordinary original criminal jurisdiction, **9 C. 397,** *see* **21 C. 97** for the exercise of the power under this section. Under s. 494, the Public Prosecutor may also, with the permission of the Court, withdraw from the prosecution of any person *Cf.* the power of the Advocate-General to enter *none prosequi, vide* s. 333 and the effect thereof.

2. Illegal commitments.—The reference to portions of a charge and to the charge or portion thereof being clearly unsustained is sufficient to show that the section is intended to provide a short and an effective way by which charges which have no merits may be disposed of, **A. I. R. 1929 Cal. 756 (F.B.).**

C—Choosing a Jury.

Number of jury.

274. (1) In trials before the High Court the jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five,* or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct:

† Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

* The word "five" has been substituted for the word "three" by Act XII of 1923.

† This proviso has been added by Act XII of 1923.

Court, draw or cause to be drawn, out of the said box, one after another, as many of the said cards or pieces of paper as may represent the number of jurors required to try the case, and if any of the jurors whose names shall be so drawn shall not appear, or if any be objected to and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case.

(ii) In cases in which not less than one-half of the jury must be Europeans (ss. 460 and 451 read with s 7, Act III of 1884) or both Europeans and Americans (s. 451 read with s. 7, Act III of 1884), the jurors shall be chosen as follows —

First—Not less than one-half of such jury shall be chosen by lot, in the manner prescribed by Rule I from a box containing the names of only Europeans or Americans or Europeans and Americans, until the necessary majority is complete.

Second—To the names of jurors not so chosen shall then be added the names of all the other jurors summoned to attend and the number necessary to complete the jury shall then be chosen by lot in the manner prescribed by Rule 1

(iii) In cases in which not less than one-half of the jury must be neither Europeans nor Americans (s 275), the jurors shall be chosen as follows —

First—Not less than one-half of such jury shall be chosen by lot in the manner prescribed by Rules from a box containing the names only of such persons as are neither Europeans nor Americans, until the necessary majority is complete.

Second—To the names of jurors not so chosen shall then be added the names of all the other jurors summoned to attend and the number necessary to complete the jury shall be chosen by lot in the manner prescribed by Rule 1

(iv) (1) When the jurors have been finally selected, their names shall be entered on the flyleaf prescribed for records of Sessions trials (p 220 Cr R. and O) the "FOREMAN" (s. 280 Cr P C.) being specially designated as such.

(2) *District Magistrate's Court.*—The above rules *mutatis mutandis* shall apply to the selection of jurors in cases before District Magistrates in which the accused is an European British subject and claims to be tried by a mixed jury [s 451 (a) Cr P C.]. Such jurors shall be selected from the persons summoned under the provisions of s 462 of the Code to attend for the purposes of the trial.—*Rule No 4 of 25th June* 1885 *Wilkins Addenda*, p 90, *see* also **55 Cal. 371 = 32 C W N. 321.**

(b) *Madras Rules*

1 As to Madras rules for selecting jury by lot, see *the High Court Proceedings No* 1353 *dated 11th April*, 1883

2. As to the applicability of jury rules to trials by jury of European British subjects before District Magistrates under Act III of 1884, embodied in the present Code see *the High Court Proceedings No* 2554 *dated 4th September*, 1884

(c) *Bombay Rules*

1 The list of jurors shall be prepared, published and revised in the manner laid down in ss 321 322, 323, 324 and 325 of the Code of Criminal Procedure in the month of January of each year or as soon thereafter as may be convenient.

2. No one shall be included in the jury list, who does not possess a knowledge of the English language provided that if a sufficient number of persons acquainted with English cannot be obtained the jury list may be completed by the addition of the necessary number of persons not acquainted with English.

3 A week before the commencement of the Sessions, folded papers bearing the names of the jurors in the list aforesaid shall be put into a ballot box, and as many of them as the Sessions Judge may deem necessary shall be drawn by lot in open Court. The names of such persons as have served within six months of the date of the commencement of the Sessions are to be excluded from the ballot.

4 When the number of jurors required to serve is found insufficient, the names of the persons who have served within six months of the commencement of the Sessions shall be drawn as above directed, so far as may be necessary to complete the required number

thirdly, "in a trial before any High Court in the town" * which is the usual place of sitting of such High Court;

Trials before special jurors.

(*a*) if the accused person is charged with having committed an offence punishable with death, or

(*b*) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed, and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

Notes.—1. Mode of choosing jury.—This section contemplates that the names of the jury to be "chosen by lot," shall be drawn out of one box containing the names of all persons summoned to act as jurors, **1 B. 462.**

2. Conviction in a case tried by a jury not chosen by lot is illegal—Effect of Judge selecting a jury instead of choosing by lots.—The object of this section coupled with ss. 279 and 326, is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case, and an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided by law to secure perfect impartiality. On the day fixed for trial, there was not a sufficient number of jurors in attendance and the Judge summoned from among the residents of the town contrary to s. 326, other men; *held*, that when a Judge fails to obtain a panel in the manner provided by ss. 277 and 326 (by lot) it is his duty to postpone the trial until the requisite number of jurors have been obtained in the manner provided by law. **31 Cal. W. N. 1102.** Where instead of choosing jurors by lot and then hearing and deciding objection as provided by ss. 276—279, the Judge proceeded at once to exempt some of the persons present, merely on their own representation and tried the accused with the rest, and where it further appeared that the persons summoned to serve as jurors had not been selected in the manner provided by s. 326; *held*, that such a grave irregularity in the selection of the jurors affects the proper constitution of the Court and is not rectified by s. 537, **7 C. W. N. 188,** where **8 C. 739** is *not followed*. Where ten European jurors were summoned for the trial of a person who was entitled to a majority of three European jurors, but only three out of the ten were present and all were empanelled, *held* that the European jurors not having been chosen by lot, the trial was illegal. Jurors are Judges of facts and in the absence of a properly constituted jury the violation of the provisions of this section is of such a serious nature as cannot be cured by s. 537, **33 A. 385.** *See* also **12 Cr. L. J. 537 (Oudh)** and **26 A. 211; (1917) M. W. N. 1.**

2-A. Selection of jurors from outsiders in a case of deficiency.—In a case of deficiency of persons summoned, the number of jurors required may be chosen from such other persons as may be present in Court. These may not be chosen by lot and may not be at all in the jury list, **29 C. W. N. 652.** But where a—whose name was in the jurors list was specially requisitioned from the local school and empanelled, *held* that the procedure adopted was contrary to law and that the trial was vitiated. **56 Cal. 835.**

3. Effect of empanelling a juror not summoned.—When in the course of a trial it was discovered that a person was on the jury who was not on the jury panel, and who had been by mistake summoned as a juryman, the jury was discharged and a fresh jury constituted by taking another juryman in the place of the one who had served by mistake, *R.* v. *Phillips*, **11 Cox. 142.** In *Hill* v. *Yates*, **12 East 229,** it was held that the grant of a new trial because a juror not summoned had served was discretionary and if not injustice had resulted, a new trial should be refused, *Archbold*, p. 237. *See*, however, Note 7 to s. 284.

4. Rules for selecting jury by lot.—

(*a*) *Bengal Rules.*

For Courts of Session.—(*i*) In order to nominate jury for the trial of any prisoner or other person to be tried by jury, the Sessions Judge shall cause to be put together in one box cards or pieces of paper containing the names of all the persons summoned to attend, except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day, or for any other cause. Such cards or pieces of paper shall be, as nearly as may be of equal size, — shall bear the name, of one person summoned to attend. The Sessions Judge shall then, in open

* Substituted for the words "in the Presidency towns" by Act of XVIII of 1923.

peremptorily challenged the juror whom he had previously accepted. His number of peremptory challenges had not been exhausted. The Judge refused to allow the challenge and said it was too late, *held* that the defendant had not waived his right to peremptory challenge, and that the ruling was erroneous. *See* Note 1 to s. 281

5 Grounds for challenging under the New York Code—Under the N Y Cr Pro. C. s. 374 challenges (*i.e.*, objections) are (*a*) general or (*b*) particular Under the former, (1) (s. 375) a conviction for felony and (2) want of any of the qualifications prescribed in the Code to render a person a competent juror The latter is again subdivided into (1) implied and (2) actual. Under s. 377, a challenge for implied bias may be taken for all or any of the following causes and no others —

(1) consanguinity or affinity within the ninth degree to the person alleged to be injured by the crime charged or on whose complaint the prosecution was instituted or to the defendant

(2) bearing to him the relation of guardian of ward attorney or client or client of the attorney or counsel for the people or defendant master or servant, or landlord or tenant or being a member of the family of the defendant, or of the person alleged to be injured by the offence charged or on whose complaint the prosecution was instituted or in his employment on wages,

(3) being a party adverse to the defendant in a civil action, or having complained against or being accused by him in a criminal prosecution

(4) having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of indictment

(5) having served on a trial jury which has tried another person for the crime charged in the indictment

(6) having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict, after the cause was submitted to it

(7) having served as a juror in a civil action brought against the defendant, for the act charged as a crime

(8) if the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty in which case he shall neither be permitted nor compelled to serve as a juror

A challenge for actual bias may be taken for the existence of a state of mind on the part of the juror in reference to the case, or to either party which satisfies the Court, in the exercise of a sound discretion that such juror cannot try the issue impartially and without prejudice to the substantial right of the party challenging But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence and the Court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict (s. 376).

Upon the trial of a challenge to an individual juror the juror challenged may be examined as a witness to prove or disprove the challenge and is bound to answer every question pertinent to every inquiry therein (s. 383).

Grounds of objection.

278. Any objection taken to a juror on any of the following grounds if made out to the satisfaction of the Court shall be allowed —

(*a*) some presumed or actual partiality in the juror

(*b*) some personal ground such as alienage deficiency in the qualification required by any law or rule having the force of law for the time being in force or being under the age of twenty one or above the age of sixty years,

(*c*) his having by habit or religious vows relinquished all care of worldly affairs,

(*d*) his holding any office in or under the Court

5. A precept shall then be addressed to the District Magistrate requiring him to summon the jurors so drawn to attend on the day the Sessions commence.

6. At the commencement of the Sessions the names of the jurors summoned to attend shall be put into the ballot-box, and as many of them as the Court may think necessary shall be drawn to sit as jurors, for the trial of the case coming on first.

7. The rest of the jurors summoned shall be asked to attend at such time as the Court may specify, and the requisite number shall be selected from amongst them at the beginning of each case or day, the manner above specified, to serve as jurors in the case or cases standing for trial.

8. It shall be in the discretion of the Court to excuse the attendance of any person whose name has been drawn, either before or after he is summoned, and to direct another name to be drawn.

9. When the name of a Government servant who is absent on duty is drawn, such servant shall ordinarily be deemed not available and it shall be within the discretion of the Court to direct that he shall not be summoned or if already summoned to excuse his attendance.

10. The power of chosing jurors from amongst persons present in Court shall be exercised by the Judge or by such person as the Judge may appoint for that purpose under the superintendence of the Judge.

(d) *Allahabad Rules.*

For rules made under this section in conjunction with s. 313 by the Allahabad High Court, see *United Provinces and Oudh Gazette*, 1902, Pt. II, p. 539.

Names of jurors to be called.

277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked, if he objects to be tried by such juror.

Objection to jurors.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection without grounds stated.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

Notes.—1. Procedure prescribed by this section to be strictly followed.—Where instead of at once proceeding to choose a jury by lot from among the jurors who were present, subject to objections, if any, under this section, and deciding and recording his decision as to each person objected to, as provided by s. 279, the Judge exempted most of the jurors present merely on their own representations and no reasons were stated as against each of them nor any formal decision recorded, *held* the proceedings were irregular, **7 C. W. N. 183.**

2. **Effect of omission to give the accused opportunity to challenge the jurors.**—Though the High Court *held* it was a serious error for a Judge to proceed with the trial of an accused without giving him an opportunity of challenging the jurors in accordance with the provisions of this section, yet it refused to set aside the conviction. *See* **13 C. W. N. 111.** In England if the defendant was not allowed his full right of challenge, the proceedings might be quashed on writ of error, and a *venire de novo* awarded. *Gray* v. *R.*, **6 St. Tr. (N.S.) 117**, *Archbold*, p. 207.

3. **Jurors when to be challenged.**—According to English practice, when a full jury has appeared, and before any juror is sworn, the proper time comes for the exercise of the right of challenge or exception to the juror's returned to pass upon the trial. *Archbold*, p. 207. Under the N. Y. Cr. Pro. Code, s. 371, "a challenge must be taken when *the* juror appears, and before he is sworn; but the Court may, in its discretion for good cause, set aside a juror at any time before evidence is given in the action." The administering of the oath to each juror as he is found competent is a lawful mode of swearing, and precludes a subsequent peremptory challenge to such juror.—*People* v. *Carpenter*, 4 N. Y. Cr. Rep. 39; 38 *Hun.* 491. A juror may be peremptorily challenged at any time before he is sworn whether he has taken his seat in the jury box or not (*People* v. *Carpenter*, 3 N. Y. Cr. Rep. 923. In that case during the selection of the jury the trial Judge stated that all challenges must be exhausted before the jurors took their seat in the box. Defendant's counsel then said he accepted a certain juror. After the jury had been completed and had taken their seat in the box but had not been sworn, defendant's counsel

help me God' or I *solemnly* affirm *in the presence of Almighty God*, that I will judge truly between the King Emperor of India and the prisoner of the bar, and will give a *true verdict according to the evidence* ' The words in italics may be omitted if the juror objects to this form.

Procedure when juror ceases to attend, etc

282. (1) If, in the course of a trial by jury, at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout, the trial or if any juror absents himself, and it is not practicable to enforce his attendance or if it appears that any juror is unable to understand the language in which the evidence is given, or, when such evidence is interpreted the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen

(2) In each of such cases the trial shall commence anew

Notes.—1. Discharge of jury—If a juror is incapacitated, the jury may be discharged and a fresh jury called, who may be the remainder of the former jury with another added to their number but the defendant should be given his challenges afresh and all the jurors should be re-sworn the witnesses should be re-sworn and their oral evidence taken again *Halsbury's Law of England* IX p 370 *Archbold*, p 230. According to English law it is for the Judge alone to decide whether a necessity exists for discharging a jury and his decision is not subject to review or appeal

1-A. Inherent power—Though this Code has not specifically conferred any right on the Judge to discharge a jury on the ground of misconduct every Judge has an inherent power to discharge a jury when he is satisfied on inquiry that reasonable grounds exist for exercising the discretion vested in him. **56 Cal. 1032.**

2. The trial shall commence anew.—It is irregular for the Judge, even with the consent of the defendant to read over from his notes the evidence given before the previous jury *R. v Bertrand* (1867) **L. R. 1 P. C. 520.** One of the jurors was added after some of the prosecution witnesses were examined and in the place of another who was discharged The trial was not commenced afresh but the Judge called the witnesses who had been examined, read out their statements to them which they admitted to be correct and the trial proceeded, *held* there was no valid trial, **36 A. 481.**

3. Temporary illness of a juror during trial.—After the retirement of the jury on a murder trial one of them was taken very ill he was put in bed in a communicating room a physician was summoned who attended him there not speaking to the others at all, nor to him on the subject of the trial. It appearing that the prisoner sustained no injury, *held* that the verdict of guilty was not vitiated.—*Goersen* v *Commonwealth* 106 *Penn St.* 477, *Am. Rep* 531 *See* **11 Cr. L. J** 492 (**C.**) Notes 7 and 13, pp. 244 and 246. *Upon a trial for murder one of the* jurymen was taken ill. He left the jury box and was taken out of Court accompanied by two medical men and a jury bailiff who however was not sworn for the purpose. After the absence of three-quarters of an hour during which time no one but the doctors spoke to him, the juryman rejoined the rest of the jury and trial proceeded The *prisoner was convicted*, *held*, that as the evidence showed that there had been no opportunity of tampering with the juryman the fact that he had left the Court in charge of an unsworn bailiff did not establish that there had been a mis-trial. *Rex* v *Crippen* (**1911**) **K. B. 149.**

4. Juror unable to understand the language, etc.—This has been interpreted to include the case of a juror who was deaf and partly blind. When this became known to the Sessions Judge he stopped the trial and recommenced a fresh trial with another jury, **19 M. 375**

5. Until the jury is discharged, a new jury cannot try the case.—*See* **2 C. W. N. 481,** where the trial Judge having come to the conclusion in the midst of a trial that he was personally interested and could not go on with the case, adjourned the trial without discharging the jury On another Judge being appointed to try the case, objection was taken that the first Judge and the jury had still seizin of the case To get rid of the difficulty, a *nolle prosequi* was entered.

Discharge of jury in case of sickness of prisoner

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Notes.—1. No provisions for discharge of jury for misconduct.—This and the preceding are the only sections which provide for the discharge of the jury before a verdict is returned. They do not provide for a discharge of the jury for improper conduct during trial. In the trial of a case in the Calcutta High Court, after

(e) his executing any duties of Police or being entrusted with Police duties;

(f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury;

(g) this inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted;

(h) any other circumstances which, in the opinion of the Court, renders him improper as a juror.

Notes.—1. WHITLEY STOKES is of opinion that the objections for implied bias referred to in the Note to last section with some slight omissions and verbal changes illustrate the presumed partiality mentioned in the section.—*Anglo-Indian Codes*, Vol. II, p. 163.

2. Objection must be made out to the satisfaction of the Court.—The burden of proof of a challenge for cause is on the person who makes it; and he is not entitled to question a juror before challenging him. When the challenge has been made, the trial proceeds by witnesses called to support or defeat the challenge; the juror objected to may also be examined on the *voir dire* as to his qualification, or the leaning of his affection. But he cannot be interrogated as to matters which tend to his own discredit, nor, as it seems whether he has expressed a hostile opinion as to the defendant. *Archbold*, p. 215.

2-A. Objection as to presumed partiality should be allowed, **7 Pat. 50; 104 I. C. 459.**

3. Disqualification by reason of holding office in or under the Court.—The fact that a person is a clerk in the office of the Magistrate of the district is not sufficient to disqualify him from sitting on a jury, **7 C. 42.**

4. Duty of Court when juror obviously unfit.—The Court, even without challenge taken, may and ought to excuse a juror on the panel when called, if he is obviously unfit to perform his duty, from physical or mental infirmity, or *semble*, from expressed unindifferency. *Mansell* v. *R.*, **8 St. Tr. (N.S.) 831,** *Archbold*, p. 217.

Decision of objection.

279. (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Supply of place of juror against whom objection allowed.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury:

Provided that no objection to such juror or other person is taken under section 278 and allowed.

Foreman of jury.

280. (1) When the jurors have been chosen, they shall appoint one of their number to be foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable agree in the appointment of a foreman, he shall be appointed by the Court.

Swearing of jurors.

281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

Notes.—1. No Challenge after swearing in jurors.—No cause of challenge to the jury can be taken either in arrest of judgment, or otherwise after the jury are sworn, *R.* v. *Sheppard*, **1 Leach 101;** *R.* v. *Sutton*, **8 B. and C. 417.** *See* Note 3 to s. 277.

2. Form of oath.—The Madras High Court has prescribed the following forms of oath and affirmation:—" I shall well and truly try and true deliverance make between our Sovereign Lord, the King-Emperor of India, and the prisoner at the bar and a true verdict give according to the evidence. So

6. Trial with the aid of assessors begins only when proceedings are commenced at which assessors can give their aid.—A trial with the aid of assessors does not begin with the reading of the charge, but begins only when proceedings are commenced at which assessors can give their aid. Where, therefore, after an accused person had claimed to be tried, a Sessions Judge chose two assessors but immediately dispensed with the attendance of one of them who was suffering from fever and proceeded with trial with the aid of the other only, *held*, that the action of the Sessions Judge was illegal. The attendance of the assessors having been dispensed with before such commencement, the trial could not legally be proceeded with unless another assessor were appointed, **15 B. 514** *followed* in **25 B. 694**, where it was held that such a defect as commencing the trial with one assessor vitiates the whole proceedings and the defect could not be cured by s. 537. *See* also **21 A. 108; 6 C. W. N. 713; 15 A. 136, 24 M. 523.**

7. Assessors must be chosen 'from the persons summoned to act as such'—*See* ss. 321—326 for list of assessors and summonses to them. When one of the assessors was not summoned for the Sessions and whose name was not in the list, *held* that there was no lawful trial before a lawfully constituted tribunal **35 A. 570; 3 Pat. L. J. 141.** Out of six assessors summoned to appear at a Criminal Sessions, three absented themselves. Of the remaining three, the Sessions Judge discarded two as not appearing sufficiently intelligent, and having appointed the third to act as assessor sent for two other persons to fill up the other two places. These two last mentioned persons had not been summoned to act as assessors, nor did it appear that they were competent to act as such *held* that under the above circumstances there having been only one properly appointed assessor, all the proceedings conducted with his aid must be set aside **1894 A. W. N 207**. In the absence of assessors duly summoned the Nazir of the Court was directed by the Judge to act as an assessor and the Judge noted that no objection was taken to the course taken by him and in the end the accused was convicted the assessor duly summoned being of opinion that the accused was not guilty and the Nazir being of opinion that he was guilty, *held*, that the circumstances the Court was not properly constituted and the defect could not be cured by s. 537. The Nazir was not duly summoned and it was not even proved that his name was in the list of assessors and there was no provision corresponding to s. 276 (2) in respect of trials by jury. The Nazir as an official of the Judge trying the case was a most unsuitable person and the trial must be taken to have been held with one assessor only and therefore illegal. The fact that the accused did not object was immaterial **13 O. C. 337 = 11 Cr. L. J. 724.** Where, however, an assessor who was summoned to appear on the 14th June failed to appear on that date, but appeared on the 17th June, when another trial had to commence and was selected to act, *held*, that his selection was not improper and the trial was not invalid. The object of the rule is that there must be no reason for suspicion that any of the assessors sitting on a particular trial has been, if I may be allowed to use the expression, planted on the Court by any person interested in the success or in the failure of the prosecution, **17 Cr. L. J. 17 (A.)**. The wording of ss. 326 and 327 lends no colour whatever to the suggestion that an assessor cannot be held to have been lawfully summoned to act as such on a particular day (in the course of a Sessions), unless the summons issued to him was for his attendance on that day and no other.

Assessors for trial of European and Indian British subjects and others.

***284-A.** (1) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.

Procedure when assessor is unable to attend.

285. (1) If in the course of trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

* S. 284-A has been added by Act XII of 1923.

the prosecution had closed and the counsel for the defence had declared his intention to call witnesses for the defence, the jury wanted to give their verdict against the accused without hearing any defence evidence. The counsel for the defence pressed for their discharge for misconduct, citing *R.* v. *Fowler*, **4 B.** and **Ald. 273** and **1 Q. B. 370** at **p. 395.** On objection by the prosecution to the adoption of this course, a *nolle prosequi* was entered under instructions and on behalf of the Advocate-General under s. 333, **7 C. W. N. 31.** See *Archbold*, p. 353 for English practice.

2. **Jury not to be discharged, if a witness is absent.**—A trial may be adjourned, if from the absence of a witness or any other reasonable cause, the Sessions Judge considers it necessary or advisable to do so, stating in an order in writing, his reasons for doing so; but the Sessions Judge cannot on account of the absence of a witness, discharge the jury and direct a fresh trial to be held. Such an order was set aside and the Sessions Judge was directed to proceed with the trial from the stage at which he had discharged the jury, **4 Bom. L. R. 939.** In England the jury has been discharged on account of the sudden illness of a witness, or when in a trial, witnesses have been kept away by collusion or even were absent by accident. See *Archbold*, p. 237 and *see* s. 285.

D—Choosing Assessors.

Assessors how chosen.

284. When the trial is to be held with the aid of assessors, "not less than three and, if practicable, four shall be chosen" *from the person summoned to act as such.

Notes.—1. Assessors must be treated with consideration and respect.—It is very desirable to maintain the position of assessors in public estimation and to make their duties as little irksome as possible. No assessor should be summoned too frequently. When assessors are summoned the notice should be sent to them in a regular and formal manner, and they should be treated with consideration and respect. A proper place should be provided for them to wait in, when their presence in Court is not necessary.—*Bom. H. C. Cr. Cir.*, p. 25.

2. **Assessors not members of the Court.**—A trial is proper, if commenced with two assessors. When the trial proceeds in the absence of one of the assesors, the absent assessor ceases to occupy the position of one aiding the trial and his opinion ought not to be taken, **6 C. W. N. 715.** If he took such opinion into consideration, it is a mere irregularity curable by s. 537. *See* Notes 2 and 4 to s. 285.

3. **Real function of assessors.**—The real object of appointing assessors is to assist the Court and the discussion and statement of points by a Judge sitting with assessors cannot be said to be otherwise than in furtherance of the subject of getting the best assistance for the proper adjudication of the case, **7 L. B. R. 63** at **p. 68.** Until the contrary is shown, it must be presumed that persons who under the law are called upon to act as assessors, will do their duty, **1887 A. W. N. 139.**

4. **Persons of experience most likely to give efficient assistance must be chosen.**—It is desirable that it should be in the power of the Court to select from among the assessors who are in attendance those who may seem most likely to give efficient assistance in any particular case. Though the law provides for the choosing of "two or more," it is not desirable ordinarily that more than two should be chosen, because the larger the number of the assessors selected for each case, the greater the burden on the body of those registered as liable to serve. *C. P. Cr. Cir.*, Part II, No. 33. The law does not as in the case of jurors provide for objections being made to an assessor. The choice of jurors is by lot, but the choice of assessors is entirely with the Sessions Judge who, in the exercise of this power, should pay every consideration to any reasonable objection raised. In selecting assessors, the Judge must have regard to the nature of the case, to the person who is tried, to the nature of the evidence to be brought against him and to the public feeling. The assessors ought not to be pleaders, nor young men fresh from college and devoid of experience. They must be persons of independent condition in life, men of judgment and of experience. *Per* JACKSON, J., in **23 W. R. 35** at **p. 39.**

5. **A trial which begins and ends with one assessor only illegal.**—When a trial before the Court of Session begins and ends with one assessor only, it is no legal trial and the whole proceeding is vitiated by error, **25 B. 694; 15 B. 514; 21 A. 106; 24 M. 523** or when nominally only there is a second assessor who, by reason of blindness, deafness or other such cause, is unable to understand the proceedings, **Weir II, 340; 19 M. 375.** *See* Note 2 to s. 285 below.

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* Substituted for the words "two or more shall be chosen as the Judge thinks fit" by Act XII of 1923

5. Procedure where it is discovered that assessor is an interested person.—Where it is discovered, after the trial has begun in a case tried with the aid of assessors that one of them is interested or otherwise unfit to sit as an assessor, there is no provision in the Code to meet such a contingency In such a case it is proper to refer the case to the High Court to set aside the order appointing incompetent assessor and all the subsequent proceedings in the trial. Then the Sessions Judge ought to be asked to choose another assessor and proceed with trial *de novo* (1912) M W. N 378 = 13 Cr L J. 473.

6. Taking evidence after discharging assessors' trial invalid.—If the portion of the trial which consists in the taking of additional evidence takes place after the discharge of the assessors, the trial will be invalid 15 A. 136.

DD—Joint trials

***285-A.** In any case in which an European or American is accused jointly with a person, not being an European or American or an Indian British subject is accused jointly with a person not being an Indian and such European Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284 A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this chapter

Trial of European or Indian British subject or European or American jointly accused with others.

E—Trial to Close of Cases for Prosecution and Defence

286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused

Opening case for prosecution.

Examination of witnesses.

(2) The prosecutor shall then examine his witnesses.

Note—As to the mode of recording evidence, *see* Chapter XXV and for power to adjourn, *see* s. 344

Notes.—1 Scope of the section —Although under s. 342 of the Code the power given to the Court to examine an accused person is one which may be exercised at any stage of the trial in the discretion of the Court, this provision must not be regarded as in any way superseding the clear directions contained in s. 286 as to the manner in which a trial at Sessions should be commenced. So, when a plea of "not guilty" is entered by an accused person (particularly in a capital case) after the said accused had admitted his guilt before the Magistrate it is the duty of the trial Court to proceed with the hearing of the evidence, the Court cannot and ought not to examine and cross-examine the accused on his confession. The proper time for taking into consideration such confession comes after the entire prosecution evidence is recorded. *See* 20 A. L. J. 663.

2. When the jurors or assessors have been chosen the case must be proceeded with.—After the jurors are sworn, the trial cannot be postponed to enable the prosecution to examine a witness by commission, 19 C. 113.

3. It is not the duty of the counsel for the prosecution to get a conviction at any price.—It is his duty to see that the case against the prisoner is brought out in all its strength but it is not his duty to conceal or in any way to diminish the importance of its weak points. His function is not to inquire into the truth, but to put forward, with all possible candour and temperance, that the part of it which is unfavourable to the prisoner —*Harris, Principles of Criminal Law*, p. 416, 8 C. 121. The duty of counsel for the Crown is not to secure a conviction but to assist the Court in arriving at the truth. 18 Cr. L. J. 576 (C.). *See* also 42 C. 422; 42 C. 857.

4. Opening case for the prosecution.—Counsel for the prosecution opens the case prosecution to the jury by giving the outline of the evidence and the leading features of the case. In doing so he ought to state *all* that it is proposed to prove, as well as declarations of the prisoners as facts, so that the jury may see if there is any discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them, unless such declarations amount to a *confession* when it would be improper for counsel to open them

* Section 285-A has been added by Act XII of 1923

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

Notes.—1. Liability of absenting assessor.—He may be fined Rs, 100 for non-attendance, s. 332.

2. **Trial must begin with at least two competent assessors.**—*See* Note 5 to s. 284. This section contemplates the case of a trial which had commenced with the aid of two or more assessors, who, at the commencement of the trial, were capable of acting as assessors. Therefore, in a case where three assessors were chosen to assist the Court at a trial, one was found to be deaf before commencement of the trial, and his services were dispensed with. Of the remaining two, one was discovered to be deaf after the Public Prosecutor had closed his case; *held*, that under these circumstances the trial was really being held with only one capable assessor, and therefore it must be set aside, **21 A. 106.** Where at the close of a trial, one of the assessors was discovered to be so deaf and blind as to be incapable of understanding the proceedings, the trial was held to be null and void, **Weir II, 340; 19 M. 375.** *See* **1894 A. W. N. 207.**

3. **At least one assessor must continue throughout the trial, otherwise trial illegal.**—During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on, another assessor became too ill to take any further part in the trial, and the third assessor was obliged to retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished; *held*, that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provisions of s. 268) been held before a Court not having jurisdiction, **13 A. 337.** A Sessions trial began with the aid of two assessors, *K* and *A*. On the third day *K* was absent for an hour but the trial went on with the aid of assessor *A*. On the fourth day *A* was absent for 20 minutes during which the trial continued with the aid of *K* alone. At the conclusion of the trial, the opinions of both the assessors were recorded; *held*, that the proceedings were void as the trial was not held by a properly constituted tribunal. The law requires that a Sessions trial should be held under exceptional circumstances by the Sessions Judge with the aid of at least one assessor sitting throughout the trial and hearing all the proceedings. When a trial is resumed by a Sessions Judge in the absence of one of the assessors, but still with the aid of the other assessor or assessors present, the absent assessor ceases to occupy the position of an assessor during the trial, **6 C. W. N. 715.**

4. **Absentee assessor must not be allowed to resume his functions, but the illegality may be cured.**—A criminal trial before a Court of Session having commenced with the aid of two assessors, one of them was, owing to unavoidable causes, absent during a part of the trial. He was allowed to read the evidence recorded in his absence and resumed his seat during the rest of the trial and gave his final opinion just like the other assessor who was present throughout the trial; *held, per* BENSON and BHASHYAM AYYANGAR, JJ. (DAVIES, J., *dissenting*), that though the proper course for the Court was to proceed with the trial without the absentee assessor, the irregularity was one which might be cured under s. 537. *Per* BHASHYAM AYYANGAR, J. In criminal trials with assessors, though assessors merely assist the Court, but do not form part of the tribunal which finally decides the case, the Code prescribes as an essential condition precedent to the exercise of jurisdiction by the Court that the trial should commence with not less than two assessors and that one at least of them should be present throughout the trial and give his opinion. The assessors, unlike the jury give their opinion separately and not as members of a body; and the fact that one of them was wrongly allowed to take part in the trial and give his opinion, will not vitiate the opinion of another assessor which was validly given. *Per* DAVIES, J. When the absentee assessor was allowed to resume his seat as assessor, the Court ceased to be a Court of competent jurisdiction and the irregularity was not one curable by s. 537, **24 M. 523.** Where in a Sessions trial the judge allowed one of the two assessors to absent himself for one of the days on which the trial proceeded, and to return on the following day; *held*, that the procedure adopted by the Sessions Judge was contrary to the intention of this section and of s. 295, and the Judge ought either not to have given leave of absence or should have adjourned till a day when both the assessors could attend, **Ratanlal 695.** An assessor who is allowed under the provisions of this section to absent himself during a portion of the trial cannot be allowed to resume his functions afterwards, the portion of the proceedings which had taken place during his absence being read over to him on his return. This procedure is not in accordance with law. Under the section, the trial should have proceeded with the aid of other assessors, **8 C. P. Cr. 9.**

he declines, the Court ought to call the witness for cross-examination **11 Bom. L. R. 1162 = 10 Cr. L. J. 338.** In a case in which the prisoner is undefended the presiding Judge should look at the deposition of any witness appearing in the Calendar as a witness for the Crown and not called on behalf of the prosecution or tendered for cross-examination in order to ascertain whether he should not himself taken action under s. 540. All witnesses returned in the Calendar as witnesses for the Crown are, whether they are called or not for the Crown, bound to be in attendance until the conclusion of the trial unless they are released from attendance by order of the Court, and before releasing them from attendance the Court should satisfy itself that their evidence will not be required either by the prosecution or by the defence, **16 A. 84 (F.B.).** The prosecution is not bound as a matter of procedure to produce at the trial witnesses who have been examined before the committing Magistrate when there is reason to believe that the evidence of such witness is not true **Weir II, 378,** it is a sufficient reason for not calling any particular witness on behalf of the prosecution that there is a reasonable belief that he will not if called, speak the truth **Weir II, 378.** He is not bound to do more than have all the witnesses called before the Magistrate present in Court, for the accused to call them or not as he thinks fit **14 C. 245; 16 A. 521; 15 A. 6; 5 C. 614; 15 W. R. 34** and *see* Note 3 under s. 289 *See* Note 2 above. **49 C. 277.**

8. Duty of prosecutor to call his witnesses for cross-examination by accused.—Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment it has been usual to do so, that the defendant may cross-examine them If the Counsel will not call the witness, the Judge in his discretion may Where a witness called before the Coroner was not called for the Crown at the trial the Court has refused to require him to be called, *R v Wiggins*, **10 Cox. 562.** However, the prosecutor is not *bound* to call them all, though he ought it has been said to have them in Court that they might be called for the defence if the prisoner chooses, *Archbold*, p 483. There is no provision in this Code analogous to English practice, entitling a prisoner to have a witness for prosecution who is not called put into the witness-box for cross-examination. The accused might apply to have such a witness examined under s. 291 or might comment on the circumstance of his not being examined by the prosecution or tendered for cross-examination, **5 B. H. C. R. Cr. Ca. 85** at **p. 98,** *see* also **5 C. 614; 24 C. 283; 7 A. 904; 17 C. 939; 14 C. 245; 11 Bom. L. R. 1162.**

9. The examination of witnesses should be oral.—The examination alluded to in the section means oral examination of the witnesses present (except in cases where evidence is taken by commission, or in any case where a witness is deaf or dumb). Such oral examination is, therefore, the general rule and it is of the utmost importance that the rule should be followed in all cases where the witness is present to be examined. If a witness before a Magistrate gave a true statement, he will probably, if intending to tell the truth repeat the same statement without substantial difference at the trial. If on the contrary his statement before the Magistrate was not true in important particulars he may not be able to repeat the same statement, and may omit something important mentioned in his former evidence, or may deny on oral examination that he did make a particular statement before the Magistrate. The demeanour of the witness may be important for the assessor or Judge towards forming an opinion of his truth. It is unnecessary to go into the many reasons why this rule should be followed. It is sufficient to say it is the rule and is founded on reason and justice."—*Per* KERNAN C.J., in **9 M. 83.**

10. Cross examination must follow examination and cannot be reserved—The Judge's procedure at a Sessions trial in following all the witnesses for the prosecution to be all examined in one day, but permitting the cross-examination to be reserved to a subsequent date was held irregular, **Weir II, 382.** Where, however an application is made on reasonable grounds for time to cross-examine the witnesses, the application should be granted especially in capital cases, **41 C. 299.**

11. How to use at the trial evidence given before the committing Magistrate.—It is against the law to read the deposition of a witness previously recorded and then to ask him if it is true. It amounts to putting him a leading question and intimating to him impliedly that the story is expected from him, **8 C. P. Cr. 33; Oudh S. C. No. 88; Weir II, 360.** It is no doubt the distinct duty of a Public Prosecutor to give opportunity to a witness for the Crown to explain discrepancies in his statements before the committing Magistrate and the Sessions Court, **1894 A. W. N. 57;** but it is wrong and highly prejudicial to the accused to allow witnesses to be set straight in their examination-in-chief, and whenever a witness says something that does not exactly tally with what he said before the Magistrate, his memory should be jogged by a reference to his previous deposition, **13 W. R. 18.** *See* Notes 3 to 14 to s. 288.

12. Ordering witnesses out of Court.—When the case is called on, or at any period during the trial the Court at the request of either party, will order such of the witnesses of the opposite party as have not yet been

to the jury, the reason being that circumstances under which the confession was made may render it inadmissible in evidence. *The general* effect only of the confession said to have been made ought to be given, *Archbold*, pp. 218 and 219.

5. In opening case prosecutor should give names of witnesses not previously examined.—There is nothing in the Code which restricts the prosecutor at a Sessions trial to witnesses who have been examined in the Court of the committing Magistrate : but, in fairness to the accused, the prosecutor should state in his opening address the names of witnesses whom he proposes to call, who have not already been examined under s. 208 or s. 219 and the purpose for which each is to be produced. The mere fact that a witness has not been examined before a committing Magistrate is no ground for refusing to take the evidence of a relevant witness tendered for the prosecution, **1 P. R. 1889.** But, in **14 A. 212** it was *held* that the Public Prosecutor cannot demand *as a right*, such witnesses should be examined, but that the Court may call and examine such a witness if it considers it to be necessary in the ends of justice. According to English practice notice of intention to call such additional witnesses with a copy of the evidence which it is proposed they should give ought to be given to the prisoner and sent to the Court, *Archbold*, p. 483. But failure to do so does not render the additional evidence inadmissible, *Halsbury*, Vol. IX, p. 365.

6. Every witness present at commission of crime should be called, even though he gives different account.—It is *prima facie* the duty of the prosecutor to call all the witnesses who prove their connection with the transaction connected with the case, and who also must be able to give important information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution. The only legitimate object of a prosecution is not to secure a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court, **8 C. 121 at p. 124 = 10 C. L. R. 151; 14 A. 521; 16 A. 84; 8 P. W. R. 1909 = 10 Cr. L. J. 321.** In a trial of the accused under s. 304, I.P.C., certain witnesses who deposed to seeing the homicide take place and who gave evidence before the Magistrate were not called and examined in the Sessions Court; *held*, that every witness who was present at the commission of such offence ought to be called, that even if they give different accounts, it is fit that the jury should hear their evidence so as to enable them to draw their own conclusions as to the real truth of the matter, **Ratanlal 581.** Similarly, the prosecution is bound to examine witnesses present at a search, **9 C. W. N. 438.** Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution that they had been examined by the committing Magistrate against the express wish of the Police-officer in charge of the prosecution, *held* that it was not a valid ground for the non-production of the witnesses in the Sessions Court. In conducting a case for the prosecution, all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined, **10 C. 1070; 3 S. L. R. 200 = 11 Cr. L. J. 410.** It is not within the province of a Judge to dispense with the evidence of any witness for the prosecution and if the Public Prosecutor dispenses with the evidence of witnesses who can speak to material facts, he commits a serious error of judgment. The whole evidence should be put before the Court and the Public Prosecutor is bound at least to tender the witnesses bound over to appear at the Sessions for cross-examination, **Weir II, 379.** All persons said to have witnessed the murder should have been produced before the Magistrate, though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness whom he may have reason to believe will give false evidence, **12 P. R. 1916 = 17 Cr. L. J. 267.**

7. Public Prosecutor not bound to call witnesses who in his opinion will not speak the truth or support his case.—The Public Prosecutor is not to bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence, but in such circumstances he should explain to the Court what is his reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion, **7 A. 904.** Even the Court is not competent to pick and choose among the witnesses sent up by the committing Magistrate. It is his duty to examine all the witnesses, unless he has good and sufficient cause of the representation of the Public Prosecutor or otherwise, to believe that the witnesses came into Court-house with a pre-determined intention of giving false evidence, **15 A. 6.** It is open to the Public Prosecutor to decline to examine at the Sessions trial a witness, whom he had examined before the committing Magistrate, but whose cross-examination by the defence was reserved. It is, however, his duty to tender the witness for cross-examination in the Court of Session; and if

5. Statement made to a Jail Superintendent confirmed before the committing Magistrate.—When asked by the committing Magistrate that if he wished to make any statement, the accused said he did not. The following day he made a statement to the Jail Superintendent and asked that it might be placed on record. The Superintendent forwarded the statement to the Magistrate who examined the accused with reference to the statement and filed it in the case learning that the accused wished to file it. *held*, that the statement was admissible as evidence under this section, **32 M. 3 at p. 15.**

6. Not necessary to read out confessional statements.—It is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate, and ask them if they have any objections to the reception of these confessions. The examination of the prisoners before Magistrate is to be received in evidence and the attestation of the Magistrate is *prima facie* proof of the circumstances. **14 W. R. 9.**

7. A confession is evidence though retracted or not corroborated.—A voluntary and genuine confession is a legal and sufficient proof of guilt. **7 W. R. 61; 6 W. R. 73 and 83.** A confession before a Magistrate though afterwards retracted before the Sessions Court, is evidence against the party making it **8 W. R. 40,** without any other corroboration if properly attested before a Magistrate, **12 W. R. 49; 6 W. R. 73; 21 M. 83 at p. 85; 1890 A. W. N. 173.** The Judge must be satisfied that it was made voluntarily, **19 B. 735;** but not where the Police-officers were guilty of misconduct in having produced evidence with regard to the identification of property which was false there being no corroboration, **2 C. L. R. 132; 1883 A. W. N. 59.** *See* also Note under Heading VIII.—'Retracted confessions,' to s. 164 at p. 373.

8. Statement of the accused must be taken in its entirety.—*See* Notes under s. 342 and Note 5 to s. 255. If the statement made by the accused is to be used against him, it must be taken in its entirety, **8 W. R. 38.** Where the prisoner admitted that he had accompanied the dacoits for a short distance but declared that he had turned back almost immediately, and had nothing to do with dacoity that afterwards took place, and did not know that such an offence was in contemplation, *held* that this statement did not go the length of a confession, and the conviction was, therefore, quashed **7 W. R. 39;** also **7 W. R. 8.** When an accused makes two distinct statements—the one amounting to a confession of guilt, and the other repudiating it—if the one statement is taken against the accused, the other also must be taken for what it is worth in his favour. The Court ought to weigh well the relative credibility of the two statements before it accepts the one in preference to the other, **10 B. L. R. 337; 18 A. 78.** Where, therefore, the accused admitted that she threw a child into a well but said that it was dead at the time, *held* that she could not be convicted of murder on her statement though the medical evidence showed that the child must have been alive when thrown into the well, **9 M. L. T. 316 = (1911) M. W. N. 199 = 12 Cr. L. J. 142.** It does not follow that because parts of the confession are found to be false, the entire confession should be rejected. After the entire statement of a prisoner has been given in evidence, any part of it may be contradicted by the prosecution if they choose to do so and then the whole testimony is left for consideration precisely as in other cases where one part of the evidence contradicts the other. Even without such contradiction it is not supposed that all the parts of a confession are entitled to equal credit. If sufficient grounds exist the part that charges the prisoner may be believed while that which is in his favour may be rejected. *See Rex* v. *Higgins*, **(1829) 3 C. and P. 603;** *Rex* v. *Steptoe*, **(1830) 4 C. and P. 397;** *Rex* v. *Clewes*, **(1830) 4 C. and P. 221, 40 C. 873.** The former refer to those cases only where the conviction is based solely upon the statements of the accused and it is but fair that the statement should be taken in its entirety and do not apply to those cases where there is independent evidence corroborating some of the material parts of the confession.

9. Confession of co-accused.—A confession of a co-accused can only be *taken into consideration* against the other accused, s. 30 of *the Indian Evidence Act*, and is not evidence, **15 B. 68.** *See* also **4 C. 483 (F.B.), 2 C. W. N. 749; 7 M. 102; 23 M. 151; 1 A. 666; 10 B. 319.** It must be made in the presence of the other accused, **10 C. 970; 7 C. 65; 6 B. 124.** A retracted confession of a co-accused should carry practically no weight against any person other than the maker, **23 C. 659.** *See* Note under s. 367. *See*, however **18 C. W. N. 663 = 13 Cr. L. J. 571.**

10. Deposition of an approver when inadmissible.—When the accused person to whom a conditional pardon had been tendered is examined as a witness, the deposition is inadmissible when the deponent, on forfeiture of the pardon, is tried jointly with the other accused, **11 C. 550; 21 W. R. 5; 7 C. L. R. 65.** *See* Notes to s. 336.

11. "Committing Magistrate."—When a Sub-Magistrate inquired into a case and discharged the accused and the District Magistrate acting under s. 436 committed the accused for trial, *held*, that the examination of the accused and statement of the witness before the Sub-Magistrate will be held to have been recorded

examined or are not under examination to leave the Court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side who are to be examined after him. If after such an order a witness is present during the examination of the other witnesses, the practice is to allow him to be examined, subject to observation as to his conduct in disobeying the order. *Taylor* (10th Ed.), s. 1401; *Archbold*, pp. 482-483.

13. **Trial ought not to be stopped before the close of the prosecution case.**—Where after the examination of some of the witnesses, the Judge asked the jury whether they wished to hear any more evidence and they stated that they did not believe the evidence and wished to stop the case and the Judge recorded a verdict of acquittal; *held*, that the procedure was wrong and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to have been arrived at until all the remaining witnesses had been examined, **20 M. 445.**

14. **Admissibility of post-mortem report in evidence.**—The *post-mortem* report is not admissible as evidence except to contradict the officer who made it, but it may be used by that officer when under examination for the purpose of refreshing his memory. If it is intended to bring the report as evidence on the record, the officer who made it should be called as a witness, **27 C. 295.**

15. **Turning out of Court perjuring witness before conclusion of his cross-examination.**—A Sessions Judge is not justified in stopping the cross-examination of and turning a witness out of Court because he is of opinion that the witness is not speaking the truth, and no reliance can be placed on the evidence of such a witness, **1900 A. W. N. 149.**

Examination of accused before Magistrate to be evidence.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

Note.—*See* ss. 209 and 342 for the power to examine the accused, s. 364 for the record of examination of the accused, s. 164 for the power and mode of recording statements and confessions investigation, s. 533 or the provision remedying irregularities in recording such statements and *see* 271 for recording of plea.

Notes.—1. Object of examination.—Though it is not imperative on a Magistrate to examine the accused, yet this section and s 342 contemplate such an examination for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, **Ratanlal 100** and **710; 42 C. 957** and not for the purpose of filling up a gap in the prosecution, **4 L. B. R. 244 = 8 Cr. L. J. 62** and *see* Note 3 under 239 and Note 12, *et seq* to s. 342.

2. **Procedure—Time for tendering certain examinations.**—(*a*) The 'examination of the accused' should be put in *before the accused is called upon to enter upon his defence*, **Weir II, 361**; (*b*) so also should the deposition of a medicial witness which, 'may be given in evidence' (s. 509) and the deposition of a witness in a case in which it may be given in evidence under s. 33, *Evidence Act*; (*c*) before examinations are received as evidence under any of these three sections care must be taken to see that they are in proper form and duly attested or otherwise strictly proved ; (*d*) such examination when so received are to be detached from the proceedings in the preliminary inquiry and annexed to the record of the trial, *Wilkins*, 114. The Madras High Court has ruled that the examination of the accused persons which this section requires to be given in evidence should be read as part of the case for the prosecution before the defence is entered upon and marked as an exhibit. A note to the effect that this has been done should be entered on the record.—*See* Madras Criminal Rules of Practice, Rule 241.

3. **Examination not duly recorded ought not to be put in.**—Where the committing Magistrate admitted a confession which was not admissible and examined the accused with respect to it; *held*, that the accused being examined about confession which was not admissible in evidence, the questions and answers to them could not be said to be duly recorded, as the questions were such as were not allowed by the law to be put and that the answers to those questions were not admissible in evidence against the accused, **4 L. B. R. 244 = 8 Cr. L. J. 62.**

4. **Tender of accused's examination before Magistrate is obligatory.**—The examination of the accused before the Magistrate must be given in evidence at the Sessions trial, whether it tells for or against the prisoner, and it is not in the discretion of the prosecution to put in that examination or not, **88 W. R. 63.** A Sessions Judge refusing to put on record confessional statement of the person whom he treated as accused commits great irregularity. It is not optional with the prosecution to put in such statements, **15 M. 312**; the whole of the statement should be read out, **5 M. H. C. R. Appx. IV.** If it is not tendered, the Judge is bound to call for it, **15 M. 352.**

witnesses for the prosecution taken before the Magistrate should be read out and that he should be allowed to cross-examine the witnesses thereupon, to this course the Government Prosecutor and the Court consented, *held*, that this procedure was illegal but that inasmuch as it had not occasioned a failure of justice, a new trial should not be granted, **9 M. 83.** This section is not an exception to the rule in s. 256. It does not dispense with *examination* of the witness directed by s. 256. The provision is not the evidence before the Magistrate may be put in as evidence of the witness if he is tendered for cross-examination, but it is that such evidence before the Magistrate may be trusted as evidence in the case if the witness is *examined, i.e.*, examined as a witness, not if he is cross-examined or tendered for cross-examination. This section does not provide that the Judge may treat the evidence before the Magistrate of all the witnesses for the prosecution as evidence if all the witnesses are produced and examined. *Per* KERNAN, J., in **9 M. 83.** The previous deposition cannot be filed if the witness is merely produced for cross-examination at the trial and not produced and examined, **1915 M. W. N. 544 = 16 Cr. L. J. 615.** The section does not permit a Sessions Court to ground its judgment on the depositions taken by the Magistrate without examining the witnesses afresh. The section has no operation whatever unless the witnesses at the trial makes statement inconsistent with his deposition before the Magistrate, **24 W. R. 11.** The former deposition ought not to be read until after his examination in Court, **1 W. R. 14**; and evidence taken before the committing Magistrate, but not used at the trial cannot be referred to an appeal, **8 B. L. R. Appx. LXIII.**

7. Evidence of a witness not allowed to be cross-examined is not duly taken in the presence of the accused.—If a committing Magistrate does not allow the accused to cross-examine the witnesses for the prosecution, the evidence of such witnesses cannot be said to have been duly taken in the presence of the accused. To require the presence of the accused merely to hear the *ex parte* statements of a witness, without allowing him to show by cross-examination that the statements are untrue or unreliable, defeats the real object of the law, for it deprives the accused of any substantial benefit from being present, **21 C. 642 at p. 665.** *See* also **3 M. 48.**

8. Admissibility of approver's evidence given in preliminary inquiry.—A deposition made by an accomplice at the preliminary inquiry is capable of being treated as evidence under this section in the Sessions trial, because though an accomplice, he is none the less a witness for the matter of this section **14 P. R. 1894; 15 M. 352; 8 B. L. R. 203 = 16 Cr. L. J. 233; 3 P. R. 1904.** The admissibility of statements made by an accused person, under a conditional pardon was no doubt raised in **7 C. L. R. 56** and **13 C. L. R. 326**, but not decided until the Allahabad High Court held that repudiation by approver of his statement before the committing Magistrate does not prevent the Sessions Court from considering his evidence under this section, **21 A. 175.** But the use of such statement as substantive evidence of the facts alleged by him on the prior occasion is fraught with the gravest peril and could never have been the intention of the Legislature, **22 A. 445; 27 C. 295** and **4 C. W. N. 49**; and *see* Notes to ss. 339 But *see contra* **22 C. 50.**

MODE OF USING EVIDENCE.

9. Mode of using in Sessions Court, evidence taken before committing Magistrate.—This section was never intended to be used so as to enable a Court trying a case to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself. A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth, **7 A. 862; 21 A. 111; A. I. R. 1929 Lah. 111.** At a trial before a Sessions Court, the attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution taken before the Magistrate should be read, and that he should be allowed to cross-examine the witnesses thereupon to this course the Government Prosecutor and the Court consented, *held*, that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted, **9 M. 83.** The Judge is bound to let his intention or the possibility that he may do so, be known, to the accused and the prosecution in order to afford them an opportunity to test such statement by cross-examination otherwise, **1886 A. W. N. 256.** So, too, the counsel for the prisoner, if he desires to use previous statements to contradict the witnesses for the Crown, must draw their attention to such contradiction, **31 C. 142 (F.B.)**, which *overrules* **6 C. L. R. 293** and *refers* to **11 B. H. C. R. 231.** In the Full Bench Case referred to above, after the case for the prosecution had closed, counsel for the prisoner claimed a right to read to the jury the depositions taken before the committing Magistrate for the purpose of showing that the evidence given at the trial differed from that given before the Magistrate and it was ruled that the counsel for defence had no such right without drawing the particular

by or before the committing Magistrate. The phrase "committing Magistrate" in ss. 287 and 288 is merely a compendious way of referring to the Magistrate or Magistrates, who held the preliminary inquiry on which the committal was made, **31 M. 40; 7 Lah. 70.**

12. Irregularities in mode of recording examination—their effect.—*See* s. 342 and Notes thereto.

Evidence given at preliminary inquiry admissible.

288. The evidence of a witness * "duly recorded in the presence of the accused under Chapter XVIII" may in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case † "for all purposes subject to the provision of the Indian Evidence Act, 1872."

Note.—The words "under Chapter XVIII" have been used in the place of "the committing Magistrate" to cover the case of evidence recorded by a Magistrate, other than the committing Magistrate under s 219—*Sel. Com. Report*, 1916.

Notes.—1. *See* Chapter XVII for inquiry preliminary to commitment and ss. 208, 212 and 213 for taking examination of witnesses and s. 350 for committal on evidence recorded by two Magistrates and s. 33 of *the Indian Evidence Act* for filing depositions of absent witnesses.

2. Object of the section.—This section is intended to provide for the contingency that may arise when a witness, who is *produced* before the Court of Session, holds back information and evidence and tells a different story from that which he gave in the preliminary inquiry before the Magistrate. It is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with and the evidence given by him before the committing Magistrate referred to, **2 A. 646.** Ordinarily the previous deposition can be used only after the witness has been called and examined, **24 W. R. 11; 23 P. R. 1883.**

APPLICATION OF SECTION.

3. The section does not extend to Courts of Magistrates other than the committing Magistrate.—Under the old law this section did not extend to Courts of Magistrates other than the committing Magistrate. Under the newly amended section evidence duly recorded by anybody under Chapter XVIII, in the presence of the accused may be treated as evidence by the Sessions Court in the case under the safeguards mentioned in section 288. But it must be borne in mind that the analogy of section 288 is not to be extended to other cases of evidence not duly recorded under Chap. XVIII, and in a case not before the Court of Sessions. Where conviction of the accused was really based on the former statements of witnesses made before a Magistrate other than the trying Magistrate, and it was confirmed in appeal by a Sub-divisional Magistrate who, on the analogy of this section admitted such statements, the High Court set aside the conviction and sentence and directed the lower Appellate Court to examine the witnesses *de novo* in the usual manner, **Ratanlal 728.** The phrase 'committing Magistrate,' is merely a compendious way of referring to the Magistrate or Magistrates who *held* the preliminary inquiry on which the committal was made. Where a Subordinate Magistrate recorded the evidence but the District Magistrate made the commitment, it was *held* that the latter need not have himself recorded any of the evidence or statement of the accused to make them admissible under this section, **31 M. 40.** A statement made by a witness at a search though signed by him cannot be used under this section, **36 M. 159.**

4. Criminal Law Amendment Act XIV of 1908.—Section 13 of that Act lays down the procedure in respect of trials held under that Act. "Notwithstanding anything contained in *the Indian Evidence Act* I of 1872, the evidence of any witness taken by a Magistrate in proceedings to which this part applies shall be treated as evidence before the High Court if the witness is dead or cannot be produced and if the High Court has reason to believe that his death or absence has been caused in the interest of the accused."

5. Depositions not taken in presence of accused cannot be admitted under this section.—Statements made by a witness in the absence of the accused is not admissible under this section, **35 A. 260.** Unless it be that the accused was absconding and the provisions of s. 512 applied to the circumstances of the case (**6 C. L. R. 53**) the evidence referred to in this section must have been recorded in the presence of the accused, **7 A. 862; 21 A. 111; 22 A. 445; 3 P. R. 1904; 23 C. 361.**

6. Section applies only when the witness is 'produced and examined.'—To expedite the trial in a Sessions case, the attorney for the prisoner suggested to the Court that certain depositions of

* Substituted for the words "duly taken in the presence of accused before the committing Magistrate" by Act XVIII of 1923.
† Added by Act XVIII of 1923.

witness or the proper formalities being observed, for the purpose of contradicting a witness, and to permit either the prosecutor or the accused to use it for either purpose. Further it enables the Judge to treat it as part of the material on which he sums up to the jury or assessors under s. 297 or s. 309 at the conclusion of the trial. But see the latest amendment by the introduction of the words for all purposes subject to the provisions of the Indian Evidence Act. *See* Note 18 below.

But there is nothing in the section which prescribes the value or weight to be attached to the evidence thus admitted. Once admitted, the power given by this section in respect of the evidence is exhausted, the discretion of the Judge extending only to the question whether the former evidence is to be treated as evidence in the case. Once admitted it is on the same footing with all other evidence in the case that is to say it is to be considered by the jury, or by the assessors and the Judge according to the nature of the trial, as part of the material upon which the verdict or the finding is to be given. The value of the previous evidence is a matter entirely beyond the scope of the section, as it is also of *the Evidence Act*. Its value is a question in the particular case for the jury or for the assessors, subject to the directions of the Judge in summing up or for the Judge in cases where he is a Judge of the fact. Whether any portion or the whole of the evidence thus admitted is entitled to credit and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury or assessors, or for the Judge as the case may be, but they are in no way affected by this section. *Per* PLOWDEN J., **51 P. R. 1887.** *See* also **37 P. R. 1917 (Cr)**

16. The discretion of a Judge is open to review by a Court of Appeal.— The purpose of this section as amended is to make deposition given before Magistrates in the preliminary inquiry evidence for the purposes of the trial in the Court of Session only when the Sessions Judge determines, in the exercise of his discretion, that they are to be used in this way. But we think the exercise of his discretion considering it as a matter of fact or law, is open to review by this Court in appeal. When the case is under trial in a Court of Session the Sessions Judge has the depositions given in the Magistrate's Court before him. If he finds that the statements of the witnesses in his own Court differ materially from those previously made by the same witnesses, it is his duty to examine them as to discrepancies, and this is more especially his duty when the prisoners are undefended, and contradictory testimony is given for the prosecution. But if he thus examines the witnesses, he ought (*see* Taylor on evidence ss. 1300 and 1301, and *the Indian Evidence Act* s. 155), in ordinary cases, to make the depositions upon which he has examined, evidence in the case he is at liberty to do so and the power should be exercised so as to bring all relevent matter so far as possible under consideration in forming a judgment on the case. If the Sessions Judge has omitted to examine witnesses on obvious and important discrepancies in their statements this Court will in general, direct that such an examination be made and the Sessions Judge having the witnesses before him for such purpose will in most cases, feel it his duty to make the former depositions evidence *quantum valeant* for the purpose of the final adjudication in appeal. The alternative is for this Court in such cases to order a new trial on the ground that there has been a misuse of the Sessions Judge's discretion which may have caused a failure of justice but a new trial will not be ordered except in special cases.' —*Per* WEST J. **11 B. H. C. R. 251.** Where a Sessions Judge used as evidence under this section the statement which a witness made before the committing Magistrate but which he repudiated at the Sessions trial as having been made under improper influence and the circumstances were such that the Sessions Judge could not properly rely on either of these statements *held following* **21 W. R. 43 = 13 B. L. R. Appx. XV** that the Sessions Judge did not exercise a proper discretion in allowing the former statement to be treated as evidence, **7 C. W. N. 345.** But see now **53 C. 181** *overruling* **21 W. R. 43** and **37 C. 205** as a result of the latest amendments. *See* also Note 18 below.

17. Statements let in under this section may be treated as substantive evidence.—In a capital case certain witnesses who had stated before the committing Magistrate that they had seen the accused striking the deceased withdrew their statements before the Court of Session and gave evidence exculpating the accused. The Sessions Judge considering the evidence given by these witnesses before him to be untrue, and acting under this section admitted in evidence the statements of these witnesses made before the committing Magistrate, *held* that such statements were rightly admitted and when admitted were on the same footing as the other evidence on record, **28 A. 683,** where **21 A. 111; 1888 A. W. N. 3-6, 22 A. 445** and **51 P. R. 1887** are *referred to* and **7 A. 442** *overruled.* The Calcutta High Court seems to have held that the evidence before the committing Magistrate which was afterwards wholly retracted and repudiated at the Sessions trial, cannot be treated as substantive evidence (*See* next Note.) But in **28 M. 414,** where a Sessions Judge being of opinion that certain prosecution witnesses had been gained over by the defence allowed their depositions before the

witness's attention to the alleged contradiction and affording him an opportunity to explain. Even the Judge would not have the right claimed by the prisoner in the Full Bench Case, **5 W. R. 54,** being opposed to the Full Bench Ruling. When a counsel or pleader cross-examines a witness with reference to a previous deposition, the parts thereof to which the cross-examination is directed should be set out in Judge's minute of the proceedings. The deposition itself need not, in such a case, be made a portion of the evidence in the Sessions Court, unless the Government Pleader desires that it should be so recorded or the Sessions Judge adopts it under this section. The pleader or counsel for the defence may introduce as part of his own evidence a previous deposition made by a witness, and, in this case, the deposition must be numbered and translated in the minute of proceedings. The prosecuting counsel or pleader has a right in such a case to question the witness as to apparent contradictions and discrepancies between the two statements, **Ratanlal 343.** *See* also **4 C. W. N. 49; 15 M. 353; 23 A. 683.** *See* Note 10 to s. 286.

10. Omission to examine witness on certain facts cannot be made good by filing previous statement.—Where a witness when examined in Sessions Court had shown no disposition in any way to resile from any statement he had made before the committing Magistrate, there is no valid reason for the Sessions Judge to admit the previous statement in preference to the one made before him. Where a witness was not examined in the Sessions Court, with regard to the particular statements made by him before the committing Magistrate, and he did not repeat those statements before the Sessions Court; *held*, **4 C. W. N. 49.** Similarly, the evidence of a medical witness before the committing Magistrate and not attested by him is not admissible before the Sessions Court under this section. A *post-mortem* certificate would not be admissible as evidence except to contradict the officer who made it or when used by that officer for refreshing his memory, **27 C. 295.**

11. Question of admissibility of evidence given before committing Magistrate should be determined immediately on its tender.—When the evidence of a witness taken before the committing Magistrate is tendered in evidence at the Sessions trial, the Sessions Judge should consider the question of its admissibility, and then and there determine the point and record his reasons if he decide to admit the same, **1 Bom. L. R. 156.**

12. Admissibility of statement alleged to be made under ill-treatment by Police.—When a witness makes a statement before a Sessions Court different from that made before the committing Magistrate, and alleges that that previous statement was made under Police pressure, that Sessions Judge should make some inquiry by examining the Police-officer regarding the restraint and pressure which is said to have been exercised upon the witness before bringing his previous statement upon the record under this section, **4 C. W. N. 49; 7 C. W. N. 345; 22 A. 445; 27 C. 295.** The retracted confessions of an accused standing by themselves uncorroborated, and the statement of witnesses brought in under this section, without independent corroborating testimony, should not both be joined together and held as mutually corroborating each other, so as to justify a conviction based thereon.

13. Practice—Translation of deposition before a Magistrate in Sessions proceedings.—A Sessions Judge should, in his proceedings, distinctly note that he has admitted, under this section a deposition of a witness taken before the committing Magistrate as evidence in the trial before a Sessions Court, and given the deposition a number in his proceedings and translate it, or the material portions of it in his English minute of the proceedings, **Ratanlal 343.**

14. When deposition is denied prosecution must prove that conditions of this section have been satisfied.—The confession of a witness in the shape of a former deposition can be used as evidence against a prisoner only on the condition prescribed by this section, that is, it must have been duly taken by the committing Magistrate in the presence of the accused person, *i.e.*, the person, against whom it is to be used. The certificate of the Magistrate appended to such confession, in order to afford *prima facie* evidence under s. 80 of *the Evidence Act*, of the circumstances mentioned in it relative to the taking of the statement, ought to give the facts necessary to render the deposition admissible under this section. Where the deponent, when examined as a witness before the Sessions Court and asked about his alleged deposition, denies that it was the deposition made by him, the presumption allowed by s. 80 of *the Evidence Act* cannot be made, and it becomes necessary, in order to render the deposition admissible under this section, to show by direct testimony that the conditions of that section have been satisfied, **21 W. R. 5.**

VALUE OF PREVIOUS DEPOSITIONS.

15. Purposes for which previous deposition may be used—its value.—The provisions of this section enable the Judge to use the deposition or such part of it as is necessary for the purpose of corroborating a

to do so, it can hardly be said that he had the opportunity to cross-examine. We are borne out in this view by the fact that on the record it is stated that a lengthy examination in-chief of the approver was read over to him and admitted to be correct, and it does not appear that the accused persons were asked then and there to cross-examine if they wished to. We think in the case of approvers having regard to the difficulty which has arisen in this case that it would be a sound principle for the committing Court to clearly bring to the notice of the defence that it is their duty to cross-examine the approver if they desire to do so directly his evidence is given," **17 C. W. N. 230 = 14 Cr. L. J. 70** Depositions of an absent witness are only admissible when the prisoner has had that right and opportunity to cross-examine, **21 W. R. 12** Inconvenience to witness is no ground, **6 A. 224.** The evidence must have been taken before a competent tribunal **3 M 48.**

(ii) *The witness must be dead etc*—A mere statement of the Public Prosecutor that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable is not enough. There must be independent evidence before the Judge can exercise the powers under s. 33 of *the Evidence Act* **23 M. L. J. 323 = 17 M. L. T. 214 = 16 Cr L. J. 294,** where **2 A. 646; 3 M. 48; 41 C 601** were *referred to*

22 The mere fact that witness tells a different story at trial will not make him a hostile witness.—The fact that a witness at the Sessions trial tells a story different from that told by him before the Magistrate, does not render him a hostile witness so as to entitle the prosecutor to cross-examine him. The proper inference to be drawn from such contradiction is not that the witness is hostile to this side or to that, but that he ought not to be believed unless supported by some satisfactory evidence **13 C. 53.** The mere fact, that a witness who is examined before the committing Magistrate and who in the opinion of the Public Prosecutor will not speak the truth in the Sessions Court does not entitle the Public Prosecutor at once to treat him as a hostile witness and begin to cross-examine him In such cases the duty of the prosecution is to have such witnesses in attendance so that they could be examined by the defence if necessary, though the prosecution is not bound to produce witnesses who are not likely to speak the truth **3 Lah 144.**

23 English practice.—The depositions of witnesses taken before a coroner's jury may be used in the cross-examination of the witnesses who made them but cannot be used as direct evidence except to contradict evidence of such witnesses, when such contradiction is permissible. *Halsbury*, Vol. IX p 366 *See Archbold*, pp 490—492 as to mode of cross-examining witnesses on their previous depositions.

Procedure after examination of witnesses for prosecution.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case, and if the Court considers that there is no evidence that the accused committed the offence, it may then in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury direct the jury to return a verdict of not guilty

(3) If the accused, or any one of several accused says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence

Notes.—1. Duty of prosecution to produce evidence.—*See* Notes 1 to 5 to s. 286.

2. English practice—When prosecution counsel may sum up case.—According to English practice the right ought to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution

committing Magistrate (where cross-examination had been reserved) to be received in evidence under this section, it was *held*, that this section enabled the Court to treat such depositions as substantive evidence in the case at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. Such evidence may be used as much in favour of the defence as of the prosecution and that the Court is not restricted in permitting the production of the evidence before the committing Megistrate, to use it solely for the purpose of contradicting the witness at the Sessions trial. *See* also **14 P. R. 1894** and **3 P. R. 1904.** *See* Note 18 below for the effect of the amendment of s. 288 by Act XVIII of 1923.

18. The effect of the amendment of s. 288 by the Act XVIII of 1923.—Now it is *held* that the words " For all purposes " were added to s. 288 to remove the limitation to the value of the evidence, admitted under this section, as laid down in **21 W. R. (Cr.) 49** and **27 C. 295.** So evidence recorded by the committing Magistrate, if admitted under the amended s. 288 must be treated as evidence for all purposes, even as the basis of the finding or verdict. It stands on the same footing as any other evidence before a Court of Session and is to be considered as proposed materials on which the verdict or finding may be given. **53 C. 181 (3 Pat. 781 not relied on); 5 Lah. 324; 27 Bom. L. R. 113; 47 A. 276; 47 M. 232; 2 Pat. 517; 45 M. L. J. 602; 6 Lah. 199; 49 All. 251.**

19. In the absence of an independent inferential circumstance conviction upon a statement absolutely withdrawn is unsafe.—It would be most unsafe to found a conviction upon the statements made before the committing Magistrate when such statements are absolutely withdrawn before the Sessions Court, unless there be independent circumstances from which it may be inferred that the second statements were false and the original statements true, **Weir II, 374; Ratanlal 966.** But when the conviction is by a jury who believed the statement before the committing Magistrate (although it was absolutely withdrawn at the Sessions trial) it being corroborated to a certain extent by independent evidence before the Sessions Court, it was *held* that the conviction was not illegal, **Weir II, 375.** When evidence given before the committing Magistrate is retracted in the Sessions Court, it would be very unsafe to act upon it, unless it is clearly proved to be true by some independent evidence, **Ratanlal 966.** In **10 C. W. N. 243,** the evidence given by a witness before the committing Magistrate and the Coroner as having actually seen the accused murdering the deceased who wholly retracted and repudiated before the Court of Session for the reason that it was given under threat and coercion of the Police; *held,* following **22 A. 445** that evidence before the Magistrate cannot be treated as substantive evidence under this section and that corroboration on all material particulars was necessary before the accused could be convicted.

20. Admissibility of previous statements of witness.—Previous statements of a witness used at the trial for contradicting his evidence, if not made *in the presence of the accused*, cannot be used against the accused as independent evidence of his innocence or guilt, **23 C. 361.** Such statement can be used under s. 145 of *the Evidence Act*, solely for contradicting the witness. It cannot be used at all under this section, if the witness is *absent*, **21 W. R. 12; 35 A. 260.** *See* **8 Bur. L. T. 38 = 18 Cr. L. J. 299** for using the statements of witnesses made to their counsel in giving their proof. Inconvenience to the witness is not one of the grounds allowed by s. 33 of *the Evidence Act*, **6 A. 224; 21 W. R. 56; 2 A. 646.** An accused is entitled to have an opportunity to cross-examine a witness before his evidence can be used against him. Accused are entitled to cross-examine under s. 153 of *the Indian Evidence Act* the witnesses upon statements made by them in a departmental inquiry, **2 Bom. L. R. 329.** Such statements are not privileged, **16 C. W. N. 431 = 13 Cr. L. J. 445.**

21. When previous deposition of witness not present at trial may be used.—*See* s. 33 of *the Indian Evidence Act*. The application of s. 33, Evidence Act, in criminal cases ought to be confined within the narrowest limits. It can only be in very extreme cases that it is right to make adverse use of the evidence of a witness under s. 33 in a criminal trial when that evidence if true, would be extremely material, **17 Bom. L. R. 590.**

(i) *Accused must have had the right and opportunity to cross-examine.*—S. 33 of the Evidence Act says that the adverse party in the first proceeding must have the right and opportunity to cross-examine. Where an approver who was examined in the inquiry died before the Sessions trial and his deposition was put in during the trial; *held,* that it was doubtful whether the evidence was admissible under s. 33 and even if admissible its evidentiary value was very small, **17 C. W. N. 230 = 14 Cr. L. J. 70.** " Now the practice in Sessions inquiries is not to cross-examine the prosecution witnesses unless, at the conclusion of the case when the charge is drawn up, the accused thinks it worthwhile to defend himself in the first Court, and, under the new provisions of the amended Code of Criminal Procedure, he may get the charge cancelled by cross-examining the witnesses and by entering into his defence. But if from the first he takes no such action, although it is clear he has the right

witnesses, to address the jury and to make a statement, but omission to give this information does not invalidate the conviction, *Archbold*, p 220. Entering on the defence marks a special stage in a trial omission to call upon the accused may occasion failure of justice and is not cured by s. 537. But *see* **18 A. L. J. 41.**

9. Accused not to be prejudiced, if he does not adduce evidence after saying he will.—Where on being asked under this section, the accused had stated that he means to adduce evidence, but on further consideration does not do so, the Court is not at liberty to make a presumption adverse to the accused from the circumstance that he has not adduced evidence and the accused does not lose his right to the last word, **10 C. 140 = 13 C. L. R. 358.**

10. Nature of defence set up must appear from record.—This section provides that the accused is to be called on to enter upon his defence and to produce his evidence. If he makes any statement in defence it ought to be recorded. If he does not voluntarily make any statement and declines to answer any question put by the Court, the fact should be noted, and when there is nothing else to show the nature of the defence a note of the address to the Court if any (under the following section), should be recorded. The record is not complete unless it shows the nature of the defence set up **15 W. R. 16.** There is nothing in the Law which prohibits a written defence. If presented it should be received **2 Agra H. C. R. 358**

11. Procedure where defence witnesses are not present.—If the accused has not his witnesses present the Judge should if he sees grounds for proceeding first call upon him for his defence and then postpone the case **23 W. R. 58; 6 B. L. R. Appx. LXXXVIII = 13 W. R. 34.**

12. Practice—Prosecution witness examined before Magistrate called by defence—his examination.—Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness is afterwards called by the defence the counsel for the defence has no right to commence his examination by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition are only admissible by way of cross-examination, with the permission of the Court if the witness proved himself a hostile witness **20 A. 155.**

13. If prosecution witness is recalled, opportunity must be given to accused with reference to such evidence.—Where a witness for the prosecution was recalled after the accused had made his defence and he (the accused) had no opportunity of calling evidence with reference to the evidence of that witness, the High Court quashed the conviction and ordered a new trial, **13 W. R. 15.** But *see contra* **13 W. R. 38,** where the accused had full notice of the nature of the evidence adduced.

14. Prosecutor's reply.—As to the prosecutor's right of reply on production of evidence for defence, *see* Notes to s. 292. The word prosecutor does not exclude the assistance of counsel, **11 B. H. C. R. 102.**

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Defence.

Notes.—1. Duty of defendant's counsel.—*See* s. 340 as to the right of the accused to be defended by a pleader. The counsel for the prisoner has before him, as his subject, the acquittal of the prisoner. His duty is to act as an advocate and not to any extent as a Judge. *He is to put himself in the place of the accused*, and so is not under any obligations which the accused would not be under. Thus he is not obliged to divulge facts with which he may be acquainted which are unfavourable to the prisoner.—*Harris Prin. of Cr. Law* 418.

2. In opening, counsel ought to state facts which he does not intend to prove.—"In the opinion of the Judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury as alleged existing facts matters which they have been told in their instructions on the authority of the prisoner, but which they do not propose to give in evidence," *R. v. Shimmin*, **15 Cox. 122,** *Archbold* p. 222.

3. Criminal case ought not to be adjudged on mere probabilities.—The Court ought not to adjudge a criminal case on mere probabilities as if it were a civil action, or contravene the well known principle of law

should state his case before he calls the witnesses; and after the evidence has been given either say simply 'I say nothing' or 'I have already told you what would be the substance of the evidence and you see the statement I made is correct' or, in exceptional cases to say "something is proved different to what I expected" and add any suitable explanation which is required. *R.* v. *Holchester*, **10 Cox. 226.** It is not proper to comment on the absence of witnesses for the defence unless it might be fairly expected that witnesses would be called, *Halsbury*, Vol. IX, p. 368. *Archbold*, pp. 219-220. If by reserving his defence before the justices, the prosecution have been prevented from investigating the case set up by the defendant at the trial, comment may be made on that circumstance. *See* also *Demmans Act*, 26 *and* 29 *Vict.*, *c.* 18. *R.* v. *McNair*, **(1909) 25 T. L. R. 228.**

3. **Examination of the accused not imperative.**—When the accused had admitted his guilt and had been examined by the committing Magistrate, the omission of the Sessions Judge to examine the accused does not constitute an illegality; s. 289 clearly indicates that such an examination is not necessary in all cases, **9 C. L. J. 55 = 10 Cr. L. J. 325.** The omission to examine the accused would not constitute an illegality which would vitiate the trial, **27 M. 238.**

4. **Accused entitled to be acquitted in absence of prosecution evidence.**—An accused in the absence of evidence on the prosecution side should be acquitted under sub-sec. (3) and should not be convicted on the evidence given against him by the witnesses called by the co-accused in his defence, **5 M. L. T. 75 = 10 Cr. L. J. 68.** A gap in the evidence cannot be supplied by examining the accused and so covering up the defect as, *e.g.*, in a defamation case, by questioning the accused as to whether he published the libel, **27 M. 238.** *See* also **26 C. 49.** Similarly, where the prisoner was charged with having been previously convicted and there was no evidence of this, it could not be supplied by his admission of the fact, **28 C. 689.** Witnesses for the defence ought not to be examined until after the close of the prosecution evidence for it is only when sufficient evidence has been produced that he can be called on to enter upon his defence, **4 C. L. R. 338.** It is incumbent on the prosecution to prove all the facts necessary to constitute the offence charged against the accused. When the case for the prosecution has been closed, the Court should acquit the accused where no evidence of any of the links necessary to establish the offence has been adduced by the prosecution. Any gap in the evidence ought not to be supplied by any statement of the accused, **36 M. 457.** *See* also **29 M. 372; 27 M. 288** and Notes to s. 342.

5. **Section applies only when there is "no evidence" that the accused committed the offence.**—These words cannot be extended to mean *no satisfactory*, *trustworthy* or *conclusive evidence.* Such a meaning would enable a Sessions Judge to exclude his assessors from their share of the trial whenever he thought the evidence unsatisfactory or inconclusive, **10 A. 414; 9 C. 875; 16 W. R. 20.** *See*, however, the remarks of JENKINS, C.J., in **19 C. W. N. 653,** Note 10 to s. 299 at p. 792. If there is any evidence relevant to the charge preferred, the accused must be called on for his defence and the trial must go on to its close, **16 B. 414; Weir II, 382.** The section can only apply when there is no evidence, and will not cover a case when the Court considers that the charge is in itself improper, **12 A. 551 at p. 552.** The third paragraph of this section means that if at a certain stage of the Sessions trial the Court is satisfied that there is not on record *any evidence* which even if it were perfectly true would amount to perfectly legal proof of the offence charged, then the Court has power without consulting the assessors to record a finding of not guilty, **10 A. 414; Weir II, 382.** If the trial was by jury, the Judge need not put the case at all to the jury, **16 W. R. 19; 7 W. R. 39.** It is not necessary to record the opinion of assessors, **7 Bom. H. C. Cr. Ca. 82,** but *see* **1 A. 610.**

6. **Opinion of the jury not to be taken in the middle of the case.**—After taking all the direct evidence in the case, the Sessions Judge is not competent to stop it, by asking the jury, if they wish to hear more evidence and by this means to obtain the opinion of the jury that they do not believe it. No final opinion as to the falsehood or sufficiency of the evidence for the prosecution ought to be arrived at by the Judge or jury until the whole of the evidence is before them and has been considered, **20 M. 445.**

7. **"Not proven."**—There is no legal warrant for a finding "not proven." The proper course is to record a finding of not guilty, **Weir II, 381.**

8. **Accused himself must be asked if he means to adduce evidence.**—The question whether the prisoner has any evidence to adduce is one which should be put to the accused himself and not to his pleader and the question and answer should be recorded as required by s. 364.—*Madras Criminal Rules*, p. 242. *See* also **9 M. 224.** This is not a mere formality, but is an *essential* part of a criminal trial. The High Court held that it would hesitate to apply s. 537 although the accused had not cross-examined the Crown witnesses, **23 C. 252.** When a prisoner is not defended by counsel, the Judge should inform him of his right to cross-examine

4. Court not entitled to decide how much evidence the accused shall let in.—Though the Sessions Judge could first call upon the accused to state the grounds of his defence (23 W. R. 53), yet where he refused to summon defence witnesses on the ground that "it is needless to prove the alleged enmity, there is ample evidence on record about this" *held* that it was manifestly for the accused person whose interest was concerned and not for the judge to say what amount of evidence it was proper to place before the jury in order to establish the case for the defence, 7 C. W. N. 183.

Prosecutor's right of reply

***292.** The prosecutor shall be entitled to reply—

(*a*) If the accused or any of the accused adduces any oral evidence, or

(*b*) with the permission of the Court, on a point of law, or

(*c*) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence.

Provided that, in the case referred to in clause (*c*) reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced

Notes.—1. Scope of the amended section.—This section is thoroughly re-drafted by Act XVIII of 1923. Under the old law there was a difference of opinion as to whether the prosecutor retained his right of reply when the accused produced certain documents without producing any oral evidence of witnesses. In 30 B. 421, it was laid down and held that the section makes the right of reply dependent upon the fact of evidence being adduced. But this interpretation, as is pointed out by BEAMAN J., would include both documentary and oral evidence and the logical effect would be to exclude a large proportion of legitimate cross-examination under pain of forfeiture of right of reply, 11 M. 339; 16 A. 88, also *held* that the prosecutor had a right of reply if the accused produced documentary evidence alone. Whereas 18 C. 243 and 17 C. 930 and 14 B. 436 held that the production of documentary evidence alone by the accused did not give the prosecutor a right of reply. The present section as amended has tried to do away with the difference of opinion in the High Courts as pointed above especially by the insertion of cl. (*c*) and the proviso.

2. Reason *for the rule as to prosecutor's right of reply*.—*Where the Judge allowed the prosecutor to* reply when no evidence for the defence was actually given, *held*, though the strict interpretation of s. 289 and of this section warrants this course, it was never meant by the Legislature that the prosecutor should have a reply when no witnesses are called *for the defence, the object of law being evidently to let each side have an opportu*nity of commenting on the evidence of the other and not to give an additional advantage to the prosecutor, 10 C. 140 = 13 C. L. R. 358 *approved in* 30 B. 421.

3. Has the prosecution any right to reply where the defence puts in documentary evidence through prosecution witnesses?—

(*i*) **Bombay.**—BEAMAN J., in 11 L. R. 177 = 9 Cr. L. J. 234, dissented from the judgment of BATTY J., as laid down in 30 B. 421, and *held* that the true principle to apply in deciding whether a reply ought to be allowed is that nothing which the accused can fairly get in to his own advantage by the legitimate employment *of cross-examination while the case is in the hands of prosecution, deprives him of his right to the* last word. The only practical difficulty which ever arises is this. Sometimes under the guise of cross-examining a prosecution witness counsel for the defence will try to get in a lot of matter, especially documentary *matter* which ought to properly come in as evidence in rebuttal. Now although this may be in strictness ... no Judge who knows his business ought to be in any uncertainty how to deal with it. The Court has only to say this evidence is all very well but this is not the proper time or proper way, to lay it before the Court. "If you really need it you must pay for it." He is of opinion that s. 292 ought to be read with s. 289 and not independently. He disapproves of the test laid down in 1 S. L. R. 81 = 8 Cr. L. J. 215, that when evidence is adduced by the defence through the mouths of the prosecution witnesses, it is for the Court to decide in the particular case whether such evidence is such as to take the prosecution by surprise and to assign the right of reply accordingly

In 30 B. 421, BATTY, J. *held*, that the section as amended was intended to give a right of reply whenever "at any stage, evidence is recorded for the defence which is not part of that adduced for the prosecution. The

* Section 292 has been substituted in the place of the old section by Act XVIII of 1923.

that the burden of proof lies on the Crown, not at all on the accused; and, unless the evidence is such as to enable the Court to judge rather the conjecture, the accused should not be called upon to make his defence, **Ratanlal 732 and 779; 4 C. L. R. 338.**

4. **Accused has no duty.**—On the probabilities a Sessions Judge held that it was more likely that the prisoner rather than the other inmates of his house inflicted injuries which caused his daughter's death, but did not come to any conclusion that his guilt was established by evidence beyond reasonable doubt; *held*, reversing conviction and sentence, that the accused being merely on the defensive owed no duty to anyone but himself, therefore, he could not be convicted, because he had not tried to explain to the Court how the death of his daughter had occurred or by whose means, **Ratanlal 886.** *See* also **41 C. 350.**

5. **Accused not bound to account for his movements.**—An accused person is not bound to account for his movement at or about the time an offence was committed, unless there has been given legal evidence, sufficiently *prima facie* to convict him of the offence, **10 C. 970.**

6. **No adverse inference can be drawn on failure of accused to produce his witnesses.**—If the accused fails to call witnesses on his behalf without sufficient reason being shown, the Court cannot draw an inference adverse to him. The accused is merely on the defensive and owes no duty to anyone but himself. He is at liberty, as to the whole or any part of the case against him to rely on the witnesses for prosecution, or to call witness, or to meet the charge in any other way he chooses, and no inference unfavourable to him can properly be drawn, because, he takes one course rather than another, **8 C. 121 at p. 125 = 10 C. L. R. 151.**

7. **Trial before the day fixed is irregular.**—The trial of the accused in the absence of witnesses for the defence, and before the day fixed in their summonses, is a serious miscarriage of justice or, at all events, is an irregularity sufficient to prejudice the accused in his defence. In such a case conviction will be reversed and a new trial ordered.—*M. H. C. Pro.*, 1882.

8. **One accused may cross-examine the witnesses of co-accused—may give evidence.**—One accused may cross-examine a witness called by another for his defence, when the case of the second accused is adverse to that of the first, **21 C. 401.** Also, if the accused are being tried separately, each would be a competent witness in the trial of the other, **23 B. 213; 16 B. 661.**

Right of accused as to examination and summoning of witnesses.

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

Note.—*See* s. 211 for list of defence witnesses to be given to committing Magistrate or Clerk of the Crown; s. 216 for summons to defence witness by committing Magistrate or Clerk of the Crown; ss. 216 and 544 for expenses of witnesses and deposit and Chap. XL for the commissions to examine witnesses, s. 231 for recalling witnesses when charge altered.

Notes.—1. **Magistrate bound to summon defence witnesses.**—A committing Magistrate is bound to take steps to procure the attendance of all the witnesses mentioned by the accused in his list delivered to the Magistrate, **15 W. R. 34; 23 W. R. 56; 2 W. R. 6; 3 W. R. 33.** There is no reason to refuse an application for summons simply because a large number of witnesses is mentioned therein, **11 C. 762.** A conviction had, without summoning and examining the witnesses for the defence is liable to be set aside, **12 W. R. 22.**

2. **Adjournment to secure the attendance of defence witnesses.**—If before conclusion of the trial the accused requests for adjournment to secure the attendance of his witnesses who had not properly been served, such application is not too late, **Weir II, 383.** *See* **18 W. R. 20; 15 W. R. 34 = 6 B. L. R. Appx. LXXXVIII; 12 W. R. 44; 4 Bom. L. R. 939** and *see* Note 2 to s. 295 at p. 786. **47 C. 758.**

3. **Judge has power to summon witnesses other than those named by the accused if he applies.**—The summoning of witnesses by an accused person through the medium of Sessions Judge is not a matter of "right," **3 W. R. 29.** Yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of witnesses other than those named in the list given to the committing Magistrate, **8 A. 668.**

deed and to suit the convenience of the expert, he was examined as a prosecution witness, *held* on these facts that the defence had adduced evidence and the prosecution has the right of reply, **63 P. L. R. 1911 = 12 Cr. L. J. 72.** Filling the deposition of a prosecution witness recently given by the witness on behalf of the prosecution another connected case is not adducing evidence within the meaning of s. 292 by proving it through the prosecution witnesses, **1 S. L. R. 91 = 8 Cr. L. J. 215.**

5. If defence evidence is solely as to character, reply generally waived.—Even if evidence for the defendant is only as to his character, it gives in strictness a right of reply, but the right is never even excercised, *Archbold*, p 223 In Calcutta the practice is similar, *Henderson's Cr Pro*, p. 616.

6. Right of reply where one of several accused calls witnesses.—The word *reply* in this section must mean ' reply generally on the whole case. It cannot be that the prosecutor is to sum up as to such of the accused as do not call evidence, and reply only on the evidence that may have been adduced by the others. Where one of several accused persons tried jointly calls witnesses, at the trial, but the other accused call no witnesses, they must all follow in their defence and the prosecution has the right of reply on the whole case, **18 B. 364.** The English practice seems to be different. If there are several defendants and witnesses are called by only one or some of them there is no right of reply except against the defendants who call evidence. *See Halsbury's Laws of England* Vol. IX, p 369 (footnote). If one of them calls evidence which is applicable to the cases of all, the prosecution has a general right of reply although the other defendants call no witnesses. *R* v *Hayes*, **2 M.** and **Rob. 155.** *R* v *Davis*, **17 T. L. R. 164;** but where such evidence is applicable only to the case of the prisoner calling it, and does not apply to the cases of the other defendants, the right of the prosecution to reply is confined to the case of the defendant calling evidence *R* v *Trevelli*, **15 Cox. 289.** *Archbold*, pp 223-224

7. Right of reply depends on what is done, and not on what may be said.—*See* **Ratanlal 923,** Note 16 under s. 557, and *see* Note 2 above.

293. (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

View by jury or assessors.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

Notes.—1. A Judge cannot delegate his function of examining witnesses on the spot to the assessors.—In cases of view by assessors of the scene of the alleged offence it was *held* that the Judge cannot delegate his own function of examining the witnesses on the spot to the assessors, **5 W. R. 59.**

2. View of *locus in quo* by the jury must be during the trial and not after close of case.—The Judge may permit the jury at any time during the trial, and even after summing up to view the *locus in quo*. *Archbold* p. 224 If in a Sessions trial the Judge should think it necessary or desirable to visit the place of the alleged occurrence, he should give due notice to the parties, and should proceed thither with the assessors and the parties and not after the close of the case and after the opinion of the assessors have been recorded, **1 C. L. R. 163; 17 Cr. L. J. 500.** It is illegal to take into account any observations of the locality made by a Judge without notice to the parties, **9 L. B. R. 64.**

3. The trial Judge to investigate if jury held improper communication.—Where it is alleged that the jury upon the view have received evidence in the absence of the Judge and of the prisoner, it is for the Court before which the trial takes place to investigate the facts and ascertain whether the alleged irregularity has occurred, *R* v *Martin*, **L. R. 1 C. C. R. 378.**

section makes the right of reply, dependent upon the fact of evidence having been adduced. But this interpretation as is pointed by BEAMAN, J., and by Mr. KNIGHT in the **1 S. L. R. 91** case would include both documentary and oral evidence and the logical effect would be to exclude a large proportion of legitimate cross-examination under pain of forfeiture of right of reply.

(*ii*) **Calcutta.**—During the cross-examination of the witnesses for the prosecution various documents were tendered by the counsel for the defence and were admitted, but no witnesses were called for the defence. *Held*, following **10 Cox. 226** and *distinguishing* **31 C. 1050,** that this did not entitle the prosecution to have the right of reply, as the documents tendered by the defence were such as did not take the prosecution by surprise and that this was the correct test for determining whether the prosecution should have the right of reply, **10 C. W. N. 267.** For other Rulings, under the previous Code, *see* **2 C. W. N. 201; 6 C. W. N. 303,** and **8 C. W. N. 209,** and also **10 C. 1024; 14 C. 245; 17 C. 930.** In **43 C. 126,** it was held by SANDERSON, C.J., that s. 292 must be read with s. 289 and must be construed accordingly. Reading the two sections together the right to reply which is given by s. 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Code, *viz.*, after the case for the prosecution is concluded and the test was not whether the prosecution was taken by surprise.

(*iii*) **Madras and Allahabad.**—The Madras and Allahabad High Courts hold that when documentary evidence is put in by the accused during the case for the Crown and before examination of the accused the Crown has the right of reply, **11 M. 339; 14 A. 212; 16 A. 88.** These cases were under the previous Code.

(*iv*) **Sindh.**—"The correct test for deciding in these cases whether the prosecution should get the right of reply, is whether the evidence adduced by the defence was such as to take the prosecution by surprise . . . It is for the Court to decide in the particular case whether that evidence is such as to take the prosecution by surprise, and to assign the right of reply accordingly . . . The prosecution must be presumed to have had notice of all relevant facts within the knowledge of its witnesses. Such a presumption need not always arise but it is only in rare and exceptional cases, as for example, when the Crown witnesses are openly and undisguisedly hostile to the prosecution and have withheld material facts from the knowledge of the prosecutor, that it would be rebutted," **1 S. L. R. 91 = 8 Cr. L. J. 215.**

(*v*) **Burma.**—In **7 L. B. R. 84 = 15 Cr. L. J. 241,** the decisions of the various High Courts were considered, and though HARTNOLL, J., felt a doubt as to what meaning should be attached to this section, and was inclined to the view, that it may have been intended that if the accused produced documentary evidence at any stage of the trial, the prosecutor would be entitled to reply, yet laid down that the benefit of doubt should be in favour of the accused and the prosecution was not entitled to a reply. The case in **4 L. B. R. 5 = 6 Cr. L. J. 115** was doubted.

4. What would amount to adducing evidence.—In a Sessions trial before the High Court, the accused had put in during the cross-examination of a witness the statement made by him under s. 162 to a Police constable, and after the case for the prosecution had closed, but before he was asked by the Court under s. 289 whether he meant to adduce any evidence, put in the depositions of certain prosecution witnesses taken by the committing Magistrate, all of whom had been examined at the Sessions trial; *held per* GEIDT, J., that the statement as well as the depositions formed part of the record sent up by the committing Magistrate and cannot be said to be evidence adduced by the accused after the case for the prosecution is closed, that the accused merely applied that the Sessions Judge should exercise the discretion vested in him by s. 288. *Semble*, tender of documents are for forming part of the record sent up by the committing Magistrate might constitute adducing of evidence by the accused, **31 C. 1050.** But where in the course of the cross-examination of a prosecution witness in a Sessions retrial, a newspaper report of the previous trial including the deposition of the witness in the same was put in by the defence and admitted as evidence and where the accused in answer to a question put to him under s. 289 at the conclusion of the prosecution case stated that he meant to adduce no evidence; *held, dissenting* from the above Calcutta Ruling, that the prosecutor had the right of reply by reason of the newspaper having been put in **4 L. B. R. 5 = 6 Cr. L. J. 115,** where **11 M. 339; 14 A. 212** and **16 A. 88** are *followed. See*, however, Note 3 (*v*). In the course of the cross-examination, a prosecution witness was asked whether he was or was not indebted to the accused and upon his denying the fact a bond alleged to have been executed by the witness in favour of the accused was produced by the council for the defence. But the witness not admitting even the bond, an expert was summoned at the instance of the defence to give his evidence as to the thumb-mark on the

Notes.—1. Bombay rules.— In every case involving the punishment of death or of transportation for life in which the trial lasts for more than one day, the jury shall be kept together during the trial by the Sheriff or Deputy Sheriff or such other officer as the presiding Judge may appoint for that purpose and in every other case in which the trial shall last more than one day it shall be in the discretion of the presiding Judge whether the jury shall be kept together in manner aforesaid or shall be allowed to return to their respective homes. —*Bombay Gazette* 1875 *Pt. I, p.* 653.

2. Separating without permission of Judge.—If the jurors separate without leave the jury must be discharged and a new trial had *R* v *Ward* **10 Cox. 573;** *R* v *Kinnear* **2 B. and Ald. 462**

3. *Analogous Law* —*See* s. 414 of the *N Y Cr Pro. Code* and the following cases thereunder —

(*a*) Even in a capital case if the Court permits the jury to separate before submission and the defendent does not object until after verdict, the objection is waived, *Henning* v *State* **55 Am Rep 756** (*b*) On a murder trial after the case was submitted to the jury members of the jury were permitted to go to a privy five yards distant, unattended by an officer It was not shown that anyone did or could communicate with them *held* no error *State* v *State*, **60 Am Rep. 70.** (*c*) During the trial of a capital felony the jury were lodged every night in a hotel on the third night the hotel was destroyed by fire The jury escaping became separate for an hour or more some of them mingling with the crowd about the fire, others going home. On an examination by the Court every juror swore that during the separation no one had spoken to him or in his presence on the subject of trial. The prisoner did not object to the continuing of the trial but refused to assert or waive any right or advantage resulting to him from the separation. Conviction being had it was *held* that the prisoner was entitled to a new trial. *Early* v *State*, **23 Am. Rep. 409.**

F—Conclusion of trial in cases tried by Jury

Charge to jury

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided

Note.—It is the duty of the Judge to give the jury substantial help and guidance by properly sifting and weighing the evidence and marshalling the facts under distinct and separate heads. **A. I. R. 1929 Cal. 742** and to place before the jury the salient points arising from the evidence on record **33 C. W. N. 918.**

Duty of Judge.

298. (1) In such cases it is the duty of the Judge—

(*a*) to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and, in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial,

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given,

(*d*) to decide whether any question which arises is for himself or for the jury and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding

Illustrations

(*a*) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(*b*) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

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(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial,

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(*d*) to decide whether any question which arises is for himself or for the jury and upon this point his decision shall bind the jurors.

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verdict of the jury. In each case it must be a question whether the omission to read the material portions of the evidence was such as to mislead the jury and the Court of Appeal will not interfere with it, if it has not prejudiced the accused, **5 Bom. L. R. 207** which *follows* **5 B. H. Cr. Ca. 85 and Ratanlal 917**; **7 C. 42**; **3 S. L. R. 102 = 11 Cr. L. J. 13.** But if a fair and proper statement of the evidence has not been placed before the jury the High Court will set aside the conviction, **13 C. W. N. 754 = 11 Cr. L. J. 9.** Where in a trial by jury before a Court of Session, the Judge's summary of his charge to the jury consisted merely of these words. "It is for you to say from the evidence you have heard whether you consider the accused guilty or not." *Held*, that the charge was wholly insufficient and the conviction and sentence were therefore set aside and a fresh trial ordered, **1902 A. W. N. 201.**

14. Judge may express his opinion on evidence, but must add that jury must form their own opinion.—A Sessions Judge in summing up is bound to advise a jury on questions of fact, and may tell the jury the impression which the evidence has made upon his own mind, **13 W. R. 34.** But it is not a misdirection if he omits to enter into details regarding the identification of stolen property, **1 W. R. 22.** In giving a warning to a jury not to disbelieve a mass of otherwise consistent evidence, because in one or two minor and immaterial points, the witnesses made different statements, a Judge exercises a wise discretion and affords no ground for an objection that he misdirected the jury, **1 W. R. 17.** It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence; but he should always be careful to add that it is for the jury to form their own opinion on the evidence and that they are the sole judges of fact, **10 C. 970; (1864) W. R. 5; 19 W. R. 72 = 10 B. L. R. Appx. XXXVI; 4 C. W. N. 196; 14 A. 25; 23 B. 316; 25 C. 230; 4 C. W. N. 576; 12 W. R. 80; 35 C. 531.** He should not state his own view of important matters of fact so positively as to leave the jury no loop-hole for taking any other views, **Ratanlal 743; 1 W. R. 25.** He should not tell the jury that there was *no doubt* regarding certain facts which it was the duty of the jury to determine. A Judge is not entitled under sub-sec. (2) to give his opinion as to the guilt or innocence of the prisoner, **1 W. R. 2** and **26**; but he may unfavourably comment on the defence evidence as compared with that adduced by the prosecution, **2 W. R. 60.**

15. Jury sole judge of facts—Judge not to present his own views of facts too positively.—The duty of a Judge charging a jury is to present the facts in their natural aspect and not to suggest far-fetched explanations of points that tell in favour of or against either party, **Weir II, 386.** The Judge ought to leave the jury to decide the facts for themselves and it would be a misdirection if he explains away the fact without leaving it to the jury, **14 M. L. T. 442 = 14 Cr. L. J. 623.** In trials by jury, the Judge in his charge should not state his own view of important matters of fact so positively as to leave the jury no loop-hole for taking any other view. This section requires the Judge to sum up the evidence for the prosecution and defence and s. 299 leaves it to the jury to decide which view of the facts is true. The duty of the Judge is simply to lay down the law authoritatively to the jury and to decide on the admissibility of the evidence, **Ratanlal 743.** It is not for the Judge to tell the jury that any explanation which the accused may offer of any fact appearing against him in evidence is incredible without any qualification that it is merely his own opinion and that the jury is at liberty to draw their own conclusions, **Weir II, 385.** Where a Sessions Judge charged the jury in a trial for dacoity that there was no force in the argument that the accused may not have foreseen and may not have intended that dacoity should have taken place, *held* that the Judge should not have taken the matter out of the hands of the jury in this way, but should have set out the evidence bearing on the question and left it to the jury to say what was the proper inference to be drawn from that evidence, **7 M. L. T. 191 = 11 Cr. L. J. 334** *following* **Mad. Cr. A. 592 of 1905.** An expression of opinion by the Judge on the facts without telling the jury that they are at liberty to form their own opinion in regard thereto and also without cautioning them to give the accused the benefit of a reasonable doubt amounts to a misdirection, **34 C. 698.** Where the Judge expressed his opinion on various questions of fact without telling the jury that his opinion was not binding on them and that they were the sole judges of fact, *held*, the charge was unsatisfactory, **35 C. 531.** Even if he informs the jury that on questions of fact they are not bound by any opinion of his, it may amount to a misdirection if he expresses his own opinion on the evidence in terms too dogmatic and unqualified, **18 C. W. N. 180.**

16. Directing jury to neglect evidence improper.—Where a Judge in the charge to the jury stated that there was a mass of oral evidence for the prosecution and another mass for the defence and then told them "It may literally be stated that the jury may neglect it all". *Held*, this was a misdirection to the jury. It is not the duty of a Judge to say that the jury may neglect any portion of the evidence. That is clearly against the provisions of the law, which says that the jury are to give their verdict upon the whole of the

are concluded that is after all the evidence has been taken on both sides and counsel on both sides have finished addressing the jury.' After evidence for the prosecution was closed in a case of rioting where there were a large number of accused and a large number of witnesses, the Judge opining that the quickest way of getting through the case would be for the vakils and the Judge to sum up first on the case generally and then on the case against each of the accused, one by one leaving it to the jury to say if they wished to hear the witnesses for the defence cited by him or were prepared to find that the prosecution had not made out a case against him and this procedure was followed until the sixth accused was reached. Then the witnesses of the defence were examined and the case against the rest of the accused was summed up and the verdict of the jury obtained *held*, the trial was irregular, **36 M. 585.**

2. Proper charge to the jury is indispensable.—Where the provisions of this section are neglected, and the Judge does not sum up the evidence at all, a new trial will be ordered **9 W. R. 51**; on the ground of mis-direction, **25 C. 561, 23 C. 252, 30 C. 822; 4 C. W. N. 193.** The summing up contemplated by this section does not mean any statement of the evidence which a Judge may, in his caprice think proper to make to the jury but a "proper" summing up by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. And in so far as the Judge has not summed up "properly" an error in matter of law has been committed, **5 B. H. C. R. Cr. Ca. 85 at p. 94** *followed* in **Ratanlal 720; 3 S. L. R. 102 = 11 Cr. L. J. 13.** A summing up to the jury, in which the Judge gave no aid to the jury in the arrangement of the facts which were spoken to by witnesses, and himself found facts which he should have put to jury, was no summing up at all and a verdict founded thereon was set aside, **10 W. R. 7.** In charging the jury it is the duty of the Sessions Judge to call their attention to the facts and then to leave it to them to consider whether from the facts they conclude that a particular criminal act was done and if they so conclude, then to direct them that the case comes within a particular section of the Code, **4 C. W. N. 193.** It is absolutely the duty of a Judge to give a narrative and history of the case and to place the facts and evidence in a clear manner before the jury so as to enable them to grasp the details and come to a right decision **6 Bom. L. R. 31.** But it is not necessary for the Judge to go into the minutest details, **40 C. 367.**

3. Judge cannot evade his duty of summing up because pleaders on both sides argued at length.—A Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance, especially if they favour the accused merely because they have been discussed by the advocate. Such an omission would amount to no direction of summing up by the Sessions Judge **27 B 644 at p 651; A. I. R. 1925 Cal. 259.** It is open to the Judge to refer the jury to the arguments of pleaders, but he should not omit matters of prime importance and it is not necessary to go over all the evidence himself **3 S L. R 102 = 11 Cr. L J. 13**; *see* remarks of JENKINS C.J., in **19 C. W. N 633 = 16 Cr L. J. 561.**

4. Judge must not read over the charge in a previous trial on the same facts.—Where a prisoner is tried for a crime for participation in which other prisoners were previously tried and punished before the same Sessions Judge ought to give a new charge to the jury and not read his former charge in the previous trial although the evidence in either case be the same, **1864 W R. 15.**

5. Language of the charge must be simple and direct.—A Judge in addressing a jury should endeavour to speak in a manner simple and direct. The charge must not be involved and the language should not be extravagant, **11 Cr. L. J. 535 (C.).** Intemperate language in a charge, as to the accused and witnesses deprecated **53 C. 372.**

6 Judge must not place before the jury a hypothetical defence.—It would be a most undesirable practice for Judges to put hypothetical defences not taken by the accused before the jury and might cause serious prejudice to the accused (**1 C. L. R. 62 at 1 1575 A. W. N. 209** *referred to*). *Per* HOLMWOOD, J. It would be a serious error on the part of a Judge to put a suppositious case before the jury, by which is meant a case founded . . . . 'I have never had any doubt that no error of . . . . . . jury as to exceptions which have neither been . . . . dence on the records.' *Per* HOLMWOOD, J. **19 C. W. N. 633 = 16 Cr. L. J. 561** Where in a trial for murder a verdict of culpable homicide not amounting to murder could not be properly come to under any aspect of the case before the Court, the Judge is not called upon to explain to the jury the distinction between murder and culpable homicide not amounting to murder, **8 Bur. L. T. 220 (F.B.)**

wounds on him which proved fatal. The Judge in charging the jury expounded the law with regard to the right of private defence of the body, but neglected to direct the jury with regard to the right of private defence of property. *Held*, that the Judge should have charged the jury on the right of private defence of property and omission to do so was misdirection. **23 C. W. N. 555.** *See* also **53 Cal. 980.**

23. Omission to direct the jury to give the accused the benefit of any doubt.—It is usual and most proper direction for a Judge to instruct the jury that if they entertain any reasonable doubt as to the guilt of any one of the accused, they should give him the benefit of the doubt and acquit him, and as a matter of practice this direction should always be given in every case, though the omission to give it may not in every case constitute a *misdirection of such a character as to render a conviction invalid. Where in regard to one of the accused* the Judge after summing up the evidence in detail observed "there only seems to be some vague suggestion that he might have been concerned in the offence. When we scrutinise the evidence, it seems very weak and for the reasons I have pointed to jury, it seems to be wholly inconclusive. *Held* that with regard to this accused, the omission by the Judge to give the above direction to the jury amounted to misdirection which prejudiced the accused and he must therefore be acquitted, **1 M. L. T. R. 350.** *See* also **15 C. W. N. 193 = 13 Cr. L. J. 557; Weir II, 500.** Where the probabilities in favour of the prosecution outweigh the probabilities in favour of the defence, but looking to all the circumstances there remains a reasonable doubt in favour of the accused, the accused must get the benefit of the doubt, **Ratanlal 127, 14 Bom. L. R. 710 = 33 Cr. L. J. 677.**

24. Omission to point out circumstances under which confession was made and retracted.—In case of a retracted confession, the circumstances under which it was originally made and the fact of its reputation a few days later, ought to be brought to the attention of the jury. The question which should have been put to them with regard to the confessions is not whether they were corroborated by independent evidence but whether having regard to the circumstances under which they were made and the circumstances under which they were retracted—having regard to all the circumstances connected with the confessions, whether it was more probable that the original confessions, or statements before committing Magistrate were true. The omission on the part of the Judge to place the circumstances before the jury and to put this question to them amounts to a misdirection **21 M. 83;** *see* **23 C. 682; Weir II, 510.**

Omission to refer to provisions of s. 101 in charge under s. 320 I P C., amounts to a misdirection. **30 C. 318.**

24-A. Omission to point out that a confessional statement if believed showed that the offence charged was not committed.—Where a confessional statement by the wife charged with abetment of murder alleged that she held her husband's legs while another struck him with an axe but that she protested against the murder and only assisted because such other person threatened to kill her also, *held* that the omission of the Judge to direct the jury that if they believed the statement, she could not having regard to s. 94 I P C., be convicted of abetment of murder under s. 109 was a misdirection vitiating the conviction, **52 C. 112.**

IV.—ADMISSION, RELEVANCY, ETC., OF EVIDENCE.

25. Question what the jury are to receive is for the Judge, what they are to believe is for the jury.—Where a Sessions Judge allowed certain documents to go upon the record which were not proved for the purpose of comparison of handwriting and left it to the jury to form their opinion whether the accused wrote the disputed signature. *Held*, that the irregularity was not such as to make interference of the High Court necessary, **Ratanlal 452.**

26. Judge should decide whether confession voluntary and admissible.—It is the duty of the Judge not the jury, to decide the point whether an accused person while making a confession was or was not in Police custody as it is a matter which it is necessary to prove in order to enable the confession to be admitted in evidence, and his omission to state to the jury his finding on the point is not a misdirection and could not prejudice the accused, **31 M. 127.** The question whether a confession was voluntarily made or not has to be decided by the Judge himself for the purpose of admitting it in, or excluding it from the evidence in the case. If the Judge finds it was voluntarily made and was not caused by any threat or inducement, he must admit it in evidence, once it is so admitted, it is for the jury to say whether it is true or not, **11 Bom. L. R. 333 = 10 Cr. L. J. 85.** When a retracted confession of an accused is tendered in evidence at the trial of a case tried by a jury, it is the duty of the Judge to determine the question of its admissibility under ss. 24 and 26 of the *Indian Evidence Act*, **Ratanlal 750.** When the Judge omitted to charge regarding the relevancy or otherwise of a

evidence recorded, 6 Bom. L. R. 31. It would be a material misdirection to the jury to tell them to leave out of consideration the evidence of a witness and the retracted confession of the accused, 8 M. L. T. 372 = 11 Cr. L. J. 683.

17. Judge should charge the jury that expert evidence should be approached with considerable care and caution.—An accused was charged under s. 82 (*c*) *of the Registration Act* with false personation in getting a document registered and the case depended on evidence as to the identity of thumb-impressions. *Held*, that the Judge should call the attention of the jury to the nature and history of the case as laid down before the Court by the prosecution. Where a case depends on expert evidence the Judge should call the attention of the jury to the fact that the evidence of an expert should be approached with considerable care and caution. In the present case the charge of the Judge to the jury was far from satisfactory and that certain statements in the charge—that certain exhibits being identical must be of the same person—was eminently a matter for the jury to decide upon and not for the Judge. The Judge was wrong in not drawing the attention of the jury to the actual thumb-mark on the mortgage-deed nor was the expert asked any question about it. The conviction was therefore quashed as the prejudice to the accused was apparent and a fresh trial was ordered 1 C. L. J. 335 = 2 Cr. L. J. 211.

18. Judge ought to point out presumptions that may be drawn from facts—effect of possession of recently stolen property.—It is a serious misdirection if the Judge fails to point out to the jury that recent possession of a murdered man's jewels is a fact from which they might presume not merely the theft or receipt of stolen property, but also murder with which the accused was charged, 17 C. W. N. 1077 = 14 Cr. L. J. 556. It is specially important that a Judge should point out a presumption of this kind because jurors are often reluctant to act on that which is commonly known as circumstantial evidence. *ibid.*

19. Duty of Judge in respect of statements of witnesses taken under s. 164.—The Judge ought to tell the jury that the evidence of witnesses taken under s. 164 must be accepted with a great deal of caution. He ought to point out that it is not always proper for the Police-officer to get such statements recorded for the purpose of pinning the witnesses down to some statement especially at a time when they are not free from Police influence, 7 C. L. J. 246 = 7 Cr. L. J. 315.

19-A. Judge should not unduly dwell upon the evasion of arrest by accused.—In pointing out the absence of the accused, the Judge should warn the jury that even if they believed he absconded, absconding is not necessarily or invariably incompatible with innocence 18 C. W. N. 150 = 15 Cr. L. J. 167. An attempt to evade arrest should not be unduly insisted upon as evidence of guilt, *R.* v. *Hampson* C. C. A. 11 Cr. Ap. R. 75. Where a criminal succeeded in evading arrest for some considerable period and meanwhile obtained honest employment, the jury were told that they could convict the prisoner of being an habitual criminal because he was a fugitive from justice. *Held*, that this amounted to a misdirection. *R.* v. *Iveson* C. C. A. 23 Cox. C. C. 615 = 78 J. P. 79.

III.—NON-DIRECTION.

20. Non-direction is not a misdirection unless the jury have been misled.—*See* Note 8. A mere omission or misstatement in a summing up is not in itself a misdirection when the case has been fully heard by the jury but there is a miscarriage of justice where the omission or misstatement is such that the jury may have probably been misled by it. *R.* v. *Wann*, 78 J. P. 269 (1913) = 23 Cox. C. C. 183. As a general rule non-direction does not amount to misdirection and the High Court will not interfere with the verdict of a jury because there was non-direction, unless the circumstances were such as to make the non-direction amount to a misdirection Ratanlal 645; 5 W. R. 13; 7 C. 42. A non-direction is not a misdirection unless it is on a matter of prime importance and especially if it tells in favour of the accused 3 S. L. R. 102 = 11 Cr. L. J. 13. The omission of the Judge to enter into details regarding the identification of stolen property does not amount to a misdirection, 1 W. R. 22. *See* Note 17.

21. Where non-direction is on a point of prime importance especially in favour of the accused, it may amount to misdirection.—A non-direction amounts to a misdirection if the point is one of prime importance especially telling in favour of the accused, 4 Bom. L. R. 653; 3 S. L. P. 102; 17 Bom. L. R. 1019 = 3 Bom. Cr. C. 135, *see* also 3 S. L. R. 125 = 11 Cr. L. J. 15. The prisoner has if he raises a defence a right to have it put fairly before the jury. When the prisoner is undefended by counsel it is even more important that this rule should be observed that his defence may be properly and adequately presented to the jury by a person qualified to do so. Thus where a Sessions Judge omitted to point out that certain of the prisoners under trial were not originally accused and that their names were not mentioned until eighteen days afterwards it was *held*

relevancy but told the jury that if the confession was true it was enough to warrant the conviction of the accused. The accused took no objection to the admission of the confession *Held*, that there was a misdirection that was material and important and the conviction was set aside, 28 M. 38. Where the Sessions Judge told the jury generally that confessions to the Police if followed by the production of stolen property are admissible but omitted to point out that such confessions are only admissible in so far as they relate distinctly to the fact thereby discovered *held* such omission vitiated the trial and a retrial was necessary Where there are more than one accused the jury should be warned to take and deal with the case of each accused separately and a confession of one involving himself alone cannot be used against the others 18 M. L. J 250. Where a Sessions Judge told the jury that they may use as evidence against the accused a statement made behind their back, and not tested by cross-examination the Court directed a re trial 31 M. 127. It is a misdirection to ask the jury to consider confessions made to the Police by the accused against another which were not the immediate cause of the discovery of stolen property, 31 M. 127; also where a witness for the prosecution was allowed to give hearsay evidence as to the guilt of one of the accused, and statements made by the accused when they were in Police custody were received as confessions and the jury was misdirected by being told that confessions to the Police if followed up by the production of stolen property were admissible and the Judge did not warn the jury to take the case of each accused separately and that a confession by one accused involving himself a one could not be received against the other accused *held* that a new trial must be ordered 18 M. L. J 210 = 3 M. L. T 263 = 7 Cr. L. J. 353. *See* Note 45.

(iv) *First information*—It is a misdirection to ask the jury to accept the statement in the first information in preference to the evidence in the case. The first information is not evidence in the case It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence. The most that the Judge can make of it is say whether although it gave a different account of the occurrence from that in the evidence it could be reconciled with the evidence and give the jury an opportunity of judging whether in that view the positive evidence in the case could be believed 13 C. W. N 198 = 11 Cr. L. J. 557. *See* also 34 C 315; 35 C 531, Note 21 above.

(v) *Previous conviction or bad character*—In charging a jury a Sessions Judge should not tell them that the prisoners had previously been bad characters The fact may be taken into consideration by him in passing sentence when the prisoners are convicted 10 W R. 33 In charging a jury upon the trial of a prisoner for being dishonestly in possession of stolen goods the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of the accused. *Held* that this amounted to a misdirection, as the evidence of bad character of the accused is irrelevant and inadmissible under s. 54 of *the Evidence Act* 5 C. 763. *See* also 31 M 127, Note 2 to s. 310. *See* also *R* v. *Hemmingway*, 77 J P 15 (1912) and *R* v *Curtis* (1912) 23 T. L. R. 512, where a conviction was quashed because evidence of a previous conviction was wrongly admitted.

[illegible] order of a Judge — [illegible] ons Judge's order in [illegible] Magistrate should not be admitted in evidence and it is a misdirection for the Judge to lay stress on them 11 Cr L. J 538 (C.) It is a misdirection to lay stress on a document a statement reduced to writing under s. 167 improperly admitted in evidence 13 Cr. L. J. 244 (Mad.).

(vii) *Reference to previous cases against others unfounded and the opinion of the High Court therein*—A Judge should not in charging the jury refer to a previous case against some other persons tried for the same offence except to warn the jury not to be influenced by it. It is a misdirection to tell the jury that the High Court had come to a certain finding in the previous case and they were to consider if they had any reason to come to a different conclusion 9 C. L. J. 850 = 10 Cr L. J. 495.

34. Duty of Judge when inadmissible evidence has come to the knowledge of jury.—When in the course of a trial inadmissible evidence has come to the knowledge of the jury such as the fact that the accused has been in prison or that he has been previously convicted, the Judge should expressly tell the jury to disregard it and warn them not to let it influence their judgment. The accused was charged with uttering counterfeit coin and evidence was given that a fortnight earlier he had tendered a counterfeit coin to the same person. This he showed conclusively was not true, he was in prison at the time. The Judge did not expressly warn the jury that they ought to disregard the fact that the accused had been in prison. The Appeal Court quashed the conviction, *R* v *Lee*, (1908) 72 J. P. 252. *See* also *R* v *Warner*, (1908) 73 J. P. 53. Where the accused has

confession, but said that if the confession were true it was enough to warrant the conviction and the jury convicted, it was *held* that there was material misdirection, 26 M. 38. In a trial by judge and jury, it is for the judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false. It is not open to the judge to ask the jury to determine whether it is voluntary or not even though it is a question of fact. 33 C. W. N. 1112.

27. **Where beating is alleged by the prisoner, Judge must make an inquiry.**—On his trial before the Court of Session, the accused retracted the confessions which he had made before a first-class Magistrate and the committing Magistrate alleging that he was beaten by the Police and that the confession was the result of an offer of inducement. *Held*, that under cl. (*c*) of this section, the Judge ought to have made some inquiry into the allegation of the prisoner about torturing, which, he said, had resulted in his confessions, Ratanlal 245.

28. **Judge must decide if a communication is privileged.**—A Judge should not leave it to the jury to find whether a communication is privileged or not, but should himself decide it as a point of law, 10 W. R. 14.

29. **Judge must decide upon the admissibility of evidence.**—It is also his duty to see that evidence which is not admissible in itself, *e.g.*, statement made to a pleader, *mukhtyar* or his clerk, should not be allowed to go into the prejudice of the accused, though no objection is taken thereto by the accused, 25 C. 736; *see* also 27 B. 626. In a trial by jury, it is the duty of the Sessions Judge to determine whether confessions retracted at the trial are admissible. If he finds them irrelevant under s. 24 of *the Evidence Act*, he should so direct the jury. If there is no evidence on the record showing that they are invalid by reason of any improper inducement or threat, they should go to the jury with a direction that in absence of evidence it is not to be presumed that they are inadmissible, Ratanlal 842.

30. **Judge must find documents admitted or proved before admitting them for comparison.**—Before admitting documents under s. 73 of *the Evidence Act*, for the purpose only of comparison with a document alleged to be a forgery, it is the duty of the Judge to find whether they are admitted or proved, and the fact that the question of admissibility has been determined, should be noted by the Judge in the record of the case, Ratanlal 491.

31. **Judge must decide on the capacity of a witness to justify.**—The question of the capacity of a witness to testify is a question for the Judge himself to decide and not for the jury, although after he has decided in favour of the competency of a witness, it is for the jury to determine the amount of credit to be given to the statements made by such witness, 41 C. 406 *following* 8 W. R. 60.

V.—ADMISSION OF INADMISSIBLE EVIDENCE.

32. ***When jury placed in possession of evidence which ought not to be admitted, there is misdirection.***—Where material evidence which ought not to be admitted, is admitted and the jury are placed in possession of it, there is a misdirection in law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused, 27 B. 626. Where evidence which the law says shall not be admitted is let in with other evidence legally admissible and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have in convicting the accused relied upon the latter and neglected the former, 5 C. 768.

33. **Cases where relying on inadmissible evidence held to vitiate verdict.**—

(*i*) *Hearsay evidence and anonymous letter.*—Where a Judge in his charge to the jury admitted hearsay evidence and an anonymous letter put in by the prosecution, without showing how or by whom it was sent, or that it reached the accused. *Held*, that the jury were misdirected and the accused prejudiced, 24 W. R. 77. *See* also 18 M. L. J. 250 = 3 M. L. T. 263 = 7 Cr. L. J. 358; *see R.* v. *Campbell*, (1915) 77 J. P. 95; where a conviction for burglary was quashed on the ground that the trial Judge had admitted hearsay evidence which refused an *alibi* set up by the prisoner. *See* also 7 W. R. 2 and 25 as to the duty of a Judge when a witness proposes to give inadmissible evidence.

(*ii*) *Statements made before investigating Magistrate.*—A direction by the Judge to the jury that statements made before an investigating Magistrate and not admissible under s. 288 is strong evidence against the accused is clearly a serious misdirection, 31 M. 127; 27 B. 626; 18 M. L. J. 250 = 3 M. L. T. 263 = 7 Cr. L. J. 358.

(*iii*) *Confessions to Police.*—A confession made by the accused was irrelevant under s. 24, *Indian Evidence Act*, being induced by a person in authority. The Judge in his charge made no reference to its

prejudiced the prisoner justifies the High Court in setting aside the verdict, **Ratanlal 466; 12 M. 196; 6 B. H. C. R. Cr. Ca. 57; 1 B. 475; 14 B. 115;** but *see* **1 M. 394; 5 W. R. 80; 9 A. 528; 1884 A. W. N. 286; 8 A. 306; 2 C. W. N. 55** and **672; 21 M. 83; 5 M. L. T. 355 = 9 Cr. L. J. 308.**

(*ii*) *The Judge should direct the attention of the jury to the evidence corroborating the accomplice.*—The Judge ought in his charge direct the jury that the corroboration of an accomplice or accomplices ought to be that which is derivable from unimpeachable or independent evidence, as distinguished from that derived from the earlier statements of the same accomplice or the statements of other accomplices; and to point out the danger of convicting any one of several prisoners charged at the trial about whose *identity* as one of the persons committing the crime the accomplice testimony is not corroborated. The accomplice often knows all the circumstences and may speak truth about them yet may put some innocent man in his own place or that of some other guilty person, **Ratanlal 840.** *See* also **10 B. 319** at **p. 327; 1 B. 475; 8 A. 306** and **509** and **10 C. 970.**

(*iii*) *Judge should not mislead the jury by stating that a witness who is really an accomplice is not an accomplice.*—In **17 C. 642 (F.B.)**, the Judge charged the jury that they were not to convict upon the evidence of *G* if statisfied that he was an accomplice and uncorroborated, but coupled the direction with a strong expression of opinion that *G* was not an accomplice; it was *held*, that this constituted a misdirection in fact, though not in form, calculated seriously to prejudice the prisoner's case, as the substantial effect of the direction was that the evidence of *G* was entitled to as much weight as that of a perfectly independent and unprejudiced witness

(*iv*) *It is an error if the Judge points out that the accomplice evidence is corroborated by a fact when it is not so.*—In a dacoity case, where the conviction depended mainly on the evidence of an approver, the Judge stated in his charge, "If you think, that the approver's story is worthy of credit in itself, you have to consider whether it has been corroborated on material points." He then described what in his opinion were the points of corroboration and he told the jury that the above "are points on which the evidence has been corroborated and that corroboration is full and complete if you believe it; you have to consider these points and decide whether the approver has been corroborated in material points; and if you find that to be so, then you have in his story sufficient evidence to connect all three accused with the crime." *Held*, that this was not a proper way to place the case before the jury. The Sessions Judge should have told the jury that although the law permits them to convict on the uncorroborated evidence of an accomplice it is not the practice of the Courts which in prudence has invariably required some corroboration sufficient to connect each of the accused with the offence committed. With this caution, the Sessions Judge should have laid before the jury the evidence corroborating the statement of the accomplice, **29 C. 782.** As a general rule juries ought to be advised and directed that the accused ought not to be convicted upon an accomplice's testimony unless it is confirmed not only as to the offence, but as to the identity of the individual prisoner as the person or one of the persons who participated in the crime, **Weir II, 796; 13 L. J. 537 (Oudh); 12 O. C. 418 = 11 Cr. L. J. 71.** It would be an error in summing up if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the jury that the evidence of the accomplice was corroborated by facts, which did not amount to any corroboration at all, **29 C. 782** where **5 W. R. 80** at **p. 88** and **8 W. R. 19** at **p. 25** are *followed. See* also **17 C. 642** and **2 C. W. N. 672; 10 Cr. L. J. 567 (M.).** A Judge might misdirect a jury as to what is corroboration of the testimony of an approver, **10 C. 979.** As to what amounts to legal corroboration, *see* **11 B. H. C. R. 196; 19 W. R. 57; 23 W. R. 24; 8 A. 120** at **p. 137; 1 B. 475; 14 B. 331; 10 B. 231; 28 C. 339** and Note to s. 337.

41. Duty of Judge when the only evidence is the uncorroborated testimony of approver.—The law as to the duty of a Judge in charging a jury in respect of accomplice evidence was exhaustively dealt with in the recent case of *E. N. Nilakanta*, **35 M. 247,** which was a case before a Special Bench constituted under the *Criminal Law Amendment Act* and in the appeal therefrom under the Letters Patent on a certificate of the Advocate-General, *E.* v. *Muthukumarswami*, **35 M. 397 (F.B.).** In this case there was no jury and the question was whether the Special Bench could act on the uncorroborated testimony of three approvers. In discussing the law on the subject, the duty of a Judge in charging a jury was considered, and the majority of the Special Bench consisting of WHITE, C.J. and AYLING, J. (SANKARAN NAIR, J., *dissenting*) held that—

The proper direction seems to be:—"Consider the evidence of the approvers, always to bear in mind that it is tainted evidence, scrutinise it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sence of the word. If you do not believe it 'reject it.' And they approved of the law laid

jury to the different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable, **25 C. 711; 30 M. 44, 8 M L. T. 82 = 11 Cr L. J 432.** *See* **14 C. 164**, *e.g.*, upon a charge of murder the Judge must point out to the jury accurately the difference between murder and culpable homicide not amounting to murder, **9 W R. 51, 15 W. R 80; 15 W R. 17 = 6 B L. R. Appx LXXXVI** The Judge should adhere to the words of the particular section of the Penal Code in charging the jury and not substitute phraseology of his own **13 C. W N 754 = 11 Cr. L. J. 9** In a charge of trespass the Judge should explain to the jury the distinction between civil and criminal trespass **41 C. 662.**

38 Discussion in Judge's charge of law points raised by defence unnecessary — A Judge should not in his charge to the jury discuss points of law raised by prisoner's counsel and dispose of them. He should avoid all extraneous and unnecessary discussion and argument and should confine himself to a mere summing up of evidence on both sides showing how the law applies to it **8 W R. 87**, *see* also the remarks of [illegible] in **19 W. R. 71 at p 73 = 10 B L R. Appx. XXXVI**

39 Duty of Judge when jury are uncertain as to law on the offence committed.—If the jury after finding the accused guilty be unable to determine what offence has been committed a Judge should not by handing over to them a copy of the Penal Code leave them to decide under which section the offence falls; he should solve their doubts if they have any, by explaining the law to them and should state to them what offence is proved by the facts of the case if they believed those facts, **14 C. 164** The jury should take the law from the Judge They are not entitled to resort to a commentary on the law during their consultation **Ratanlal 736, 6 Bom. L. R. 258** It is the duty of the Judge when he is told that the jury do not understand the law in the matter to explain the law to them again **(1911) M W. N 190 = 9 M L. T. 345 = 12 Cr L. J 162** Where a Sessions Judge in his charge to the jury stated "the accused are charged with offences under ss 148, 149 [illegible], 325/149 and 304/149, I P C. The law bearing on the case has been placed before you more than [illegible] in the addresses delivered by the learned pleaders on either side I need not go into details as to the law [illegible]" *Held* there was misdirection and a re-trial was ordered. It is immaterial how much or how [illegible] have been addressed by the pleaders on both sides upon the law The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge and the verdict arrived at in the absence [illegible] is not a valid verdict **29 C. 379, 27 B 644**

VII.—ACCOMPLICE TESTIMONY AND CONFESSIONS

40. How a jury ought to be charged regarding testimony of accomplices — *The Judge should advise the jury that it is unsafe to act upon the evidence of an accomplice unless it is corroborated.* [illegible] doubt the practice of the Judges when the testimony of an accomplice is not confirmed to recommend the jury not to give credit to his testimony At the same time it is to be observed that if the jury [illegible] that recommendation believes the testimony of the accomplice the want of corroboration is not a legal objection to the verdict **3 Knapp 349 at p 358** The proper course is to inform the jury (a) that there is no [illegible] law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice [illegible] that as a rule of practice it is considered unsafe to convict upon such evidence and then to point out [illegible] any, in the particular case for relying upon the evidence **4 M. H C. R. Appx VII** In a trial by jury the Sessions Judge should in his direction add to what s. 114 of *the Evidence Act* lays (s) says an accomplice the direction about the corroboration as to each prisoner as laid down long ago in **3 B. H C. R. Cr Ca. 57; Ratanlal 843.** The omission to caution the jury not to accept the evidence of an approver [illegible] was in **12 M 195** held to be a misdirection requiring the reversal of the verdict. "In the case of a trial by jury it is the function of the jury to ascertain the facts upon the evidence before them and [illegible] by the law which is applicable and it is in all cases the duty of the Judge to point out to them the law. It was therefore in the present case the duty of the Judge to lay before the jury [illegible] to the effect [illegible] the principles relative to the reception of an accomplice's testimony which the Legislature has [illegible] in *the Indian Evidence Act*, and we think the Judge was wrong in telling the jury that this case was one in which no caution or instruction from him was needed on this head It is in all cases where an accomplice's testimony is admitted incumbent on the Judge to inform the jury of the result of the law bearing on it [illegible] as we have endeavoured to explain it" *Per* **INNES, J., in 21 W. R. 69** The omission by a Judge to direct the jury in his charge that although a conviction upon the uncorroborated testimony of an accomplice is valid in law, it is dangerous to convict a prisoner on such evidence alone and that they must look for corroboration of it in material particulars from independent sources in the case is an error of law which if it materially

particular, that is to say, in some particular that involves the guilt of the accused. The confirmation of the accomplice must be in some fact which goes to fix the guilt on the person charged, *R.* v. *Wilkes and Edwards*, (1837) 7 C. and P. 272; "a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that it is really no corroboration at all," *R.* v. *Farler*, (1837) 8 C. and P. 106; *R.* v. *Everest*, (1909) 73 J. P. 269. It is the practice of the Court of Criminal Appeal to require corroboration of the evidence of an accomplice on cases when it is not necessary by statute, *R.* v. *Cohen*, 111 L. T. 77. **As to charge to jury.**—It is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated. *In re Munier* (1894) 2 Q. B. 415. Where there is no corroboration of the accomplice's story, the Judge should warn the jury that they ought not to act upon it. If this is not done and the Court of Criminal Appeal consider that there was no evidence of corroboration, they will quash the conviction, *R.* v. *Tate*, (1908) 2 K. B. 680 = 72 J. P. 391; *R.* v. *Beauchamp*, (1909) 73 J. P. 223. A Judge should direct a jury to acquit if the evidence of the accomplice is not corroborated in material particulars, *R.* v. *Everest*, (1909) 73 J. P. 269; but the Appeal Court will not interfere with the conviction even if there has been no warning if the evidence of the accomplice has been sufficiently corroborated, *R.* v. *Warren*, (1909) 73 J. P. 359; and when it is doubtful whether the witness is or is not an accomplice, it is desirable that the Judge should indicate to the jury that the evidence of such a witness should be carefully scrutinised, *R.* v. *Kirkham*, (1909) 73 J. P. 406. Though in strictness if the jury believe the evidence of an accomplice they may legally convict a prisoner upon it though it stands totally uncorroborated in any material particular, whatever be the nature of the crime charged, the practice of requiring some *confirmation* of the accomplice's evidence has obtained so much sanction from legal authority, that "it deserves all the reverence of law," and a deviation from it in any particular case would be justly considered of questionable propriety. *Taylor's Evidence* (10th edn.), s. 967; 1. *Phill, Ed.* 32; *Archbold*, p. 456; *Russell on Crimes*, 7 edn., pp. 2282—2293; *Halsbury*, Vol. IX, 408.

44. Rules of accomplice testimony not applicable to Police spies.—The law and practice as to the corroboration of accomplices do not extend to the case of Police spy or *agent provocateur*, *R.* v. *Mullins*, (1848) 12 J. P. 776 = 3 Cox. C. C. 526; *R.* v. *Bickley*, (1909) 73 J. P. 239; 11 Cr. L. J. 560 (C.) and *see* also 19 B. 363.

45. Direction in case of confessions.—It is a misdirection to tell the jury that a confession to the Police if followed by the production of stolen property is admissible, whereas he should have pointed out that such confessions are only admissible in so far as they relate to the fact thereby discovered. Evidence of such confessions should not be allowed to be given or recorded to any great extent nor when such evidence has been properly recorded should the jury be afterwards told generally that the prisoners had confessed, 18 M. L. J. 250 = 3 M. L. T. 263 = 7 Cr. L. J. 358. The Judge should point out the irrelevancy of a confession under s. 24 of *the Evidence Act*, 26 M. 38. It is a misdirection to treat a statement as a confession when it is consistent with innocence. *R.* v. *Joyce*, (1908) 72 J. P. 483. It is a misdirection to tell the jury that a person to whom a confession was made was not a person in authority within the meaning of s. 24 of *the Evidence Act* when he is one, the Judge should in such a case leave it to the jury to decide whether the confession was caused by an inducement, threat, etc., 20 C. W. N. 612 = 23 C. L. J. 477; 17 Bom. L. R. 1059 = 3 Bom. Cr. C. A. 135 = 40 B. 220. A confession falling within the provisions of s. 24 of *the Evidence Act* ought not to be placed before the jury without an explanation as to how they should value it having regard to the circumstances under which it was made, 20 C. W. N. 512 = 23 C. L. J. 477 = 17 Cr. L. J. 188; *see* also 32 C. W. N. 731. *See* Note 33 (iii) above.

46. Direction in case of retracted confessions.—In the trial of a murder case a Sessions Judge in his charge to the jury treated the evidence in very general terms and described it as very poor evidence, and also told the jury that in the case of retracted confessions: "The law is that you are to look for corroboration in independent evidence, and if that supplies such corroboration that you can confidently say 'the confession must be absolutely true' you can act upon them otherwise not. *Held*, that the Judge had erred in law in not summing up the evidence to the jury, and then calling their attention to the material parts of it, leaving them to form their own opinion upon it instead of treating the evidence generally and calling it very poor evidence, which evidence standing alone practically amounted to nothing," 23 B. 316. There is no rule that a retracted confession cannot be acted upon against the maker thereof unless corroborated. The jury should be asked to consider not whether it is corroborated by independent evidence but rather having regard to the circumstances under which it was made and retracted, it is more probable that the confession is true or the statement retracting it, 21 M. 83; 8 M. L. T. 372 = 11 Cr. L. J. 683. *See* also 20 A. 133. Where the only evidence against the

down in **9 A. 528; 1 M. 394 and 27 M. 271.** On appeal the view of the majority was approved by the majority of the Full Bench. ' It is the duty of the Judge to explain to the jury the taint and infirmity which ordinarily attach to the testimony of an accomplice and to remind them that they may presume that this evidence is unworthy of credit unless corroborated in material particulars. But it is also his duty to refer to any circumstances of fact (*see* illustrations to s 114, *Indian Evidence Act*) which show that the presumption should not be drawn in the particular case or which rebut the presumption if drawn . . and all other circumstances tending to show its truth or falsehood, if they believe it to be true they should act upon it even though there may be no corroboration of it in the strict sense of the word but that if they are not satisfied of its truth they should refuse to act upon it.' BENSON, J, WALLIS J, while approving of the law as laid down by WHITE C.J and AYLING J., were of opinion that the trend of English authorities is that the Judge should, where there is no corroboration withdraw the case from the jury and direct them to acquit, but such a practice would be at variance with the provisions of *the Indian Evidence Act* ' As a matter of practice, a Court should not accept the uncorroborated evidence of an accomplice as sufficient evidence to support a conviction, but it is impossible consistently with the Evidence Act to hold that as a matter of law the presumption must be raised and rebutted by special circumstances or by corroboration MILLER J, who approved of the view of the majority held that while Judges are bound by law to advise juries to adhere to this practice, it does not follow the juries are bound as a matter of law to do so, SUNDARA IYER, J In approving of the majority view holds that the English practice in its uncertain state is not a safe guide to determine the law in this country and approves of the law laid down by EDGE, C J, **9 A. 528.** Where he says " A Judge would advise the jury that it would be unsafe to act upon in other words believe the uncorroborated evidence of an accomplice, as he would advise the jury not to act upon the evidence of any other witness whose evidence might from any cause be open to suspicion. But in either case, he would tell the jury that if they believed the evidence, they might legally convict the prisoner with this addition that it is the duty of the Judge to draw the attention of the jury to any circumstances either in favour of or against the credibility of the accomplice. ABDUR RAHIM J *dissenting* held, my conclusion is that it is well established that except in circumstances of an especial nature it is the duty of the Court to raise the presumption, that accomplice s evidence is unworthy of credit as against the accused persons unless it is corroborated in material particulars and the failure of the Judge to direct the jury to that effect is an error in law The next proposition which is also well recognised is that if there are any especial circumstances which would justify a disregard of this rule those circumstances in a trial by a jury must be clearly set out in the direction of the Judge, and the Appellate Court is entitled to consider as a matter of law whether those circumstances are such as to justify exceptional treatment If, in the opinion of the Appellate Court the facts in this connection are such that they in no sense negative the danger of acting upon the uncorroborated testimony of the accomplice but if the Judge told the jury otherwise verdict must be set aside as being due to an error in law, if the especial facts however are such as may reasonably be considered to take the case out of the rule even though it is possible to hold a different view the verdict cannot be interfered with by a Court of error, **(1911) 1 M. W. N. 327 = 21 M. L. J. 283 = 12 Cr L. J. 150** *followed* SANKARAN NAIR J., who dissented from the view of WHITE C.J and AYLING J in the special Bench *held*, that " The question is (1) not whether a conviction based on the uncorroborated testimony of an accomplice is legal, but whether there is a presumption that such testimony cannot be accepted without corroboration (2) a person should not be convicted 'except under very special circumstances' upon the uncorroborated testimony of an accomplice (3) the special circumstances are that the grounds on which an accomplice s evidence has been held to be untrustworthy did not exist either in the case or did not exist in their full strength, that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions, and (4) in cases tried by a jury, a jury has to be advised by the Judge on the points above referred to "

42. An improper direction regarding testimony of accomplice is a good ground of appeal—If a Judge instead of advising a jury not to convict on the mere uncorroborated evidence of an accomplice were to advise them to convict upon such evidence or were to tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible, and that it was for them alone to form their opinion upon it that a conviction founded upon such evidence would be legal and that such evidence without corroboration might be acted upon with as much safety as that of any other witness the error in the direction would form a good ground of appeal. *Fakee Buksh's case*, **B. L. R. Sup. Vol. 459 (F.B.) = 5 W. R. 80; 29 C. 782** *See* also the opinions of ABDUR RAHIM, WALLIS and SUNDARA AIYAR, JJ. in **35 M. 397 (F.B.)**

43. English law as to accomplice testimony.—The English law on the subject has been summarised in SUNDARA AIYAR, J's Judgment in **35 M. 397.** The story of the accomplice must be corroborated in some material

accused is his retracted confession and it is clear that it was not corroborated by independent evidence, it was *held*, that there was misdirection in not pointing out to the jury that it was unsafe to rely on the subsequently withdrawn confession unless corroborated in material respects **Weir II, 507 and 510.** He ought to tell the jury that the retracted confession is not to be acted upon unless supported by independent reliable evidence corroborating in material particulars **Weir II, 509; 18 A. 78**

47. Direction in case of confession when there are several accused.—*See* Notes under Heading VIII

VIII.—JOINT TRIAL OF SEVERAL ACCUSED

48 Evidence against each accused should be clearly and carefully placed before the jury—In cases where several accused persons are being tried together on evidence which is not identical it is of the first importance that the evidence affecting each should be clearly and carefully placed before the jury and that their attention should be pre-eminently drawn to the considerations by which they may properly be guided in estimating the value of the evidence as against each accused To tell a jury generally that they have the approver's deposition and the corroborative evidence without pointing out as regards each person what the corroborative evidence is is to give them no guidance at all especially in a case where the principal evidence against most of the accused is that of an approver **29 C. 782** *See* also **30 M 41,** where the conviction was set aside and no re-trial ordered *See* also *R* v *Beauchamp* **(1909 73 J. P 223** where in a joint trial of two persons the Court held that the Judge in summing up the case to the jury had not properly distinguished between the evidence against each and set aside the conviction Where a Judge failed to comply with the requirements of s 297 in charging the jury and at the conclusion of the charge directed them to consider the evidence against each prisoner, without at the same time requiring them to consider the evidence in favour of each and also omitted to give them the very necessary directions that if they entertained any reasonable doubt as to the guilt of the accused, they were entitled to have the benefit of the doubt and should be acquitted. *Held*, that there was grave misdirection by the Judge to the prejudice of the prisoners, **Weir II, 500** In charging a jury, the Judge should set out clearly the evidence as against each prisoner separately and should not place before them all the evidence against all the prisoners in a confused mass. Thus where the accused are charged both under s 395 and 396, I P C., the Judge should in the first instance place before the jury the evidence against the accused on the charge of dacoity and after they have returned their verdict on the charge of dacoity, he should then set before them as assessors the evidence connected with the charge of murder in dacoity, **Weir II, 517.** *See* also **Weir II, 501.**

49. Jury should be warned that statement of one accused is not evidence against his co-accused.—The Judge should warn the jury to take the case of each accused separately and that a confession by one accused involving himself alone could not be used against the other accused **18 M. L. J. 250 = 3 M. L. T. 353 = 7 Cr. L. J. 358.** *See* also **1 Bom. L. R. 784** Also when statements are made by some of the accused do not amount to confessions so as to incriminate themselves though they purport to incriminate others also under trial the Judge is bound to tell the jury that they must not consider the statements except as against those who made them and an omission to do so would be a clear misdirection **25 C. 711** The omission of a Sessions Judge to tell the jury that the statement of one prisoner was not evidence against his fellow prisoner was *held* to be a material error and fatal to the trial notwithstanding that the Judge dealt with the evidence against each prisoner separately **6 B. H. C. R. Cr. Ca. 10; 5 W. R 80** The jury should be directed that a statement made by one prisoner implicating another and immediately denied although strictly evidence must not be regarded as evidence of the facts contained in such statement *R* v *Curnock* **(1915) C. C. A. III, L. T 816**

50 Jury should be cautioned not to act upon confession of co accused corroboration—A confession of one prisoner can be taken into consideration against another jointly tried with him if it really amounts to a confession of guilt of the offences charged **6 C. 279 = 7 C. L. P. 295; 25 C. 711; 6 B. H. C. R. Cr. Ca. 10,** but the Judge ought to caution the jury that unless the statement is corroborated it should not be acted upon. It is the duty of the Judge when there is no other evidence than the confession of a co-accused to direct the jury accordingly and tell them to acquit the accused and his omission to do so is a misdirection which will vitiate a conviction **33 M. 46; 1 M. 163; 6 C. 453 (F B.) 5 M. L. T. 3[illegible]5 = 9 Cr. L. J. 3[illegible]5; 7 M. H. C. R. Appx XXV; 31 B 158** Where the only evidence against the accused was the retracted confession of a co-accused and the Judge in his charge to the jury told them that it was the only evidence against the accused corroborated by the evidence of motive *Held*, that the charge was extremely defective and contained no positive misdirection as regards the amount of corroboration required to support the retracted confession. Evidence of motive can never by itself

it is the duty of the Judge to explain the distinction between murder and culpable homicide, and the jury, as judges of the facts, have to decide the issue about sufficient provocation. A wife's resistance to the act of sexual intercourse, or her denial of a charge of adultery, is not sufficient to constitute grave provocation, **Ratanlal 766.** *See* also **3 S. L. R. 125 = 11 Cr. L. J. 15.** But in the absence of any direct evidence of grave and sudden provocation or of fact from which this exception could be legitimately inferred, it would be an error on the part of a Judge to lay down the law on that subject. Where a trial for culpable homicide is proceeding before a jury, it is not an appropriate mode of laying down the law to discourse on all branches and departments of this complicated topic of crime; to do so is calculated to confuse the jury and possibly to direct their deliberations into channels that have nothing to do with the case. *Per* JENKINS, J., in **19 C. W. N. 653 = 16 Cr. L. J. 561.** If a Judge omits to draw the attention of the jury to any matter a consideration of which might lead them to a verdict of culpable homicide not amounting to murder. instead of murder, he commits an error, though the defence did not suggest the existence of any such matter. STEPHEN, J., *ibid.* In a similar case the Full Bench of the Burma High Court (ORMOND, J., *dissenting*) *held*, that as the circumstances the existence of which might bring the case under exception 4 to s. 300, I.P.C., could not properly be inferred from the evidence or the accused's statement, the effect of that exception did not fall to be considered, and the Judge did not err in not putting to the jury that it was open to them to consider the effect of that exception in that case, **8 Bur. L. T. 220 (F.B.).** *See* also **8 L. B. R. 126 = 17 Cr. L. J. 154.** *See* also Notes 6—8.

58. Duty of Judge where accused charged with culpable homicide.—Where a jury returns a verdict of culpable homicide, it is the duty of the Sessions Judge to require them to find expressly whether or not the accused is guilty of the minor offence, **2 Bom. L. R. 334.** Where death has been caused by a blow with a weapon, which does not necessarily suggest an intention to cause such bodily injury as would in the ordinary course of nature cause death, and it is presumed in favour of the accused, that he had no knowledge that the injury which he intended to cause was likely to cause death, and the circumstances are such that an intention merely to cause hurt dangerous to life might reasonably be inferred, the jury should be directed that it is open to them to find the accused guilty of a lesser offence, *viz.*, of causing grievous hurt. An omission to do so is a misdirection, **6 S. L. R. 116 = 13 Cr. L. J. 750.** The omission to put the case of grievous hurt, s. 320 (8), I.P.C., was a misdirection. *See* also **8 L. B. R. 125 = 17 Cr. L. J. 154.**

59. Possession of stolen property, s. 411, I.P.C.—A direction to the jury that they should convict the prisoner, if they believed that he had shown the stolen property to the Police is open to exception. The mere act of knowing where the stolen property is, is not equivalent to possession, **Weir II, 493.** Where an accused is charged with an offence under s. 411, I.P.C., merely directing a jury to find whether the property was stolen and whether it was retained by the accused amounts to misdirection. The proper direction in such a case is to find—(1) whether the property was stolen; (2) whether it was dishonestly retained, and (3) whether the accused knew, or had reason to believe the same to be stolen property. Unless these three questions were found by the jury in the affirmative, the accused could not be convicted of an offence under s. 411, I.P.C., **15 B. 369** *followed* in **25 C. 711.** On a charge against a person of being in possession of recently stolen property, well knowing it to have been stolen, when the prosecution have proved recent possession of stolen goods, the jury should be directed that in the absence of any explanation which may reasonably be true they may find the prisoner guilty but are not bound to do so. If any explanation is given and the jury think that it may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the *onus* is on the prosecution to establish the guilt of the prisoner beyond reasonable doubt. *R.* v. *Schama*, **(1915) C. C. A. 84; L. J. K. B. 396.** On a trial of an indictment for receiving stolen goods with guilty knowledge, the jury should be expressly asked to consider whether the accused's explanation of his possession of the goods soon after the theft of them is reasonable or not, *R.* v. *Hampson*, **(1915) 11 Cr. Ap. R. 75.** *See* also *R.* v. *Millington*, **(1915) Cr. Ap. R. 86;** *R.* v. *Holmes*, **(1915) 11 Cr. Ap. R. 130.** There is no *onus* on the accused to prove that he received the property honestly, *R.* v. *Aubrey*, **(1915) 11 Cr. Ap. R. 182.** *See* Note 64 below. *See* also **52 C. 229; 53 C. 157.**

60. Rape—not leaving determination of fact to jury.—On a charge of rape the Judge in his charge to the jury said: "You will observe that this sexual intercourse was against the girl's will and without her consent, etc.." instead of saying, as he ought to have done,—"You will have to determine, upon the evidence in this case, whether the intercourse was against the girl's will, etc.," and the charge went on in the same style of stating to the jury what had been proved instead of leaving it to them to decide what in their opinion was.

defined in s. 390, I.P.C., and that this is a real and not merely technical defect and the conviction was *therefore set aside*, **30 M. 44**, where **23 C. 379** and **25 C. 711** are *followed*. **9 Cr. L. J. 311 (M.) : 8 M. L. T. 83 = 11 Cr. L. J. 482; Weir I, 446.**

55. Belonging to a gang of thieves, s. 401, I.P.C.—In the trial of prisoners for the offence under s. 401, *viz.*, belonging to a gang of persons associated for the purpose of habitually committing theft the Judge should in his charge put clearly to the jury, (1) the necessity of the proof of association (2) the need of proving that that association was for the purpose of habitual theft and that habit is to be proved by an aggregation of facts, **8 M. H. C. R. 120.**

56. Dacoity, s. 397, I.P.C.—In a case of dacoity, the jury must be distinctly instructed that unless they are satisfied that there were five or more persons committing robbery, and that the persons present and aiding in commission of the robbery numbered five or more persons, there could be no robbery. Where therefore the jury acquitted two persons out of six alleged to have committed a dacoity and the charge to the jury did not distinctly state that if they found that the robbery was committed by less than five persons the conviction should be not for dacoity but for robbery, the conviction was set aside on the ground of misdirection. **Weir I, 445-447, II, 519.** Where on a charge against the accused under ss. 392 and 397 I.P.C. the Sessions Judge [illegible] out to the jury that there is no evidence that the accused caused the grievous hurt or used deadly weapons directed the jury that they may convict the appellants of the offence under s. 397, merely because grievous hurt was caused by some of the robbers and that some of the robbers used knives *held* that this amounted to a misdirection and following **Weir I, 450** and **23 A. 404**, the conviction under s. 397 was set aside **21 M. L. J. 155 = 11 M. L. T. 20 = (1912) 2 M. W. N. 35 = 13 Cr. L. J. 42.** *See* also **1899 A. W. N. 186; 47 A. 53 (21 A. 253** *dissented from*).

57. Murder and culpable homicide, ss. 302 and 304, I.P.C.—Where the Judge in a case of culpable homicide, in his charge to the jury omitted to ask the jury specifically to consider whether in causing the death the accused had the intention to cause death or such injury as was likely to cause death or the knowledge that he was likely to cause death. *Held*, that this was a very material misdirection not cured by the fact that at the commencement, the Judge explained the sections of the Penal Code defining *murder* and *culpable homicide* and pointed out to them the distinction between the two, **35 C. 531.** *See* also **8 C. 739, 14 C. 164; 25 C. 736; 11 Cr. L. J. 295 (C.).** As there are two parts of s. 304, I.P.C., under one of which [illegible] a sentence of transportation for life legal, a Sessions Judge, in summing up a case to a jury, should draw the attention of a jury to both parts of the section and ask them to say explicitly under which part they find the accused guilty, **Ratanlal 530.** Where in a trial on a charge of murder, the Judge omitted to explain to the jury, the distinction between murder and culpable homicide and suggested that a strong inference should be drawn against the accused from his having failed to take steps to bring the real offender to justice, the misdirection was *held* to be grave and material, **3 L. B. R. 75 = 3 Cr. L. J. 1.** Accused were convicted before a Sessions Judge and a jury of murder, and were sentenced No. 1 as principal to death, and the others to transportation for life. The evidence showed that there was never any intention to kill the deceased, but that there was a quarrel, and the accused then proceeded to beat the deceased. Accused Nos. 1 and 2 struck the deceased on the head with a *kuda* (a flat iron bar, 2½ feet long, with a sharp edge) and thereby fractured his skull and so caused death and did not know that the blows would in all probability cause death. No. 3 tried to protect the deceased from further injury and himself received a blow which No. 2 had aimed at the deceased. The notes of the charge of the Sessions Judge to the jury were as follows:— S. 302 "The murder of *M*.—murder defined—punishment.—The only question herein as to the statements made by the prisoners, is did the prisoners, any or all of them, inflict these injuries on the deceased. If they did, they are guilty of murder." *Held*, that although death was caused by accused Nos. 1 and 2 with a weapon, which was likely to cause death, still as they did not intend to cause or know that in all probability they would cause death, they were guilty of culpable homicide only and not of murder, while accused Nos. 3 and 4 were guilty of causing hurt only. That the Sessions Judge's charge to the jury was, according to the notes recorded, were defective and that he should have left it to the jury to decide whether the offence was one of murder or of culpable homicide, or any offence after pointing out to them the legal definition of each offence, and that infliction of injuries would not necessarily make the offence of all the accused the same, and the jury should have been asked to find as to the intention of the accused persons, and their attention should have been drawn to the provisions of ss. 34, 35, 37 and 38, I.P.C., and they should have been told to return a verdict as to the exact guilt of each of the four accused persons, **1 Bom. L. R. 784.** In a trial for murder, where grave and sudden provocation causing a loss of the power of self-control is suggested for the defence

5 = **11 B. L. R. (F.B.) 347** and **21 C. 955** were distinguished as in these cases the charge was altered at the end of the case for the prosecution and a totally different common object was alleged. In cases of riot it is essentially necessary to mention what an unlawful assembly is. The jury might not be able to distinguish between a collection of five or more men without a common object and a collection of the same number of men with a common object, **17 Cr. L. J. 92 (C.) = 33 In. Ca. 684.**

X.—FUNCTIONS OF JURY.

62. **Jury sole Judge of facts.**—The jury must take into consideration all the facts alleged for or against the accused, and decide whether the view taken by the prosecution which leads to the conclusion of his guilt or the view which is set up on his behalf and which would make him innocent, commends itself to their judgment. *Per* COUCH, C.J., **21 W. R. 72** at p. **86.** Section 298 leaves it entirely to the jury to decide which view of the facts is true. The Judge should not state his own view of important matters of facts so positively as to leave the jury no loop-hole for taking any other view, **Ratanlal 748.** *See* Notes 14 and 15 above.

63. **Question of consent in case of rape must be determined by the jury.**—In charging a jury in a case of rape, the Judge should leave the question of consent to the jury and not direct them to find that the woman's consent, after a considerable struggle, renders the charge of rape nugatory, **1 W. R. 21.** *See* also **2 W. R. 230 (Civ.)** and Note 60 above.

64. **Whether possession of stolen property is recent enough to convict is for the jury.**—Where the accused was charged with dacoity and receiving stolen property, the Sessions Judge directed the jury that the finding of the dacoited article with the accused two months after the dacoity was "so short a time as to justify them in convicting the accused of the dacoity itself" and the jury returned a verdict of guilty of both charges. *Held*, that this was a clear misdirection. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence, was a matter entirely for the jury and should not have been put to them in the positive way which the Judge adopted, **26 M. 467.** Similarly, in a trial for dacoity and receiving stolen property, the charge to the jury did not leave it to them to decide whether the prisoners were guilty of one or other of the offences charged and did not contain any direction as to whether they were satisfied that the prisoners knew that the property was stolen in a dacoity, nor a reference to the lapse of time between the dacoity and the finding of the property; *held*, that there was misdirection, **Weir II, 515.** Accused was in possession of stolen property for five years, and he said he obtained it in a raffle. He was charged with house-breaking with intent to commit theft and theft in a building. Excepting the possession there was virtually no other evidence to connect the accused with the offence. In charging the jury the Judge's direction was: "Notwithstanding that it is nearly five years since the crime occurred, you will decide whether you are satisfied with the prisoner's explanation of his possession of stolen property"; *held*, that the direction to the jury was so defective and misleading as to amount to a misdirection, and that the verdict must be set aside and accused altogether acquitted. If the case should have been left to the jury at all, they should have been told to consider whether after five years it was reasonable to require the prisoner to prove how he came by the property, or whether his explanation, not being in itself improbable, ought not to be accepted, **Weir II, 489.** *See* Notes 18 and 59 above.

65. **Maturity of understanding of an infant accused must be decided by the jury.**—The question whether an accused person being a child between 7 and 12 years old, has sufficient maturity of understanding to judge of the nature and consequences of his conduct is a question of fact upon which, in cases tried by a jury, the accused is entitled to the verdict of the jury. The omission of the Sessions Judge to refer the question to the jury is a ground for setting aside the conviction and for ordering a new trial, **Ratanlal 27.**

66. **Question of identity of thumb-impression.**—The question of the identity of the thumb-impressions on two or more documents for the purpose of establishing whether the thumb-impressions are of one and the same person is eminently a matter for the jury and not for the Judge, **1 C. L. J. 385 = 2 Cr. L. J. 311.** The jury may decline to rely on the evidence of an expert witness, unless their own intelligence corroborates the reasons guiding the witness to his own conclusions, **9 C. W. N. 520.**

67. **Duty of jury in an alternative charge for perjury.**—In an alternative charge for perjury for having made two contradictory statements, the jury need not find which of the two contradictory statements is false; but it is sufficient for them to find whether the allegations made in the charge are proved, **21 W. R. 72 = 13 B. L. R. 324 (F.B.).** *See* also **14 A. 25.**

proved. In the concluding sentence of the charge the Judge said "You have seen the witnesses and I have no doubt that you will return a just verdict." *Held* that such a charge amounted to a clear misdirection, and that the verdict was erroneous owing to such misdirection. Even the concluding sentence did not satisfy the requirements of a proper charge 23 C. 230. *See* also Note 63 below.

61. Rioting—ss. 147 and 149, I P C.—generally common object must be stated.—The omission to state correctly to the jury what is alleged to be the common object of an unlawful assembly does not vitiate the verdict if such omission has not prejudiced the accused **4 C. W. N. 198**. But where persons other than those who actually did the deed are sought to be made liable by virtue of s. 149 I P C. the Judge ought in commenting upon the provisions of s. 149 expressly to draw the attention of the jury to the common object although the common object of the assembly may be stated in the charge **23 C. 372; 30 M. 44**. In **9 Bom L. R. 153 = 5 Cr L. J. 168**, ten persons were tried for offences under ss. 148 and 302 I P C. In his charge to the jury the Sessions Judge did not place before the jury the special circumstance which in his view would have brought the offence within the definition of murder in s. 300 I P C. It was not put to the jury in the charge whether any of the intentions mentioned in the section were established as against any of the accused and the exceptions 1, 2 and 4 to that section were not explicitly explained to the jury. The Sessions Judge directed the jury to find that if the offence of rioting were established all the accused were guilty of murder. *Held* that this was a misdirection in the charge to the jury because before any member of an unlawful assembly could be convicted of murder committed by any other member it is essential that the murder must have been committed with an intention specified in s. 300 and not falling within any of the exceptions to that section, and the act must be an act committed in the prosecution of the common object. Again if the accused are charged with an offence under s. 304 or s. 325 I P C. they may be convicted under s. 323 though not charged under that section. But where they are charged with these offences alleged to have been committed by another person in the course of a riot, *i.e.*, charged under ss. 147, 304 and 325 combined with s. 149 I P C. and the commission of the riot is disbelieved they should not be convicted under s. 323 I P C., in respect of their individual acts with which they are not charged and which are not imputed to them in the Judge's charge to the jury **31 C. 325**. Where in a trial on charges under ss. 147, 149/304, 149/325 and 149/323 I P C. the Judge told the jury "if therefore the jury find that a riot took place they should under s. 149, I P C., find every member of the unlawful assembly guilty of causing hurt or grievous hurt," but he nowhere instructed the jury what their verdict should be if they found there was no unlawful assembly but that grievous hurt or hurt was caused by any one or more of the accused persons, *held* that the omission of the Judge to do so amounted to a serious misdirection, **34 C. 693; 29 C. 379**. Fourteen accused were charged with rioting armed with deadly weapons and with murder and causing grievous hurt during such riot. The common object alleged by the prosecution was to compel the payment of certain money by one of the persons of the opposite party. Some of the accused who admitted their presence at the scene of the occurrence stated that they had been attacked on account of an allegation being made that one of the opposite party had enticed away another's wife and that they had merely acted in self-defence. The case was tried before a jury, and on the close of the case for the prosecution the Sessions Judge considering that possibly the common object alleged by the prosecution might be considered not to have been proved, amended the charge and added an alternative common object to it, *i.e.*, that the object of the assembly was to punish one of the opposite party for enticing away another's wife. There was no evidence on the record to prove the alternative common object, it being based solely on a portion of the statements of one of the accused, and the Sessions Judge put it to the jury that it was an inference that could possibly be drawn from the evidence but it was for them to draw that inference or not. The jury convicted all the accused without specifying which common object they relied on, and were not asked [illegible] the purpose of ascertaining what their verdict was based on. *Held* that the Judge [illegible] that the verdict of the jury leaving it uncertain what was the common object which [illegible] was bad in law and that the conviction must be set aside and the case retried **21 C. 955 F. B.** and [illegible] **25 C. 220** and **1 B. 749**, *see* however, **25 C. 711, 30 C. 822 at p. 830**. But the omission of a Judge to state correctly the common object of an unlawful assembly in a charge to the jury, was said, regard being had to s. 225 not to vitiate the trial if such omission had not prejudiced the accused **22 C. 276; 4 C. W. N. 198** and **11 C. 105**. *See* also **34 C. 693**. In a trial for rioting where only one common object was alleged in the charge the Sessions Judge suggested to the jury that the case might not be precisely as the prosecution alleged and that the real object might not be what the defence endeavoured to set up, but a third alternative something between the two, *held* that there was no misdirection as he left it entirely open to the jury as to whether they should accept his suggestion or not and the suggestion was not inconsistent with the prosecution case, **40 C. 257**. Also **20 W. R.**

73. Verdict should be obtained once for all at the end of the trial and not piecemeal.—There should be but one charge to the jury both on the facts and on the points of law and a Judge acts illegally in dividing the charge into two. Where, therefore, a Judge in his direction to the jury informed them that he would after commenting on the evidence, ask them whether they considered "that the prisoner had been guilty of any crime or whether he is the unfortunate victim of a most cruel fabrication of false evidence, and that he would then explain the law and take their verdict as to what offence the prisoner has been guilty of;" *held,* the procedure adopted by the Judge was unwarranted and the conviction was accordingly set aside, **Weir II, 493.** It is illegal for a Judge to take verdicts in respect of some of the accused and then to hear arguments and charge the jury and take their verdict in respect of other accused, **36 M. 585.** *See* s. 301 as to the delivery of the verdict

XII.—EFFECT OF MISDIRECTION.

74. *See* Notes under ss. 423 and 537.

75. It is not in all cases of misdirection or prejudice to the accused, the High Court will set aside a verdict.—When the Court is satisfied that there has been misdirection, the next question is whether the accused is prejudiced thereby. It is not in all cases of misdirection or prejudice to the accused the High Court will order a new trial. The question to be determined is not whether upon a proper summing up of the whole evidence a jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before the Judge and assessors, it ought not to set aside a verdict by a jury, merely because the Judge had not given the proper caution or advice to the jury an to the weight which they might properly give to the evidence. It would be improper to order a new trial if the evidence were wholly insufficient, to support any conviction against the prisoner, **B. L. R. Sup. Vol. 459 = 5 W. R. 80 at pp. 90—92.** *See* also **19 B. 749.** The High Court will set aside the verdict of a jury only in such cases in which, by a misdirection to the jury, the accused has been materially prejudiced, or where there has been a failure of justice, **19 W. R. 71 = 10 B. L. R. Appx. XXXVI; 26 M. 1.** In **21 C. 955** and **25 C. 230,** the Calcutta High Court *held* that ordering a re-trial is the only course open to the High Court where a verdict has been vitiated by misdirection. But this view has been *dissented from* in **25 C. 711; 19 B. 749** and **26 M. 1,** and it has been *held* that the High Court could deal with the matter in any of the ways contemplated by s. 423 (*b*). *See* also **17 C. 642** and **1 C. 207.** If, after considering the entire evidence, the Court be of opinion that it could not in any view of the case support a conviction, it would be worse than useless to order a re-trial. *See* **5 W. R. 80** at **p. 89; 26 M. 1; 30 C. 822; 29 C. 782; 7 C. 42; 4 C. W. N. 576; 14 C. W. N. 493 = 11 Cr. L. J. 96,** and also the case of *Arnold* v. *R.*, **41 C. 1023** (P.C.). If there was no failure of justice, s. 537 (*d*) would cover the case, **12 A. L. J. 146 = 14 Cr. L. J. 638.** *See* Notes to s. 423.

76. Effect of improper admission of evidence.—Where in a trial by jury evidence has been improperly admitted, the High Court has a power to inquire into the merits of the case under s. 167 of *the Indian Evidence Act* independently of s. 423. But the general principle is laid down in **4 C. W. N. 576** and the re-trial by jury will be ordered if the misdirection, that is the wrongful admission of evidence, has occasioned a failure of justice. If the improperly admitted evidence was so trivial that it could not have occasioned a failure of justice, the High Court will not order a re trial, but proceed under s 167 of *the Evidence Act,* **11 C. L. J. 301 = 14 C. W. N. 493 = 11 Cr. L. J. 96.** "In England where the trial Judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the *Criminal Appeal Act,* 1907, s. 4, may refuse to interfere, if it thinks that the jury giving heed to that warning would have returned the same verdict [*R.* v. *Lucas,* **1 Cr. Ap. Rep. 234,** *R.* v. *Stoddart,* **(1909) 73 J. P. 348,** *R.* v. *Norton,* **(1910) 2 K. B. 496—501,** *R.* v. *Loates,* **(1910) 5 Cr. Ap. Rep. 193,** *R.* v. *Wilson,* **(1911) 6 Cr. Ap. Rep. 207**]; or when evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance [*R.* v. *Westcott,* **1 Cr. Ap. Rep. 248,** *R.* v. *Mullins,* **(1910) 5 Cr. Ap Rep. 13**] or most unlikely to have affected the verdict] *R.* v. *Solomon,* **(1909) 2 Cr. Ap. Rep. 80**]. When the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Appeal quashed the conviction, if it thinks that the jury may have been influenced by it even though without it there was evidence sufficient to warrant a conviction [*R.* v. *Fisher,* **(1910) 1 K. B. 140**]. The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute 'highly improbable' for 'impossible' in Lord Herschell's reservation in *Makin* v. *Attorney-General for N.S. Wales,* **(1894) A. C. 57** to the effect 'where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury,' *Ibrahim* v. *E,* **18 C. W. N. 705 = 15 Cr. L. J. 326.** In this case their Lordships

68. Question of grave and sudden provocation must be laid before the jury.—In a case tried by a jury where the plea of grave and sudden provocation causing the loss of the power of self-control is raised by the accused, it must be submitted to the jury and their verdict must be taken upon it, 11 C. 410. It is the duty of the Judge in such circumstances as is clearly set forth in this section to explain the distinction between murder and culpable homicide not amounting to murder, and the jury as the judges of the facts have to decide the issue as to sufficient provocation **Ratanlal 766.** Where, however, grave and sudden provocation is no part of the defence case nor is any direct evidence given at the trial of such provocation or of facts from which this exception can be legitimately inferred, the Judge is quite justified in excluding inquiry into the exception. In fact it would be an error on his part to lay down law as to a matter which is not legally and properly before the jury **19 C. W. N. 653 (F.B.) = 16 Cr. L. J. 561.**

69. Jury must decide upon the weight to be given to a confession.—Where a prisoner charged with murder made a statement that he did strike the deceased with a stick, and the Sessions Judge after considering the evidence discredited the statement and all the evidence except that of the medical officer, and discharged the prisoner, not considering it necessary that the case should go before a jury, *held* that the Judge had no right to pronounce his own judgment on the credibility of the evidence and to withdraw the consideration of the due weight to be given to the evidence from the jury, whose peculiar province it is to come to a finding on the evidence after they had been duly assisted by the summing up of the Judge **18 W. R. 20.** But the absence of any evidence to warrant a commitment is a point of law, exclusively within the province of the Judge **5 C. W. N. 99.**

70. Jury must decide upon the character or credibility of a witness.—When there is not the slightest evidence *on the record* regarding the credibility of character of the witness, either one way or the other a Judge should not in his charge to the jury, say that the witness is deserving of credit, **10 W. R. 57 at p. 58.** It is a misdirection for the Judge to say that he sees no reasons to disbelieve a particular witness. He ought to leave the believing or disbelieving to the jury, **7 C. L. J. 245 = 7 Cr. L. J. 315.**

71. Jury must decide whether a previous conviction is proved or not.—*See* s. 310. Where in a Sessions case, the Judge told the jury that certain alleged prior convictions against the accused were proved instead of leaving it to them to decide whether they were proved or not: *held* (1) that it amounted to misdirection (2) that the misdirection did not affect the conviction of the accused as the question of prior convictions can be gone into only after the jury returns their verdict, and (3) that though it affected the question of sentence the Court was not prepared to interfere seeing that the sentences passed were not too severe, **10 Cr. L. J. 11 (M.), 21 W. R. 40.**

71-A. It is for the jury to decide whether an approver has forfeited his pardon.—Under this Code, there is no provision for withdrawing a pardon to an approver and the only question now is whether the pardon has been forfeited. *See* s. 339 and Notes thereunder. It is for the jury and not for the Judge to decide whether the pardon was forfeited. Cl (1)(*c*) of s. 298 refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible. The question of forfeiting the pardon was important not for the purpose of making other evidence admissible, but for the purpose of determining whether the trial could at all continue as against the approver, **42 C. 855.**

XI.—VERDICT SHOULD BE OBTAINED ONCE FOR ALL AT THE END OF THE TRIAL.

72. Judge ought not to record a verdict in the middle of a trial.—At a trial before a Sessions Court the Judge after having examined five out of seven witnesses examined by the committing Magistrate and bound over to give their evidence at the trial, asked the jury whether they wished to hear any more evidence and on their stating that they did not believe the evidence and wished to stop the case, recorded a verdict of acquittal, *held* that the procedure of the Judge was illegal and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at by the Judge or by the jury until the whole of that evidence has been considered, **20 M. 445.** It is not open to a Sessions Judge after hearing one witness for the prosecution to tell a jury that it would not be safe to convict and that there is no necessity to hear any further evidence. Unless the Public Prosecutor withdraws the charge with the leave of the Court the Judge is bound to allow the evidence to be placed before the jury, **Weir II, 318.** To allow the jury to pronounce their verdict before the accused is called upon to enter on his defence is an irregularity, though the Judge omits to charge the jury at all **23 C. 252.** *See* **Weir II, 499.**

2. **'Verdict' 'means the collective opinion of the jury.'**—By verdict should be understood the collective opinion of the jury as a body, arrived at after mutual consultation, and ascertained and announced by the foreman. In cases of disagreement among the jury, the individual opinions of members are never intended to be disclosed. When several accused were charged with the offence of rioting, etc., the Judge called on each member of the jury individually to answer a series of questions, of which he was furnished with a typed copy, and the individual opinion of each member of the jury on each question was recorded; *held*, that the divergence from the procedure laid down in the Code was of a serious nature and opposed to the fundamental principle of the scheme of trial by jury, **36 M. 585.**

3. **Form of verdict.**—The law does not prescribe any specific form in which the jury are to return their finding and they are at liberty to deliver it in any form in which they think fit, **14 W. R. 59.** In **15 B. 452** and **19 B. 735,** JARDINE, J., was of opinion that it was open to a jury under the Code to deliver 'special' verdict which the Judge is bound to accept. In **13 Cr. L. J. 586,** the Madras High Court has held that it is not open to a jury under the Code to deliver a special verdict and that they are bound to deliver a verdict of guilty or not guilty and disapproved of the Bombay cases. *See* Note 7 below.

Forms of verdict in English Law.—The verdict may be either (1) a general verdict of guilty or not guilty on the whole charge; or (2) *partial* as to a part of the charge, as when the jury finds the defendant guilty on one or more counts of the indictment and acquit him of the residue; or (3) *special* when the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the Court. *Halsbury's Laws of England*, Vol. IX, p. 371. *Archbold*, pp. 226—232.

4. **Verdict where there are several accused.**—A question may arise as to whether a jury has seisin of the case as a whole or whether they tried each prisoner personally and it appears clear that they take oath to try well and truly the case as between the Crown and the prisoner and they are not like the Judge in charge of the entire case as a whole. They have to give their verdict on the facts as against each man severally, and even when several prisoners are jointly tried it is open to them to convict one and acquit the others, **16 C. W. N. 909 = 13 Cr. L. J. 715.**

5. **Repugnancy in verdict.**—But if several are indicted for a riot and the jury acquit all but two, they must acquit the two also. And if upon an indictment for a conspiracy, the jury acquit all but one, they must acquit the one also unless it is charged in the indictment that he conspired with someone not tried upon that indictment, *R.* v. *Thomson*, **16 Q. B. 832**; *R.* v. *Plummer*, **(1902) 2 K. B. 339.** *See* also **14 A. L. J. 688.**

'The principle which underlies *R.* v. *Plummer* is this, that you cannot have contradictory results or decisions on one set of facts as only one decision can be the right one. But the repugnancy in the verdict of a jury in India is not in itself sufficient to justify the quashing of a conviction and the technicalities which are borrowed from the English Law and founded on ideas as to the sacred character of a verdict by a jury whose findings of fact are unknown, cannot be imported so as to give such a character which by the express provisions of law does not attach to jury verdicts in this country,' **41 C. 350; 41 C. 754.** In **41 C. 350** it was argued on the authority of *R.* v. *Plummer* that where a Judge acquitted the accused under s. 399, I.P.C., and convicted them under s. 402, I.P.C., the conviction was repugnant and could not stand. It was, however, found on the facts that there was no repugnancy and *held* that such a doctrine could not be applied to the decision of a Judge trying a case with the aid of assessors. In **41 C. 754,** it was argued that as the case for the prosecution in the previous trial was one of conspiracy between two youths who were then acquitted and the present accused, and that charge failed, no proceeding ought to be taken against the present accused though he was no party to the previous trial.

6. **Jury must be allowed to deliver their verdict in full.**—When after returning a verdict of "guilty," or "not guilty," the jury wish to state something in addition, it is wrong to stop the jury at such a stage of the proceedings. It may be the desire of the jury to add a recommendation to mercy or it may so happen that before the verdict is so recorded, the foreman of the jury may make some observations in respect of that verdict which may show the presiding Judge that the jury have not properly understood the case and that it would be the duty of the Judge not to record the verdict, but to re-charge the jury so as to lay the case properly before them. Where on a trial of certain accused on charges of rioting (ss. 147 and 148, I.P.C.), in connection with certain lands, the jury after delivering a unanimous verdict of guilty, attempted to add some words to the effect 'that the lands and crop belong to the accused' and they were stopped by the Judge on the ground that the verdict was clear and nothing was left to be ascertained under s. 303; *held*, that the

of the Privy Council refused to interfere because a doubtful piece of evidence was admitted by the trial Judge as the preponderance of unquestioned evidence was so great that if not impossible, it was at any rate highly improbable that there was any miscarriage of justice substantial, grave or otherwise. *See* also *R* v. *Christie* 30 T. L. R. 41 (1913) where it was laid down that where evidence has been improperly submitted an appeal will not be dismissed [s. (1) of the *Criminal Appeal Act* 1907] on the ground that substantial miscarriage of justice has actually occurred unless the Court feels certain that the jury would have come to the same conclusion if the evidence had been rejected. *See* Notes under s. 423 for Indian cases.

77. The whole of the case must be sent back.—Where an accused is tried and convicted at a trial on two connected charges and the High Court finds that the conviction on one charge was obtained by misdirection and is of opinion that the verdict of the jury on the other charge was correct, still the High Court has no jurisdiction to uphold the conviction under one charge and order a retrial on the other charge. The whole of the case must be sent back to the jury if the verdict was obtained by misdirection. **16 C. W. N. 909 = 13 Cr. L. J. 715.** *See* also **22 C 377; 12 P. R 1904**.

78. Correctness of procedure in jury trial must be judged by the Code and not by English practice.—When the proceedings upon a trial by jury in the Mofussil are consistent with a reasonable construction of that part of the Procedure Code where such trial is provided for, the proceedings are good in the absence of any distinct ruling to the contrary, and ought not to be examined by the light of English rules of procedure, **14 W. R. 69**.

Retirement to consider.

300. In cases tried by jury, after the Judge has finished his charge the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to or hold any communication with any member of such jury.

Notes.—1. Summing up essential for a valid verdict.—In a case tried by a jury the Code does not contemplate the reception of a verdict from the jury without their having had the assistance of a summing up by the Sessions Judge since a careful summing up may often change the hasty and superficial impressions of a jury and the parties are entitled to this service, **Ratanlal 235.** *See* Notes 2 and 3 to ss. 297-298.

2. What papers the jury may take with them.—There is no provision in the Code as to what papers the jury may take with them. The N. Y. Cr. Pro. C. (ss. 425 and 426) allows the jury to take with them any paper or article which has been received as evidence in the cause (but only upon the consent of the defendant and the counsel for the people) also the notes of the testimony or other proceedings on the trial taken by themselves or any of them but none taken by any other person. *See* also **Weir II, 516.**

3. No one shall hold communication.—If a juror falls ill while the jury are enclosed a medical man may by leave of the Court see and prescribe for him. *R* v. *Newton* 13 Q. B. 716—733. If a juror, after the Judge has summed up separates himself from his colleagues and not being under the control of the Court converses or is in a position to converse with other persons it is an irregularity which renders the whole proceedings abortive and it is not necessary to consider whether the irregularities in fact prejudiced the prisoner. The only course open to the Court is to discharge the jury and commence the proceedings afresh. *R* v. *Ketteridge*, (1915) 1 K. B. 467; 22 C. W. N. 743. On the trial of a prisoner at the assizes some time after the jury had retired to consider their verdict the clerk of assizes went to their room and asked if they had agreed or were likely to agree. The jury then put some questions to him and he answered them and a discussion took place. Later on he visited the jury again and a further discussion took place. Eventually the jury found the prisoner guilty. *Held* that evidence from the jurymen to prove the above facts was inadmissible but the Court could act upon a report made by the clerk of assizes and that as it was impossible to say that but for the discussions and the advice given by him the jury would have come to a unanimous conclusion, the conviction must be quashed, *R* v. *Willmont* 78 J. P. 352 = 31 T. L. R. 497. *See* also Note 8 to s. 301. 45 C. 327.

Delivery of verdict.

301. When the jury have considered their verdict the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Note.—*See* s. 303 for power of Judge to question jury, s. 304 for power to amend verdict and ss. 305 and 306 for acting upon verdict.

Notes.—1. Each juror must form his own opinion.—The law requires a juryman to exercise his own discretion and to decide on the evidence and not to rely on the opinion of his fellows. **23 W. R. 5.** A jury cannot return a verdict on the casting of lots. *Hale* v. *Cove* (1725) 1 Str. 642.

verdict, have invariably been rejected on the ground that it would be against public policy to permit jurors, who have left the Court, and in all probability discussed the case with outsiders, to endeavour subsequently to set aside a verdict, to which, by their silence, they have impliedly given their consent. In my opinion this is a principle which in the true interests of administration of justice ought not to be departed from, save only in the exceptional cases above referred to. (*See* Note 3 under s. 304.) In **40 C. 693,** the facts were that the jury returned a verdict of guilty on the 7th, which the Judge accepted but deferred passing sentence till the 9th. On the 8th, information was given to the Judge that the jury had arrived at their verdict by casting lots and their verdict was vitiated. [*Hale* v. *Cove*, **(1725) 1 Str. 642.**] The Judge sentenced the accused and examined the individual jurors and referred the matter to the High Court, *held* that the sworn statements of jurors and evidence of admissions by them, as to the mode in which their verdict was arrived at were inadmissible. But the evidence of other persons is admissible [*Owen* v. *Warburton*, **(1805) 1 B. and P. 326, 1 = 127 Eng. Rep. 489.** *Straker* v. *Graham*, **(1839) 4 M. and W. 721;** *Burgess* v. *Langlay*, **(1843) 5 M. and G. 722, 1 = 134 Eng. Rep. 750** and *Queen* v. *Murphy*, **(1869) L. R. 2 P. C. App. Cas. 535** *referred to.*] The evidence in the case was held insufficient to prove that the verdict was arrived at by casting lots. *See* also *Taylor on Evidence, Vol. I* (*10th edn.*), *p.* 670; *Russel* (*7th edn.*), *p.* 604. If the verdict is pronounced and one of the jury is so drunk or otherwise incapable that he cannot or does not assent a conviction in such a case would, it seems, be bad. *See ex-parte Morris*, **(1907) 72 J. P. 5** and Note 3 to s. 300.

9. Powers of jury to return a verdict in respect of an offence not charged.—

(*i*) *Jury may ignore graver charges and find accused guilty of lesser one.*—A jury trying an offence triable by jury has authority under s. 238, to find as an incident to such trial, that certain facts only are proved in the trial which facts constitute a minor offence and return a verdict of guilty of such offence, though such minor offence be not triable by jury. Sessions Judge may thereupon record a judgment, convicting the accused of such minor offence although he is not charged with and tried for it with the aid of the jurors as assessors. *Per* BHASHYAM AYYANGAR, J., **26 M. 243.** *See* also **3 W. R. 41; 20 B. 215; 15 C. W. N. 244** and **3 C. 189,** and Notes to s. 238. It is open to a jury to bring in a verdict of guilty of abetment of robbery when the charge is for dacoity only, **16 Cr. L. J. 676 (Bur.).**

(*ii*) *Jury may return verdict of attempt to commit offence when principal offence is charged.*—Where the accused was charged and tried for the offence of rape, *held* it was competent to the jury to bring in a verdict that the charge of rape was not proved but that the prisoner was guilty of an attempt to commit rape and it is open to the Judge to accept the verdict, **13 O. C. 295 = 11 Cr. L. J. 630.** *See* s. 237.

(*iii*) *Jury may return verdict in the alternative.*—A jury may under certain circumstances return a verdict in the alternative, *e.g.*, when it is doubtful under which of two sections or which part of the same section of the Penal Code the offence falls; or the jury might convict on a minor offence, though not specifically charged. But under all circumstances, the jury, if so inclined to act, should ask for and obtain the instructions of the Judge, **5 C. 871 = 6 C. L. R. 349.**

(*iv*) *Offence charged ss.* 341/523, *power to find guilty of s.* 325, *I.P.C.*—It is not open to the jury to bring in a verdict of guilty of grievous hurt when the charge is one combined with s. 149, I.P.C., *see* Note 10 to s. 238.

Procedure where jury differ.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

Notes.—1. Unanimous verdict must be received unless contrary to law.—It is only in a case where a jury are not unanimous that a Court may require them to retire for further consideration. Where the verdict is unanimous, it must be received by the Judge, unless contrary to law, **5 C. 871 = 6 C. L. R. 349; 11 Cr. L. J. 557 (C.); 16 Cr. L. J. 676 (Bur.); 3 L. B. R. 75.** *See* **1 W. R. 41,** in which it was *held*, that where a jury is not unanimous the Judge is not bound to summon a new jury.

1-A. Section has no application after delivery of verdict.—The Judge can ask the jury to retire for further consideration when he ascertains that they are not unanimous and before the delivery of their verdict; but cannot do so after the actual delivery of the verdict, **7 L. B. R. 140 = 15 Cr. L. J. 678.**—Whatever may be he individual opinion of the Judge in the matter, if he goes so far as to ask the jury what was the exact majority and what was the opinion of the majority, he ought to receive that verdict without hesitation, **10 C. 140.** The

jury ought not to have been stopped, and as the words which the foreman attempted to add were very material, the accused had been prejudiced and a new trial ordered The jury having regarded the case set up for the prosecution either as not established or as untrue, it was for them to consider and find whether the persons who were not the aggressors, had or had not exceeded the right of private defence of their property, **20 C. 455.**

7. Special verdict—Is it open to a jury to deliver their opinion on the facts only without returning a verdict of guilty or not guilty?—In a trial by jury of an accused for rape the jury having retired to consider their verdict returned to the Court and announced, through their foreman, that the prisoner "did the act with consent." Thereupon the Sessions Judge required the jury to say whether the accused was guilty or not. The jury then retired and brought in a verdict of guilty, whereupon the Sessions Judge convicted and sentenced the accused, *held*, on appeal that the first verdict of the jury being a special verdict which it was at the option of the jury to return in such a form, and as there was no real ambiguity about it, the Sessions Judge was bound under s. 302 to record the verdict and apply the law thereto But that the second verdict could not be sustained, as there was nothing to show that the Judge gave the jury any fresh directions or explained to them that a finding that the woman had consented was tantamount to an acquittal, **19 B. 735.** Where, instead of the ordinary verdict in the form of guilty or not guilty, a special verdict stating facts found by them is returned by the jury, and this special verdict is ambiguous or defective in regard to matters forming part of the offence, *e.g.*, intention knowledge, common design or abetment, it is the duty of the Judge to ascertain its meaning by questioning the jury under this section. In dealing with a special verdict, the Judge is confined to the facts positively stated in the verdict, and cannot of himself supplied by intendment or implication any defect in the statement, **Ratanlal 710**; *see* **20 C. 455.** It is open to a jury to find a special verdict, a string of facts, as in *Reg* v. *Dudley*, **14 Q B. D. 273**, to which the Judge applies the law The option is theirs, not his, **20 B. 215**, where (**Ratanlal 710** and **15 B. 452** *referred to*). *Contra*—In a case where the accused were charged with house breaking by night and with dacoity the jury were asked to deliver their verdict and then the foreman said "we find that the accused were present at the dacoity, but there is no evidence they shared the common purpose of those engaged in the dacoity or were assisting in it." The Judge informed the jury that a verdict of guilty or not guilty of the offence charged must be returned and added, "the question for you, gentlemen, is whether you think they were there in pursuance of the common purpose of those who were engaged in the dacoity and whether you think they had that purpose in assisting in it" After some consultation in the box by the jury, the Court said —I shall direct you, gentlemen, that on that finding, your verdict should be not guilty The jury expressed a desire to return again for consultation and, after doing so, the foreman said that their finding was "guilty," as the very presence of the accused at the time was sufficient to justify a finding that they were guilty of dacoity The Judge accepted the finding and convicted the accused. It was contended that when the foreman said that the accused were present at the dacoity but that there was no evidence of a common purpose, the Judge was bound to have recorded a verdict of not guilty and acquitted the accused, *held* that the procedure adopted by the Judge was correct and the conviction was upheld. No doubt according to English Law it is open to the jury to deliver a *special verdict*, *i.e.*, deliver their opinion on the facts leaving it to the Judge to draw the legal inference from the facts found, but the Code does not recognise any distinction between a "general" verdict and "special" verdict. The jury are bound to deliver a verdict of not guilty or guilty **13 Cr. L. J. 558 (M)**

8. Delivery of verdict by the foreman binds rest of the jurors—Evidence of individual jurors as to how the verdict was arrived at inadmissible.—The assent of all the jurors to a verdict pronounced by the foreman in the presence and the hearing of the rest, without their express dissent is to be conclusively presumed *Archbold* p 227 After the verdict, however, has once been pronounced by the jury and accepted, it is final as regards its meaning and effect, and no statements by the jurors, whether on affidavit or on examination, either unanimously or individually can be resorted to for explaining or changing its meaning or legal effect *Wigmore's* Law of Evidence Vol. IV, paras 2355—2358 In *R* v. *Wooller*, **2 Stark 111**, it was held that the Court is precluded from acting on the affidavits of jurors as to what happened at the time of the verdict. In this case the Court was satisfied by the evidence of bystanders that certain of the jurors had not heard the verdict announced by the foreman, the Court having declined to receive the affidavits of the jurors, and allowed a re-trial. The Court will not take notice of a letter written by a juryman after a trial to the trial Judge *R.* v. *Mahk*, **C. C. A.—11 Cr. Ap. Rep. 100.** In **8 P. R. 1913 = 9 P. W. R. 1913 = 13 Cr L. J. 815**, a Full Bench held the Punjab Chief [illegible] India were bound by s. 301 of the Code and could not disturb a verdict openly [illegible] In every case, however, that I have consulted, the Judges have been agreed [illegible] that the verdict announced in Court by the foreman did not represent their opinions, or that they were under a misapprehension of law or of fact in not protesting forthwith against such

discretion vested in him by this section." *Per* PHEAR, J., in 21 W. R. 1. *See* 20 W. R. 50. Where the verdict is ambiguous, it is the duty of the Sessions Judge to ascertain what the jury meant its verdict to be and this section empowers a Judge to ask such questions as are necessary for such purpose. Thus, where in the trial of three persons, the jury returned a verdict of "not guilty" in respect of two and added that the third accused was "*Kam Doshi*" (a little or less guilty) it was *held*, that the Sessions Judge should have refused to accept such a verdict and should have required the jury to give a proper verdict by means of questions put to them, 7 C. W. N. 135. Where the jury returned a verdict of "guilty but not voluntarily" on a trial under s. 326 and the Judge without further questioning the jury accepted the verdict as one of *guilty* and convicted the prisoner under s. 333, *held* by the Full Bench, that the verdict was in effect one of "not guilty" and the Judge was wrong without further questioning the jury in treating it as a verdict of "guilty," 12 C. W. N. 530 = 7 Cr. L. J. 362. It has been repeatedly laid down that the Judge is only entitled to question the jury as to their verdict when it is ambiguous or incomplete, 36 M. 585; *see* also 4 Rang. 488.

2. **Where verdict clear and full, Judge bound to record without questioning.**—Where the verdict although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question, 9 C. 53 = 11 C. L. R. 169; 30 M. 469. It is the duty of the Judge simply to accept the verdict without any question, especially where the jury return an unanimous verdict of *guilty* or *not guilty*. This section justifies questioning the jury only where it is necessary to ascertain what the verdict really is, 32 C. 759. *See* also 2 A. L. J. 475 = 2 Cr. L. J. 357; 32 C. 759 at p. 765. It is not competent to a Sessions Judge to put questions to the jury where the verdict is general and has been delivered without ambiguity and without incompleteness and where there is no reason to suspect a misconception or disobedience of the doctrines of the law. He is not at liberty to put questions to the jury, after it has delivered its verdict, with a view to bring on record the points on which his opinion is at variance with the jury, Ratanlal 442; 15 B. 452; 14 B. 115 and 20 B. 215. *See* also 8 C. 739; 6 Bom. L. R. 258 and 361; 19 B. 735; 28 B. 412; 29 M. 91; 30 M. 469; 36 M. 585; 22 M. L. J. 355 = 13 Cr. L. J. 285; 7 L. B. R. 140 = 15 Cr. L. J. 678 and Note 1.

3. **Reasons for verdict cannot be asked.**—A Judge ought not to put any questions to any of the jury as to his reasons for the verdict he has given, 20 W. R. 50; 9 C. 53 = 11 C. L. R. 169, *contra, see* 1 C. L. R. 275, where PRINSEP, J., *held* that the law did not prevent the Judge from questioning the jury as to the grounds on which they based their verdict. A Judge is not entitled to ask the jury their reasons for the verdict. He is not entitled to put questions to them to show that the conclusions at which they arrived were not logical or consistent. Though he is entitled under certain circumstances to refer the case to the High Court for decision he cannot put any question to the jury or come to a conclusion upon the case himself. Any ambiguity in the verdict is the only justification for any question by the Judge. It is true that it may be of very great assistance to a Judge to know the reasons for the verdict of the jury to make up his own mind whether it is necessary to differ from the jury or not. But the jurors would not generally be able to state their reasons very clearly, 30 M. 469, *followed*, 13 Cr. L. J. 586 (M.). The Code does not empower a Judge to question the jury as to their reasons for an unanimous verdict where there is nothing ambiguous in the verdict itself, 22 M. L. J. 355 = 13 Cr. L. J. 285. It is a serious irregularity opposed to the fundamental principle and scheme of trial by jury if a Judge puts questions to each of the jurors and records their opinions, 36 M. 585. A Judge ought not to treat them as assessors. *See* Note 3 to s. 302 and 20 W. R. 73. *See*, however, 36 C. 629; 29 M. 91 and 18 C. L. J. 522; 11 L. W. 561; 43 M. 744.

3-A. **Judge not to make minute inquiries to learn the nature of the majority of jury.**—Although this section empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as to ask the jury what the exact majority is, and what the opinion of that majority is, he ought to receive that verdict without hesitation, 10 C. 140 = 13 C. L. R. 358.

4. **Where verdict is vague or ambiguous, proper course is to question the jury and not to ask them to retire for further consideration.**—In 3 L. B. R. 75 = 3 Cr. L. J. 1, the jury returned an ambiguous verdict and the Judge instead of proceeding under this section by questioning, asked them to retire for further consideration. The conviction and sentence based on the second verdict was *held* altogether illegal. *See* also 2 A. L. J. 475 = 2 Cr. L. J. 357 and Note 4 to s. 302. But where the verdict is vague or uncertain in its meaning or effect, the proper course is for the Judge to ask the jury such questions as may be necessary to ascertain what their verdict really means. Thus, *e.g.*, where the verdict is *guilty of culpable homicide not amounting to*

Judge may act under s 302 when he has merely ascertained from the jury in what proportion they are divided and it is only when the nature of the actual finding has been disclosed that the Court is debarred from sending the jury back, **7 L. B. R. 140 = 15 Cr. L. J. 673.**

2. Judge has no power to control the verdict.—Where a Sessions Judge refused to accept the verdict of the jury acquitting the prisoner on the first count, and finding him guilty on the second required them to find the prisoner guilty on the first count *held*, that the Judge had no power to control the verdict of the jury in this manner Having left the several charges to jury, it must be presumed that he considered that there was evidence in support of each of those charges, and it was for the jury alone to acquit or convict the prisoner on the several charges, as they thought proper The Judge should have recorded the first finding of the jury which is the verdict in the case and sentenced the prisoner accordingly **7 W. R. 12.**

3. When verdict is unanimous, reason cannot be asked of jury.—Questions by a Judge demanding the jury's reason for acquitting the accused by an unanimous verdict without any uncertainty sound exceed the limits of questioning which the law contemplates, where they were not unanimous the Judge may further direct on matters of law and require them to retire for further consideration, **Ratanlal 726** which *follows*, **13 B. 452** and **8 C. 739.** There is nothing in the Code which empowers a Judge to question the jury as to their reasons for an unanimous verdict when there is nothing ambiguous in the verdict itself, **22 M. L. J. 355 = 13 Cr. L. J. 235.** *See* also **36 M. 585** and Note 2 to s. 303.

4. When direction for further deliberation proper.—When in a murder case the jury returned the following verdict —" We have no doubt the prisoner killed *N*, we think *N* gave no provocation, but we do not think it murder, because the prisoner had no object in killing him " the Calcutta High Court *held* that this was clearly not such a verdict as could have been received and the jury were properly directed by the Sessions Judge to re-consider their verdict, **1 W. R. 50.** When the jury are not unanimous, it is open to the Judge to require them under s 302 to retire for further consideration and, at the same time, further direct them on matters of law, **6 Bom. L. R. 253.** This course is desirable when the verdict is that of a bare majority *e.g.*, three to two when there are five jurors, *see* also **Weir II, 514.** A Judge is not bound to receive at once the first verdict which the jury brings in; he may direct them to re-consider it If their verdict is meaningless or inconsistent, he may refuse to accept it. If however, they insist on a general verdict of guilty, or not guilty, the Judge must accept it, *R.* v. *Meany*, (1862) **L. and C. 213**; *Halsbury, Vol IX, p* 373, *Archbold, p* 234

5. Where jury are not clear about the law the Judge bound to explain again.- When the jury were apparently not able to follow the summing up of the Judge as regards the law bearing on the charges *held* it was clearly the duty of the Judge when he was told that they did not understand the law in the matter to explain to them again, **1911 M W. N. 190.** *See* also **6 Bom. L. R. 253** and Note 39 at p 800

Verdict to be given on each charge

Judge may question jury.

Questions and answers to be recorded.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) Such questions and the answers to them shall be recorded

Notes.—1. Questions may be put only when verdict is incomplete or ambiguous in order to ascertain what the verdict really is—The law does not prescribe any specific form in which the jury ought to return their finding, and they are at liberty to deliver it in any form which they think fit. And if that finding is not exhaustive as to the facts in issue which go to make the charge or charges, it is competent to the Judge, and is, indeed, his duty, to put such questions to them as shall elicit a complete finding, **16 W. R 53 = 8 B. L. R. 557.** " It is only when it is necessary in order to ascertain what the verdict of the jury really is, that the Judge is justified in putting questions to the jury Unless a necessity of this kind truly exists the questions are not justified in law No doubt the Legislature thought that it would be very dangerous to give the Sessions Court the power of crossexamining the jury after they had delivered their final verdict with a view to show that the conclusions at which they had arrived were not legal or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict. But in this instance it does appear from the answers which the foreman returned upon being asked to give the verdict of the jury on the first charge, that there was at the time some lurking uncertainty in the minds of the jury themselves as regards their verdict; and we think that this uncertainty in their minds made itself apparent to the Judge, and that therefore, on the whole, the questions which were put by him were rightly put and in the

of the jury, he must give judgment in accordance with such opinion. On a verdict of murder being given it is certainly not competent to the Court to take any verdict on the lesser charge of culpable homicide. It would not only be superfluous, but impossible, **19 C. W. N. 653 = 16 Cr. L. J. 561.**

Amending verdict.

304. When, by accident or mistake, a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Notes.—1. When verdict is not delivered by accident or mistake, jury not entitled to amend it.—A Judge asked a jury as to their reasons for a verdict which was unanimous and unambiguous and in consequence two of the jury were led to say that they had been misled by the notes of the foreman as to some of the evidence and that they would like to re-consider the case with the result that the jury unanimously brought a verdict exactly opposite to the first, *held* that this was not a case in which it could be said that a verdict was delivered by accident or mistake and the High Court set aside all the proceedings taken on delivery of the jury's first verdict and directed the Sessions Judge to try that case from that point in accordance with law, **22 M. L. J. 355 = 13 Cr. L. J. 285.** Accused was tried by jury before a Court of Session for murder under s. 302, I.P.C. The jury by a majority returned a verdict of guilty under s. 304, I.P.C. The Sessions Judge thereupon asked the jury to consider for the purposes of the latter section whether they found that accused had intended to cause the death of the deceased. The jury retired, and on returning informed the Judge that they wished to alter their verdict as they were unanimously of opinion that accused was guilty of murder. The Judge recorded this verdict and sentenced accused to transportation for life; *held*, treating the second verdict merely as a reply to the point which the jury had been asked to re-consider, *viz.*, that there was an intention to cause death (1) that the offence proved fell under the first clause of s. 304 and not under s. 302, I.P.C., and the sentence was altered to one of transportation for ten years; *held*, further (2) that the second verdict could not stand, as all that the Judge had wished the jury to consider was, which of the two classes of offences under s. 304, I.P.C., the majority of the jury had found the accused guilty of, and they had, therefore no power to re-consider the whole case, and bring in an unanimous verdict of guilty of murder, an erroneous verdict not having been delivered by accident or mistake such as will entitle them to amend it under this section, and the Judge not having asked them to re-consider their first verdict under s. 302, **Ratanlal 982.** *See* **30 C. 466.**

2. Section does not apply where jury deliver wrong verdict owing to a misunderstanding of law.—This section obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury and does not apply to a case where the jury owing to a misunderstanding of the law arrive at a wrong conclusion, but there is no accident or mistake in the delivery of the verdict. The accused were tried before a jury on a charge under s. 232, I.P.C., the jury returned an unanimous verdict of *not guilty*. The Judge thereupon questioned the jury as to their reasons and the jury answered that the accused had not actually been caught in the act of coining. The Judge then explained the law under s. 232, I.P.C., and asked them to reconsider their verdict. Upon this, the jury returned an unanimous verdict of *guilty* and the Judge accepting the verdict, sentenced the accused; *held*, that this section did not apply and s. 303 limited the powers of the Judge to ask questions and hence the procedure adopted was irregular. If the jury returned a verdict, owing to a misapprehension of law, it can be corrected only by the Judge disagreeing with the jury and referring the case to the High Court under s. 307, **28 B. 412,** where **6 Bom. L. R. 258; 19 B. 735; 21 W. R. 1** are *followed*.

3. The power of amendment must be exercised before or immediately after verdict is recorded.—According to English practice the jury may before the verdict is recorded (or even promptly after the verdict is recorded, *R.* v. *Parkin*, **1 Mood 45**), rectify their verdict and it will stand ultimately as amended. This may be done even after the defendant has been discharged out of the dock (in pursuance of a supposed verdict of acquittal), if it is done before the jury have left the box, *R.* v. *Vodden*, **23 L. J. (M.C.) 7 = 6 Cox. C. C. 226.** *Archbold*, p. 234. In *R.* v. *Wooler*, **18 R. R. 402 = 2 Stark 111,** it was proved to the satisfaction of the Court by extrinsic evidence, *viz.*, affidavits of by-standers that all the jurors had not heard the announcement of the verdict by the foreman and that some of the jurors did not concur in the verdict and the Court thereupon ordered a re-trial by a different jury. On the Judge being informed by the foreman that the jury were agreed upon their verdict which was one of acquittal on both the charges and thereupon verdict was recorded and the accused was discharged from custody. From information received some days afterwards the trying Judge was led to believe that, as a matter of fact, the jurors were not agreed as regards the verdict. The Judge sent for the foreman, examined him on oath and discovered that the verdict on the second count was really a verdict of the majority of jurors and was

murder, as the punishment for that offence varies with regard to the intention or knowledge with which the act of causing death was committed, the Judge should ask such questions as would enable him to ascertain the exact nature of that offence found to have been committed If he does not do so, the verdict of the jury must be taken to have found that the lesser form of the offence has been committed **6 B. L. R. Appx. LXXXVI = 12 W. R. 35; 20 B. 215.** The jury when questioned for this purpose can no longer return a verdict of "guilty of murder" If they return such a verdict, the Judge must simply treat it as a verdict under the first part of s. 304, I P C., **Ratanlal 982.**

5. Jury should be asked to return verdict on each one of the heads of charge.—In a trial by jury the Sessions Judge ought to call on the jury to return a verdict on each one of the heads of charge If the trial is for murder of two persons, and the jury return a verdict of guilty, the Sessions Judge ought to ascertain whether the verdict relates to the killing of one or the other, or both, **Ratanlal 746.** It is inexpedient to put a series of questions to the jury unless when called on for their verdict on different heads of charge, they find themselves in difficulties which have to be resolved in that way, **Ratanlal 237.** Where the jury convicted an accused on the second head of the charge and acquitted him on the first, and the Judge required them to reconsider the verdict, it was *held* he was bound to receive the verdict, **7 W. R. 22.**

6. When charges are in the alternative the jury may be asked to ascertain the exact nature of the verdict.—Where a case depends on inferences to be drawn from two or three facts neither principle nor statute forbids the Sessions Judge from asking the jury to state a plain concise finding on those facts, **15 B. 452.** But where the Sessions Judge in a case of rioting with deadly weapons, considered that probably the common object alleged by the prosecution might be deemed by the jury not to have been proved and amended the charge by adding an alternative common object not based on the evidence but upon portions of the statement made by certain of the accused and the jury convicted without stating the common object and were not asked under this section any question for the purpose of ascertaining what their verdict was based upon it was *held* that the Judge misdirected the jury and the verdict leaving it uncertain what was the common object of the accused was bad and that the conviction must be set aside, **21 C. 955.**

7. When jury finds provocation, Judge should ascertain its nature.—In a trial for murder the first verdict returned by the jury was "guilty of murder under grave and sudden provocation." On being told by the Judge that their duty, after considering the question of provocation, was to acquit or convict of the charges of murder alone, the jury retired and brought in a verdict of "not guilty," *held* that the first verdict was a verdict of murder, as the provocation does not reduce the offence to culpable homicide unless it destroys the power of self control, a fact which the verdict did not find. Whether in the opinion of the jury there was, by reason of provocation, destruction of the power of self-control, could have been ascertained by the Judge by questioning them under this section, **20 B. 215.** Also the direction given to the jury after the first verdict to return a verdict of "guilty" or "not guilty" was clearly wrong as the case fell under s. 238 and although the charge was one under s. 302, I P C., the jury had a right to bring in a verdict under s. 304 I.P C., if there was grave and sudden provocation, so as to deprive the prisoner of the power of self-control, **5 C. 871 = 6 C. L. R. 343; 20 C. 483.** *See* also the remarks of SARGENT, C.J., in **8 B. 200** and **3 C. 182.**

8. Questions put and answers elicited to be recorded in exact words.—The questions put to the jury and the answers given must be recorded in exact language used and not merely their substance, **8 C. 729.** *See* also **1911 M. W. N. 190 = 9 M. L. T. 345 = 12 Cr. L. J. 140.**

9. Effect of not noticing verdict on some of the charges.—Where an indictment contains two counts for misdemeanour to which the defendant pleads "not guilty," and the finding of the jury is guilty on the second count (without noticing the first) whereupon judgment is passed, such judgment is not affected by reason of no finding being entered on the first count, for each count is a separate indictment on which a separate judgment can be entered. *Archbold* pp. 234 and 235 where *Latham* v. *R.*, 5 B. and S. 635 = 33 L. J. (M.C.) 197 is *referred to*. *See* s. 403 and *cf* **41 C. 1072.**

10. When verdict is given on the major charge with which the Judge agrees, verdict on the lesser charge ought not to be taken.—Where the charges were under ss. 302, 304 and 326, I P C., and on the jury bringing in a verdict of guilty under s. 302 by a majority of 8 to 1, the Judge accepted the same, sentenced the accused and did not take the verdict of the jury on the other counts. It was contended that as the jury returned a majority verdict only on the charge under s. 302, it was incumbent on the Judge to take their verdict on the charge under s. 304 *Held* that there was no error If the Judge agrees with the opinion of the majority

decided expressly, as the Advocate-General entered a *Nolle prosequi*, **8 C. W. N. 48.** *See* also **2 C. W. N. 481** and **7 C. W. N. 31.**

3. **Recording evidence after verdict illegal.**—Feeling doubt as to the correctness of a jury's verdict of guilty, the Sessions Judge postponed passing sentence and thereafter examined certain witnesses in the absence of the jury and the prisoner and then agreeing with the verdict, convicted and sentenced the accused. *Held*, that in a jury trial, the Judge had no jurisdiction to examine witnesses, after the jury had been discharged and in the absence of the accused, **7 Bom. L. R. 979 = 3 Cr. L. J. 42.**

4. **It is improper for a Judge to obtain verdict prematurely and discharge the jury because he disagrees with the verdict.**—After the evidence for the prosecution had been given and the accused's statements read, the Judge thinking the jury would not be likely to convict upon the evidence already given asked the jury if they wished to hear the defence evidence. The jury misunderstanding the question replied that they found certain accused "guilty" and the others "not guilty" and the Judge thereupon dismissed the jury and tried the case again with a fresh jury. *Held*, that the action of the Judge in re-commencing the trial with the aid of a fresh jury was not authorised by law and that the proper course was for the Judge to have explained to the jury that they misunderstood the purport of the question and to have directed them that it was their duty to hear the defence before making up their minds that the accused was guilty, **Weir II, 497.**

Verdict in Court of Session when to prevail.

306. (1) When in a case tried before the Court of Session, the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall* "unless he proceeds in accordance with the provisions of section 562" pass sentence on him according to law.

Notes.—1. Upon verdict of guilty, adequate sentence must be passed.—Upon a verdict of guilty it is the duty of the Judge to pass a sentence adequate to the offence of which the prisoners stand convicted. Passing a nominal sentence on account of his disagreement with the verdict would amount to usurpation of the functions of the jury.—*Mad. H. C Pro., 8th November*, 1866 (**3 W. R. Cr. Let. 16**).

2. The Sessions Judge should state whether he agrees or disagrees with the verdict of the jury, **15 W. R. 46.**

3. **Sessions Judge not competent to refer to High Court after once accepting the verdict.**—Where the verdict of the jury is once accepted and the case is postponed, it is not open to the Sessions Judge to re-consider his order and refer the case to the High Court under s. 307. He is bound to pass sentence, **4 C. W. N. 683.**

4. **On acquittal, accused to be released immediately.**—If the prisoner is acquitted, no warrant of release or intimation to the jail authority is necessary. The prisoner is entitled to be discharged from custody immediately on judgment of acquittal being pronounced, and if there is no further charge pending against him, his further detention is illegal. It is for the jail authorities in whose custody the prisoner was until the trial was concluded, to satisfy themselves of the result of the trial, and no formal warrant of release need be sent by the Court to the Superintendent of jail, **5 M. H. C. R. Appx. XI.**

Procedure where Sessions Judge disagrees with verdict.

307. (1) If, in any such case, the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which † "any accused person" has been tried and is clearly of opinion that it is necessary for the ends of justice to submit the ‡ "case in respect of such accused person" to the High Court, he shall submit the case accordingly, recording the grounds of his opinion and, when the verdict is one of acquittal, stating the offence which he considers to have been committed § "and in such case if the accused is further charged under the provisions of s. 310 shall proceed to try him on such charge as if such verdict had been one of conviction."

* The words and figures in inverted commas were inserted by Act XVII of 1923.

† The words in inverted commas substituted for the words "the accused" by Act XVII of 1923.

‡ The words in inverted commas inserted by Act XVIII of 1923.

§ The words in inverted commas were added by *ibid.*

given as an unanimous verdict owing to a misunderstanding that the opinion of the majority was binding on all the jurors, *held*, that the Court has no jurisdiction in consequence of the statement of the foreman to set aside a verdict given in open Court and in hearing of all the jurors and the formal order of acquittal that followed thereupon. The Courts in India cannot travel beyond the scope of s. 304 even in cases when the facts are similar to those in *R* v *Wooler*. Jurisdiction in criminal cases is not to be assumed and in regard to matter for which Legislature has made express provision it certainly must not be assumed in excess of the jurisdiction so conferred, **8 P. R. 1913 (F.B.) = 9 P. W. R. 13 = 13 Cr. L. J. 813**. The section provides for an amendment of a wrong verdict delivered by accident or mistake but clearly contemplates that such a verdict is amended only *before or immediately after* it is recorded, in other words before the jurors have left the Court and while they are still under the observance of the presiding Judge. And the reason for this restriction is obvious, for, once the jurors have left the Court they are liable to outside influences, and it would be in the highest degree dangerous thereafter to accept statements to modify the verdict.

4. Section 304 does not apply to a second verdict after hearing further evidence.—In a jury trial all the evidence on both the sides must be considered before the case can be submitted to the jury and once a verdict has been delivered there is no power in the trial Court or in the jury to re-consider that verdict except under s. 304. The second verdict is therefore a nullity and the judgment based upon it is without jurisdiction and void, verdict of jury once given is final. **4 Lah. 332.**

Verdict in High Court when to prevail.

305. (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall after the lapse of such time as he thinks reasonable discharge the jury.

Notes.—1. Verdict obtained by duress.—In *Pierce* v. *Pierce*, 38 Mich. 412, the jury after being out for one day sent word to the Judge that they could not agree. The Judge sent back word that he did not believe it yet, and added the suggestion that they had better agree that night as he was going away and should not be back until the second day after and they might not get discharged until he returned. The verdict was returned within an hour afterwards. *Held* that it must be set aside as obtained by duress. The Court said: "Jury trials can never be safe unless the verdict is made as far as possible on the unbiassed and free conclusion of every juror. Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. It may be discretionary with the trial Judge to keep a jury out until he is satisfied an honest and free agreement is not to be expected. But there is no legal propriety in keeping the jury confined unreasonably after they have come to an agreement and a verdict obtained by the suggestion of such an alternative is a verdict obtained by what it would be hard to distinguish from duress. It may be that the Court is not bound to be present continually on the chance of an agreement, but any unusual and prolonged delay is not to be favoured without giving an opportunity to find a sealed verdict. This error, however innocently committed as we are bound to suppose it was, must nevertheless in our opinion, be held fatal to the verdict."

2. When jury divided in the proportion of six to three, Judge bound to ascertain verdict before discharging them.—Where in a trial at the High Court Sessions the jury were divided in the proportion of six to three and the presiding Judge without ascertaining what the verdict of the majority was discharged the jury and ordered a retrial, and on the retrial coming on before a different Judge and jury, objection was taken to the competency of the tribunal to retry the case on the ground that the jury in the first trial were improperly discharged and it could not be said the presiding Judge at the first trial agreed or disagreed with the verdict of the majority, he not having ascertained what that verdict was, *held*, the Court as constituted of the Judge and jury at the first trial has legal seisin of the case and no other Court could try the case. The jury had not to be

The rule in cases where evidence is circumstantial is, that the facts found should be inconsistent on a reasonable hypothesis with the innocence of the accused before a conviction is pronounced, **41 C. 621; 26 Bom. L. R. 610.**

3-A. When reference ought not to be made.—(*i*) *After accepting verdict.*—Where, after the delivery of the verdict by the jury, the Sessions Judge recorded, "I see no reason for not accepting the verdict," but subsequently on re-consideration, he referred the case to the High Court; *held*, that it is not open to him to re-consider his order any more than it would be for the jury to re-consider their verdict once given and recorded. The terms of s. 369 preclude him from re-considering his judgment, which was that he accepted the verdict, **4 C. W. N. 683.** When a Sessions Judge thus acts under this section without jurisdiction, the High Court has no power to act and consider the merits of the case on the evidence. *Ibid. cf.* **41 C. 662.**

(*ii*) *Where on his own showing in his charge to the jury, the prosecution evidence is open to doubt.*—Where, on his own showing in his charge to the jury the evidence is so open to hostile criticism as to justify the jury in regarding it with suspicion, the Sessions Judge does not exercise a proper discretion in referring the case under this section, **7 C. W. N. 135**, but *see* **9 C. L. J. 432.** In the latter case it was, however, held that it is not improper for a Judge to refer a case to the High Court merely because there is a weak link in the evidence for the prosecution to which he drew the attention of the jury and asked them to favour and consider before returning their verdict.

(*iii*) *Because the High Court had upon the same evidence convicted certain other persons in another case.*—Again, where a Sessions Judge not accepting a verdict of "not guilty" referred the case to the High Court, because the High Court had upon the same evidence convicted certain other persons tried in another case. *Held*, that that fact was no justification for referring this case to the High Court, unless the Judge himself considered the evidence against present accused reliable, independently of the result of the other trial. The reference was accordingly returned with the direction "that he must appreciate the evidence and arrive at his own conclusions and it is only if he disagrees with the verdict of the jury that a reference should be made to the High Court," **6 Bom. L. R. 599.**

4. The Judge who makes the reference must be the one who held the trial and not his successor.—A reference under this section is not invalid in consequence of its having been made by an officer who had held the trial, but who at the time of the reference had ceased to be a Judge. In fact, the Judge who may make a reference under this section must be one who held the trial and heard the evidence and not the officer who succeeds him as Judge, **2 C. L. J. 48 = 2 Cr. L. J. 386.**

5. Points to be noted when making reference.—A Sessions Judge ought to record distinctly whether he agrees with the jury or not, **7 W. R. 6.**

(*i*) *The Judge should ask the jury for specific findings on the particular facts on which he himself relies.*—Where the jury are unanimous in their verdict of not guilty, the Judge should ask for specific findings on the particular facts on which he himself relies. This would enable the High Court to understand the particular grounds on which the jury proceeded, and it will then only be necessary to consider the propriety of those grounds **Weir II, 388.** A bare verdict of 'not guilty' may be as consistent with a belief of great part of the evidence for the prosecution, as with a total disbelief of every part of it, **41 C. 621; 16 Cr. L. J. 587 (Bur.)** and *see* Notes to s. 303 as to the power of questioning the jury.

(*ii*) *There should be no delay.*—In cases in which the Sessions Judge has disagreed with the verdict of the jury, no delay should be permitted to occur in the submission of the records with the Sessions Judge's letter of reference. It is open to the Government Pleader, and to the pleader for the accused, to make notes of the evidence as the case proceeds, *Wilkins*, 115.

(*iii*) *Judge should state his opinion on the evidence with his reasons.*—It should clearly be stated in the letter of reference what material portions of the evidence the Sessions Judge believes to be true and what his reasons are for arriving at his conclusions; he should not content himself with his remarks to the jury and merely adding vaguely the remark "for these and other reasons, I submit the case for the orders of the High Court." **6 Bom. L. R. 519.** DAVIES, J., in **29 M. 91,** CASPERSZ, J., in **36 C. 629** and PRINSEP, J., **1 C. L. R. 275** are of opinion that when a Judge makes up his mind to refer case he should proceed to question the jury and record their opinions and *see* also **20 W. R. 73.** In **9 C. 53** and **30 M. 469,** it was held that the Judge cannot ask the jury for their reasons. Where the Judge's charge to the jury is meagre, it is necessary that the Judge should state in his reference the evidence for the prosecution and the defence. He ought also to state what facts

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which * such accused has been tried, but he may either remand * such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict * such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, and if it convicts him, may pass such sentence as might have been passed by the Court of Session.

Notes.—1. The words "any accused person" have been substituted for the words "the accused" and the words "in respect of such accused person" have been added. The reasons given for this amendment are "this amendment prescribes that when a Judge accepts the verdict of the Jury in respect of some of the accused but not of others he need only refer the case of the latter to the High Court."—*Statement of Objects and Reasons*, 1914.

The words beginning with "and in such case ... had been one of conviction" have been newly added. "We think however that a further amendment is required in s. 307 to provide for the case of a person who is also charged with a previous conviction under s. 310. It seems obvious that if the Judge disagrees with the verdict of the jury and submits the case to the High Court it is desirable that the record should be complete. We propose, therefore, to insert at the end of s. 307 (1) a provision for the trial of the further charge under section 310." *Sel. Com. Report* 1916.

POWERS OF SESSIONS JUDGE.

2. When reference may be made.—When a Judge differs from the unanimous verdict of a jury given in accordance with law, the only procedure open to him to follow is that laid down by this section, **8 C. 871 = 6 C. L. R. 319.** The disagreement may be on matters of fact as well as on matters of law, **11 B. L. R. 14.**

(*i*) *When the Judge thinks that the verdict is not supported by evidence.*—The discretionary power to refer cases conferred on Sessions Judges by this section should always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court. It should be borne in mind that there is no appeal (**10 C. 1029**) on the facts, not even in cases of acquittal, and the result of his failing to refer the case is that prisoners are convicted on evidence as to the sufficiency of which he is doubtful, **13 M. 343.**

(*ii*) *When the verdict is erroneous owing to misapprehension of law.*—If the Judge believes that the jury has returned an erroneous verdict owing to misapprehension of law, the mistake can be corrected only by the Judge disagreeing with the jury and referring the case to the High Court under this section, **23 B. 413; 22 M. L. J. 355 = 13 Cr. L. J. 255.**

(*iii*) *When the Judge is clearly of opinion that he should refer for the ends of justice.*—Where a Sessions Judge made a reference on the ground that the question involved was one of importance but it was not stated that he was clearly of opinion that it was necessary for the ends of justice to submit the case to the High Court and that he disagreed with the verdict of jury the case was sent back directing the Judge to make a proper reference should he think it necessary to do so, **9 C. W. N. 68.** And a reference under this section should be made only when the Judge is clearly of opinion that he should do so for ends of justice, **23 C. 535; 8 PAL. 817.** The disagreement referred to in this section must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court, **2 B. 513,** *followed in* **23 B. 213; 13 C. W. N. 767.**

3. Reference should be made only when the verdict of the jury is manifestly wrong and not in every case of doubt nor in every case in which a view different from that of the jury can be entertained.—In a case where the evidence against the accused was mainly of a circumstantial character the jury acquitted the accused but the Sessions Judge disagreeing with the verdict referred the case to the High Court. The High Court in rejecting the reference remarked that not in every case of doubt, nor in every case in which a view different from that of a jury can be entertained on the evidence that a reference under this section is to be made to the High Court, but the verdict of the jury should be manifestly wrong before such reference is made, **8 PAL. 318.**

* The words "such accused" were inserted for the words "the accused" by *ibid.*

7. **Single offence triable with aid of assessors tried by jury.**—An accused was tried by a jury for having delivered a counterfeit coin, s. 240, I.P.C., and jury returned a verdict of not guilty. The Sessions Judge disagreeing with the jury was about to refer the case under s. 307, when it was brought to his notice that the offence had not been declared triable by a jury and ought to have been tried with assessors and the Judge thereupon treating the verdict of the jury as the opinion of the assessors convicted the accused; *held*, that the conviction was bad, inasmuch as the case was validly tried by a jury within the meaning of s. 536 and the trial was complete when the verdict was delivered and the Judge was bound either to give judgment in accordance with it or refer the case under s. 307, **25 C. 555.**

8. **Where in trial of offence triable by jury, verdict of offence triable with aid of assessors is delivered.**—Where in a case the jury in trying a compound case incidentally (without any separate charge) find the accused guilty of a minor offence triable with the aid of assessors, it is submitted that it is competent to the Judge and he is bound if he disagrees with the verdict of the jury on the minor offence while accepting their verdict on the compound offence, to make a reference under this section. *See* the judgment of BHASHYAM AYYANGAR, J., in **26 M. 243.**

PROCEDURE AND POWERS OF HIGH COURT.

9. **It is fair to give notice to accused.**—Where a Sessions Judge differed from the majority of the jury and referred the case to the High Court under this section to be dealt with as an appeal, the High Court, before proceeding with the case, considered it fair to the accused to give him notice to bring forward any objections he may have to the Sessions Judge's recommendation, **19 W. R. 33.**

10. **Government as appellants to begin.**—In a case referred to the High Court under this section, it is for the Government, the appellants, who ask for conviction, to begin and satisfy the Court that there is a case calling upon the prisoner for an answer, **20 W. R. 33.**

11. **Where Judge and jury agree, is High Court bound to accept their opinion?**—In a reference under this section the High Court is bound to accept the opinions of the Judge and the jury where they agree, and it is not open to it to believe evidence which both have disbelieved, **Ratanlal 925.** But under the present Code, the High Court can act on its own view, **29 C. 123; 9 C. L. J. 432.**

11-A. **High Court cannot interfere with verdict, if Judge does not refer.**—The High Court cannot interfere with the verdict of a jury when the Sessions Judge has refused to refer the case and there has been no material misdirection in the case, and no failure of justice has been caused, **4 M. L. T. 483;** *see* also **14 M. 36,** where although the Judge did not agree with the verdict he did not refer the case to the High Court as there was evidence against the accused which it was open to the jury to believe. On appeal by Government on the ground that the Sessions Judge ought to have referred the case to the High Court, *held* that since there has been no misdirection by the Judge and there was some evidence to support the verdict, the High Court had no power to interfere, however absurd the verdict might be considered. *See* also **13 B. L. R. Appx. XIX; 13 M. 343** and **32 C. W. N. 673.**

12. **When Judge has accepted verdict on certain charges, High Court cannot vary.**—Where a Sessions Judge has approved of a verdict on certain charges and finally acquitted and discharged the prisoner as to those charges, the High Court, it was *held* cannot under this section, convict under those very charges. This section contemplates only cases in which without recording any order of acquittal or conviction, the Sessions Judge refers the whole case, **20 W. R. 73.** The High Court has no power to interfere with the unanimous verdict of the jury with which the Judge agrees, **41 C. 662.** *See* also **29 C. 128; 21 C. W. N. 435.**

13. **What is meant by the 'opinion of the jury.'**—By opinion of the jury in this section is meant the conclusion of the jury, *i.e.*, the verdict, and not the reasons on which that conclusion is based. If the verdict of the jury is unanimous, it coincides with their opinion. If it is a decided verdict the opinion of the minority no less than that of the majority must be considered by the Court dealing with the reference, **36 C. 629;** *held per* SUBRAHMANYA AIYAR and BODDAM, JJ., in **29 M. 91 (F.B.).** That in a reference under this section, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when they have been given, the circumstance that no such reasons have been ascertained does not warrant the High Court to decline to go into the evidence and thus arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused. There is nothing in sub-sec. (3) warranting the interpretation of the term '*opinion*' in it to mean anything other than the respective conclusions of the Judge and jury, DAVIES, J., *held* that the Legislature in directing that the High

in his opinion were proved upon the evidence recorded in the case and the conclusions to which those facts lead him. The witnesses were examined before the Judge and the law contemplates that the High Court should have his opinion upon the evidence before it can deal with the case **8 Bom. L. R. 559** In a reference therefore where the Judge merely said that the verdict was against the weight of evidence and expressed no other opinion, it was observed that it was his duty to set out on what portions of the evidence or on what facts disclosed by the evidence the accused should have been convicted **7 C. W. N. 345; 6 Pat. L. J. 754.** The Judge should record the grounds of his opinion in the reference in as clear a manner as he would have done if he had to write the final judgment in the case **50 A. 40 = 29 Cr. L. J. 342.**

(iv) *He should state what offence the accused has committed and his reasons for differing from the jury*—In his letter of reference the Sessions Judge should also state what offence the accused has in his opinion committed and on what grounds in that respect, he differs from the jury. He should state with some fulness his view of the evidence and the credibility of the more important witnesses, because the High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses **10 Bom. L. R. 173 = 7 Cr. L. J. 192.** *See* also **3 C. 623 = 2 C. L. R. 204; 2 C. L. R. 1** and **20 W. R. 70** *See* Note 7.

(v) *He should not refer to matters not placed before the jury*—A Sessions Judge in making a reference under this section should not ask the High Court to consider and determine the case on matters not placed before the jury. He should recollect that in a trial held by him he is exactly in the same position as the jury in dealing with the evidence properly given before him and that he is bound to confine his attention solely to that evidence **27 C. 295**

(vi) *Judge ought not to call upon the accused to plead to previous convictions pending a reference*—The Sessions Judge ought not to call upon the accused to plead to previous convictions pending a reference to the High Court but he might be asked to record the plea after the Court has considered the reference, **30 M. 134.** *See* Note 3 to s. 310

(vii) *Unfair imputations to the jury ought not to find a place in the reference*—Where a Sessions Judge disagreed with the majority verdict and observed "four of the members of the jury were Hindus and one a Mussalman. One of the accused is an educated Hindu. I cannot but think that the majority of the jury returned a deliberately perverse verdict in order to secure the acquittal of this man." *Held* that such an imputation is unfair to the jury, to the Sessions Judge, to the accused and to the High Court **51 C. 418.**

5-A. Judge cannot refer whole case when he disagrees with the verdict in respect of some of several accused only—Sub-sec. (2) does not intend that when the Judge is not prepared to accept the verdict of the jury in its entirety, the whole case is to be referred to the High Court. It only contemplates a reference to the case of those persons in respect of whom the Judge declines to accept the verdict. When the Judge agrees with the jury in respect of any particular accused the Judge ought to convict and sentence or acquit that accused as the case may be, **41 C. 789.**

5-B Copies of all essential documents should be sent—When cases are submitted to the High Court under this section, fair copies should be made and transmitted of all essential documents in the record.—*I. m. H. C. Cr. Cir., pp* 46 *and* 47

REFERENCE IN CASES TRIABLE WITH ASSESSORS WHEN TRIED BY JURY.

6. Joint trial of offences some triable by jury and some with the aid of assessors.—The proper procedure is laid down by s. 269 (3), *see* Notes at p. 611 under s. 746 (3) and *see* s. 536 and Notes thereto —S. 269 (3) applies only to cases where the accused is charged with distinct offences some of which are triable by jury and some with the aid of assessors. In such cases if all the charges are tried by jury and their verdict taken the Judge disagreeing with the verdict refers the whole case to the High Court under this section. In **8 Bom. L. R. 599 = 4 Cr. L. J. 132; 9 Bom. L. R. 1057 = 7 Cr. L. J. 326** and *Madras Referred Case 9 of 1904* the High Court dealt with the verdict on the offences triable by a jury and returned the records to the Sessions Judge so that he might deal with the offence triable with the aid of assessors remarking that the Judge should not have joined these latter offences in the reference while in **23 B. 618** it was *held* following **4 C. L. R. 603, 25 C. 555** and **Ratanlal 800** that although the procedure of the Sessions Judge was irregular the trial by jury must be accepted as legal and the case *held* to be one that can be submitted under s. 307. On the reasoning adopted in **25 B. 610 (F.B.)** and **33 B. 423,** the latter view seems to be preferable, but *see* **15 M. L. J. 412** (contra).

section merely because it might be argued, upon the face of the charge to the jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of the Judge and jury, 36 C. 629 (29 C. 128 and 9 C. L. J. 432 *followed* 7 C. W. N. 135, *explained* 2 A. L. J. 473 = 2 Cr. L. J. 357 *dissented* from). *See* also 10 Bom. L. R. 632 = 8 Cr. L. J. 143; 10 Bom. L. R. 173 = 7 Cr. L. J. 192; 17 C. W. N. 1077 = 14 Cr. L. J. 556; 15 Cr. L. J. 513 (Bur.); 16 Cr. L. J. 440 (M.).

15-A. High Court must consider the opinions of the referring Judge as well as of the Jury.—In case of a reference under this section the High Court is to give due weight not to the opinion of the jury alone but to that of the Sessions Judge as well, 17 C. W. N. 1077 = 14 Cr. L. J. 556. 'In this country the opinion of the Judge is to be weighed by the High Court in exactly the same balance as the opinion of the jury,' 41 C. 754; 55 Cal. 879.

16. No analogy between powers exercised by High Court and those exercised by English Court in civil cases.—"The finality of the verdict of the jury is by this section made subject to the power of the Sessions Judge who presides at the trial (when he disagrees with the verdict of the jury so completely that he considers it necessary for the ends of justice) to submit the case to the High Court, which is, in dealing with the case has to exercise any of the powers which it may exercise on an appeal. This is a most important departure from English law and practice, and was undoubtedly dictated by the circumstances that the trial by jury in this country was an experiment which it was necessary to safeguard against a miscarriage of justice, by allowing the case to be referred under certain circumstances to the highest judicial authority. There is, therefore, no true analogy between the discretionary powers thus conferred upon the High Court under the above section and that which the Courts of Law in England have sparingly exercised in interfering with the finding of a jury in civil action by directing a new trial on the ground of the verdict being against the evidence, and the practice, therefore, of the latter Court cannot be resorted to as affording a rule in the exercise of the powers conferred on the High Court. This is, I believe, the gist of Mr. Justice WEST's remarks in 1 B. 10. However, I entirely agree with Mr. Justice NANABHAI, whose long experience is entitled to great weight, that it has been the uniform practice of this Court not to interfere with the verdict of a jury except, when it is shown to be clearly and manifestly wrong (10 B. 497), and such practice ought, in my opinion, to be followed."—*Per* SARGENT, C.J., 15 B. 452 at p. 436. But now *see* 29 C. 128, in Note 15 above. 46 A. 265.

17. Power of the High Court to convict the accused of offences not charged.—Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence and omitted to convict the prisoners of that offence, the High Court could convict for such minor offence, 3 C. 189. *See* also 5 C. 871 = 6 C. L. R. 349; 20 B. 215; 20 C. 433; 22 C. 1006. The accused were tried for charges under ss. 148, 304/149 and 326/149, I.P.C. The jurors acquitted them of the offence under s. 148, I.P.C., but found them guilty under s. 226, I.P.C., without the aid of s. 149 for which there was no charge. The Judge accepting the finding of the jury in respect of s. 148 but referred the verdict of the jury convicting the accused under s. 326, I.P.C., disagreeing with the verdict and recommending that the finding should be altered into one under s. 326/149. *Held*, that the High Court could not interfere under s. 307 as the verdict under s. 326 was practically a judgment of acquittal, inasmuch as there being no charge under that section independently there can be no verdict given upon it (*see* 34 C. 698 and 16 C. W. N. 1077 = 13 Cr. L. J. 502).—"On a reference under s. 307 we are bound to weigh the opinion of the Judge and the jury, and we have no power to interfere with the unanimous verdict of the jury with which the Judge agrees; and the only verdict with which the Judge disagrees is the verdict which on the face of it is illegal and void and must be set aside. We are unable to see our way to substitute anything for this offence, because we are precluded from considering the question of rioting or the question of any separate act of causing hurt with which the accused were never charged." 41 C. 662. *See* Notes to s. 238.

18. Non-direction—Interference on account of.—The High Court will not interfere with the verdict of a jury because there was non-direction, unless the circumstances were such as to make the non-direction amount to a misdirection, Ratanlal 644; 23 C. 252; 6 Pat. 817.

19. Appeal—High Court dealing with a reference does not act in the exercise of its original jurisdiction.—No appeal lies to High Court from its own judgment passed under this section, Ratanlal 691. A High Court, disposing of a reference under this section is not acting in the exercise of its original criminal jurisdiction, but only as a Court of reference in a criminal matter under cl. 28 of its Charter. The hearing under this section is not in any sense an original trial, 29 C. 286.

19-A. Whether s. 537 applies to a reference under s. 307.—S. 537 of the Code does not in terms apply to a reference under s. 307, but the limitation contained therein applies to such a reference. Therefore on

Court should duly weigh the opinion of the jury gives an implied authority for the taking of such opinions. In 36 C. 829, CASPERSZ, J., approving of the above case *held* that the Sessions Judge would do well before referring the case to invite the opinions of the jury when there is some inconsistency in their verdict but that the Sessions Judge may do so not for the purpose of deciding whether a reference should be made but after arriving at his conclusion to refer the case to the High Court and after telling the jury that such is his intention. In 13 C. W. N. 815 = 16 C. L. J. 522 = 15 Cr. L. J. 81, 19 M. 91 was dissented from and it was *held* that by "opinion of the Jury" is meant the "verdict of the jury". The omission to ascertain from the jurors their grounds for their verdict would not vitiate a reference to the High Court.

14. High Court's power of interference with the verdict of a jury.—In 1 C. L. R. 275, GARTH, C.J. and PRINSEP, J. (MARKBY, J., *dissenting*) said that they would not go so far as to hold with the Ruling in 25 W. R. 35, that the verdict of the jury should not be interfered with except when there is a gross and unmistakable miscarriage of justice. This section casts upon the High Court duty of both the Judge and the jury. 1 B. 10; and in cases referred under it the trial remains open for the High Court till it pronounces its Judgment of acquittal or conviction. 9 A. 420. *See* also 10 Bom. L. R. 632 and 9 C. L. J. 432. But notwithstanding this difference which clothes it with greater powers and responsibilities than the superior Courts of England it will interfere, as far as may be, guided by the principles of English law that the verdict of the jury will not be set aside unless it be perverse and patently wrong or may have been induced by an error of the Judge, 1 B. 10; 10 B. 497. Nor will the High Court interfere upon any mere preponderance of evidence, or unless it is satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict, Weir II, 388, 29 Cr. L. J. 432, or unless it were established in the clearest possible manner that the jury were wholly miscarried in their conclusion upon the case. 20 W. R. 33, 13 B. L. R. Appx. XX; 20 W. R. 73 = 13 B. L. R. Appx. XIX; 19 W. R. 43, 21 W. R. 4 = 14 B. L. R. Appx. II; 8 C. L. R. 431 and 349; 11 C. 85; 3 C. 189; 25 W. R. 25; 2 C. L. R. 518. The High Court will form and act upon its own view of what the evidence in its judgment proves but in doing so it will give due weight to the opinion of the Sessions Judge no less than to the verdict of the jury, 15 C. 269; Weir II, 390, 15 B. 452. In such a case the High Court has to consider whether from the evidence it was so convinced that the jury ought to have convicted the accused as to take upon itself the responsibility of deciding differently from those to whom the decision was primarily entrusted by law and without an appeal in ordinary cases. Ratanlal 626. Its power under this section is not limited to interference on questions of law, *i.e.*, misdirection by the Judge or misapprehension by the jury of the Judge's direction upon a point of law, 9 A. 420. The mere fact that upon a consideration of all the evidence before the Court a Judge would have arrived at a conclusion different from that arrived at by the jury would not justify the High Court in interfering with their unanimous verdict. 2 A. L. J. 475 = 2 Cr. L. J. 357. When the High Court is asked to set aside a verdict, because it is against the weight of evidence the question is not whether the Judge who tried the case was or was not satisfied with the verdict, or whether he would have come to the same conclusion as the jury but whether the verdict was such as reasonable men ought to have come to. 9 C. 53 = 11 C. L. R. 169; 20 B. 215; 51 Mad. 956. "If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict then we must hold that real trial by jury is absolutely at an end and that the verdict of a jury has no more weight than the opinion of assessors." 13 B. L. R. Appx. XIX = 20 W. R. 73 *followed* 41 C. 621; 26 Bom. L. R. 610; 45 A. 255.

14-A. Power to call further evidence.—The High Court has power under this section read with section 428 to call further evidence. 55 Cal. 865.

15. The Ruling in Lyall's case on reference—High Court must form its own opinion after considering the entire evidence and giving weight to the opinion of the Judge and jury.—A District Magistrate who held a trial under s. 451, one of the accused being an European British subject, disagreed with the unanimous verdict of *not guilty* returned by the jury and referred it to the High Court under this section. On behalf of the accused it was contended that the High Court was bound to act in accordance with the unanimous verdict of the jury unless it was shown to be perverse or clearly and manifestly wrong. *Held* that it was not necessary for the prosecution to show that opinions of the jury are perverse or clearly and manifestly wrong. Since the alteration of the language of this section by the Act of 1896 which expressed the law as it now stands the High Court is bound to consider the entire evidence in the case and then give due weight to the opinions of the Sessions Judge and the jury and not to rely solely on the verdict of the jury. 29 C. 129; In a reference under this section although the High Court is bound in dealing with it, to give due weight to the opinion of the Sessions Judge and to the verdict of the jury, still it can decide for itself the question of guilt or otherwise of the accused, 11 C. W. N. 715; 15 B. 452; 9 C. L. J. 432 = 10 Cr. L. J. 57. The High Court cannot throw out a reference under this

3. Assessors not to be asked to reconsider their opinion.—When once the Judge has summed up the case to the assessors and taken their opinion, he should not re-open the matter and press upon their attention, a part of the accused's admission which appears damaging, in order to induce them to alter their opinion. It is important that the opinion of the assessors, whether good, bad or indifferent, wise or foolish, should be recorded as they are expressed without any influence from the Judge, except such as may be reasonably exercised in the course of his summing up, **1886 A. W. N. 22.** Otherwise, a native assessor is likely to be unduly biassed by the attitude of the presiding Judge.

4. When opinion of assessors may be dispensed with?—(*i*) *When there is no evidence.*—It is only when there is no evidence, that a Judge can withdraw a case from a jury or abstain from taking the opinion of the assessor, **Weir II, 391; 7 B. H. C. R. Cr. Ca. 82.** In the last-mentioned case it was said that when a judgment of acquittal is recorded, it is not necessary to record the opinion of assessors, but it has since been held that the omission would be a serious irregularity, **26 M. 598.** (*ii*) *When the Public Prosecutor withdraws case.*—When the Public Prosecutor has withdrawn the case with the consent of the Court, an acquittal should have been recorded without taking the opinion of the assessors. An acquittal was a matter of right whatever the opinion of the assessors might be, **Ratanlal 307.**

Where in a trial for the abetment of murder opinion of the assessors was taken and the Judge acquitted the accused accepting that opinion but convicted the accused of causing the disappearance of evidence under s. 201, I.P.C., *held* that it was imperative for the Judge to take the opinion of the assessors on the charge relating to s 201, I.P.C. **25 Bom. L. R. 1318.**

5. In other cases recording the opinion of assesors imperative.—In **24 M. 523** at **p. 535** it was laid down, *dissenting* from **1 A. 610** and *following* **10 A. 414** and **22 W. R. 34,** that if a Judge should decide a case, without inviting the opinion of the assessors, he virtually holds the trial without the aid of the assessors and his finding of sentence cannot be regarded as one passed by a Court of competent jurisdiction. Thus where in a Sessions trial, the accused first pleaded *not guilty* but in the course of the examination of the accused, after the completion of the prosecution evidence, she pleaded *guilty* and thereupon the Judge without taking the opinion of the assessors, found her guilty and sentenced her, it was *held* that it was the duty of the Judge to proceed with the trial as provided by this section, and hear the defence and then take the opinion of the assessors, **7 Bom. L. R. 731.** A trial is altogether bad if the assessors are not asked and are apparently not allowed to give an independent opinion in the case, **40 C. 163.** Again, where a person was tried for offences under ss. 397 and 307, I.P.C., and the jury returned a verdict of *not guilty* but the Sessions Judge convicted the accused of an offence under s. 324, I.P.C, without requiring the jury as assessors to give their opinion with reference thereto and recording such opinion, as required by this section, the conviction was held bad, **Weir II, 334.** A person cannot be convicted of an offence with which he has not been charged, but which the evidence shows he has committed, in a case tried with the aid of assessors, when the opinion of the assessors has not been taken with regard to such charge, **Weir II, 391.** Where the accused was tried at one trial for two offences, one of which was a jury case and the other an assessor case and the Judge after taking the verdict of the jury on the former charge, took the opinion of two of the jurors only on the latter charge and convicted the accused on both the charges, the conviction on the latter charge was set aside for non-compliance with the provisions of s. 269 (3) read with this section. The failure to take the opinion of all the jurors as assessors, cannot be treated as a mere omission or irregularity curable under s. 537, **26 M. 598; 21 M. L. J. 520 = 10 M. L. T. 22 = 12 Cr. L. J. 239.**

6. Opinion of assessors must be delivered orally and recorded.—Under sub-sec. (1) the opinions of assessors must be stated orally, and not in writing or in the form of a judgment, **36 C. 119.** The opinion of each assessor shall be given orally and shall be recorded in writing by the Court. Such record shall contain not only the conclusion arrived at by each assessor, but also the grounds of his opinion. Sessions Judges should be careful to make it intelligible and precise, **Oudh Cr. Dig.** at **p. 13.**

7. Each assessor should be encouraged to state grounds of his opinion.—In **2 Bom. L. R. 322,** JENKINS, C.J., remarked: "We are led by the meagre record of the assessor's opinion in this case to point out how desirable it is that assessors should be invited and encouraged by Sessions Judge to state briefly the grounds of their opinion as well as the result;" *see* also **2 Bom. L. R. 323.** Assessors are appointed to aid the Judge in the trial and are to give their opinion, and when that opinion differs from that formed by the Judge, he should always ascertain the grounds of the assessors' opinions, **3 W. R. 21.** Where, in a case tried with the aid of assessors, the Sessions Judge's views differ from the opinions of the assessors, and he gives judgment without conforming to their opinions, it is his duty to record in his judgment the opinions of the assessors, with the reasons given

reference under s 307, it is not competent to the High Court to pass an order quashing proceedings for want of sanction under the old s 195 if such want of sanction has in fact not occasioned a failure of justice. 47 B 31.

20. **Procedure where Judges disagree on hearing a reference**.—Where the Judges of the High Court hearing a case referred under this section differ in opinion the procedure laid down in s. 429 should be followed and the case referred to a third Judge 2 C. L. J. 77 N. *See* also 15 B 452 and 1 C. L. R. 275

G.—Re-trial of Accused after Discharge of Jury

308. Whenever the jury is discharged the accused shall be detained in custody or on bail (as the case may be) and shall be tried by another jury unless the Judge considers that he should not be re-tried in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal

Re-trial of accused after discharge of jury

Notes.—1. Discharge of a jury.—The discharge may be for any of the reasons set forth in ss. 282, 283 or s. 305. In 8 C. W. N 128, the jury being divided in the proportion of 5 to 4 and being unable to come to any unanimity, an application made on behalf of the accused under this section for his discharge on the ground of reasonable doubt as to his guilt was granted by HARRINGTON, J.

The Sessions Judge has inherent power to discharge the jury before the verdict for misconduct, etc., and to empanel another, s 308 applies where a jury is discharged for misconduct 50 C. 872.

2. S 403 no bar to re-trial.—When the accused is re-tried under this section he cannot be considered to be 'tried again' within the meaning of s. 403. He is being tried on the original indictment and the duty of the Court is to continue the trial of the accused before another jury, and the process may continue till a verdict is passed on all the counts without the accused being 'tried again' under s. 403 41 C. 1071.

H.—Conclusion of Trial in Cases tried with Assessors

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally * on all the charges on which the accused has been tried * and shall record such opinion * and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded *

Delivery of opinions of assessors.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

Judgment.

(3) If the accused is convicted the Judge shall* unless he proceeds in accordance with the provisions of section 562* pass sentence on him according to law

Notes.—1. Summing up optional with Judge.—The provision as to summing up the evidence for the prosecution and defence in cases tried with assessors seems to have been suggested by the observations of NORMAN, J., in 15 W. R. 25 = 7 B. L. R. 63. Heads of summing up need not be recorded as in the trials by jury *See* also 40 C. 163.

2. Object of summing up evidence is to assist the assessors in their conclusions.—The provision as to summing up evidence is new and its object is to enable the Sessions Judge in long and intricate cases to place the evidence in an intelligible form so as to assist the assessors in arriving at a reasonable conclusion and not to give the Judge an opportunity of expressing his opinion in emphatic terms on the evidence. Such a course is very likely to be embarrassing to assessors in coming to an independent opinion in the face of the very decided opinion expressed by the Judge 9 C. 873 = 12 C. L. R. 506. He should not express his opinion on any question of fact arising in such cases, nor try to press the views put forth by the committing Magistrate 32 C. 903. This provision should be availed of by the Judges only in cases where the facts are intricate or complicated and may therefore be expedient to explain or marshal the same. Even in those cases the Judge should not, as he may do in charging a jury express any opinion upon any question of fact arising in the case. [illegible] AYYANGAR, J., in 24 M. 523 at p. 535

* Words in inverted commas were added by Act XVIII of 1923

specified in s. 367. A reference to the heads of charge to the jury is not a sufficient compliance with the requirements of the section, **Ratanlal 426.**

14. **Practice—Prosecuting pleader not to be employed in recording summing up.**—A Sessions Judge should not utilise the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose, **9 C. 875.**

15. **Practice—Record of previous conviction when to be referred.**—In trials before a jury or assessors, the record should invariably show that reference to the previous conviction has not been made until the subsequent offence has been found proved against the accused, **12 C. L. R. 555.**

16. **Fresh evidence cannot be taken after assessors have given opinion.**—When a Sessions Judge has taken the opinion of the assessors, the trial is at an end, except for the purpose of giving judgment, and if there is a conviction, of passing sentence. He has no legal authority to re-open a trial, to recall witnesses, and cause fresh evidence to be summoned, and take a second and third opinion from the assessors, **29 P. R. 1888.** In a trial for murder, in which the soundness of the accused's mind was the matter in issue, the Sessions Judge after closing the case and recording the opinion of the assessors, reserved judgment. Then he had private communications and interviews with the Civil Surgeon, regarding the mental condition of the accused. *Held*, that the action of the Judge, in discussing the condition of the accused's mind with the Civil Surgeon out of Court and after taking the opinion of the assessors was illegal. If he desired further information from the Civil Surgeon, he ought to have adjourned the trial and procured the evidence of the Surgeon like that of any other witness, **1889 A. W. N. 181.** Similarly, where after the assessors had been discharged, the Judge took some evidence to prove that a statement had been made by a person who was dead at the time of trial, a re-trial was ordered, as the evidence was not admissible, **15 A. 136.**

17. **Judgment and sentence by successor of trial Judge illegal.**—Where after the assessors had given their opinion, the Judge left the district without recording his finding or judgment, and his successor after considering the evidence recorded at the trial, convicted and passed sentence on the prisoners, the conviction was quashed and a re-trial ordered, **21 W. R. 47; 8 C. L. J. 59 = 8 Cr. L. J. 121.**

18. **Recalling assessors after their discharge.**—When assessors have given their opinions and they are discharged, a Sessions Judge cannot recall them and amend the charge and convict the prisoner on such amended charge, **1 W. R. 40.**

19. **Judge cannot cancel trial after delivery of opinion by assessors, judgment must be given.**—The assessors' opinions having been recorded, the Judge has no option but to give his judgment in accordance with the section. He cannot cancel or set aside the trial because when writing his judgment he finds there has been a misjoinder of charges and is of opinion that the trial is illegal.; s. 537 (*a*) does not invest the Judge with authority to cancel his own completed trial, **16 Cr. L. J. 824 (B.).**

I.—Procedure in Case of Previous Conviction.

Procedure in case of previous conviction.

* **310.** In the case of a trial by a jury or with the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of different kinds for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, *viz.* :—

(*a*) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,

(*i*) he has been convicted of the subsequent offence, or

(*ii*) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.

* Section 310 has been substituted for old section 310 by Act XVIII of 1923.

by them for their opinions, 45 P. R. 1905 = 192 P. L. R. 1905 = 3 Cr. L. J. 132. *See* also 8 C. L. J. 59 = 8 Cr. L. J. 121 and 24 M. 523 as to the value to be attached to the opinion of assessors. Each assessor should be called upon to state his opinion orally, 9 C. 875. It is irregular to take a joint opinion, 41 P. R. 1887. When a Judge differs from assessors, the grounds of each assessor's opinion should be distinctly recorded by him. As it is not a verdict but an opinion and not having any legal validity, its weight depends solely on the reason and sense by which it is supported, 3 W. R. 6 and 21.

Form of record—ground of each assessor's opinion must be recorded.—When a Sessions Judge differs from the assessors or any of them, it is desirable to have a record not merely of the opinion of each assessor but also, as far as possible, of the ground on which the opinion is based. Such a record will be of use to the Court of Appeal and to Government in dealing with petitions for mercy. Sessions Judges should therefore record also as concisely and clearly as possible the grounds on which each assessor bases his opinion. Such grounds should be elicited by putting specific and pointed questions to the assessors on the important and salient points on which the decision of the case really depends and writing their opinions thereon.—*Madras Criminal Rules of Practice*, ss. 243—245. The record of the opinion of each assessor should appear at the commencement of the judgment of the Sessions Judge. It is not sufficient that this record should contain a mere verdict of guilty or not guilty, or proven or not proven; what is required is not only the result arrived at by each assessor sitting on a Sessions trials, but, if possible, the reason by which each assessor arrived at that result, *i.e.*, the grounds of his opinion. While avoiding prolixity a Sessions Judge should be careful to be intelligible and precise in recording such opinions.—*Wilkins*, 116, *Pun. Cir.*, Chap. XLIV, p. 239, *Oudh Cr. Dig.*, p. 15.

8. Distinct opinion on each charge should be taken.—Where an accused is tried on two charges, it is necessary that the assessors should give a definite opinion whether the prisoner is guilty of either, and if so, of which of the charges preferred against him, and that the Judge in delivering his judgment should give it with advertence to the opinions of the assessors, 22 W. R. 34. Where he fails to do so the conviction is liable to be set aside and a fresh trial ordered, 15 W. R. 3. *See* also 10 A. 414 *dissenting* from 1 A. 610; 16 B. 414 and 28 M. 598. *See* Note below.

9. Is a consultation between the assessors allowable?—We cannot find in the Code any provision authorising or forbidding the Judge to allow consultation between the assessors and although we are not prepared to decide that the Judge may not in his discretion do so we follow the opinion of Subramania Ayyar, J., expressed in 24 M. 523 to the extent of holding that he is entitled to have before him each assessor's individual and independent opinion, 16 Cr. L. J. 717 (M.)

10. Questions must be put only after delivery of opinion.—S. 309 gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary but it gives no power to question them until they have delivered their opinion orally and he has recorded such opinions. If there is anything obscure in their verdict, there is no objection to the Judge asking questions to clear up such obscurity, but he is bound to allow the assessors to express their own opinions independently in their own words on the whole case before interfering with them in any way of asking them any question whatever except what is your opinion, 40 C. 163. A Judge should allow the assessors in the first instance to give their opinion in their own language and way and then when they had completed what they had to say it would be open to the Judge to put to them such questions as are necessary to elucidate or supplement their opinion, 41 C. 350.

11. Duty of Judge to pronounce judgment.—Failure on the part of a Judge to record a judgment on a charge tried with the aid of assessors, is irregular, but having regard to s. 537 might not invalidate the trial, Weir II, 392. *See* also 5 B. H. C. R. Cr. Ca. 55; 9 W. R. 51 and 10 W. R. 7.

12. Duty of Judge in dealing with opinions of assessors.—The opinions of assessors must have no doubt, regard paid to them but after all it is the Judge who has to decide the case on the facts as well as law. The assessors are no doubt to assist the Judge, but nowhere in the Code has the Legislature invested the assessors with the power of appreciating the evidence so as to bind the Judge, 14 Bom. L. R. 710 = 1 Bom. Cr. C. 133 = 13 Cr. L. J. 677. A Sessions Judge is certainly wrong if he imports into his judgment the opinion of an assessor derived from personal knowledge, and unsupported by evidence on record, 24 W. R. 23.

13. Reference to heads of charges to the jury is not sufficient where the jury are treated as assessors.—When an accused person is charged at the same trial with several offences, of which some are and some are not triable by a jury, and with respect to the heads of charges on which the Sessions Judge convicts, the jury become assessors, it is the duty of the Sessions Judge, under s. 309, to pronounce a judgment containing the particulars

When evidence of previous conviction may be given.

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

Note.—Relevant under the Evidence Act.—*See* ss. 14, 43 and 54 of *the Evidence Act* as to circumstances under which previous convictions would be relevant. *See* **1 C. W. N. 146; 27 C. 139** and **4 C. W. N. 97.** As a result of the Full Bench Ruling in **14 C. 721,** s. 54 of *the Evidence Act,* was amended by Act III of 1891 with a view to prevent a previous conviction being proved in order merely to prejudice an accused person.

J.—List of Jurors for High Court and summoning Jurors for that Court.

Number of special jurors.

* **312.** The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list :

Provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed.

Note.—The section has been amended by the Criminal Law (Amendment) Act of 1923. "The High Court special jury list should in our opinion be revised and it should no longer be limited to 200 Europeans and 200 non-Europeans. It should include all who are qualified to whatever nationality they may belong. This revision will probably increase the proportion of non-Europeans in the list," *Report of the Racial Distinctions Committee.*

Lists of common and special jurors.

313. (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules † as the High Court from time to time prescribes, prepare—

(*a*) a list of all persons liable to serve as common jurors and

(*b*) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) The Governor-General in Council ‡ "or the Local Government" in the case of the High Court at Fort William in Bengal, and, in the case of other High Courts, the Local Government, § may exempt any salaried officer of Government from serving as a juror.

Discretion of officer preparing lists.

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

Publication of lists preliminary and revised.

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the Local Official Gazette before the fifteenth day of April next after their preparation.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the Local Official Gazette before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house.

* S 312 has been substituted for old s. 312 by Act XII of 1923.

† For rules framed by the Allahabad High Court under this section in conjunction with s. 276, see *U. P. and Oudh Gazette,* 1902, Part I, p 539. For Madras High Court Rules, see *Fort St. George Gazette,* 1891. Supplement, dated 7th April.

‡ Words in inverted commas added by Act XXXVIII of 1920.

§ For notification exempting certain officers of Government from service as jurors or assessors, see *Burma Gazette,* 1902, Part I. p. 637 ; *Fort St. George Gazette,* 1890, Part II, p. 507.

(*b*) In the case of a trial held with the aid of assessors, the Court may, in its discretion proceed or refrain from proceeding with the trial of the accused on the charge of the previous convictions

1. **Scope of the section.**—The whole section has been redrafted by Act XVIII of 1923 Cl (4) of the present section is entirely new under which the Court is given a discretion to proceed or not with the trial of the accused on the charge of the previous conviction in case of a trial with the aid of assessors (See *Statement of Objects and Reasons*, 1914) The main object of this section is to prevent the interests of the accused from being prejudiced by the production of the proof of previous conviction before jury or assessors before the accused is convicted of the subsequent offence charged.

2. **When to put in proof of previous conviction?**—Records of previous conviction should not be put in until the trial is concluded. They can only be used after conviction in determining the measure of punishment, **3 W. R. 33; 103 I. C. 203 = 28 Cr. L. J. 667.** In cases tried by jury, before the verdict is given the jury ought not to be informed that the accused is charged with previous conviction, **Weir II, 323.** Where in the course of a trial a witness was allowed to say " that he had heard that the accused was an old offender " the verdict was set aside and a re trial ordered on the ground that this improper statement of the witness might have probably influenced the verdict of the jury, **1890 A. W. N. 12** Reading a charge relating to previous conviction during trial, will amount to a positive misdirection, **5 C. 785; 10 W. R. 39;** and it is most essential that the procedure in jury trials in the Sessions Court should be conducted with precision regularity and close attention to the rules laid down in this section **1890 A. W. N. 12.** In jury trials therefore the record should invariably show that reference to previous conviction had not been made until the accused was convicted of the subsequent offence, **12 C. L. R. 555.** But where this rule was contravened in a clear case of theft the High Court refused to interfere with the conviction as the accused had not been prejudiced, **13 C. L. R. 110** *See* Note 33 (*v*) at p 739

3. **Nature of previous conviction to appear on the face of the record**—Where an enhanced sentence is passed in consequence of previous conviction, the Sessions Judge or Magistrate shall state in his judgment, the date of such previous conviction and the sentence passed as well as the particular offence charged r. 39 (*d*) *Cir G R and Cr O, p* 20 amended. But the part of the charge stating the previous conviction need not show the extent of the former punishment, **4 M. H. C. R. Appx. XI.**

4. **How previous conviction proved** —*See* s. 511 An extract from a record of the previous conviction is not evidence of the conviction without proof of identity Where such an extract was admitted as evidence of the conviction on the accused's denial it was *held* that the procedure was more than a mere irregularity, **Weir II, 323; 6 B. L. R. Appx. CLI and 1881 A. W N. 144.** The examination of the accused in respect of the previous conviction is without legal warrant or justification, the nature of the questions which might be put to an accused person being clearly indicated in s. 342, **25 B. 122; 27 M. 233.** But a Sessions Judge is justified under this section in passing sentence on the accused on an admission by him of previous convictions and such sentences will not be interfered with unless the irregularity in the inquiry as to previous conviction has prejudiced the accused, **25 C. 639.** *See* also **25 C. 47.**

5. **Previous conviction outside British India cannot be taken into account.**—Berar forms no part of British India Hence a conviction in Berar purporting to be under the Indian Penal Code is not a conviction under that Code; consequently previous convictions had in Berar cannot be considered for the purpose of effecting the punishment on the second conviction in British India under the Penal Code But it is not improper to take such convictions into consideration in measuring the punishment which the Court is competent to award irrespective of those special provisions of law, **7 C. P. Cr. 26.**

6. **Previous conviction under local laws.**—It has been held that a conviction under a local law, like *the Frontier Crimes Regulation* does not come under the purview of s. 75, I P C., and the provisions of that section cannot be applied with reference to such a conviction, **1 Cr. L. J. 1051.**

7. **Applicability of this section to trials before Magistrate.**—Though this section does not in terms apply to trials before Magistrates, still clauses (*b*) and (*c*) indicate in general terms the procedure with which charges relating to such convictions should be tried, **11 Bur. L. R. 23.**

Section 310 of the Code does not apply to trials before Magistrates, **20 C. 287.**

Notes.—1. In Madras all persons who reside outside the radius of 20 miles where there is no railway communication, outside 50 miles when there is railway communication and in Kistna, Godavari and Malabar, outside 40 miles when canal communication exists are exempt. See *G. O. No.* 1734, *dated* 10*th December*, 1909, *Madras Rules, para.* 46 (*g*).

2. Remuneration to be paid.—Jurors and assessors should not be paid allowances of any kind, except in cases in which at the request of the Sessions Judge they had to come more than five miles from the Court-house to visit the scene of the offence when they may be paid actual out-of-pocket expenses. *Madras G. O. No.* 1602, *dated* 26*th October*, 1904 and *G. O. No.* 234, *dated* 10*th February*, 1910. In *Punjab*, if the jurors' and assessors' residence be more than five miles from the Court each juror or assessor is entitled to his *bona fide* travelling expenses, and if he is detained for more than a day he is entitled to subsistence allowance at a rate not exceeding five rupees. *Punjab Book Cir.*, 244. In *Bengal* if the usual residence of the juror or assessor is more than five miles from the Court-house he is entitled to a daily allowance for attendance at Court only, not less than one rupee and not more than five rupees. *Cal. Gazette, April*, 1904.

Exemptions.

320. The following persons are exempt from liability to serve as jurors or assessors, namely:—

(*a*) officers in civil employ superior in rank to a District Magistrate;

(*b*) salaried Judges;

(*c*) Commissioners and Collectors of Revenue or Customs;

(*d*) Police-officers and persons engaged in the Preventive Service in the Customs Department;

(*e*) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;

(*f*) persons actually officiating as priests or ministers of their respective religions;

(*g*) persons in Her Majesty's Army, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;

(*h*) surgeons and others who openly and constantly practise the medical profession;

(*i*) legal practitioners (as defined by the Legal Practitioners' Act, 1879) in actual practice;

(*j*) persons employed in the Post Office and Telegraph Department;

(*k*) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641;

(*l*) other persons exempted by the Local Government from liability to serve as jurors or assessors.

Note.—S. 640 of the Code of Civil Procedure relates to exemption of certain women from personal appearance in Court. S. 641 relates to exemption of certain persons by the Local Government from personal appearance in Court. Now *see* ss. 132 and 133 of the 1908 Code, *see* s. 278 as to grounds of objection to persons summoned.

Notes.—1. Exemptions by Local Government.—For Madras, *see* G. O. No. 1734 Judicial, *dated* 10*th December*, 1909. In Punjab military men are not exempt unless the commanding officer requires them to be excused.

2. Exemption not a disqualification.—Persons who are exempt from service as jurors are not incapable of serving, as exemptions cannot be treated as a disqualification under s. 278.

3. Persons exempted may be summoned to try Europeans.—*See* s. 462.

List of jurors and assessors.

321. (1) The Sessions Judges and the Collector of the district or [illegible] er the Local Government appoints in this behalf, shall in alphabetical order a list of persons li[illegible] serve as and qualified in the judgment of the [illegible] udge an

Number of jurors to be summoned in Presidency towns.

315. (1) Out of the persons named in the revised lists aforesaid there shall be summoned for each Sessions* "in the town which is the usual place of sitting of each High Court" † "as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary."

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

Supplementary summons.

(3) If, during the continuance of any Sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such Sessions.

Summoning jurors outside the Presidency towns.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the ‡ town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list in the manner hereinafter prescribed for summoning jurors to the Court of Session.

Military jurors.

317. (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful after communication with the commanding officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries for the trial of persons charged with offences before the High Court as aforesaid.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code, but no such officer shall be summoned whom his commanding officer desires to have excused on the ground of urgent military duty, or for any other special military reason.

Failure of jurors to attend.

318. Any person summoned under sections 315, 316 or 317 who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend, after an adjournment of the Court, after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit, and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid.

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

K.—List of Jurors and Assessors for Court of Session and summoning Jurors and Assessors for that Court

Liability to serve as jurors or assessors.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the Local Government on consideration of local circumstances has fixed any smaller area in this behalf, within the area so fixed.

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* Words in inverted commas were substituted for the words "in each Presidency town" by Act XVI of 19[illegible].

† Words in inverted commas were substituted for the words "at least twenty-seven of those who are liable to serve on special juries and [illegible] of those who are liable to serve on common juries" by Act XVI of 19[illegible].

‡ Words in inverted commas were substituted for the words "Presidency town" by Act XVIII of 19[illegible].

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

Annual revision of list.

(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

Preparation of list of special jurors.

325. In the case of any district for which the Local Government has declared that the trial of certain offence shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an oridinary juror in cases not tried by special jury.

District Magistrate to summon jurors and assessors.

326. (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the Sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said Sessions, the number to be summoned not being less than double the number required for any such trial,* "and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial."

(2) The names of the persons to be summoned shall be drawn by lot in open Court excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

(3) † Where the accused requires and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be has been obtained:

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury summon any person excluded from the list on the ground of his being exempted under section 320.

(4) ‡ Where, under the provision to sub-section (3) the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.

* Words in inverted commas were added by Act XII of 1923.
† Sub-section (3) has been added by Act XII of 1923.
‡ Sub-section (4) has been added by Act XII of 1923.

officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278 clauses (*b*) to (*h*) both inclusive.

(2) The list shall contain the name, place of abode and quality or business of every such person and if the person is an European or an American the list shall mention the race to which he belongs.

Notes.—1. What class of persons are eligible as jurors.—In selecting persons to serve as jurors and assessors, a Sessions Judge should choose persons of an independent condition in life, men of judgment and of experience. **23 W. R. 35.** Persons of high social position should not be placed on the list of assessors as native sentiment upon this point is rightly or wrongly not in favour of such nomination. **1897 A. W. N. 167.** Even in a district in which there may be no Sessions Court a jury list should be prepared for use should a trial be held by the District Magistrate under s. 451.

2. Qualified persons not to be arbitrarily excluded.—It is not open to the Sessions Judge or Deputy Commissioner to arbitrarily exclude from the list any person who is liable and qualified to serve as a juror or assessor and who is not likely to be successfully objected to under s. 278 cls. (*b*) to (*h*) both inclusive. Special exemption from liability to serve can be granted only by the Local Government under cl. (*j*) of s. 320. *C. P. Cr. Cir., Part II No.* 33.

3. What the list should contain in addition to particulars specified in cl. (2).—The list should also show against each person included in it the language or languages understood by him. *C. P. Cr. Cir., Part II No.* 33.

4. Holding Sessions anywhere within the Sessions division may not be permitted by Assessor List.—Where the Sessions Judge of Canara asked the High Court for special permission to hold his Court at Sirsi instead of at Karwar for the September Sessions of 1886, *held* assessors can only be chosen from the list prepared under this section which can only be revised once a year [s. 324 (6)]. The Court, therefore, declined to grant the permission asked for, there being no assessors available for Sessions at Sirsi. **Ratanlal 304.**

5. Jury list to be carefully revised.—All Collectors should exercise great care in the revision of the jurors' list so as to secure the inclusion of all qualified persons of intelligence who are liable to serve and the exclusion of those who are not fit to sit as jurors. *Madras G. O. No. 474 dated 16th March* 18[illegible].

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid and in the Court-houses of the District Magistrate and of the District Court and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

Publication of list.

323. To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid at the Sessions Court-house at a time to be mentioned in the notice.

Objections to list.

324. (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may establish his right to any exemption from service given by section 320 and insert the name of any person omitted from the list whom they deem qualified for such service.

Revision of list.

(2) In the event of a difference of opinion between the Sessions Judge and Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

Penalty for non-attendance of juror or assessor.

332. (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any movable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the Civil Jail for the term of fifteen days, unless such fine is paid before the end of the said term.

Notes.—1. Serving of summons by registered letter is illegal.—The issue of a summons by registered letter is illegal and not being authorised by law, conviction based upon such service is illegal and will be set aside, **1 C. W. N. 116.**

2. Legality of service by affixture—obligation to report change of address.—Where a juryman had been fined for non-attendance and it was shown he was not living at the house, when the summons was served by fixing the duplicate to the door of his dwelling-house and that he had no knowledge of the service of the summons, it was *held* that the law does not contemplate the imposition of an obligation on persons on the jury list to notify their change of address to the Court before leaving their usual place of residence or to make arrangement for acceptance of service of summons, or for intimating to the Court their inability to attend, **6 C. W. N. 887.**

3. No appeal from an order imposing a fine.—No appeal lies from an order fining an assessor or juror for non-attendance But if a juror or assessor has been fined and he subsequently gives good ground, such as illness for his non-attendance, the Judge should re-consider his order, **8 W. R. 83.**

4. Gentlemen of high rank should not be put on assessors' list.—A gentleman of high rank and status was summoned to attend as an assessor, and he put forward a plea of sickness which was disbelieved by the Sessions Judge, who fined him Rs. 100. In an application for revision, it was *held* that such persons of high position should not be placed on the list of assessors, as native sentiment upon this point is rightly or wrongly not in favour of such nomination, **1897 A. W. N. 167.**

L.—Special provisions for High Courts.

Power of Advocate-General to stay prosecution.

333. At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Notes.—1. Cases where Nolle prosequi was entered.—At the Criminal Sessions of Calcutta High Court the trial of the accused had commenced before Mr. Justice R. and evidence partly had been gone into when the Judge retired from the case under s. 556 as he was a shareholder of the prosecuting bank, and the case

Notes.—1. Form of precept to District Magistrate to summon jurors and assessors is given in Sch. V, Form No 32. The duty of issuing a precept which is imposed on the Court of Session by this section cannot legally be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Sessions, **Ratanlal 143.**

2. Object of section—Trial by jurors not summoned.—The object of the provisions in this section and ss. 276—279 is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case and an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided therein to secure perfect impartiality. Where on the day fixed for the trial of a jury case, only three jurors were present in Court and the Sessions Judge summoned the other jurors necessary, from among the residents of the town, *held*, that the facts that the jurors were summoned from among the residents of the town, were specially selected and were not summoned after being chosen by lot as the law requires from the whole of the persons liable to serve on the jury were very serious matters, inasmuch as they affected the constitution of the Court and the irregularity, therefore was not cured by s. 537 **7 C. W. N. 155**. If the Judge was unable to obtain a panel in the manner provided by this section, it was his duty to postpone the trial and to proceed under this section to obtain a sufficient number of jurors. *See* Notes to s. 276.

3. Trial with the aid of assessor not summoned.—The trial held with the aid of an assessor who has not been duly summoned (it being not proved that his name was in the list of assessors and he could be summoned) is illegal and the defect cannot be cured by s. 537. The fact that the accused did not object is immaterial, **13 O. C. 337 = 11 Cr. L. J. 724; 1894 A. W. N. 207.** But it is not illegal to select as an assessor one whose name was in the list and was summoned to attend on a particular day but who attended on another day of the same sessions, **17 Cr. L. J. 17 (A.)**. *See* Notes under s. 284.

4. Murder case.—In the case of an offence punishable with death the number of jurors to be summoned is not less than eighteen, where it is not done it is a breach of clause (1) and of clause (2) also of this section. This is an illegality and not a mere irregularity cured by s. 537 of this Code, **33 C. W. N. 1054.**

Power to summon another set of jurors or assessors.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the periods specified in section 326, when the number of trials, before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever for other reasons such direction is found to be necessary.

Form and contents of summons.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

For Forms of summons to assessors or jurors *see* Sch. V, Nos. 32 and 33.

When Government or Railway servant may be excused.

329. When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

Court may excuse attendance of juror or assessor.

330. (1) The Court of Session may, for reasonable cause, excuse any juror or assessor from attendance at any particular session.

Court may relieve special jurors from liability to serve again as jurors for twelve months.

(2) The Court of Session may, if it shall think fit at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

List of jurors and assessors attending.

331. (1) At each Session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

Tender of pardon to accomplice.

337.* (1) " In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, sections 216-A, 369, 401, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

*(1-A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record:

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in †* " the Court of the Magistrate taking cognisance of the offence and in the subsequent trial, if any."

‡ (2-A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(3) Such person, " unless he is already on bail " § shall be detained in custody until the termination of the trial.

|| * * * * *

Note.—Referring to the amendment of this section, the Sel. Com. say—

After considerable discussion of the provisions of s. 337 and examination of the large body of opinions on this clause, we have unanimously come to the following decisions :—

(*a*) Instead of including all offences punishable with imprisonment for a term which may extend to seven years, we have made the limit ten years, and have added, as special cases. Ss. 211, 216-A, 369, 401, 435 and 477-A, of the Indian Penal Code.

* Sub-sections 1 and 1-A were substituted for sub-section (1) by Act XVIII of 1923.
† " ——— " These words were substituted for the words " the case " by Act XVIII of 1923.
‡ This sub-section was added by Act XVIII of 1923.
§ " ——— " These words were substituted for the words " if not on bail."
|| The words " by the Court of Session or High Court as the case may be " were omitted by Act XVIII of 1923.

was adjourned without the jury being discharged. The Chief Justice purporting to act under cl. 13 of the Charter appointed another Judge to preside at the trial of the accused. In answer to a question by the Judge the Standing Counsel intimated that he intended proceeding with the trial from the point where it had been left, whereupon it was contended on behalf of the accused that the presiding Judge could not proceed with the trial as Mr. Justice R. and the jury empanelled before him had still the *seisin* of the case. The Advocate-General entered a *Nolle prosequi* and the accused was discharged. 2 C. W. N. 431. *See also* 8 C. W. N. 41 noted under s. 305; 7 C. W. N. 31, noted under s. 282 and see *Nirmal Kanti Roy's Case* 41 C. 1072 for other instances.

2. English practice—when a Nolle prosequi is entered.—A *Nolle prosequi* to stay proceedings upon an indictment or information pending in any Court may be entered by leave of the Attorney-General at the instance of either the prosecutor or the defendant at any time after the bill of indictment is found and before judgment. *R. v. Dunn* 1 C. and K. 730. This power of the Attorney-General is not subject to any control by the Courts, but does not interfere with the right of a Judge to allow a case to be withdrawn on the application of a private prosecutor. *R. v. Comptroller of Patents* (1899) 1 Q. B. 909—914. A *Nolle prosequi* is discretionary and has not the same effect as offering no evidence and submitting to acquittal. *Haworth v. Ford* 2 Blag. 255. It appears to be preferable to an application to discharge the recognisances of the prosecutor and witnesses. The usual occasion of granting a *Nolle prosequi* is either where in cases of misdemeanour a civil action is depending for the same cause, *R. v. Fielding* 2 Bur. 719; or where any improper and vexatious attempts are made to oppress the defendants as by repeatedly preferring defective indictments for the same supposed offence. *R. v. Guarchy* 1 W. Bl. 545; or if it is clear that an indictment is not sustainable against the defendant. A *Nolle prosequi* may be entered as against one of two or more defendants who are jointly indicted to enable one such defendant to give evidence for the Crown against his co-defendants. *Archbold* pp. 143—146. *Halsbury* Vol. V, pp. 259—351.

3. Effect of a Nolle prosequi.—A *Nolle prosequi* puts an end to the prosecution but does not operate as a bar, or discharge, or an acquittal on the merits, *Goddard v. Smith* 6 Mod. 261, and the party remains liable to be re-indicted. Fresh process may not, however, be awarded on the same indictment, *R. v. Allen* 1 B. and S. 850; *R. v. Mitchel*, 3 Cox 93. *Archbold*, p. 146. *See* Notes under s. 403. Where an accused person was discharged before the Calcutta High Court under ss. 363 and 366 I. P. C., and an order of discharge passed on the Advocate-General entering a *Nolle prosequi*, the accused was subsequently put up before a Deputy Magistrate who held that he could not be tried, *held* that the Magistrate could take cognisance of the case. The order of discharge could not be set by any tribunal and it did not require to be set aside for fresh proceedings on the same charge (29 C. 726 *referred to*), 40 C. 91; 52 C. 590.

Time of holding sittings.

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient interval as the Chief Justice of such Court from time to time appoints.

Place of holding sittings.

335. (1) The High Court shall hold its sittings as the place at which *it now holds them* or at such other place (if any) as the Governor General in Council in the case of the High Court at Fort William or the Local Government in the case of the other High Courts, may direct.

(2) But it may, from time to time in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

Notice of sittings.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the Local Official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

336. [Place of trial of European British subjects.] Omitted by section 20 of Act XII of 1923.

8. ' Government not competent to tender a conditional pardon under this section.—The Local Government has no power to tender a conditional pardon to an accused person within the meaning of this and the next section, and the evidence of an accused taken under a conditional pardon so offered, is wholly inadmissible, **10 C. W. N. 847 = 4 Cr. L. J. 44; 33 C. 1353.** In **9 P. R. 1906 = 4 Cr. L. J. 282,** it was *held* that an accused person whom the Local Government had promised not to prosecute in respect of an offence to which this section does not apply is a competent witness against his accomplices provided the promise not to prosecute was given and accepted before commencement of trial. An accomplice to whom the Local Government has made a promise not to prosecute and by whom the promise had been accepted after the commencement of the trial, is not a competent witness. Such a grant of pardon does not alter the position of the accomplice as an accused person, or make him cease to be an accused person so as to enable him to depose on oath.

TO WHOM PARDON MAY BE TENDERED.

9. Persons supposed to have been concerned.—The word '*supposed*' in this section and the next, must be taken merely as intended to exclude the case of a man who has actually been *convicted* of the crime, and not the case of a man who, although admitted to be a party to the crime, is unconvicted, **7 A. 160 at p. 163.** A tender of pardon to a person who had already pleaded guilty but who had not been sentenced on his plea, is not illegal though he may no longer be regarded as a suspected offender, *see* **25 M. 61 (P.C.).**

PROCEDURE.

10. Magistrate to explain that pardon is conditional.—The Court should, when it tenders a pardon to a person, explain to him the conditions which accompany the tender. If he refuses, the trial will proceed as if no such tender had been made. If he accepts it is the duty of the Court to examine him as a witness in the case and then, if the Court be of opinion that he had not complied with the conditions, the Court may commit him or direct him to be committed for trial upon the charge in respect of which the pardon was tendered, **4 B. L. R. Appx. L. = 12 W. R. 80.**

11. Improper condition attached to pardon—temptation to strain the truth.—Pardon was tendered to one of three persons accused of murder coupled with the condition that he should profess to have been present when the death occurred and to have personal knowledge of the circumstances under which the alleged offence occurred; *held*, such a condition could not be attached to a tender of pardon, as the only condition which the law allows is that stated in this section. The law should be so worked that the temptation to the accomplice to strain the truth should be as slight as possible, **Ratanlal 612.** *See* **12 C. L. R. 226,** as to breach of condition.

12. Sub-section (2)—Approver shall be examined as a witness in the case (old Section)—The words "*in the case*" in sub-sec. (2) include a preliminary inquiry and do not refer to the trial alone. Where, therefore, a person to whom a conditional pardon had been tendered gave false evidence at the preliminary inquiry and was therefore not called as a witness by the prosecution at the Sessions trial and subsequently the pardon having been withdrawn he was charged and stood committed; *held*, that the commitment was legal as the prosecution was not bound to put him forward as a witness at the Sessions trial if they believed that he would give false evidence, **24 M. 321** which *approves* of **20 A. 529; 42 C. 856.** Even where the approver before the committing Magistrate first makes a full and true disclosure and subsequently resiles from his statements he need not be examined in the Sessions Court; **38 M. 514; 5 S. L. R. 174 = 13 Cr. L. J. 33; 41 P. R. 1905 = 153 P. L. R. 1905 = 3 Cr. L. J. 55 (F.B.)** *overruling* **4 P. R. 1903; 4 U. B. R. Cr. P. 7 = 7 Cr. L. J. 245; 17 P. W. R. 1913 = 14 Cr. L. J. 64; 25 B. 675; 11 A. 79; 42 C. 685; 11 N. L. R. 59 = 16 Cr. L. J. 417,** and *see* Note 8 under s. 339. But *see* the new amendment of sub-section (2) under which the approver must be examined as a witness in the subsequent trial and it is not left now to the discretion of the Magistrate to withold him from being examined in the Sessions Court on the ground that he may prove an untrustworthy witness.

The approver must, however, be examined as under sub-sec. (2) and then dealt with under s. 339, if necessary, after the trial of the other accused is over, **31 M. 272.**

13. Sub-section (3)—Approver to be detained in custody till termination of trial and no longer.—(*a*) *Approver must be discharged after trial.*—In **30 B. 611,** BEAMAN, J., was of opinion, that the approver must be discharged immediately the trial is over. 'It is not for the Judges of the Sessions or the High Court to exercise a discretion in the matter, and to say that they will detain him in order that the further proceedings may be taken against him;' but ASTON, J., was of opinion that if a Sessions Judge was of opinion that the pardon had become forfeited he may also have authority to order the pardoned accomplice to be remanded in custody until the

(*b*) The Magistrate who should be allowed to tender a pardon should in our opinion be Magistrates of the first class who are inquiring into the offence and any District Magistrate, Presidency Magistrate, Sub-Divisional Magistrate or with the sanction of the District Magistrate a Magistrate of the first class, having jurisdiction in any place where the offence might be inquired into or tried

(*c*) The power to tender a pardon should be exercisable during an investigation as well as after a magisterial inquiry has begun

(*d*) We have deleted the words "other than a Presidency Magistrate" We see no reason why Presidency Magistrates should not record their reasons for tendering a pardon

(*e*) We do not agree with the Committee of 1916 that it should not be necessary to produce as a witness in the Sessions Court an accused person who has accepted a pardon.

(*f*) We think all cases in which there is an approver should be committed for trial and we have deleted the provision which enabled cases to be transferred to s. 30 Magistrates.

The changes between the old and the new section are clearly brought out in the Sel. Com. Report quoted above.

Notes.—1 Scope of the section.—The procedure laid down in this section is an important exception to the general rule that the statement of an offender is not to be taken as evidence against his co-accused unless he incurs the same risk as those jointly accused with him by inculpating himself. With a view to see that grave offences do not go unpunished the Legislature has introduced this exception but confined its operation to cases mentioned in the section. In tendering a pardon the Magistrate should make an offer to the one least guilty among the several accused *See* the observations of TURNER OFFG. C.J in **1 A 251** as to the necessity of tendering pardon to an accomplice in certain cases. This section does not suggest the idea that the only way of obtaining the evidence of a co-accused against another is by tendering him a pardon with all the safeguards mentioned in this section. This section does not also control s. 494 of the Code **26 Cal 1022.**

2. For the History of the section, *see* Note (1) to s. 339

IN RESPECT OF WHAT OFFENCES PARDON MAY BE TENDERED

3. 'Offence triable exclusively by the Court of Session'—The words mean an offence shown in the Schedule so triable, and an offence is none the less so because an accused person charged under s. 395, I P C., has a pardon granted to him under the orders of a District Judge empowered under s. 30 and is subsequently tried and convicted by the District Magistrate so empowered **8 P. R. 1897.** *See* also **10 C. W. N. 847 = 4 Cr. L. J. 44; 25 M. 61.**

4. That other offences triable by Magistrates are jointly charged, will not invalidate a pardon when the case as a whole is a sessions case—All that ss. 337 and 338 require is that there should be an offence that is triable exclusively by the Sessions Court under inquiry or trial, and the fact that there may be other offences alleged or charged, which are not so triable is immaterial and will not invalidate a pardon granted in respect of the offence exclusively triable by the Sessions Court **9 S. L. R 43 = 16 Cr L. J. 632.** Where a Magistrate is inquiring into an offence exclusively triable by a Court of Session along with one not so triable, pardon can be granted under s. 337, **11 P. W. R 1915 = 17 P. R. 1915 = 16 Cr L. J. 256.**

5. Under the old section pardon can only be granted in an inquiry, but under the new amendment the power to tender a pardon is exercisable during an investigation as well as after the magisterial inquiry has begun. So that the difference in the meaning of an investigation and inquiry under the Code is no longer important. The ruling in **46 B 61,** has become obsolete under the present section. *See* also **3 Lah 431.**

WHO MAY TENDER PARDON.

6 Tender of pardon by Magistrate of another district.—It is essential that the Magistrate tendering pardon must be one before whom the inquiry is held. Tender of pardon by the District Magistrate of *F* in respect of offences regarding which inquiry was being held in the district of *M* before another Magistrate is illegal, consequently such tender cannot be pleaded in bar of trial, and sentence passed against the person to whom tender was so made is good, **20 A. 40** Section 529 cannot cure such excess of jurisdiction.

7. Tender of pardon by unauthorised Magistrate and its acceptance in good faith.—When a pardon has been tendered and accepted in good faith, the fact that the Magistrate had no power to tender such pardon is a defect expressly cured by s. 529 (*g*), **1 P. R. 1895; 23 A. 40** So also where a pardon is granted with the oral sanction of a District Magistrate the tender of pardon though irregular is legal, **5 A. L. J. 291 = 1908 A. W. N. 259 = 8 Cr. L. J. 443.** *See* also **19 C. 936.**

and informers, who, with a view of laying a trap for a suspected person, suggest to him the commission of an offence and supply him with the means for committing it are themselves abettors of the offence and accomplices. Persons who believing that an offence is about to be committed, lie in wait till it has been committed for the purpose of apprehending the prisoner or who supply marked money for the purpose of furnishing evidence against him are not accomplices, **19 B. 363.** Witnesses who admit that they were cognisant of the crime, that they made no attempt to prevent it, that they did not disclose its commission are not necessarily accomplices, but their evidence ought to be treated with suspicion and only relied on to the same extent as that of accomplices, **24 W. R. 55; 21 C. 328; 23 C. 361; 27 C. 144** and **20 W. R. 19.** Persons who assist in concealing a crime already committed, *e.g.*, removing and concealing the dead body of a murdered person are not accomplices in the offence of murder, **27 M. 271,** but *see* **23 C. 361.** A mere detective or decoy is not therefore an accomplice nor an original confederate who betrays before the crime was committed, **16 C. W. N. 1105 = 15 C. L. J. 517.** Nor does it include persons who have acted with the accused with a view to aid justice by detecting crime. *R.* v. *Mullins*, **3 Cox. 526** *followed R.* v. *Bickley*, **2 Cr. App. R. 53 = 73 J. P. 239.**

18. **Every accomplice a competent witness, if not on his trial.**—*See* s. 133 of *the Indian Evidence Act*, 1872. There is no law or principle which prevents a person who has been suspected and discharged for want of evidence, being afterwards admitted as a witness for the prosecution without a pardon which, if offered, he would probably have rejected, for it would have ruined him, nor is it necessary that he should have been acquitted, for on the evidence against him he could not have been properly committed for trial, **7 W. R. 44.** *See* also **4 L. B. R. 362 = 9 Cr. L. J. 370,** where it was *held* that the evidence of a person discharged under s. 209 (2) is admissible whether his discharge was legal or not. Also, abettors of a crime are accomplices and must be looked upon as such, if they are produced as witnesses against the principal offenders. If they are not themselves under criminal charge, their evidence is admissible without any tender of pardon, **14 B. 115; 8 A. 120.** If a person has been merely accused of an offence but has not been proceeded against, he is a competent witness, **10 C. L. R. 553.** In **10 C. 936,** the Calcutta High Court refuse in revision to interfere, where the evidence of a person to whom pardon was illegally tendered was admitted. *See* also **16 B. 661.** Where persons accused of the same offence were being separately tried, each is a competent witness in the trial of the other, without resort being had to this section, **23 B. 213; U. B. R. (1906) Ev. 8 = 5 Cr. L. J. 300; 21 A. L. J. 42.**

19. **Evidence of accused illegally pardoned is not relevant.**—It is not competent to a Magistrate to convert an accused person into a witness except when a pardon has been lawfully granted under this section. Evidence given by such a person who had received a pardon in the case of an offence not *exclusively* triable by the Court of Session, is not relevant, that person not having been acquitted, or discharged, or convicted, **1 B. 610** *followed* in **10 B. 190; 2 A. 260; 1882 A. W. N. 240; Ratanlal 461** and **224; 3 B. H. C. R. Cr. Ca. 59; 3 P. R. 1897; 10 C. 936; 6 W. R. 91; 10 C. L. R. 553; 12 P. R. 1902; 21 P. R. 1904; 9 P. R. 1906.** In **25 M. 61,** two persons were jointly committed to the High Court on charges for offences not triable exclusively by the Court of Session or High Court, one of them pleaded guilty and his plea was recorded and the Judge purporting to act under this section, tendered him a pardon. He was then removed from the dock and examined as a witness for the prosecution in the trial against the other accused. At the end of the trial, the conditional pardon was declared forfeited and the approver was convicted and sentenced on his previous plea of '*guilty*;' *held* (DAVIES, J., *dissenting*), that though the tender of pardon was illegal, the approver was a competent witness to whom an oath could be lawfully administered, as when he gave evidence he was not in charge of the jury and no issue remained to be tried as between him and the Crown. *Cf.* **18 C. W. N. 1218 = 15 Cr. L. J. 693.** But *see* **13 C. W. N. 552 = 10 Cr. L. J. 484.**

20. **Effect of tender of pardon or promise of non-prosecution by Government.**—A person who has accepted a pardon from Government can be examined as a witness, provided that no proceedings are being taken against him, or, if any have been taken, he has been convicted, acquitted or discharged; but then his evidence may be no better than that of an accomplice and as such will require to be corroborated. If he has been discharged he cannot be kept in confinement, while his evidence may be necessary in the trial against the others. He may be examined on oath like any other accomplice who is not accused in the case under trial; but great caution is necessary in admitting and using the evidence of an approver. It not only requires corroboration in material particulars for its use but its evidentiary value depends considerably upon the circumstances under which his evidence was tendered, **33 C. 1358.** The tender of pardon by the Local Government, although of doubtful validity in law can in no way be regarded as an inducement or threat illegally held out to an accused person to disclose or withhold any matter within his knowledge, **5 C. L. J. 224 = 5 Cr. L. J. 142.**

proper authority has had reasonable time to decide whether further proceedings are to be taken against him. Opinion of BEAMAN J., was *followed* in 11 P. L. R. 59 = 16 Cr. L. J. 417. *See* also 37 A. 331.

(*b*) *Does this sub-section imply that the approver cannot be committed along with the others?*—Every person accepting pardon under this section must be examined as a witness in the case and if not on bail, should be detained in custody until the termination of trial by the Court of Session of the other accused. There are nothing should be done against such person *i.e.* the approver till after the case in the Court of Session has been finished and his trial should commence *de novo* if it be deemed necessary to take proceedings against him, 23 B. 493 *approved* in 25 M. 321; 31 M. 272; 16 A. 502; 4 U. B. R. 7 = 7 Cr. L. J. 255. But *see* Notes 8 and 9 under s. 339 and also 4 U. B. R. 7 = 7 Cr. L. J. 255.

14. Sub-section (4) old section—Magistrates bound to state reasons for grant of pardon. This is now included in the new sub section (1-A). This section requires a Magistrate who tenders a conditional pardon to record his reasons for so doing. Where however the facts which led up to the tender appear on the record the omission to state reasons is not only not a nullity but not even an irregularity which vitiates the proceedings, 5 C. L. J. 225 = 6 Cr. L. J. 142 *followed* in 35 C. 637. The recording of his reason is not a condition precedent to the tender of the pardon and its acceptance by the approver and the pardon cannot be set aside because the reasons are not recorded. 13 Cr. L. J. 555 (A.).

15. Scope of sub section (4) old section—Pardon tendering Magistrate not competent to try the case—*I.e.*, as falling under a section other than that under which he originally supposed it to fall before he tendered the pardon. Sub-section (4) refers to a stage after inquiry while sub-sec. (1) contemplates the case as it stood before the commencement of the inquiry *viz.*, an offence *exclusively* triable by the Court of Session or the High Court. The provisions of this section must be construed strictly and disqualification created by the last paragraph applies only to that Magistrate before whom the suspected person is brought face to face and who attempts to induce him by promise of pardon to make a full and true disclosure. Such Magistrate to a certain extent assumes the functions of a police-officer and identifies himself with the prosecution, and it was doubtless on that account that it was considered proper to disqualify him from trying the case. As regards the examination there is a distinction between the examination of approver made by a pardon-tendering Magistrate and that made by another Magistrate in the course of a trial, and the restriction in the last paragraph does *not* apply to the latter Magistrate. The examination referred to in the last paragraph appears to be one made on the tender of pardon and directly resulting from it. 3 P. R. 1555. Sub-section (4) refers only to those cases in which the disclosure made by the approver shows that only a minor offence had been committed. 8 S. L. R. 174 = 13 Cr. L. J. 33. When a Deputy Commissioner tries a case exclusively triable by the Court of the Session under powers conferred by s. 30 he does so as a Magistrate and if he tenders a pardon he is precluded from trying the case. 10 C. W. N. 847 = 4 Cr. L. J. 44. But the latter part of old sub-section (4) imposing a restriction on the competency of a pardon tendering Magistrate is omitted now.

16. English practice—tendering pardon.—The evidence of an accomplice is now secured by one of the following methods:—(1) By special proclamation pardon is sometimes promised upon certain conditions. Accomplices within this class have a *right* of pardon. (2) By admitting accomplices to give evidence for the Crown, under an implied promise of pardon *on condition of their making a full and fair confession of the truth*. On a strict and ample performance of this condition to the satisfaction of Judge presiding at the trial they have an equitable title to a recommendation for the King's mercy. They cannot plead this in bar to an indictment against them nor can they avail themselves of it as a defence on their trial though it may be made the ground of a motion for postponing the trial, to give the prisoner time for an application in another quarter, and if an accomplice after being received as a witness against his companions breaks the conditions on which he is admitted and refuses to give full and fair information he will be sent to trial to answer for his share of guilt in the transaction. *Russell on Crimes*, pp. 2253 and 2254. *See* also 32 M. 173 at p. 175.

ACCOMPLICES AND THEIR EVIDENCE

17. Who is an accomplice?—An accomplice is one who confesses himself a criminal. No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes a disclosure of such facts which show that he had such a hand. 11 Bom. L. R. 1133 = 10 Cr. L. J. 335; 37 M. 271. A prosecution witness against whom there is apart from his own statement, ground for suspecting that he was himself a participator in the very crime for which the accused are on their trial, though strictly speaking not an accomplice stands practically on the same basis as an accomplice. 13 Cr. L. J. 418 (A.). Since

24. Subsequent trial of accomplice for connected offences barred.—A person to whom pardon has been granted by a competent Magistrate may plead that pardon as a bar for the offence or offences under inquiry or for any other offence or which he appears to have been guilty in connection with the same matter. This plea is available in any part of British India irrespective of territorial limits, **11 A. 79.** *See* **B. L. R. Sup., Vol. 459 = 5 W. R. 80.** A person to whom pardon is tendered and by whom it is accepted, should be examined as a witness in any case arising out of the same circumstance and should not be committed for trial for any other offence arising out of the same circumstances, unless he is found guilty of forfeiture of the pardon tendered, **Weir II, 394.** *See* Notes 11 and 13 above.

But where one *S* made a confession of his complicity in certain dacoities committed in the Etah District and also in a dacoity committed some time previously at Majhaulah. In connection with the Etah dacoities *S* was tendered pardon, *S* was subsequently tried and convicted in respect of the Majhaulah dacoity. *Held* on appeal that there was no reason why the confession made by *S* in respect of the Majhaulah dacoity should not be put in evidence against him and that apart from the fact that it was not pleaded at the trial, the pardon tendered to *S* in a totally different case was no bar to his present conviction, **46 A. 236** (**11 A. 79** *distinguished*).

25. Value of retracted statements and confessions.—*See* **11 O. C. 328 = 8 Cr. L. J. 393; 12 O. C. 418 = 11 Cr. L. J. 71; 5 P. R. 1911 = 91 P. L. R. 1911 = 12 Cr. L. J. 276; 16 C. W. N. 669 = 13 Cr. L. J. 571.** Where a retracted statement is uncorroborated by any other evidence whatsoever it is unsafe to act upon it, **16 Cr. L. J. 815 (P.); 30 P. R. 1914 = 50 P. W. R. 1914 = 15 Cr. L. J. 626**; s. 288 and Notes 8, 9 and 18 thereunder. *See* Notes under Heading VIII to s. 164 at p. 373 and as to the duty of the Judge in injury trials, *see* Note 46 at p. 805 and Note 61 at p. 810. Evidence given before Magistrate but afterwards retracted should not be accepted in preference to the statement made to the Sessions Court unless there is something to show the truth of the first statement, **27 C. 295.** *See* Notes to s. 288 and **8 B. H. C. R. Cr. Ca. 103; 21 A. 175; 22 A. 445; 15 M. 352; 22 C. 50; 7 C. L. R. 66; 13 C. L. R. 326; 14 P. R. 1894.**

26. Value of statements of approver whose pardon has been forfeited.—

(*i*) *For the offence in respect* of which he was tendered a pardon:—

(*a*) **As against him.**—Where the pardon tendered to an approver has been forfeited on the ground that he has committed a breach of the conditions on which it was tendered, a statement made by him to the Magistrate is admissible against him under s. 339 (2) on a subsequent trial for the offence in respect of which the tender was made notwithstanding the fact that he was not examined as a witness in any Court under s. 337 (2), **41 P. R. 1905 (F.B.)** *overruling* **4 P. R. 1903; 14 Bur. L. R. 306 = 7 Cr. L. J. 245.** 'It is clear to us that the argument based upon the provisions of s. 24 of Act I of 1872 is not entitled to weight in the present case; cl. (2) of s. 339 was introduced to make it clear that a statement made by a person who accepted an offer of pardon is not governed by s. 24 of *the Evidence Act* and can be used in evidence against him when that pardon has been forfeited,' **1908 A. W. N. 259 = 8 Cr. L. J. 445; 11 N. L. R. 59 = 16 Cr. L. J. 417.** The statement made by an approver under conditional pardon can, if that pardon has been forfeited, be used against him for the offence under inquiry or trial when it was tendered or forfeited, or for any other offence connected with the same matter. But it should be proved that he was the person who made the statement, **11 C. 580,** but statements made under the promise of pardon are not evidence against the person making them, **8 W. R. 53; 1 A. L. J. 110; 1 P. R. 1899.** There is no rule of law or practice that the self-incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated, **6 Bom. L. R. 443; 15 M. 63;** but *see* **27 C. 295; 22 A. 445.**

(*b*) **As against the other accused.**—In **7 C. L. R. 66,** FIELD, J., has expressed a grave doubt whether the deposition of an approver taken before the committing Magistrate might be used as evidence against his accomplices on their trial before the Sessions Court, the condition of the pardon of the approver having been withdrawn; and so also in **13 C. L. R. 326.** In **5 N. W. P. H. C. R. 217,** it has, however, been *held* that the evidence is not admissible. In **22 C. 50** it was *held* that the deposition before the committing Magistrate of the approver who resiled from his statements in the Sessions trial and was then and there put in the dock and tried along with the other accused was inadmissible in evidence, because the co-accused had no opportunity to cross-examine.

PUNJAB.—The deposition of the approver at the preliminary inquiry is under s. 288, capable of being treated as evidence at the Sessions trial, if the approver is produced and examined as a witness, **14 P. R. 1894.** *See* also **24 P. R. 1902;** but a statement made by the approver, before commitment in the absence of the accused is not admissible, **3 P. R. 1904,** *see* also **9 P. R. 1906.**

21. Difference between tender of conditional pardon and withdrawal under s. 494.—There is a material difference between the position of an accused who has accepted a conditional pardon tendered under this section and that of one the charge against whom has been withdrawn by the Public Prosecutor under s. 494. If the withdrawal is before charge, the accused is discharged and if after, acquitted, both the discharge and acquittal being unconditional while if the conditional pardon is forfeited he can be tried for the same offence. In 25 B. 422 it was *held* (WHITWORTH, J., *dissenting*) that persons discharged under s. 494 were competent witnesses for the prosecution in the very case in which they had been accused. But when the Court purporting to act under s. 494 permitted the withdrawal of the case against an accused but omitted to record an order of discharge and the accused continued in custody it was *held* his position was in no way changed from that of an accused, 33 C. 1353. In 5 C. L. J. 214 = 5 Cr. L. J. 142, however, it was *held* the evidence of such a person, though not formally discharged was admissible. *See* Notes under s. 494.

22. English practice where it is intended to obtain the evidence of an accomplice in custody and jointly charged.—In all such cases, where two persons are joined in the same indictment and it is thought desirable to separate them in their trials in order that the evidence of one may be taken against the other in order to ensure the greatest possible amount of truthfulness on the part of the person who is giving evidence under such remarkable circumstances, it would be far better that a verdict of not guilty should be taken first or if the plea of not guilty be withdrawn and a plea of guilty received that sentence should be passed, in order that the mind of the witness may be free from all corrupt influences which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might be otherwise liable to produce. *Winsor* v. *R.*, L. R. 1 Q. B. 289, 390; *R.* v. *Bradlaugh*, 15 Cox. 217. It is a common practice after the indictment has been founded and the accused arranged to offer no evidence against the accomplice and on his acquittal to call him for the Crown. Occasionally a *Nolle prosequi* is entered against the accomplice during the trial and before verdict. If this is done the accomplice becomes a competent witness for the Crown. After the indictment has been found and the accomplice has pleaded guilty he may be called for the prosecution. *Russell on Crimes* pp. 2235—2285, *Archbold*, p. 458.

23. Accomplice evidence.—The general rule is that accomplice evidence must be corroborated, 17 Cr. L. J. 220 = 34 In. Ca. 332 (Pun.). If there are more than one accused, there must be corroboration against each of the accused showing his connection with the offence, 19 P. W. R. 1916, *see* also 2 P. W. R. 1916 = 17 Cr. L. J. 107 and 7 P. W. R. 1916 = 17 Cr. L. J. 97. The question of value to be attached to the statements of approvers must be decided upon the particulars and peculiar circumstances of each case, 7 P. W. R. 1916, *see* also 18 Bom. L. R. 266 = 3 Bom. Cr. Ca. 171. *See* s. 133 and illustration (*b*) to s. 114 of *the Indian Evidence Act* 1872. Though there is nothing illegal in a conviction based solely on the evidence of an accomplice, 19 W. R. 49; 1 M. 394; 27 M. 271; 8 A. 306; 9 A. 523; 16 B. 115 and 331; 5 P. R. 1902; 12 O. C. 418 = 11 Cr. L. J. 71; U. B. R. (1911) 3 Qr. 96 = 13 Cr. L. J. 424; 6 S. L. R. 106 = 13 Cr. L. J. 767; 6 S. L. R. 195; 16 Cr. L. J. 179 (Burma) yet it has now become a universal rule of practice not to convict on the uncorroborated testimony of accomplices and it would be an error of law to disregard it, 27 M. 271; 10 B. 319; 9 W. R. 23; 7 Bom. L. R. 969 = 3 Cr. L. J. 33; 12 O. C. 418 = 11 Cr. L. J. 71; 9 M. L. T. 406 = 12 Cr. L. J. 240; 19 P. L. R. 1911; 9 M. L. T. 503 = 12 Cr. L. J. 179; 19 P. W. R. 1912 = 13 Cr. L. J. 182. There is an established practice, founded on the judicial experience of generations which requires corroboration by some untainted evidence and that in a material particular pointing not only to the crime but to the participation of the accused in the crime, 15 C. W. N. 550 = 13 Cr. L. J. 433; 1916 M. W. N. 363 = 15 Cr. L. J. 417. But no rule can be laid down as to the amount of corroboration necessary. It depends upon the nature of the crime, on the extent of the complicity of the accomplice and the nature of the corroborative facts, 25 C. 339; 26 B. 193; 2 Bom. L. R. 811; 23 C. 643; 27 M. 271; 7 Bom. L. R. 969 = 3 Cr. L. J. 33; 33 M. 247; 33 Bom. 479. Corroborative evidence must establish the existence of the crime, 1 B. 475 at p. 476 (Note), the identity of each of the accused whom the approver impeaches, 3 Bom. H. C. R. 57; 1 B. 475; 10 B. 319; 1 A. L. J. 110; 8 A. 305 and 523; 10 C. 970; 22 C. 782 and must always establish something that would bring the crime home to each prisoner, 23 M. 163; 27 M. 271; 5 W. R. 18; 11 Cr. L. J. 577 (Oudh), 16 C. W. N. 150 = 13 Cr. L. J. 435. Corroboration must proceed from an independent and reliable source, 15 Bom. 219; 11 B. H. C. R. 196; 25 W. R. 43; 10 W. R. 17. Neither evidence of other accomplices, 8 A. 306; 5 W. R. 18, nor the confession of a co-accused, 11 B. H. C. R. 196; 25 W. R. 43; 12 O. C. 418 = 11 Cr. L. J. 71, nor the exact correspondence in detail of the several statements of the accomplice in the course of a trial, 10 C. 970 is sufficient corroboration. But previous statements of an accomplice can be regarded as corroborative, 33 M. 247, but *see* 33 M. 277.

As to the duty of the Judge in dealing with accomplice testimony in jury trials *see* Notes under Heading VII to ss. 297—299.

6. **Magistrate bound to obey the direction of the Sessions Judge.**—The Magistrate ordered must obey the direction and tender pardon to the approver, though he may be of opinion that the evidence already on record may be sufficient for conviction. He need not apply for the sanction of the District Magistrate. Under this section, only a Magistrate can be so ordered and not a Police-officer, **6 W. R. (Cr. Let.) 5.**

7. **Local Government cannot tender pardon.**—A Local Government cannot tender a pardon either under this section or s. 337, but it is open to the Local Government to withdraw the prosecution under s. 494, **33 C. 1353; 10 C. W. N. 847 = 4 Cr. L. J. 44** and *see* Notes 8 and 21 to s. 337 and Notes to s. 494.

8. **Power of Magistrate acting under s. 30.**—If a Deputy Commissioner acting under powers conferred upon him by s. 30 tenders a conditional pardon in a case exclusively triable by the Court of Session, he is precluded from trying the case himself, **10 C. W. N. 847 = 4 Cr. L. J. 44.** *See* Notes 15 to s. 337.

9. **Procedure when the pardoned approver forfeits his pardon.**—*See* Notes 8 and 9 under s. 339 and *see* also Note 13 under s. 337.

Commitment of person to whom pardon has been tendered.

339. (1) Where a pardon has been tendered under section 337 or section 338, and *"the Public Prosecutor certifies that in his opinion" any person who has accepted such tender has, either by wilfully concealing anything essential or by *giving false evidence*, not complied with the condition on which the tender was made, †"such person may be" tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter:

‡ Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him § "at such trial."

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Note.—Referring to the amendment of this section, the Select Committee say—

"We accept clause 86 so far as it goes except that we would substitute a certificate by the Public Prosecutor for an allegation by the prosecution as the basis of the prosecution of a person who has accepted a tender of pardon. We consider, however, that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-section (1). The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it, and difficulties of procedure may obviously arise with reference to sections 255, 271 (2) and 272. We therefore propose a new section to be added after section 339, which lays down that when a person to whom a pardon is tendered is being tried under that section, he shall at the commencement of the proceedings be asked whether he raises the plea that he has complied with the conditions on which the pardon was granted, and, if he does so plead, the Court shall record a finding on the point and, if it finds that the conditions have been complied with, shall acquit the accused. This provision we have inserted as a new clause 86-A in the Bill (s. 339-A).

Notes.—1. History of the section.—Tender of pardon was dealt with by ss. 209 and 211 of the Code XXV of 1861, s. 211 empowered the Court of Session at the time of trial and also the Sudder Court as a Court of reference, if of opinion that a person who had accepted an offer of pardon had not conformed to the conditions under which it was tendered, to order his commitment. Amending Act VIII of 1869, substituted a new section 211 empowering the Magistrate before the committal, the Court of Session during trial, or the High Court as a Court of reference to order the committal. The next Code, Act X of 1872, s. 349 conferred the like power and

* These words in inverted commas inserted by Act XVIII of 1923.
† These words in inverted commas were substituted for the words "he may be" by Act XVIII of 1923
‡ The proviso (1) was added by Act XVIII of 1923.
§ These words in inverted commas were substituted for the words "when the pardon has been forfeited under this section" by Act XVIII of 1923.

ALLAHABAD —The deposition of a pardoned approver before the committing Magistrate is admissible in evidence under s. 288 at the Sessions trial if he is examined as witness even though he should retract his previous statements, 21 A. 175. But the use of such a deposition as substantial evidence of the facts therein stated is fraught with the gravest peril and could never have been the intention of the Legislature, 22 A. 445.

MADRAS —The previous deposition is admissible under s. 288 15 M. 352

(ii) *For the offence of perjury* —Section 339 (2) does not by implication forbid the use of the statements as against the approver when he is tried for perjury 5 S. L. R. 174 = 13 Cr. L. J. 33. Such a statement may be used as the basis of a charge for perjury 1 B. 610 and 2 A. 260 refer only to the evidence of an approver illegally pardoned.

27. Approver's evidence admissible in civil case against him —The confession and sworn evidence of an approver in a criminal trial for dacoity are admissible in evidence against him in a suit for damages brought against him by the complainant for having instigated the dacoity. The Civil Courts can act on such statements even though the Sessions Judge did not think it safe to convict the accused upon such statements, 13 C. W. N. 801.

28. Accomplice evidence is admissible though the accomplice is not pardoned under s. 337 of the Code.—It is not necessary, in order to make an accomplice a competent witness that the procedure prescribed by s. 337 of the Code should be invariably made use of 45 A. 226.

Power to direct tender of pardon

338. At any time after commitment but before judgment is passed the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person

Notes.—1. When pardon under this section may be tendered?—7 W. R. 78 (114) being superseded a Sessions Judge is now competent *before trial* to direct a Magistrate to tender pardon under this section

The words '*after commitment*' and '*before judgment*' show that pardon under this section may be tendered not only during trial, but also before trial. But in an assessor case after the case for the prosecution was closed, the defence heard and the opinion of the assessors given, the tender of pardon was *held* to be irregular though not positively illegal, 1884 A. W. N. 147.

2. Under what circumstances pardon should be tendered?—The Court should usually consider not only whether the prisoners can be convicted without the evidence of the accomplice but also whether they can be convicted with his evidence. If, therefore there be sufficient evidence to convict without his testimony, the Court will be disposed to allow him to be admitted as a witness. Where there were several persons committed as principals, and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required, permission was refused to allow one of the principals to become a witness, *Russell on Crimes*, p. 2284

3. Pardon, when offence not exclusively triable by Sessions Court.—'*Such offence*' means the offences referred to in s. 337, *i.e.*, offences triable *exclusively* by the Court of Session or High Court. The Sessions Judge cannot tender a pardon to an accused person under this section when the offence for which he has been committed is "not triable exclusively by the Court of Session," 10 C. 935; 25 M. 61 (P.C.) But the fact that he is charged with other offences not exclusively triable by the Court of Session is immaterial, 9 S. L. R. 43 = 18 Cr. L. J. 637.

4. Tender of pardon to accused person who has pleaded guilty.—A Court of Session, under this section, tendered a pardon to an accused person, charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted, and such person was examined as a witness against the other accused. *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible though the evidence of the pardoned accomplice, taken with the statements of unpardoned co-prisoners, is not sufficient by itself to warrant the conviction of those who never confessed, 7 A. 160 *followed* in **Ratanlal 750; 25 M. 61.** There is no ground for the suggestion that the words 'any person' in this section do not cover an accused person before the Sessions Judge, 9 S. L. R. 43 = 18 Cr. L. J. 637.

5. "Supposed."—This word must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man who, although admitted to be a party to the crime, is unconvicted, 7 A. 160; **Ratanlal 750.** *See* Note 9 at p. 850.

the Local Government with a recommendation that the appellant should be pardoned on the ground that the had conformed to the conditions on which the original pardon was granted to him, **12 C. L. R. 226; 29 A. 24.** Approver forfeits his pardon if while giving evidence against some accused he screens one, **24 P. R. 1918 (Cr.).**

5. Mere failure of approver's evidence to convict co-accused is not sufficient to forfeit pardon.—The words "*a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences directly under inquiry*" refer to the importance when a pardon is tendered, of encouraging the approver to give the fullest details so that points may be found in his evidence which may be capable of corroboration. The question of how pardon protects him and what portion of it should not protect him ought not to be treated in a narrow spirit, **11 A. 79.** It is a matter of great importance, which cannot be too emphatically insisted upon, that the strictest faith should be kept with a person to whom an offer of pardon has been made and by whom it has been accepted under the Code, even though the statement made by him under the pardon tendered may reveal himself to be one of the vilest of criminals. The mere failure of his evidence to procure conviction of his alleged associates in crime is plainly insufficient in itself to justify a summary order for the withdrawal of the pardon and trial of the deponent. Where the same story is consistently adhered to in both the Courts, and only fails to procure a conviction for want of corroboration, the mere suspicion that the approver has given false evidence is plainly insufficient to justify the enforcement of the provisions of this section, and some definite evidence to show wilful concealment or the giving of false evidence should be required before the commitment of the approver for trial is considered justifiable, **15 P. R. 1895; 7 L. B. R. 1 = 14 Cr. L. J. 401.** Absconding before conclusion of cross-examination does not amount to wilful concealment, **17 Cr. L. J. 391.**

6. Opinion of Court directing prosecution as to non-compliance with the condition of tender is not conclusive of the fact.—A mere order by the Court before which an accomplice gives evidence that he be prosecuted for not complying with the condition of his tender does not preclude the trying Court inquiring into the question of fact involved in his plea of not guilty. The opinion of the Court directing the prosecution that the person has not complied with the condition of the tender even if relevant, cannot be conclusive, especially when the order is made, as in practice may occur, without the accused having any opportunity of showing cause against the order, **6 P. R. 1889** *followed* in **15 P. R. 1895.** The mere expression of opinion by the Sessions Judge is not enough. The approver should be given an opportunity of meeting the allegation that he has failed to make the full and true disclosure required by s. 337. The proper course is to draw up an order setting forth specifically the alleged breach and to call upon the approver to show cause why he should not be tried for the main offence as provided in s. 339. On the date fixed for the hearing unless the approver admits the alleged breach of the condition, the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence, **7 L. B. R. 1 = 14 Cr. L. J. 401.** *See* also **11 N. L. R. 95 = 16 Cr. L. J. 417.** It should be noted that under the present section the certificate of the Public Prosecutor has been made the sole basis for the prosecution of an approver. And under s. 339-A it is provided that the trying Court must ask the approver whether he pleads that he has complied with the conditions on which the tender of pardon was made. And if the approver does so plead, the Court is bound to record the plea and proceed with the trial and before judgment the Court must give a specific finding whether the approver has complied with the conditions of pardon or not. So it is clear that the opinion of the Court directing prosecution as to non-compliance with the conditions of the tender is of no value at all legally.

PROSECUTION OF APPROVER.

7. Approver forfeiting his pardon during preliminary inquiry—how dealt with.—*See* sub-sec. (3) to s. 337 and Note 13 thereto. If it turns out that the approver has committed an offence triable by a Magistrate either exclusively by himself or concurrently with the Court of Sessions, the approver may according to circumstances be either tried by the Magistrate himself or committed to the Court of Session or High Court for trial. But if it is an offence triable exclusively by the Court of Session, s. 193 provides that there ought to be a commitment and commitment is absolutely necessary in such a case—*B. H. C. R. Rul.*, 17*th Feb.*, 1898. It is only by such commitment that the Sessions Judge or High Court has jurisdiction to hold the trial, **15 M. 352; 22 C. 60; Ratanlal 119.**

(*a*) *Generally, nothing should be done against him until after the trial of the other accused is over.*—MADRAS, BOMBAY and BURMA. If an approver is considered to have forfeited his pardon during the preliminary investigation, nothing should be done against him, till after the case against the principal accused,

contained this further provision "*the statement made by a person under pardon which has been withdrawn under this section may be put in evidence against him.*"

The next Code, Act X of 1882, no longer empowered Magistrates, Sessions Judges and High Courts to commit if it appeared to them that the conditions of the pardon had not been kept and enacted the section 339 with the word *withdrawn* instead of the word *forfeited* in sub-sec. (2). The Code of 1898 amended the section by substituting the word "*forfeited*" for the word "*withdrawn*," **32 M. 173; 15 M. 252.**

No limitation was fixed by the section in the Code of 1898, unlike s. 249 of the 1872 Code as to the time when a pardon may be withdrawn, **8 C. 860 = 10 C. L. R. 369.**

Now the changes introduced under the new amendment are the following —

1. Under the present section a certificate by the Public Prosecutor to the effect that the person accepting tender of pardon has in his opinion committed a breach of the condition of the tender of pardon is made the sole basis of a prosecution of the approver

2. From the above change it follows as a corollary that no formal determination as to a withdrawal or forfeiture of pardon by the trying Court is now necessary for the approver's prosecution, but the certificate of the Public Prosecutor is enough.

3 In consonance with the above change it may be noted that the words "when the pardon has been forfeited under this section have been omitted from cl (2) of the present section.

4 It is now expressly provided by the proviso to cl. (1) that an approver cannot be jointly tried along with any of the other accused

1-A. The necessity of the certificate of Public Prosecutor for the prosecution of an approver —Under s. 339 of the Code, the certificate of the Public Prosecutor is a condition precedent to the prosecution of an approver to whom a tender of pardon has been made, but who has failed to comply with the condition of the tender. **26 Bom. L. R. 1240; 5 Lah. 379**

2. Formal withdrawal or forfeiture of pardon.—Under the present section for the reasons above noted, in Note 1, *supra* no question can now arise as to a formal withdrawal of the tender of pardon before an approver can be prosecuted. So the cases holding that a formal withdrawal is unnecessary are of pure academic interest. ***(See* 25 B. 675; 42 C. 828, 758; 30 B. 611; 32 M. 173; 29 A. 303.)**

3. What Court to decide whether pardon has been forfeited.—Under the new amendment as formal withdrawal or forfeiture of pardon is dispensed with, the Court that tries the approver upon the certificate of the Public Prosecutor has to try the issue whether the pardon is forfeited or not on the accused raising the plea that he has complied with the conditions of the pardon. The procedure to be followed in such cases is described in the new section 339-A, *see* **A. I. R. 1927 Oudh 527 (2).**

4. Approver must make full disclosure throughout—utmost good faith must be observed by both sides.—The transaction is one of the utmost good faith and the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such disclosure before the committing Magistrate if he withdraws it in the Sessions Court, or to make it when examined in chief, if he withdraws it in cross-examination, **24 M. 321,** *approved* in **32 M. 173.** "It has nowhere been laid down that if a witness first makes a full and true disclosure he is then at liberty to contradict his statement or deny its truth without any fear of forfeiting his pardon," **33 M. 516; 11 M. L. R. 59 = 16 Cr. L. J. 417; 42 C. 828.** When a pardon has been tendered and accepted, the fullest faith must be kept by both sides. No matter what degree of guilt might be admitted by the pardoned criminal he must go free provided he makes a full fair and true disclosure of the whole of the circumstances, within his knowledge relative to the commission of the crime, **12 C. L. R. 275.** Where a pardon granted under s. 337 to an approver witness was declared forfeited by the Sessions Judge before the hearing of the whole of the evidence without proof that the statement made by the person pardoned was inconsistent, except upon most immaterial points, with previous statement made by him, or contradicted by the evidence and before any evidence affecting his veracity had been given and where it was found by the High Court that the whole of the evidence showed that the crimes were committed in all probability exactly as he said they were, that there was absolutely no evidence that his part in the crime was either greater or less than what he had stated it to have been and that there were no grounds for supposing that he had concealed the name of any one concerned in it, the High Court *held*, that the accused had complied with the conditions of his pardon and that it was improperly declared forfeited. The High Court, however did not set aside the conviction and sentence on this ground, but submitted the case to

Magistrate has found that the pardon has been forfeited, **16 Cr. L. J. 234 (M.)**, where **32 M. 173** is *followed*. *See* also **7 N. L. R. 65 = 13 Cr. L. J. 326** and **11 N. L. R. 59 = 16 Cr. L. J. 417.**

(*c*) *Issue whether pardon has been forfeited should be tried first.*—Where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he relies on the pardon and if he says 'yes' which is a plea of pardon, the issue as to the pardon should be tried first. If the approver is convicted without this being done, the conviction is illegal, **32 M. 173; 30 B. 611; 42 C. 856.** When the person holding the pardon is placed on his trial he will first plead his pardon and if he proves that it was in fact granted he will be entitled to an acquittal unless the prosecution proves that he has wilfully concealed material facts or has given false evidence, **1 P. R. 1898; 34 P. R. 1902.** *See* also **7 L. B. R. 1; 19 C. W. N. 179 = 16 Cr. L. J. 120.** When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the jury thereon, and then proceed with the trial of the accused for the offences charged, **42 C. 856** where **37 C. 845** is *discussed*, **32 M. 173; 33 M. 514; 25 B. 675; 30 B. 611** and **31 P. R. 1904** are *followed*. Where, however, the Judge tried the question of forfeiture with the jury after some evidence on the general issue had been recorded. *Held*, that the irregularity had not prejudiced the approver or the other accused, **42 C. 856.**

(*d*) *The Judge must take the verdict of the jury on the issue of forfeiture and not decide it himself.*—Where this procedure was not followed and the Judge did not leave it to the jury to say whether the accused had given false evidence and thereby forfeited his pardon, but himself decided that the withdrawal of the pardon was conclusive that it had been forfeited and convicted the accused, the conviction is illegal, **33 M. 514.** The Judge ought to try the question of forfeiture, as a preliminary issue, on evidence limited to the point, and take the verdict of the jury on it before proceeding to try the general issue of the guilt of the accused, **42 C. 856.**

10. Duty of prosecution in trial of approver who forfeited his pardon—(*a*) *Onus is on the Crown.*—In a trial of the approver after breach of the conditions on which the pardon was tendered for the offence in respect of which the pardon was so tendered, it is for the prosecution to prove that the pardon has been forfeited The making of a full and true disclosure by the approver is not a condition precedent which the approver has to prove to establish his right to pardon according to the view taken in **11 A. 79**, under the Code of 1882, but his failure to make such full and true disclosure is a condition subsequent determining or forfeiting the pardon, **27 C. 137; 25 B. 675; 30 B. 611**, *approved* and *followed* **32 M. 173.** The *onus* of proof of forfeiture is on the Crown, **42 C. 856.** It must be first proved and decided by the Court before which the approver is put on his trial, that he by either wilfully concealing something essential or by giving false evidence, has not complied with the conditions on which the pardon was offered, **59 P. R. 1906 = 40 P. L. R. 1906 = 3 Cr. L. J. 342,** where **31 P. R. 1904**, was followed and *see* Note 7.

(*b*) *Procedure.*—Ordinarily the proper course to follow in such a case would be to put in evidence the record of the statement made by the approver as a witness at the former trial, together if necessary, with evidence as to the identity of the person making that statement. In order to form an opinion whether in the course of that statement the approver had given false evidence or had wilfully concealed anything essential, it may become necessary to record evidence bearing on the question, **37 A. 331.**

11. Trial of approver along with other prisoners illegal.—*See* proviso to sub-sec. (1) and Note 7, *supra.*

12. Sanction for prosecution of pardoned persons for perjury.—When the person to whom pardon has been legally tendered makes a statement on oath which he retracts in a subsequent judicial proceeding a proper sanction is necessary for a prosecution for giving false evidence on each branch of the alternative charge. The sanction of the High Court would be necessary in regard to the statement made under conditional pardon, as well as a formal complaint of the Court before which the other statement was made (*see* section 476) Such sanction can only be granted before, not after, the commencement of the prosecution, **10 B. 190; 11 B. H. C. R. 34.** A witness who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus pœnitentiæ*, **11 A. L. J. 964 = 15 Cr. L. J. 76.** The want of sanction is not a mere irregularity curable under s. 537, but is a fatal defect, **27 C. 137; 42 P. R. 1884.**

13. Practice—Application for sanction to be made in open Court.—An application to the High Court for sanction to prosecute an approver for giving false evidence should be made by motion on behalf of the Crown in open Court, **24 C. 492; 32 M. 47; 10 P. R. 1904 = 1 Cr. L. J. 793,** and not by letter, **1893 A. W. N. 12; 30 P. W. R. 1912 = 175 P. L. R. 1912 = 13 Cr. L. J. 451.** The person moving the High Court must be in a position to place before it, the tender of pardon and the evidence given in consequence of such tender and to satisfy the High Court that there is *prima facie* reason to suppose that the persons who accepted the tender of pardon

in the Court of Session has been finished and his trial should commence *de novo* if it be deemed necessary to take proceedings against him. He should be detained in custody if not on bail till the trial of the other accused in the Sessions Court is over, 23 B. 433; 4 Bom. L. R. 826, 21 M. 321; 6 U. B. R. 7 = 7 Cr. L. J. 315; 5 N. L. R. 134 = 10 Cr. L. J. 418; and it is not desirable that the Magistrate should commit the approver along with the principal accused, 31 M. 272. In 25 B. 675, however, it is stated that it cannot be laid down as a general rule that a Magistrate who tenders a pardon to an accused has no jurisdiction to commit him before the close of the trial of other accused, since the Legislature by using a general term like '*case*' in sub-sec. (2) instead of the word '*trial*' must have meant to abstain from laying down any such rule. A person examined at the preliminary inquiry may well be said to be examined in the case. It is therefore impossible to lay down a rule applicable to all cases, to determine at what stage it is expedient to commit an accused who has in the opinion of the Magistrate forfeited his pardon. It should be noted that under the present section an approver can be prosecuted only upon the certificate of the Public Prosecutor and it is also provided by the new provisions in sec. (1) that he shall not be tried jointly with any of the other accused against whom he has given evidence and the cases cited above are good law only in so far as they decide that as a general rule no trial should be held against him until after the trial of the other accused is over. And so in light of the new amendment the rulings, in 20 A. 529; 29 A. 24; 42 C. 856 are, it is submitted, no longer good law.

8. Approver even if he has given false evidence should be discharged. He cannot be detained in custody after trial.—*See* 30 B. 611, which was followed in 11 N. L. R. 53 = 16 Cr. L. J. 417, where the impropriety of the Sessions Judge having kept the approver in custody after the termination of the trial was pointed out. *See* also 37 C. 845.

It is for the Crown to decide whether the approver should be proceeded with for the offence.—At the termination of the trial in which a pardon is given the accomplice may be discharged by the Court. Then, if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he has been given conditional pardon, 30 B. 611 *followed* in 37 C. 845.

9. Duty of Court trying an approver who forfeited his pardon.—*NT*—It should be noted that under the present Code the procedure to be followed in cases when the tender of pardon is forfeited by an approver, is expressly regulated by section 339-A. And the cases referred to in the following Notes 10 and 11, though prior to the enactment of s. 339-A, embody the same general principles that are laid down in that section. When put on his trial for the offence for which a pardon is granted he may plead to a competent Court his pardon in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would take an issue whether he had or had not made a full and true disclosure of the whole facts and whether after having admittedly done that he has at a later stage recanted, whether that recantation amounted to giving false evidence within the meaning of this section and worked a forfeiture of pardon, 30 B. 611. It is now *held* by all the High Courts that it is the first duty of the Court before whom an approver is put up for his trial to decide whether the pardon has been forfeited. *See* 32 M. 173; 30 B. 611; 42 C. 855; 35 P. R. 1902; 31 P. R. 1904; 11 N. L. R. 53 = 16 Cr. L. J. 417; 7 L. B. R. 5. The contrary view in 37 C. 845, where it was *held* that in such a case it was for the committing Magistrate to decide that the pardon had been forfeited and if such an opportunity was given to the accused the Court to which he is committed would not have jurisdiction to determine whether pardon was forfeited, is no longer correct. The approver is entitled to plead the pardon before the Sessions Judge when he has not done so before the committing Magistrate, 37 A. 331; even when the committing Magistrate decides against the approver, it is open to the approver to raise it at the trial, 42 C. 156 where 37 C. 845 is not followed.

(*a*) *The forfeiture of pardon and the offence of which he is charged may be tried jointly.*—The two questions whether he has forfeited the pardon and whether he is or is not guilty of the offence of which he is charged may be heard and tried together, 42 C. 756 where 30 B. 611; 32 M. 173 and 37 C. 845 are followed. It is possible that the evidence on the two issues may overlap and in some cases be practically identical, and that seems to be the only argument against trying the question of forfeiture of pardon before calling on the accused to plead to the charge of the offence and where such is the case it might be a reason for the Judge to use his discretion and order the approver to be tried separately from the other accused. *Per* Imam, J., in 42 C. 856.

(*b*) *The Judge must ask the prisoner whether he relies on the pardon.*—Where a pardoned approver is put on his trial, it is the duty of the Sessions Judge to ask the prisoner whether he relies on the pardon granted to him and to try the issue whether the pardon has been forfeited. It is not enough that the committing

the pleader already engaged by him did not know how to behave in Court, **Ratanlal 861.** It can disallow questions where improper, but cannot ask the pleader to sit down in the middle of his cross-examination. A Magistrate has no power under this section to forbid a duly-qualified pleader to appear for the accused, **Ratanlal 25.** See *ibid.* 29 and **6 B. 14** and **1 M. 304** as to similar right in appeals. *See* also **1 B. 64** and ss. 439 (2) and 440, Notes thereto.

3. **Right of accused's counsel to be heard.**—It is not a question of indulgence that the counsel for the accused should be heard before judgment, but one of right. It is an elementary principle of law, that no order should be made to a man's prejudice especially in a criminal case without hearing him and the very object of the Legislature in allowing parties to be represented at trials by counsel is that counsel must be heard before a final opinion is formed by the Court. If counsel had a right to be heard it is not for the Court to say before hearing them whether the omission to hear and a judgment based upon opinion formed without such hearing have or have not caused prejudice to the accused, **6 Bom. L. R. 663.** And the conviction will be set aside if the accused's vakil is not heard, **5 M. L. T. 290 = 9 Cr. L. J. 305; 9 P. R. 1877; 15 P. R. 1900.**

4. **Magistrate should not interpose between accused and his friends, but should give every opportunity for making his defence.**—In a case of murder, pleaders appeared on behalf of the accused's wife before the committing Magistrate and requested him to allow them to see the accused or ascertain in their presence from him whether he required their assistance. The Magistrate asked the accused in the absence of the pleaders whether he required their assistance, and then communicated to the pleaders that the accused did not want to engage them. When the case came before the High Court for confirmation, the Chief Justice remarked:—"In conclusion I wish to draw attention to the improper conduct of the investigating Magistrate in refusing to allow the pleaders engaged by his (accused's) wife to defend this accused, to have an interview with him or to appear and sit in Court. It was the duty of the Magistrate to have afforded the accused and his friends every opportunity of making his defence, and he should not personally have interposed in any way between them," **1 Bom. L. R. 856.** Prisoners and others are to have the fullest opportunity for giving *vakalatnamas* to whomsoever they please, without reference to the mode in, or the circumstances by, which they may be influenced to do so, **1 B. H. C. R. Cr. Ca. 16.**

5. **Access to prisoners by pleader.**—Prisoners in the custody of the Police before being produced before a Magistrate are at liberty, at any time of the day, to see a pleader, due precaution being taken against escape. The access to prisoners in jails by pleaders is a matter for the officer in charge of the jail to decide.—*Mad. Pol. Man.*, p. 95, *Note.* An accused person remanded to Police custody has a right to claim reasonable opportunity of getting into communication with his legal adviser for the purpose of his defence and the High Court has power to interfere under s. 561 (A) if it appears that the accused is being deprived of this right **50 Bom. 741.**

6. **Right of private prosecutor to a pleader.**—A pleader is entitled to appear not only on behalf of the accused, but also on behalf of a private prosecutor, **5 B. L. R. Appx. LXX.**

7. **Position of pleader appointed by the Court to defend.**—The position of a pleader appointed by the Court to defend a prisoner is not the same as that of a pleader whom the accused has authorised to act for him. Any admissions that may be made by the pleader appointed by the Court are not binding on the accused, **2 Bom. L. R. 571.**

8. **Employment of Mukhtyars.**—*See* Notes to s. 4 at pp. 16 to 18. "The terms of s. 340 do not warrant any general rule for the exclusion of *mukhtyars* in all cases, but only allow the exercise by Magistrates of a discretion in each case as it arises. The Magistrates are expected not to deprive parties of legal aid which they could frequently obtain at a moderate cost by indiscriminate exclusion of persons who are invested by law with a distinct professional status in criminal trials." This rule is equally applicable to Sessions Judges, **38 C. 488**; *Wilkins*, 116.

9. **Discretion with Court to hear agent or not.**—To refuse or to allow the appearance of a *mukhtyar* on behalf of the accused person is entirely within the discretion of the Magistrate concerned, **Ratanlal 314;** though it has been *held* in **Ratanlal 1,** that a prisoner is entitled to authorise any person to be his agent in any Criminal Court. A *mukhtyar* has no right to plead in a Criminal Court without the permission of the presiding Judge, **4 S. L. R. 195 = 12 Cr. L. J. 118; 6 B. 14** was held to be no longer law. The practice of admitting *mukhtyars* to defend parties is not illegal. It is discretionary with the Magistrate to hear such agents or not, **7 M. H. C. R. Appx. XXXVII.** Courts are bound to exercise a discretion in each case as to permitting

have wilfully concealed an essential thing or given false evidence. A person tried under s. 471 by a Sessions Court is prosecuted within the meaning of this section, 42 P. R. 1884.

14. Committal proceedings whether void for want of Public Prosecutor's certificate.—Where in a case the Magistrate enquired into proceedings without the Public Prosecutor's certificate required under s. 339 and the accused was committed to the Sessions and before the trial in the Sessions the necessary certificate was produced in the Sessions Court, *held* that the irregularity in the non production of the certificate before the Magistrate was condoned by the provisions of s. 532. 3 R. 55

Procedure in trial of person under sec. 339

*"**339-A.** (1) The Court trying under section 339 a person who has accepted a tender of pardon shall—

(*a*) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271 sub-sec (1) and

(*b*) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

Note—The procedure laid down in ss 339 and 339-A must be strictly adhered to and followed. In a case where the accused was not asked before the charge was read out to him whether he pleaded that he had complied with the conditions on which the tender of pardon was made, nor were the terms of s. 339-A explained to him, *held* that the trial was vitiated by non-compliance with the provisions of s. 339-A of the Code 8 Lah. 379. The provisions of this section are compulsory and the accused cannot be tried and convicted until the Court trying him had recorded a finding that he had forfeited the pardon which had been offered to him by not complying with its conditions, 30 Cr. L. J. 852. (1)

Right of person against whom proceedings are instituted to be defended and his competency to be a witness.

†"**340.** (1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapters X, XI, XII or XXXVI, or under section 552, may offer himself as a witness in such proceedings.'

Note.—Pleader—*See* for definition, s 4 (*r*) and Notes thereto at pp 16-17

Notes.—1. Analogous law—Liberal provisions of N. Y. Cr. Pro. Code.—According to s. 188 when defendant is brought upon arrest, the Magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceeding and before any further proceedings are had According to s. 189, the Magistrate must also allow the defendant a reasonable time to send for counsel and adjourn the examination for that purpose and must, upon the request of the defendant require a peace officer to take a message to such counsel in the town or city as the defendant may name The officer must, without delay and without fee, perform that duty

2. Accused has a right to be defended by a pleader of his choice.—The defence of an accused person ought not to be shut out merely by the fact that he is represented by a *mukhtyar* 23 C. 855. The Court has no power to tell the accused, who has a right to be defended by a pleader of his choice, to engage another pleader, as

* This section was inserted by Act XVIII of 1923, s. 88

† This section was substituted for the original section by Act XVIII of 1923, s. 89

Notes.—1. Section not applicable to persons of unsound mind.—The provisions of this section do not apply to a person who is of unsound mind. They apply to persons who are unable to understand the proceedings from deafness or dumbness, or ignorance of the language of the country, or other similar cause. In such cases, the High Court would order the detention of the prisoner during His Majesty's pleasure, **Ratanlal 151.** But where the inability to understand is due to unsoundness of mind, the procedure provided in Chapter XXXIV must be followed. **5 B. 262; Ratanlal 882.** If after inquiry under Chapter XXXIV he finds the accused was not a lunatic, the Magistrate should proceed under this section. **11 M. L. T. 24 = 13 Cr. L. J. 24.**

2. Criminal responsibility of deaf-mutes.—To escape punishment a deaf-mute to whom sections 82 and 83, I.P.C., do not apply must, like his brother who can hear and speak, come within s. 84, I.P.C., in other words, if his mind is sound his inability to hear and speak will not excuse him. In **U. B. R. (1910) I. 57 = 12 Cr. L. J. 886,** it was *held* that the law does not provide for a sane deaf-mute who has never been instructed, being exempted from punishment and *Q.* v. *Bowla*, **22 W. R. 85** and **72** and **27 C. 868,** were followed in preference to *Dwarkanath* v. *Nadar*, **22 W. R. 85; 84 P. R. 1885** and **87 P. R. 1889.** "It seems very doubtful whether a sane deaf-mute could live to the age of, say, seventeen, without learning something of his duty towards his neighbour in person and property, I think, it must be presumed that if the mind is sound there is this knowledge in the deaf-mute."

3. Section not applicable where accused understands the proceedings.—Where an accused person was deaf and dumb and the Magistrate who tried and convicted the accused, thinking that the accused was unable to "understand the proceedings in the case" referred the case to the District Magistrate, who was satisfied that the accused did understand what he was charged with, *held* that the District Magistrate's finding, as to the capability of the accused to understand the proceedings against him, was conclusive, and this section did not apply. The High Court annulled the conviction by the Magistrate, and as the accused was previously convicted of an offence under Chapter XVII, I.P.C., ordered his committal to the Court of Session, **19 W. R. 37.** *See* **8 Bom. L. R. 871; 22 W. R. 85** and **72; 18 Bom. L. R. 558.**

4. Magistrate should try and get into communication with a deaf and dumb accused.—When a deaf and dumb person is placed on his trial, some means of communication with him should if possible, be adopted, **Weir II, 402.** A Magistrate should try and get into communication with a deaf-mute accused with the assistance of his relations, as it is impossible that a deaf-mute should be able to live to maturity without being able to communicate with his relations, and that if he had, his relations must have established some practicable method of inter-communication by signs or otherwise, **U. B. R. (1910) I. 57 = 12 Cr. L. J. 886.** Where a deaf and dumb prisoner was convicted of an offence, and upon the trial no attempt was made to communicate with the prisoner respecting the charge against him, the conviction was quashed, **6 M. H. C. R. Appx. VII,** and *see* Note 8 below and **22 W. R. 85** and **72.**

5. Magistrate must refer only after conviction or committal.—While the complainant and his witnesses were being examined, the accused showed that he was dumb, and thereupon the Magistrate, without framing a charge but expressing an opinion that the accused was guilty, referred the case under this section. The High Court, noticing that the trial was imperfect as no charge had been framed, refused to treat the mere opinion expressed that the accused was guilty as tantamount to a conviction, and returned the case for disposal to the Magistrate, directing him to come to a definite opinion whether the accused could be made to understand the proceedings, and if he came to that opinion, to proceed with the inquiry or trial, and if the same resulted in a conviction or commitment, to forward the proceedings under this section with a report of the circumstances of the case, **Ratanlal 879** and **886.** Before a reference to the High Court can be made under this section there should have been a committal or conviction, **Ratanlal 180** and also a definite finding. This section requires the Judge to proceed to the end of the trial and then report the result if a conviction follows, **Weir II, 403.** It does not authorise a Magistrate to refer the case in the midst of the trial, **4 Bom. L. R. 825; Ratanlal 886; 25 Bom. L. R. 43.**

6. Magistrate must state his views when making reference.—In submitting a case to the High Court under this section, a Presidency Magistrate should state his view of the conduct of the accused, and must take some evidence regarding the previous history and habits of the accused, **Ratanlal 898.**

7. Magistrate cannot pass sentence in cases of doubt.—This section prohibits a Court from passing sentence when it is uncertain that the accused has understood the proceedings against him, **Weir II, 403; U. B. R. (1910) I. 57 = 12 Cr. L. J. 886; 11 M. L. T. 404 = 13 Cr. L. J. 248.** *See* also **87 P. R. 1889** below.

or not permitting the appearance of unauthorised pleaders Weir II, 400. But a general order excluding any particular class from appearing as pleader is illegal. An order excluding any particular individual in any particular case on grounds stated, are apparently without grounds stated, would be within the discretion of the Magistrate and therefore legal, Weir II, 401. Where the High Court circular stated that, as a general rule, no person not qualified as legal practitioner, should be permitted to act in any legal proceeding except to prevent a miscarriage of justice, *held* that a general rule by a Magistrate that no private vakil should appear in his Court went beyond the terms of the circular, but that he would be acting in consonance with its terms if he stated that he was not prepared to make any general exception in favour of any particular individual, Weir II, 401; 33 C. 455.

10. General dismissal of Mukhtyar is bad.—A Magistrate has no power to dismiss a *mukhtyar* generally unless he be convicted of an offence involving moral turpitude or infamy. This refers to a general dismissal only and not to particular cases in which he might refuse to hear a *mukhtyar* whom he did not think qualified, 1 W. R. 35.

11. No Court-fee for Vakalatnama.—No advocate or attorney of the High Court or the authorised pleader appearing in defence of an accused person should be required to file a *vakalatnama*, 7 M. H. C. R. Appx. XL. See *Court Fees Act* VII of 1870, *Schedule II Art.* 10 and *see* Note 15 below.

12. Communication to Mukhtyar is privileged.—Communication made to a *mukhtyar* or his clerk is privileged. Section 126 of *the Indian Evidence Act* must be construed as applying to all persons who within the category of pleader as defined in s. 4 (*r*) of the Code, and includes therefore *mukhtyar*. Statements made by accused persons that a false charge was going to be brought against them to a *mukhtyar* who was at the time acting for one of them as his *mukhtyar* and legal adviser and to whom the statement was made with the object that he should appear for them in Court are privileged, 25 C. 736.

13. Who is an accused person?—An accused is a person over whom the Magistrate, or Court is exercising jurisdiction, 18 B. 661; therefore (*i*) *A person ordered to give security for good behaviour is an accused person within the meaning of this section* 23 C. 493 *followed* in 21 A. 107; 27 C. 656; 15 P. R. 1900; 25 A. 373 and 4 C. L. R. 457, *contra* see 27 C. 662 and 9 C. W. N. 033. And a Court is bound to hear a pleader on his behalf if he engages one, 15 P. R. 1903. (*ii*) *See* 16 C. 781; 5 C. 835 = 5 C. L. R. 435 as to persons against whom maintenance proceedings are taken under s. 488. (*iii*) A Civil Court making a preliminary inquiry under s. 476 is not a Criminal Court and the person against whom the inquiry is made is not an accused person, 8 A. L. J. 237 = 12 Cr. L. J. 231. (*iv*) *A person complained against before issue of a process has no right to be represented by a pleader.*—A person complained against does not become an accused person, until it has been decided to issue process against him, under Chapter XVI. Section 340 does not, hence, entitle a person complained against to be represented by a pleader during the preliminary inquiry which may be held under s. 202 (1). If he chooses to attend the proceedings he may of course do so like any other member of the public, but he has no *locus standi* as a party, the purpose of the law being clearly to exclude him until sufficient ground for joining him has been made out by the complaint 4 N. L. R. 81 = 8 Cr. L. J. 20. *See* 10 C. L. R. 553; 18 B. 651.

14. Duty of Pleader of accused.—Where a Sessions Judge took exception to the fact that the pleader for the accused had put forward witnesses on behalf of the accused who he must have known had been tampered with and threatened to report his conduct to the High Court, it was *held* that the remarks of the Judge were improper and that it was the duty of the pleader for the accused to call witnesses for the defence if his client insists on submitting their evidence to the Court, 3 Bom. L. R. 882.

15. Practice—Memorandum of appearance.—Under Madras Dis. No. 272 of 1907 whenever a pleader representing a party in any criminal proceeding does not file in Court a *vakalat* from his client he shall be required to file a memorandum of appearance containing a declaration that he has been duly instructed to appear for the party whom he represents. *Held* even that is not necessary where the party is present in person along with his vakil, 5 M. L. T. 290 = 9 Cr. L. J. 303.

Procedure where accused does not understand proceedings.

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Notes.—1. Scope of the section.—" We think that the present law gives too great a latitude to the Courts with regard to the examination of an accused person. The object of such an examination is to give the accused an opportunity of explaining any circumstances which may tend to criminate him, and thus to enable the Court, in cases where the accused is undefended, to examine the witnesses in his interest. It was never intended that the Court should examine the accused with a view to elicit from him some statement which would lead to his conviction. We have, therefore, limited the power of interrogating the accused by adding to the first paragraph of s. 342 the words *for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.* We think the accused should always have this opportunity of explaining, and we have, therefore, required the Court to question him generally for that purpose before he enters on his defence."—*Sel. Com. Rep.* on the Bill of Act X of 1882.

The limitation of the power of the Courts in examining the accused for the purpose of enabling him to explain any evidence against him is thus accounted for by Dr. STOKES: " The section assumed its present form partly owing to a judgment of the High Court of Bengal and partly owing to the words of EDWARD LIVINGSTON: " An unrestricted right of interrogating is also very apt to produce insidious and catching questions instead of a cool and impartial attempt to extract the truth, the examination becomes a contest in which the pride and ingenuity of the Magistrate are arrayed against the caution or evasions of the accused; and every construction will be given to his answer that may fix upon him the imputation of guilt. It may be added that badgering by the Judge is apt to arouse undue sympathy for the prisoner."—*Anglo-Indian Codes, Vol. II, Introduction, p.* 20.

2. Section applies to all proceedings in Magistrate's Court.—(*i*) *In the stage of investigation.*—Justice CARNDUFF is of opinion that neither this section nor s. 164 places any limitation on the extent to which the accused may be examined in the stage of investigation. " At that stage, and, indeed at any point other than that indicated in s. 342, the only thing that is abhorrent is pressure or inducement, and the sole criterion by which the fitness of an examination can be judged is with reference to the question whether it was voluntary or not, **37 C. 467** at p. **514.**

(*ii*) *Inquiry preliminary to commitment.*—Sections 209 and 210 do not curtail the powers of a Magistrate under this section. Section 342 applies to all sorts of proceedings in Magistrate's Courts whether the case is one triable by a Court of Session or otherwise. Under that section a Magistrate is empowered at any time and without any previous warning to put questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, **15 Cr. L. J. 474 (Oudh).** As to inquiries under s. 117, etc., *see* note 5-A below.

(*iii*) But it does not apply to proceedings under s. 488 of this Code, **10 Lah. 406.**

3. Analogous Law.—Under N. Y. Cr. Pro. Code, s. 196, a Magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the fact alleged against him, that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial (section 197). If the defendant waives his right, the Magistrate must make a note thereof, immediately following the deposition of witnesses against the defendant (section 198). If the defendant chooses to make a statement, the Magistrate must take it in writing without an oath, and must ask him besides the questions of name, parentage, residence and profession only " to give any explanation you may think proper of the circumstances appearing in the testimony against you and state the facts which you think will tend to your exculpation.

3-A. English Law—accused may give evidence.—The accused at common law was not a competent or compellable witness at any stage of the proceedings, on the ground of the maxim *nemo tenetur seipsum prodere* and if the accused was examined on oath any conviction would be bad. The position of the accused has been changed by a series of statutory provisions culminating in *the Evidence Act*, 1877 (40 and 41 *Vict.*, *c.* 14) and *the Criminal Evidence Act*, 1898 (61 and 62 *Vict.*, *c.* 36) whereby it is enacted that every person charged with an offence is a competent witness for the defence at every stage of the proceedings whether charged solely or jointly. See *Archbold*, pp. 457—463. A Magistrate has no right to ask the accused any questions, except questions incidental, to the conduct of the examination, *e.g.*, whether the accused wishes to cross-examine a witness, or to give evidence, and the statutory questions prescribed by s. 18 of *the Indictable Offences Act*, 1848. Unless the accused gives evidence under *the Criminal Evidence Act*, if the Magistrate does interrogate an accused who does not so examine himself, the answer of the accused is inadmissible as

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(*ii*) *Inquiry preliminary to commitment.*—Sections 209 and 210 do not curtail the powers of a Magistrate under this section. Section 342 applies to all sorts of proceedings in Magistrate's Courts whether the case is one triable by a Court of Session or otherwise. Under that section a Magistrate is empowered at any time and without any previous warning to put questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, **15 Cr. L. J. 474 (Oudh).** As to inquiries under s. 117, etc., *see* note 5-A below.

(*iii*) But it does not apply to proceedings under s. 488 of this Code, **10 Lah. 406.**

3. Analogous Law.—Under N. Y. Cr. Pro. Code, s. 196, a Magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the fact alleged against him, that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial (section 197). If the defendant waives his right, the Magistrate must make a note thereof, immediately following the deposition of witnesses against the defendant (section 198). If the defendant chooses to make a statement, the Magistrate must take it in writing without an oath, and must ask him besides the questions of name, parentage, residence and profession only " to give any explanation you may think proper of the circumstances appearing in the testimony against you and state the facts which you think will tend to your exculpation.

3-A. English Law—accused may give evidence.—The accused at common law was not a competent or compellable witness at any stage of the proceedings, on the ground of the maxim *nemo tenetur seipsum prodere* and if the accused was examined on oath any conviction would be bad. The position of the accused has been changed by a series of statutory provisions culminating in *the Evidence Act*, 1877 (40 and 41 *Vict.*, *c.* 14) and *the Criminal Evidence Act*, 1898 (61 and 62 *Vict.*, *c.* 36) whereby it is enacted that every person charged with an offence is a competent witness for the defence at every stage of the proceedings whether charged solely or jointly. See *Archbold*, pp. 457—463. A Magistrate has no right to ask the accused any questions, except questions incidental, to the conduct of the examination, *e.g.*, whether the accused wishes to cross-examine a witness, or to give evidence, and the statutory questions prescribed by s. 18 of *the Indictable Offences Act*, 1848. Unless the accused gives evidence under *the Criminal Evidence Act*, if the Magistrate does interrogate an accused who does not so examine himself, the answer of the accused is inadmissible as

5-B. Effect of subsequent examination under s. 540.—Where an accused person has been examined under s. 342 after the close of the prosecution case and subsequently the Court *examines* a person under s. 540 (whether such person be one of the prosecution witnesses or another person) it is not necessary to re-examine the accused person under s. 342, **3 Pat. 1015; 30 Bom. L. R. 1086;** but *see* **111 I. C. 852 (2).**

5-C. Distinction between summons and warrant-cases.—Where in a summons-case a Magistrate examined the accused only after the examination-in-chief of some of the prosecution witnesses and did not examine *him* again after another witness had been examined and after the cross-examination of the previous witness. *Held*, section 342 not complied with and omission vitiated trial, **49 Cal. 1076.** A Magistrate is bound in a summons-case to examine the accused as required by section 342 of the Code. It he omits to examine the accused it is an irregularity which vitiates the trial *per* MACLEOD, C.J.—It seems to me that while it is obligatory on the Magistrate to give the accused an opportunity of explaining the evidence against him according to the provisions of section 342 of the Code it is certainly desirable that he should not be hampered in these petty cases by the provisions of section 364 of the Code. **46 B. 441** *following* **45 B. 672 = 22 Bom. L. R. 1040;** *see* also **54 Cal. 286.** In warrant-cases accused must be examined after the further cross-examination of prosecution witnesses even though he has been examined before the charge was framed. Failure to so examine an accused is not a mere irregularity, such as is contemplated in section 537, but an illegality which vitiates the trial. **45 M. 820 = 43 M. L. J. 402.** But **45 M. 820** is dissented from in **44 M. L. J. 567 (F.B.)** which holds *per curiam.* The provisions of section 342 of the Code as regards the examination of the accused are mandatory and failure to comply with them is an illegality vitiating the trial. In a warrant-case the prosecution witnesses were examined and the accused did not avail themselves of the opportunity to cross-examine the witnesses. The accused were then questioned generally in the case. For the purpose of enabling them to explain the circumstances appearing from the evidence against them and they stated, they would put in a written statement. The Magistrate then framed a charge against the accused under section 411, I.P.C., and they pleaded not guilty and the case was adjourned. At a later date the accused cross-examined the prosecution witnesses under s. 256 of the Code and the witnesses were also re-examined. Evidence was then called for the defence and the accused were not further questioned generally on the case after the cross-examination and re-examination of the prosecution witnesses. *Held*, by the majority (VENKATSUBBA RAO, J., *dissenting*) that there was a sufficient compliance with the requirements of section 342 of the Code and the trial and conviction of the accused were legal (**43 M. L. J. 402** *overruled*; **6 Pat. L. J. 644** *dissented* from). In **6 Pat. L. J. 644** it was held that under s. 342 of the Code of Criminal Procedure the Court must examine the accused after the witnesses for the prosecution had been examined. Therefore an examination of the accused after the witnesses for the prosecution have been examined-in-chief but before they have been cross-examined and re-examined is not a compliance with the section. Examination in s. 342 of the Code means examination-in-chief, cross-examination and re-examination. **5 Pat. L. J. 402; 6 Pat. L. J. 147** and **6 Pat. L. J. 174** *referred to.* But *see* **4 Lah. 61** (*contra*), **4 Pat. 488** (*contra*) *following* **46 M. 449 (F.B.)** and disapproving **6 Pat. L. J. 644. 3 Rangoon 139** seems to follow **46 Mad. 449** and to hold that the absence of examination of the accused under s. 342 need not vitiate a trial in every case, unless prejudice is caused to the accused thereby, **7 Rang. 470.**

5-D. The section does not apply to summary trial of summons-cases.—The provisions of s. 342 of the Code requiring the Court to examine the accused generally is inapplicable to summary trials of summons-cases under Chapter XXII, as to ordinary trials of such cases, **46 M. 766 = 45 M. L. J. 230.**

The mandatory provisions of s. 342 of the Code requiring the Court to question the accused generally on the case after the examination of the prosecution witnesses, *do not apply to* trials in summons-cases.

The use of the expression "before the accused is called on for his defence" in s. 342 itself as well as in s. 256 relating to trials in warrant-cases and s. 289 relating to trials in Sessions cases, and the absence of such an expression in the sections relating to trials in summons-cases under Chapter XX of the Code show that the provisions of s. 342 are not intended to apply to summons-cases. **46 M. 758 = 45 M. L. J. 224.**

Written statement must not take the place of examination.—See Note 21. A written statement can never have the same value as answers coming directly from the accused's mouth, **19 C. W. N. 1043 = 16 Cr. L. J. 724, 46 C. 411,** but *see* **4 Patna 488** (*contra*).

5-E. The imperative provisions of s. 342 do not apply to inquiries.—Section 342 of the Code does not apply to an inquiry under s. 117. The omission to examine the person called upon for security, at the close of

evidence against him, *R* v. *Perryman*, (1855) 6 Cox. C. C. 333; *R* v. *Pr[illegible]* (1853) 6 Cox. C. C. 164; *R* v. *[illegible]*, (1817) Holt (N P. 169) *Halsbury*, Vol. IX p 337 When an accused gives evidence he may be asked any question in cross-examination notwithstanding that it would tend to incriminate him *Archb* *d*, p. 465.

4 Court must examine and not prosecutor —The Court conducting the trial or inquiry is alone authorised to examine the accused person and the counsel or other person conducting the prosecution should not be allowed to take any part in the examination.—*C P Cr Cir*, *Part II* No. 24 The law allows the Court not the complainant, to put questions to the accused and the Court should not put questions in order merely to convict the accused out of his own mouth **10 M. 121 at pp 123—125.**

EXAMINATION IMPERATIVE.

5 Court is bound to examine the accused —The provisions of this section are not permissive **Patanlal 625**; but imperative, **Ratanlal 710; 10 Bom L. R 201 = 7 Cr L. J. 194; 11 Cr. L. J 746 (Burma); U B. R. (1917) 2nd Qr 18; 1 P. R. (1918) Cr 22; 1 C. 768 (C.)** and the accused must be afforded an opportunity for the purpose of explaining any circumstances appearing in the evidence against him, **Patanlal 100 and 720** In all warrant cases there must be an examination of the accused s 263 (*g*) does not give the Magistrate any discretion whether he will examine the accused or not, **41 C. 743.** The term "*shall*" in this section makes the duty imposed on the Court to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence mandatory and not discretionary only Having regard to the object of the examination specified in the section it is clear that the omission by the Court to perform such duty in a criminal trial must be presumed to have seriously prejudiced the accused. In a criminal trial forms prescribed by statute have to be strictly observed and the Court is bound to draw no inference of waiver against accused persons, especially in the case of omission by the Court to perform a duty imposed on it by the Legislature in express terms in his interest unless the accused expressly waived it. **9 Bom L. R 218 = 5 Cr L. J 232.** Where it appeared that the Court omitted to question the prisoner under this section the trial was held invalid. The case therefore in this respect resembles **25 M. 61 (P C.)** where the Judicial Committee observed their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity And if it was enough to vitiate the trial there that the accused was tried for more than three offences which are permissible in one trial then it seems to me *a fortiori* enough to vitiate this trial that the prisoner was convicted and sent to prison without being asked for his explanation of the matters appearing against him. That omission in my judgment goes deeper than the illegality which was committed in Subramania Iyer's case For it is I think repugnant to one's natural sense of justice that a man should be convicted without being heard It is no answer to that objection to say that the appellant had an opportunity of making a statement before the committing Magistrate BATCHELOR J **17 Bom L. R. 892 = 16 Cr. L. J 765.** The law provides imperatively that before the Court of Session he shall have an opportunity of making his statement. *See* also **Weir II, 405,** where the omission to comply with this section was held to be no mere error of form though it is not in every case the omission would be so prejudicial to the accused as to require the interference of the High Court The provisions of this section apply to the case of an accused tried before a Sessions Judge even when he has been questioned on the case generally by the committing Magistrate **9 Bom. L. R. 730 = 6 Cr L. J. 74.** But in **4 L. B. R. 143 = 7 Cr L J 423,** a Magistrate convicted the accused omitting to examine them The High Court refused to set aside the conviction on a reference by the District Magistrate, as the accused who had a right of appeal had not appealed and the case were not in fact prejudiced.

Examination of the accused under s. 342 is imperative and the Court is bound to examine the accused generally whether he wishes to offer an explanation of any of the evidence which has been given against him. **26 Bom L. R. 109; 25 C. W. N 118, 119; 1 R. 659; 27 Bom L. R. 1435**

5-A Whether it is obligatory to examine the accused after cross-examination and examination of additional witnesses when the accused is once examined under s. 342 after the prosecution examination in-chief. —Section 342 is not sufficiently complied with by examining the accused after the prosecution examination in-chief but before their cross-examination In all cases where additional witnesses are called after a charge has been framed or not the obligatory examination of the accused under s. 342 must take place after all the prosecution witnesses have been examined and cross-examined and before he is called on for his defence **27 C. W. N. 743** (*[illegible]* **50 C. 223 50 C 203** (*[illegible]* **6 P. L. J 646**), **50 C. 818; 50 C. 137; 20 Bom. L. R. 215;** but *see* **45 M. L. J. 219; 23 C. W. N 1193** and **4 Lah. 61** and **45 A. 126; 43 B. 43 = 27 Bom. L. R. 1372.** *See* **46 M. 463 = 43 M. L. J. 632** which is dissented from in **50 B. 42.** *See* also **51 C. 924 and 923.** *See* also **3 Patna L. J 630; 6 Patna L. J 167, 174; 4 Patna 231;** but *see* **6 Lah. 61** (*contra*)

intended apparently rather to puzzle the accused than to elucidate the case, **6 Bom. L. R. 94.** *See* also **10 C. 140 = 13 C. L. R. 358; 13 A. 345; 5 C. W. N. 864; 4 L. B. R. 244 = 8 Cr. L. J. 62; 29 Cr. L. J. 769** and Note 1. But *see* **4 N. L. R. 163**, where it is laid down that s. 342 is not intended merely for the benefit of the accused. It is part of a system for leading the Court to discover the truth; and it constantly happens that the accused's explanation of his failure to explain, is the most incriminating circumstance against him. The result of the examination may be beneficial, but it may equally be injurious, to him. The principle involved is that contained in the judicial maxim, *judi alteram partem*; and the section does not require that the accused should be heard only on what is *prima facie* proved against him, but on every circumstance *appearing in evidence against him.* Therefore in a case of previous conviction, it is not necessary that identity of the accused with the person previously convicted should be conclusively established before the accused is questioned. The moment there is some evidence of identity, accused may be asked to explain it and may be convicted on his plea of guilty to a charge of previous conviction.

13. Accused must in his own interests give explanation of circumstances against him.—The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt that is given by the Crown. But if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence, (*Regina* v. *Frost*, **4 St. Tr. N. S. 85** *followed*) **42 C. 957.** In cases of circumstantial evidence, where facts are put forward on behalf of the prosecution which, unless explained, justify an inference of guilt being drawn against the accused, then it is both lawful and proper for the Court to consider the explanation of those facts which the accused puts forward in his defence. The principle is clearly recognised in the explanations to s. 114 of *the Evidence Act*, *per* PIGGOTT, J., in **17 Cr. L. J. 23 (A.).** The practice of refusing to answer questions in the Sessions Court and of putting in a written statement is a very pernicious practice. The refusal to answer questions may be attended with great risk to the accused, for the Court is bound to examine him, and a refusal to answer may involve an adverse inference against him, **19 C. W. N. 1043 = 16 Cr. L. J. 724.** 'An innocent man cannot well injure himself by a truthful explanation, and it would be deplorable were we to hold that it was beyond the competence of the Court when dealing with a case under Act XIV of 1908 to give an accused an opportunity of explaining the circumstances appearing against him,' **16 C R. L. J. 576 (C.); 19 C. W. N. 923 = 21 C. L. J. 396.** While it is not intended to empower Courts to cross-examine persons charged before them, they are nevertheless authorised to put any questions which appear necessary at any stage of inquiry or trial, and particularly when all the witnesses for the prosecution have been examined, for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, **5 A. 233.**

14. Accused must not be cross-examined nor driven to make incriminating statements.—The discretionary power, given by law to examine a prisoner, should be used to ascertain from him how he may explain facts in evidence appearing against him, not to drive him to make self-criminating statements, **1 M. H. C. R. 199**; also **13 A. 345; 16 W. R. 21; 25 W. R. 57; 8 W. R. (F.B.) 47; 6 C. 279 = 7 C. L. R. 385; 10 M. 121; 1884 A. W. N. 106; 6 C. L. R. 431; 30 A. 540;** nor for the inquisitorial purpose of making him confess his guilt or assist the prosecution by admitting facts which may go to criminate him, which is the only purpose that can be served by examining him before any evidence is recorded, **2 C. W. N. 702; 8 C. W. N. 22; 17 C. W. N. 354 = 14 Cr. L. J. 129.** In **6 C. 96 at p. 102 = 6 C. L. R. 521 at p. 527.** PRINSEP, J., made the following remarks on the way in which the accused had been examined :—

"We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial the law does not contemplate that he should commence a trial with a strict examination of a prisoner after the manner of the cross-examination of an adverse witness by counsel. This Court has already pointed out on more than one occasion—*see* particularly the case in **1 C. L. R. 436**—that, by exercising the power allowed by s. 250, Act X of 1872, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions, after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we observe that the Judge was engaged during the

the prosecution case and before he is called on to enter on his defence, is not an illegality, but an irregularity covered by s. 537, when the accused is not prejudiced by such omission (50 C. 223 *distinguished*), 50 C. 835.

6. When accused leaves case entirely to his pleader, Court may not question him.—If the accused has left his case entirely in the hands of his pleader, the fact should appear on the record and when this is the case, a Judge may not question the accused for the purpose of enabling him to explain any circumstance appearing in evidence against him **Weir II, 405.**

7. Where accused is exempted from personal appearance, pleader appearing on his behalf may be examined.—When the accused has been exempted under s. 205 from personal appearance in Court, the Magistrate is not bound to enforce their personal attendance in order to examine them. The provisions of this section are complied with when the pleader for the defence is examined on behalf of his client, **8 S. L. R. 206 = 14 Cr. L. J. 272.**

TIME FOR EXAMINATION.

8. When prosecution evidence discloses no criminal charge, accused not to be examined.—It is entirely within the discretion of the Magistrate himself to judge whether during the inquiry before him it is right and proper that the accused shall be examined or not and such discretion should not be exercised when the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the accused **10 W. R. 25 = 1 B. L. R. (S. N.) 16.** Where no evidence has been given implicating the accused, the Magistrate has no right under the statute to put questions to him or to invite him to make a statement. A statement therefore made by the accused under these circumstances is not admissible in evidence against him on his subsequent trial **1915 M. W. N. 413 = 16 Cr. L. J. 615,** where **27 M. 238** and *R* v *Berriman*, **6 Cox. C. C. 388** are followed.

9. Examination must not be made before any evidence has been recorded.—It is illegal to examine the accused before any evidence has been recorded or to cross-examine him with regard to the part supposed to have been taken by the other prisoners, **9 M. 224;** there is nothing for the accused to explain at that stage, **5 M. L. T. 216.** It is not merely irregular, but contrary to the spirit of this section to take the statement of the accused three weeks prior to the commencement of the magisterial inquiry proper and before a word of evidence had been heard, **1883 A. W. N 238.** It is wrong to examine the accused prematurely at a time when no evidence to connect them with the crime with the commission of which they were charged had been recorded against them, nevertheless when their statements are actually made and are freely and voluntarily given, they cannot be rejected as inadmissible in evidence on account of this irregularity of procedure, **Ratanlal 679.**

10. Examination must be made before defence commences.—Before an accused person is put on his defence, he must be examined by the Court, **Ratanlal 277.** The stage for calling upon the accused to explain the circumstances against him appearing in the evidence would be reached when after the charge is framed and the accused either declines to cross-examine the prosecution witnesses, or when the cross-examination and re-examination is finished and the evidence of remaining witnesses for the prosecution has been taken, **21 Bom. L. R. 1135.**

11. Questioning accused in middle of case to fill up gap in prosecution evidence is serious irregularity.—Where the Court of Session put certain questions in the middle of the case to the prisoners, with a view to supply the evidence for the prosecution, *held* that this was a most serious irregularity in the trial **8 B. H. C. R. Cr Ca. 81.** *See*, however **1 P. W. R. 1910; 11 Cr. L. J. 171.** The object of this section is not to fill up a gap in the evidence of the prosecution, but to enable the prisoner to explain any circumstances appearing in evidence against him. It is a misdirection to ask the jury to consider a document purporting to be proved by a statement made by the accused in his examination under this section as evidence against the accused, **26 C. 49.** To examine the accused generally on the case before the examination of the witnesses for the prosecution is completed is contrary to law and unfair to the accused, **15 Cr. L. J. 433 (A.)**

OBJECT AND SCOPE OF EXAMINATION.

12. Object of examination is to enable the accused to explain circumstances against him.—The examination of an accused person under this section is only to enable the accused to explain any circumstances appearing against him and not to supplement the case for the prosecution and to show that he is guilty, **19 M. 225; 30 A. 540.** It is highly improper to subject the accused to a very embarrassing and cruel series of questions

of the accused appears to the Court to be under 20 or over 50 years or to be material for any special reason the Magistrate should add a note expressing his own opinion as to the probable age of the accused—*Pun. Cir., No.* 8-1574 *G. of* 1894.

20. **The rules laid down in s. 364 apply to examination of the accused.**—Following the directions of s. 364, the Magistrate should record in full, not only every question put to the accused and every answer but also the whole examination should be made conformable to what the accused declares to be the truth and the Magistrate should certify that this examination of the accused contains a full account of the statement made by the accused, **4 Bom. L. R. 461.** Where, however, the Magistrate in recording the examination of the accused did not make the certificate required by s. 364, in all the pages in which the result of the examination was recorded, it was *held* that the defect was cured by the evidence of the Magistrate. In recording the evidence of the Magistrate, the Sessions Judge disallowed the questions put to the Magistrate as to the circumstances which led to the examination of the accused on the second day, but the High Court *held* the questions to be relevant and allowable, **8 C. W. N. 22.** *See* s. 533 for curing of irregularities.

21. **Written statements must not take the place of the examination.**—Though a written statement may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court, they do not take the place of evidence nor of such examination of the accused as is contemplated by this section, **42 C. 957.** 'This Court has recently animadverted on this practice of filing written statements, which is not provided for by the Code and enable statements to be put before the Court as statements of the accused when such statements are not, in fact, drawn up by the accused themselves but by their legal advisers or friends and are entirely irresponsible,' **16 Cr. L. J. 9 (C.).** There is no provision in the Code for the making of a written statement by an accused and the obvious object of the practice in many cases is to defeat the provisions of s. 342, **19 C. W. N. 1043 = 16 Cr. L. J. 724,** *see* also **53 Bom. 479.** *Quære,* whether in a trial before the Court of Session, the accused may put in a written statement of the defence. Whether such a statement can or cannot be legally put in and be accepted by the Court, it most certainly cannot be allowed to take the place of the examination of the accused which this section imperatively orders to be made, **1903 A. W. N. 1; 42 C. 957.** The only provision made by the Code for a written statement by the accused is s. 256 (2). But *see* **4 Pat. 488** (*contra*).

21-A. Where personal attendance of the accused is excused under section 205 there should be no objection to allow his pleader to make a statement under this section and his personal attendance should not be insisted upon, **4 Rang. 506.**

22. **Sub-sec. (4)—no oath to accused.**—A conviction based on the deposition of the accused on solemn affirmation is bad in law, **3 M. L. T. 138 = 7 Cr. L. J. 131.** Under ss. 118 and 133, *Indian Evidence Act,* an accomplice is a competent witness and the only limitation imposed by the general rule there stated is that involved in sub-sec. (4) to this section. If the accused and the accomplices were being tried jointly, the accomplice could not be sworn and therefore could not be a witness against his co-accused. But if they were being separately tried, this prohibition would not apply and the accomplice could be examined as a witness on oath, **1906 U. B. R. Evid. 3 = 5 Cr. L. J. 300.** *See* also **10 C. W. N. 962; 11 C. 635; 25 C. 413; 12 M. 153; 14 B. 260; 23 B. 213.** Sub-section (4) of this section applies only to persons liable to punishment. It does not apply to a person called upon to show cause against an order under s. 133, who can be examined on oath and who is liable to a prosecution under s. 193, I.P.C., if he makes a false statement, **2 C. L. J. 149.** *See* Notes 25 and 29.

23. **Accused appellant is privileged.**—A criminal appeal is a continuation of the criminal case, and, except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false statement, **11 M. 451** at **p. 453** *followed* in **19 A. 200.**

24. **Prohibition in the section not applicable to examination in another case.**—The examination of the accused person referred to in this section is an examination touching the matter on which he is being tried and that the prohibition contained in the last clause applies to that examination and does not apply to an examination in another case in which the person who is being examined is not himself an accused person. If the Magistrate's view were correct, it would follow that no man while he stood charged with a criminal offence could possibly be examined as a witness in any criminal trial whatever. This was not the intention of the Legislature, **20 A. 426.** *See* also **27 C. L. J. 91.**

whole of the first day in examining the accused. In like manner, in the second case he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law. *See also* 1882 A. W. N. 166; 14 W. R. 15; 13 A. 345; 21 C. 642 at p. 655; 5 A. 233 and Weir II, 507. It is objectionable to direct the examination towards obtaining from the accused some explanation in regard to the matter which he had previously mentioned in his confession and has already repudiated as untrue; or to endeavour to elicit information in regard to statements made by a witness, 7 C. W. N. 345. Nor can the accused be examined about a confession which is inadmissible and if he is examined about such a confession the questions and the answers to them are not admissible in evidence against the accused, 4 L. B. R. 244 = 14 Bur. L. R. 233 = 8 Cr. L. J. 62. An accused person may not be asked as to who were with him in the commission of the offence to supplement the case for the prosecution, 30 A. 540; 9 M. 224. Nor does this section allow of a Magistrate questioning the accused with regard to previous statements made by him, when such statements have not been made legal evidence are brought on the record of the inquiry, 9 M. 224. No attempt ought to be made to induce the accused to incriminate himself, 17 C. W. N. 354 = 14 Cr. L. J. 129. The fact that some of the questions put are inquisitorial and in the nature of a cross-examination, need not, however, make the whole statement inadmissible, 9 C. L. J. 83. Court has no power to cross-examine accused to test the truth of his story, 13 Cr. L. J. 941; 23 A. L. J. 659; 52 C. 522.

15. Remedying gaps in the prosecution case by the statements of the accused.—In 27 M. 238 the accused was charged with defamation but there was no evidence of the making and publication of the statement by the accused. The Magistrate remedied this defect by examining the accused under this section, *held*, that the Magistrate was clearly wrong in having tried to fill up a gap in the evidence for the prosecution and that his procedure, being more than an irregularity, vitiated the conviction: *see* also 25 C. 41; 25 C. 659; 4 L. B. R. 244 = 8 Cr. L. J. 62; 26 M. 457; 1915 M. W. N. 413 = 16 Cr. L. J. 613; 28 M. L. J. 329 = 17 M. L. T. 216 = 16 Cr. L. J. 294; 51 All 313.

A Magistrate is not entitled under s. 342 to put questions to the accused if the prosecution has not let in evidence implicating him in the offence charged and answers to questions put in contravention of the section are not admissible in evidence against the accused. 4 Lah. 55.

Questions as to previous convictions.—It is not competent to a Magistrate under this section to ask the accused, before his conviction about his previous convictions either with a view to take them into consideration for the purpose of conviction or with a view to dispense with formal evidence as to the alleged previous convictions and as to the identity of the accused in the event of conviction. 25 B. 129. But *see* 4 N. L. R. 163. Note 12 above. This section does not justify the Court in questioning the accused about previous convictions, 25 C. 659.

16. Court not justified in examining accused to know his defence.—The evidence referred to in this section is the evidence already given at the trial. A Court is not justified at all is used in examining an accused person for the purpose of ascertaining what witnesses he intends to call or what evidence they will give or what his defence is. 14 A. 242; 27 M. 238; 13 A. 345; 5 C. W. N. 854; 7 C. W. N. 345.

17. Confession before committing Magistrate to be treated as an examination.—A confession recorded by a Magistrate, who afterwards conducts the inquiry preliminary to commitment and has jurisdiction to do so, is to be treated as an examination under this section and not as a confession recorded under s. 164, notwithstanding that the prisoner may have been brought before the Magistrate before the conclusion of the Police investigation. To such a confession the provisions of s. 533 apply, 5 C. 954 (F.B.); 5 A. 233. *See* 3 C. W. N. 257. There is however, the distinction between a statement under s. 164 and one under this section. In the course of a Police investigation a Magistrate can only record under s. 164 voluntary statements made to him but he cannot examine the accused with regard to the facts of the case, 5 C. W. N. 854. As to the use in a Sessions trial of examination of an accused person before committing Magistrate, *see* s. 287.

18. When confession is retracted, Judge must ask accused to explain his having made the same.—Where the only evidence against an accused person is a retracted confession, it is a grave omission on the part of the Judge not to question the accused for the purpose of enabling him to explain his having made the confession, *M. H. C. Pro.*, 24th *April* 1885, Weir II, 507.

PROCEDURE.

19. Age of accused person to be placed on record.—In every case in which a charge is framed, the accused should, at the opening of his examination, be required to state his age, and in all cases in which the age

privilege of the accused and cannot be punished for making a false statement in the memorandum of appeal, **12 M. 351,** nor for a false statement in the revision petition, **9 A. 200.** *See* also **(1870) 2 N.-W. P. 128; 28 A. 331.** But the protection afforded to the accused limited to statements made by the accused in answer to questions which are for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him and which are put at some stage of the inquiry or trial. Where, therefore, an accused person who was under trial filed a petition voluntarily containing false allegations in a Superior Court in order to induce the Superior Court to transfer the case; *held*, that he was punishable under s. 182, I P.C., and not protected by this section, **12 O. C. 308 = 10 Cr. L. J. 509; 1 S. L. R. 124 = 8 Cr. L. J. 378.** So also it was *held* in **40 C. 433** *following* **14 W. R. 27; 23 C. 867; 5 C. W. N. 293** that a defamatory statement made in bad faith by an accused, against whom a trial is pending in a Criminal Court and contained in a petition to the District Magistrate for transfer of the case is not absolutely privileged but is punishable under s. 499, I.P.C., **11 L. B. R. 321; 15 C. 264; 27 C. 262; 38 C. 880; 32 C. 756; 40 C. 441; 36 M. 216** *considered.* *See* **6 Lah. 34 where 28 A. 331** is disapproved, and *held* that the only provision of law which confers immunity upon an accused person from criminal liability for making a false statement is that contained in sub-section (2) of section 342, but that protection is in respect of statements made by an accused in answer to questions put to him to enable the accused to explain evidence against him.

A recent ruling of the Bombay High Court is to the same effect and it is *held* that the statements made by an accused person under s. 342 of the Code or contained in written statement filed by him with the Court's permission, are not absolutely privileged as there is nothing in that section to give him an absolute privilege as regards defamatory statements made in the course of examination, **50 B. 162** (F.B.); (**17 B. 127 and 17 B. 573** *overruled* **48 C. 388** *followed*).

29. **Who is an 'accused'?**—This term means a person over whom the Magistrate or other Court is exercising jurisdiction. A person arrested by the Police as concerned in an offence and afterwards released without any order of discharge having been obtained from a Magistrate is not an accused within the meaning of this section, **16 B. 661; 23 C. 493.** A person who has been discharged, legally or not, is not an accused, **4 L. B. R. 362 = 9 Cr. L. J. 370.** But a person under examination by the Court comes under this term, **23 B. 213; 28 C. 709.** An accomplice to whom the Local Government has made a promise not to prosecute and by whom the promise has been accepted after the commencement of the trial, is not a competent witness. Such grant of pardon does not alter the position of the accomplice as an accused person and make him cease to be an accused person; nor could oath be administered to him, **9 P. R. 1906 = 4 Cr. L. J. 282.** *See contra* **21 P. R. 1904; 12 P. R. 1902.** *See* Note 20 to s. 337 as to accused illegally pardoned and *see* also Note 13 to s. 340.

30. **Inference from refusal to answer.**—*See* ill. (*h*) to s. 114 of *the Indian Evidence Act.* The Court may presume that if a man refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him. *See* also **19 C. W. N. 1043 = 16 Cr. L. J. 724.**

No influence to be used to induce disclosures.

343. Except as provided in sections 337 and 338 no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

Notes.—1. With this section should be read ss. 24, 28 and 29 of *the Evidence Act* (I of 1872). *See* Notes to s. 163. It is improper to hold out any inducement to confess, **1 W. R. 24** and it is not necessary, on the other hand, for a Magistrate to caution a prisoner before receiving his statement, **5 M. H. C. R. Appx. XI; 10 C. 775.** Also where pardon is illegally tendered, the evidence so obtained becomes irrelevant and inadmissible, **2 A. 260** and *see* Note 20 to s. 337. *See* also **1 B. 610; 10 B. 190 and 10 C. 936.**

2. Section 343 refers to the same accused person who is named and described in s. 342, **25 B. 422** and this section does not deal with the admissibility of the evidence of a co-accused who is called for the prosecution on a promise of pardon, **18 Bom. L. R. 266 = 17 Cr. L. J. 256** (SHAH, J., *dubitante*).

Power to postpone or adjourn proceedings.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

25. When can oath be administered to co-accused?—Where an accused person called as witnesses other accused persons charged with him and awaiting a separate trial for the same offence, *held*, that he was entitled to call them as witnesses, and examine them on oath 23 B 313; U. B. R. (1906) Evid. 3 = 5 Cr. L. J 300. As to examination of one of two accused in the absence of the other, *see* 6 B. 124; 7 C. 63 = 8 C. L. R. 552; 13 C. L. R. 278. An accused person cannot be examined as a witness because no oath or affirmation could be administered *to him till he is convicted or discharged* 1 B. 610; 2 A. 260; 10 B. 190; 11 P. R. 1902; even when accused pleads guilty there must be conviction, 19 B 195; 23 A. 53; 5 A 233; 20 A. 540; 13 C. W. N 352 = 10 Cr. L. J. 434; but when the witness has never been brought before a Magistrate or released on bail with conditions to appear before a Magistrate he can testify 16 B. 661; *see* also 10 C. L. R. 533 and 1897 P. R. 28. Where the prosecution called one of the accused as a witness on the understanding that if he should tell the truth he would not be prosecuted for similar offences for which he was then awaiting trial, *held* he could be affirmed, 18 Bom. L. R. 266 = 3 Bom. Cr. Ca. 171 = 17 Cr. L. J 256. *See* Note 19 to s. 337

In 3 Bom. L. R. 437, *P* and *K* were put up for trial along with seven other accused on a charge of dacoity *P* and *K* having pleaded guilty, they were at once convicted but the passing of the sentence was postponed till the conclusion of the trial of the others In the meantime they were examined as witnesses against the others *Held per* CANDY J that they were competent witnesses, for as soon as they were convicted, their trial was concluded, though they were not sentenced Their evidence was admissible, though their credit might be questionable inasmuch as they are likely to think that it would be to their advantage to tell a story favourable to the prosecution. *Held per* FULTON J that under this section no oath could be administered to them, as *trial* ends with sentence and not with conviction and therefore *P* and *K* being still under trial could not be competent witnesses.

25-A. Co-accused in a gambling case may be examined as a witness.—Section 10 of *the Bombay Gambling Act* IV of 1887 implies that the Magistrate has power to examine as witnesses persons arrested and brought before him under s. 6 (*b*). The section can apply to no other but persons so arrested. The whole procedure of the Gambling Act is a special procedure and overrides the general law of procedure enacted in s. 342. 8 S. L. R. 309 = 16 Cr. L. J. 447 where 31 B. 438 is cited with approval.

26. Sub-section (3)—Value to be attached to accused's statement.—The expression *may be taken into consideration* is not perhaps very precise or definite, but it means at all events that the statement of the accused is not to have the force of sworn evidence and a conviction solely based upon it would be bad in law 1900 A. W N. 189. *See* also 14 B. 331. In 3 L. B. R. 203 = 4 Cr L. J. 471, where a person charged with giving false evidence had admitted in his examination and his defence was that he was the person who made the statement alleged to be false, further evidence as to his identity was held unnecessary and the conviction in the absence of such evidence was held to be legal The rule of evidence that what is admitted need not be proved applies so far as the identity of the accused with the person who made the affidavit was concerned. S. 255 requires a Magistrate to take the plea of the accused *immediately* after the charge has been framed and when taking the plea facts are voluntarily admitted and there is no necessity for the prosecution to call evidence to prove such facts. Similarly, the admission of the defence having afforded sufficient proof of identity the conviction was *held* not to be illegal, merely on account of absence of evidence as to the identity of the accused with the perjurer Statements made under this section are not made extra judicially and are not necessarily governed by the sections of *the Evidence Act* which relate to the admission of confessions 15 Cr. L. J. 674 (Oudh) *See* also 27 M. 233; 25 C. 49; 28 C. 659; 13 B 339; 2 L. B R. 83; 42 B. 878.

27. *Statements of accused made in the course of examination are privileged.*—Statements of a defamatory character made by an accused person in the course of the statement which he is called to make must be considered absolutely privileged so as to make him not liable to be punished for an offence under s. 499 I P C., in respect of such statements 26 M 218 (F B), 8 M. L. T. 256 = 9 Cr. L. J. 376, *distinguishing* 15 M. 418, where it was *held* that the privilege did not extend to defamatory statements against a witness interjected during the examination of such witness by the accused who was represented by counsel but *see* 40 C. 433 and 43 C. 441 (Note).

28. Extent of immunity of accused against prosecution *for false and defamatory statements.*—It is not the intention of the Legislature that an accused person should be called upon to make a statement on oath or that he should be liable to punishment for giving false answers to questions put to him. A criminal appeal is a continuation of the criminal case, and except so far as there is a provision to the contrary the appellant has the

of this rule is somewhat relaxed as sub-sec. (4) indicates that the want of a complete judgment in writing can be cured by s. 537, **23 C. 502.** In **1892 A. W. N. 157**, where judgment had not been delivered until several days after the order of acquittal had been passed and the accused had been discharged from custody, the order of acquittal was set aside and re-trial ordered, on appeal by Government. The Madras High Court, *following* the Allahabad Rulings, set aside a conviction and ordered re-trial, where a Sessions Judge had his judgment ready only some days after pronouncing sentence of conviction, holding that the procedure adopted was in violation of the provisions of ss. 366, 367, **27 M. 237**, where **14 A. 242** is *approved. See* also Madras Case Ref. Trial I of 1909, noted in **19 M. L. J. (S.N.) at p. 9.** A Magistrate passed sentence on the accused without delivering his judgment in open Court, the judgment (one in the course of being written during the hearing of the case) being in fact not then completed. The case went on appeal to the Sessions Judge, who, dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence. *Held per* PRINSEP and TREVELYAN, JJ., that the judgment of the Magistrate was not in accordance with the law as laid down in this section; but *held* by PRINSEP and O'KINEALY, JJ. (TREVELYAN, J., *dissenting*), that the irregularity was contemplated by s. 537 and not having occasioned failure of justice, re-trial was not necessary; *per* TREVELYAN, J., the case was more than one of mere irregularity within the meaning of s. 537. The judgment having been irregularly arrived at and pronounced, there was no judgment in accordance with law, and therefore no fair trial to which every accused person is entitled; the case ought therefore to be re-tried. Judgment means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments, **21 C. 121.** *See* also **20 C. 353.** It is a material irregularity to pass a sentence before recording a judgment, but unless it has occasioned failure of justice the conviction need not be quashed, **5 S. L. R. 131 = 12 Cr. L. J. 610.** Whether a judgment delivered after sentence passed is an illegality or a mere irregularity must depend on the circumstances of each case, **13 Bom. L. R. 635 = 12 Cr. L. J. 457.** In this case the High Court refused to interfere with the judgment of the Presidency Magistrate as the accused had not been prejudiced. Where a Magistrate died immediately after pronouncing sentence, but before writing judgment, High Court declined to interfere in the matter, holding that it was for the accused either to have moved the High Court or to have exercised their right of appeal, **1 Bom. L. R. 117.** In **1 Bom. L. R. 160**, under similar circumstances, there was a petition of the accused, so the High Court reversed the conviction and ordered re-trial. *See* **45 M. 913 = 43 M. L. J. 369 (F.B.).**

12. Conviction not bad where Magistrate died without writing judgment.—A Subordinate Magistrate died after passing sentence but before recording judgment. The sentences were entered on the back of the depositions and the accused were committed to custody under warrant addressed to the jailor. *Held*, on reference to quash the proceedings, that a conviction on a trial regularly held will not be set aside merely because the Magistrate had been unavoidably prevented from recording a judgment in accordance with the requirements of s. 367. In such circumstances, the right of appeal is not taken away by the absence of a complete judgment, **Weir II, 438.** *See* Note 7.

13. Delivery of sentence and subsequent destruction of judgment does not render conviction illegal.—S. 366 only imposes the condition that the judgment should be pronounced in open Court and imposes a few other conditions but such conditions do not include the condition that the record should not have been lost or that if only a portion of the judgment (that relating to conviction and sentence only) is pronounced the conviction is illegal. In **Weir II, 711**, omission to read a portion of the judgment was *held* to be a mere irregularity covered by s. 537. So also omission to pronounce the judgment before convicting and sentencing is cured by s. 537, though it might be different if no judgment had been written, **38 M. 498.**

14. Delivery of judgment must not be delegated.—The duty of dating and signing the judgment and of delivering the same should not be delegated by the presiding officer to any other. In a case in which the Sessions Judge after holding trial in a district within his Sessions division, went back to his headquarters in another district and sent his judgment in the case to the Magistrate of the district in which the trial had taken place, to be delivered by the latter and the latter delivered it accordingly, it was *held* that the trial had never been legally complete and must be set aside, **1889 A. W. N. 181.** But in **18 M. L. J. 197 = 7 Cr. L. J. 459**, it was *held* that a judgment written by a Magistrate, but dated, signed and pronounced by his successor, was good.

III.—LANGUAGE AND CONTENTS OF JUDGMENT.

15. Judgment must be written by the Court.—The judgment must be written by the Court itself. It will not do if the judgment is written by a clerk and signed by the Court, **Ratanlal 545.** *See*, however, ss. 265 and 370. In other cases, it will not do if the judgment is written by a clerk and signed by the Judge, **14 A. 242.** The judgment must be in the hand-writing of the presiding officer; but where it was actually dictated and

discharge amounts to a judgment within the meaning of this section, and the observations of WHITE, C.J., in 22 M. 125 (F.B.) and also 1 N. L. R. 18. In 31 M. 543 it was *held* that an order of discharge is not a judgment. In 27 P. R. 1914 it was doubted whether an order made on a composition was a judgment.

5. Sections apply to appellate judgments.—*See* s. 424 and 27 C. 114 [illegible] at the head of this Chapter and Notes 29—33 below.

6. Sections do not apply when appeal summarily dismissed.—*See* s. 421 and Note 29 below. A dismissal of an appeal or an application for default of appearance of party is not a judgment, 5 N. L. R. 78 = 9 Cr. L. J. 553; 10 C. L. J. 60 = 10 Cr. L. J. 257.

II.—DELIVERY OF JUDGMENT.

7. Judgments to be delivered in open Court.—Every judgment must be delivered in open Court, 21 C. 121. This for obvious reasons is of the highest importance. When a Judge after writing his judgment but before delivering it in open Court, dies or leaves the Bench, his written judgment is not to be considered as a judgment, but merely as an opinion, 13 W. R. (Cr.) 109; 11 A. L. J. 745 = 14 Cr. L. J. 561. But where a Magistrate conducted and closed the trial in the established Court house, but could not by reason of [illegible] pronounce judgment, which he did at his private residence; *held*, that the proceedings being exceptional, could not be quashed as illegal, as no prejudice to the accused was made out, 1 Agra H. C. R. 17. Similarly in 1 Bom. L. R. 117, where the Magistrate had died after passing sentence, but had left no written judgment, the High Court declined to interfere on revision on this ground. When a Magistrate is transferred after he has written out his judgment, but before he has actually delivered it, his successor is not bound to deliver the same though he may, if he chooses, adopt it and deliver it as his own, 3 L. W. 476 = (1916) M. W. N. 372.

7-A. When judgment should not be dated and signed.—Section 367 requires the dating and signing of the judgment to be in open Court at the time of its pronouncement, 3 L. W. 478 = (1916) M. W. N. 372, but the omission to sign the judgment when it was delivered is an irregularity which could be cured by s. 537, 7 R. 370.

8. Judgment should not be delivered in the absence of accused.—Accused was charged with abetment of cheating in assisting another person to obtain Rs. 5 from complainant. He absconded after all the evidence had been taken, was convicted and sentenced in his absence. But the Magistrate re-pronounced judgment on his being re-arrested and brought before him. *Held*, that judgment should not be pronounced in the absence of the accused, Ratanlal 321. But s. 366 (2) contemplates the absence of accused up to the stage of judgment or even after that stage when the judgment is one of acquittal or of fine only, 5 S. L. R. 224 = 15 Cr. L. J. 772. In England, if the Court is satisfied that the prisoner is too ill or infirm to be brought up the judgment may be pronounced in his absence, *R. v. Constable*, 7 D. and R. 663. *Arch.* 24, p. 212.

9. No Court has inherent power to adjourn passing of sentence for indefinite period.—Judgment in criminal cases should be delivered without undue delay, as delay is not only unjust to the accused as it prevents them from appealing at once, but it is opposed to the principles of law, 5 C. P. 16. Where on conviction under Sec. 379, I. P. C., the Judge directed the accused to furnish security for six months and then to come up to receive sentence and the Judge justified his procedure on the ground that he was only deferring the pronouncing of a sentence but instead calling on the accused to furnish security, *held* that no Court has inherent power to adjourn the passing of sentence in this way for an indefinite period and the Judge did not exercise his discretion reasonably. The order cannot be treated as one of adjournment, because the Judge has as a matter directed a security to be given which is a sentence, 14 Bom. L. R. 166 = 1 Bom. C. C. 83 = 13 Cr. L. J. 321.

10. Judgment must be written and delivered before sentence is pronounced.—Judgment must always be written and delivered before sentence is pronounced. It is illegal to pass a sentence at the [illegible] of trial and to postpone the writing of the judgment to a future occasion. All cases must continue to be shown in the pending file until judgment and sentence are written and delivered, *Pun. Cir.*, p. 231.

11. Legality of conviction where judgment written after sentence.—In 10 A. 310 it was *held* that [illegible] such a sentence in the case of conviction and the direction to set the accused at liberty in the case of acquittal can only follow on the decision and cannot precede it, and inasmuch as the decision must be contained in a written judgment which is read out in open Court, and in such judgment only, it must necessarily follow that where there is no written judgment when the sentence is passed the sentence is illegal. [illegible]

The following tabular form should be annexed to judgment, *Madras G. O. No.* 918, *dated* 16*th June*, 1910:—

Serial Number.	Description of accused.						Date of					Explanation of delay.
	Name.	Father's name.	Caste.	Occupation.	Residence.	Age.	Occurrence.	Complaint.	Apprehension.	Commencement of trial.	Close of trial.	
1	2						3					4

(*ii*) *Offences must be clearly specified.*—The offence of which the accused is convicted must be specified in the judgment with the same precision as in the charge, **5 L. B. R. 21; 35 C. 718.** When an offender is convicted of two or more offences and it is competent to the Court to award more than one sentence, the Court shall in its judgment declare in respect of which offence or offences any sentences awarded is imposed, *Mad. G. O. No.* 1448, *Judicial*, *dated* 26*th October*, 1909.

(*iii*) *Finding on all charges to be given.*—A Sessions Judge should record findings, whether of conviction or acquittal, on all the charges under which prisoners are committed for trial, **13 W. R. 50.**

(*iv*) *Judgments should be signed and not stamped.*—Judicial officers shall, in all cases, take care to sign their names distinctly and legibly, *Wilkins*, 119. When the law prescribes that a proceeding should be signed by a judicial officer, it ordinarily intends that the signature should be made with a pen and not with a stamp. There are obvious reasons why judicial documents should be authenticated in such a manner that their authenticity may admit of proof, **6 M. 396,** and the signature by a Magistrate to the judgment must be appended at the time of pronouncing it in open Court, **Ratanlal 529.** In the case of all the documents which are required by law to be *signed*, the impression of a stamp bearing the officer's name is insufficient and illegal, *Wilkins*, 119.

(*v*) *Indication of power should be apparent beneath the signatures of Magistrates.*—Magistrates should indicate in ther judgments beneath their signatures the extent of their magisterial powers with which they have been invested. Omission to do so frequently impedes the exercise of the powers of revision possessed by the High Court, *M. H. C. Memo.*, 27th July, 1871. In every sentence or order made by a Criminal Court, the jurisdiction of the Judge or Magistrate making it should distinctly appear on the face of the record, *Wilkins*, 112.

(*vi*) *List of witnesses and material objects must be appended.*—There shall be appended to every judgment a list of the witnesses examined by the prosecution and for the defence and by the Court, also a list of exhibits and material objects, *R.* 39, *Madras Rules of Practice.*

(*vii*) *In trials with assessors.*—The record of opinions of the assessors should be appended to the judgment. It should also be noted of what caste or castes the assessors were. *See* Rules 245 and 255 of the *Madras Rules of Practice.* Where the Sessions Judge convicted the accused, but gave no reason for differing from the opinion of the assessors, it was held to be an irregularity which did not vitiate his finding, **6 B. H. C. R. Cr. Ca. 55.** But where an Appellate Court merely rejected an appeal without specifying the points for determination, its decision thereon and the reasons therefor, the appeal was ordered to be re-heard, **6 P. R. 1876.**

(*viii*) *Judgment must specify punishment.*—Under this section the sentence is a part of the judgment and when an accused person is convicted, it is incumbent upon the Court to pass a formal sentence of but a single day's imprisonment (or any other punishment) in order to make the record legally complete, unless it sees fit to act under s. 562, **1883 A. W. N. 219.** A sentence follows and does not precede a conviction. It is therefore illegal to antedate a sentence. It is not proper for a Magistrate to convict and sentence a person to simple imprisonment for as many days as he may have been in Police custody during the trial and to view that custody as imprisonment after conviction and release him at once, **Ratanlal 892.**

when reduced to writing signed by the Magistrate the procedure was held to be a mere irregularity curable by s. 537 4 C. L. J. 411.

16. Judgment to be in language of the Court or in English.—Under this section the judgment of a Criminal Court should be written in the language of the Court or in English. Where an Honorary Magistrate had written his judgment in *Urdu* the script used being *Persian* [illegible], this was irregular and that the judgment should have been in *Hindi* (language of the Court) or in English and the script should have been in the former case *Kaithi* (as directed by the Local Government) and *Roman* in the latter. The irregularity was, however, cured by s. 537 4 C. L. J. 232 = 4 Cr. L. J. 162.

17. Judgment must be written before passing of sentence.—*See* Note 11 above.

18. Judgment must be temperate and sober—Comment on conduct of parties and witnesses should not go beyond what is really necessary.—"A judgment is a privileged document and it is well understood by judicial officers that the immunity which they enjoy in writing judgments carries with it the duty of circumspection. Any temptation to parody or to ridicule outsiders should be restrained and comments on the character of witnesses and parties should not go beyond what is really necessary for the elucidation of the case. A humorous judgment is not necessarily a bad one. But if it is a good judgment its value does not depend on the value of its humour. It is better to disregard the humorous aspect altogether, even if the reproach of dullness was incurred in consequence," 4 Bur. L. T. 173 = 12 Cr. L. J. 634. In this case it was *held* there was no [illegible] reason to order anything to be expunged. "It cannot be too strongly insisted on that temperate and sober language should be used in judgments. It must not be forgotten that strangers attacked in judgments are not able to defend themselves. A judgment should confine itself to a consideration of the issues before the Court together with fair and legitimate comment on any errors or irregularities that may be disclosed in the course of the trial 5 Bur. L. T. 20 = 13 Cr. L. J. 253. In this case several parts of the judgment were directed to be expunged. For the purposes of judgment in a Sessions trial, the testimony of [illegible] witnesses concerned may be scrutinised and commented on in the same degree as those of other material witnesses and no further 25 W. R. 63. Remarks to the effect that the prisoner was a person of wealth and influence and had prevented truth from appearing, ought not, unless established in evidence, to find a place in a judgment, 8 W. R. 12.

19. Contents of Judgment.—Care shall be taken that the decisions of judicial officers are written on a uniform, concise and complete plan, neither too prolix, nor omitting all reference to the facts as is sometimes the case. Reference should first be concisely made to the main facts and proofs on which the accusation is founded, secondly, the deduction and reasons should follow, and then in due course will come, [illegible] the decision. When reference is made in a judgment to witnesses or accused persons judges shall not content themselves with merely mentioning their numbers on the list, but shall always [illegible]. The name of the person referred to shall always be distinctly stated *Oudh Cr. Dig.*, p. 22. [illegible] faulty, in that they hardly refer to the evidence at all and contain little more than a [illegible] of the Magistrate's convictions as to the guilt of the accused. Others again are rambling [illegible] Magistrates import into their judgments their personal knowledge of character [illegible] matters not found in the record in explanation of the probable motives or causes which may have led to an offence. A judgment should be clear, systematic and straightforward. It should [illegible] the case, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reasons which justify the finding. *C. P. Cr. Cir., Let. II* [illegible] 16 C. W. N. 32. Attention is drawn to s. 367 which lays down what every judgment shall contain [illegible] in particular to the necessity of stating clearly the points for determination in each case. *Ibid. H. C. Cr. Cir.* [illegible]

20. Judgment should contain enough particulars to enable Appellate Court to decide whether it will interfere.—A judgment should state sufficient particulars to enable a Court of Appeal to know what facts are found and how. Ratanlal 832. Where the judgment of an Appellate Court is in the nature of a [illegible] which might answer for any case it is not in accordance with this section [illegible] 424. [illegible] a judgment [illegible] is a long and elaborate one [illegible] See [illegible] a good judgment, 1 C. W. N. 159, and *see* Note [illegible] below.

21. Particulars to be given in every judgment.—[illegible] *Names of the accused to be stated.*—At the head of every [illegible] judgment [illegible] the heads of the charge, [illegible] the name of all the accused persons [illegible] always be set out together with the [illegible] they may be [illegible] by the Court in the course of the judgment or charge [illegible] *Ibid. H. C. Cr. Cir.*, p. 23.

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(*iv*) *Judgments should be signed and not stamped.*—Judicial officers shall, in all cases, take care to sign their names distinctly and legibly, *Wilkins*, 119. When the law prescribes that a proceeding should be signed by a judicial officer, it ordinarily intends that the signature should be made with a pen and not with a stamp. There are obvious reasons why judicial documents should be authenticated in such a manner that their authenticity may admit of proof, **6 M. 396,** and the signature by a Magistrate to the judgment must be appended at the time of pronouncing it in open Court, **Ratanlal 529.** In the case of all the documents which are required by law to be *signed*, the impression of a stamp bearing the officer's name is insufficient and illegal, *Wilkins*, 119.

(*v*) *Indication of power should be apparent beneath the signatures of Magistrates.*—Magistrates should indicate in ther judgments beneath their signatures the extent of their magisterial powers with which they have been invested. Omission to do so frequently impedes the exercise of the powers of revision possessed by the High Court, *M. H. C. Memo.*, 27th July, 1871. In every sentence or order made by a Criminal Court, the jurisdiction of the Judge or Magistrate making it should distinctly appear on the face of the record, *Wilkins*, 112.

(*vi*) *List of witnesses and material objects must be appended.*—There shall be appended to every judgment a list of the witnesses examined by the prosecution and for the defence and by the Court, also a list of exhibits and material objects, *R.* 39, *Madras Rules of Practice.*

(*vii*) *In trials with assessors.*—The record of opinions of the assessors should be appended to the judgment. It should also be noted of what caste or castes the assessors were. *See* Rules 245 and 255 of the *Madras Rules of Practice.* Where the Sessions Judge convicted the accused, but gave no reason for differing from the opinion of the assessors, it was held to be an irregularity which did not vitiate his finding, **6 B. H. C. R. Cr. Ca. 55.** But where an Appellate Court merely rejected an appeal without specifying the points for determination, its decision thereon and the reasons therefor, the appeal was ordered to be re-heard, **6 P. R. 1876.**

(*viii*) *Judgment must specify punishment.*—Under this section the sentence is a part of the judgment and when an accused person is convicted, it is incumbent upon the Court to pass a formal sentence of but a single day's imprisonment (or any other punishment) in order to make the record legally complete, unless it sees fit to act under s. 562, **1883 A. W. N. 219.** A sentence follows and does not precede a conviction. It is therefore illegal to antedate a sentence. It is not proper for a Magistrate to convict and sentence a person to simple imprisonment for as many days as he may have been in Police custody during the trial and to view that custody as imprisonment after conviction and release him at once, **Ratanlal 892.**

22. Judgment in particular offences.—(*i*) *Mischief.*—In every case of mischief (s. 425 I P C.) a question of legal title involved is a point for determination. It is the duty of the Criminal Court to determine whether the offender in such a case was not acting in the exercise of a *bona fide* claim of right, **2 A. 131 at p. 133.**

(*ii*) *Unlawful assembly.*—It is the duty of the Court to determine, where several alternative common objects of an unlawful assembly are alleged in the charge, to determine whether the charge is sustainable and, if so, which of the common objects is made out **25 C. 718; 28 C. 155.** On a charge under s. 143, I P C., the judgment should contain as one of the points for determination a statement as to existence of the elements constituting the unlawful assembly, **37 C. 194.**

(*iii*) *Theft.*—The judgment on a charge under s. 379 I P C., should contain as one of the points for determination, the question as to the dishonest intention and a finding on it especially when a *bona fide* claim of right is set up, **37 C. 194.**

23. Duty of the Court of limited jurisdiction to state in conviction its legal justification.—Every conviction by a Court of limited jurisdiction ought to contain a statement of its legal justification within itself. Therefore where the accused was convicted under s. 47 of Bom. Act V of 1878 (*Abkari*) for being in possession of more than one gallon of country liquor without a permit from the Collector and sentenced to pay a fine of Rs. 10 the conviction was reversed as being insufficient on its face and no other authority being cited in support of it **Ratanlal 310.**

24. Judgment must be self-contained and cannot be supported by subsequent explanation.—A Magistrate cannot supplement his judgment by his explanation to the superior Court. If there are no material findings in the judgment the defect cannot be cured by the Magistrate's explanation, **7 C. L. J. 338 = 7 Cr. L. J. 312.**

25. Personal knowledge of Magistrate may be stated in judgment.—It is not improper for a Magistrate to state in his judgment as an additional ground for believing certain evidence that it is in accord with what he had himself personally seen or heard, *M. H. C. Pro., 6th September*, 1883. But where the judgment in a criminal trial is based partly upon evidence and opinions formed in another criminal case the conviction was set aside on the ground of prejudice to the accused **11 C. W. N. 151.**

26. Reasons for not passing capital sentences to be stated, when accused convicted of offences punishable.—Subsec. (5) of s. 367 must be complied with, **8 M. L. T. 81 = 11 Cr. L. J. 491.** Judges must not shrink from doing their duty and they are bound to pass the death sentence in a case of murder when they believe the evidence, **7 W. R. 33.** The fact that the accused is a woman is no ground for not passing the death sentence, **1883 A. W. N. 131.** Even where the accused is a pregnant woman capital sentence should be passed, but the execution of the sentence shall be deferred till after delivery, **15 W. R. 65.** Where a Judge passes on conviction for murder, the alternative sentence of transportation for life, he should set forth his reasons for not passing the capital sentence, **1884 W. R. 27.** The circumstance that the body of the murdered man has not been found should not influence the Court in passing the death sentence **3 A. 383; 1882 A. W. N. 183.** But *see* **11 W. R. 32.** Where, however, the condition of the accused rendered it likely that if he were hanged, decapitation would ensue, the sentence of death was commuted to transportation for life, **2 C. L. R. 318.** In **10 M. L. T. 822 = (1911) M. W. N. 34**, the fact that the evidence was all circumstantial and the age of the accused were taken into consideration

27. Benefit of doubt as to propriety of death-sentence to be given to accused.—Where a Judge is in doubt whether a sentence of death or a sentence other than death should be passed in a capital case, the doubt like all other doubts should result in favour of the accused. It is quite erroneous and illegal, that feeling reasonable doubt as to whether death alone can be the proper penalty, the Judge should yet pass a sentence of death leaving the responsibility to the High Court of commuting it, if necessary. There is no authority in law for holding that a Sessions Judge has any right to devolve his responsibility in respect of sentence in a capital case on a higher tribunal **3 L. B. R. 111 = 3 Cr. L. J. 33**, where **1 L. B. R. 218** is *dissented from*. It is highly improper for a Sessions Judge to pass sentence of death and at the same time, in his reference to the High Court, recommend the prisoner for mercy, *M. H. C. Pro., 21st April*, 1896

28. Judgment in the alternative.—The provision in subsec. (3) applies only where the facts are ascertained but there is a doubt as to the application of the law to the proved facts and not where the doubt in the mind of the Judge is whether there was sufficient proof that the accused had committed one of two offences, *e.g.*, murder of the deceased or merely caused evidence of the murder to disappear **11 P. R. 1912.** *See* Note 8 to

s. 236, **11 P. R. 1887; 7 N.-W. P. H. C. R. 137** and **21 C. 955** *referred to.* The power to pass judgment in the alternative should not be resorted to until both the committing officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the charges; and such a finding cannot be based in a case of giving false evidence upon the statements which are not absolutely contradictory, the one or the other, nor when in one of them the accused gives only hearsay evidence. Every presumption in favour of the possible reconciliation of the statement must be made, **12 W. R. 11.** As the section allows a judgment to be given in the alternative, where it is doubtful under which of two sections or of two parts of same section, an offence falls, and alternative finding that a trespass was committed with one or other of two intents, either of which would make it criminal trespass as defined in s. 441, I.P.C., is sufficient if there is evidence to support the finding, **5 P. R. 1886.** So where the judgment did not state in express terms that the Court was in doubt as to the question under which of two sections the offence fell, as required by this section; *held*, that this was at most an irregularity and did not vitiate the judgment, **Weir II, 440.**

IV.—JUDGMENT ON APPEAL.

29. Section inapplicable when appeal summarily rejected under s. 421.—Though in rejecting an appeal under s. 421, the Appellate Court is not bound to write a judgment, **20 B. 540; 21 C. 92; 25 M. 534; 36 A. 496,** it is advisable to give reason for dismissing the appeal, in view of the order being challenged by an application for revision, **17 A. 241** (**F.B.**); **36 A. 496; 13 N. L. R. 169.** *See* Notes 10 and 11 to s. 369.

30. Unless every appellate judgment conforms to provisions of s. 367 it is not legal.—*See* s. 424 and Notes thereto. No judgment of a Court other than a High Court which purports to dispose of an appeal under s. 423 is a legal judgment unless it contains at least (1) the point or points for determination raised by the memorandum of appeal, (2) the decisions thereon and (3) the reasons for the decisions. The Legislature appears to regard two rules as cardinal points in ensuring public confidence in the tribunals of justice, namely: (1) that the Judges should understand and the parties before them should have the assurance that they do understand what questions are submitted for their decision and (2) that the Judges should lay open to criticism the reasons which impel them to their conclusions. A judgment as the following: "I have considered the evidence in this case and I agree with the Magistrate in his conclusions and in the reasons given for them, and in my opinion the sentence which he passed was a proper sentence," is not a proper judgment. The fallacy in **19 A. 506** lies in the assumption that, in a criminal appeal the matter before the Appellate Court is precisely, and only, the matter which was before the first Court. This is obviously not the case. The first Court had to try the accused for the offence charged, and both parties are entitled to a judgment which shows *on the face of it* that the 'case' of both parties has been judicially considered and weighed one against the other prior to arrival at a decision The Appellate Court has to try, not the accused, but the appeal. In every appeal, at least two points are raised which can only be raised for decision in the Appellate Court, namely: (1) is any objection raised in the memorandum of appeal a valid objection and if not, (2) is there any ground apparent on the record for interference in appeal. The judgment abovementioned does not comply with the law and ought not to be accepted as valid merely because Judges can be trusted to act honourably. The judgment of EDGE, C.J., in **19 A. 506** *dissented from*, **8 N. L. R. 84 = 13 Cr. L. J. 559.** *See* **10 A. L. J. 435 = 13 Cr. L. J. 859; (1913) U. B. R. 2nd Qr. 169 = 14 Cr. L. J. 570; 37 C. 194.** Having regard, however, to the provisions of s. 537, it does not follow that because the form of judgment does not exactly comply with all the requirements of this section, it is not a valid judgment and the conviction must be set aside. It is sufficient if the Judge in appeal has appreciated the points which the prosecution had to establish and expressed opinion thereon, **20 C. 353** and **19 A. 506 (F.B.).** In **36 C. 158,** a conviction for rioting was not set aside even though there was no express finding as to the common object, as the common object was set out in the charge and there was no question about it and the accused was not prejudiced, **22 C. 276** and **33 C. 295** *distinguished.* *See* **38 C. 384** for a slight difference in the common object charged and found, **24 Al. J. R. 318.**

Effect of s. 537.—S. 537 (*a*) deals with omission or irregularity in a judgment and it cannot be invoked in a case of the absence of any judgment. Where the only order made was—the appeal is dismissed under s. 423, Cr. P. C., *held* the order could not be sustained, **17 Bom. L. R. 1085 = 16 Cr. L. J. 832.** The provisions of s. 367 are mandatory. *See* **8 N. L. R. 84 = 13 Cr. L. J. 559.**

31. Case of several accused—Appellate judgment must be independent and not supplementary to judgment of first Court.—An Appellate judgment must be quite independent and stand by itself. It ought not to be read in connection with or as supplementary to the judgment of the Court of First Instance. The

22. Judgment in particular offences.—(i) *Mischief*—In every case of mischief (s. 425 I P C.) a question of legal title involved is a point for determination. It is the duty of the Criminal Court to determine whether the offender in such a case was not acting in the exercise of a *bona fide* claim of right, 2 A. 101 at p. 103.

(ii) *Unlawful assembly*—It is the duty of the Court to determine, where several alternative common objects of an unlawful assembly are alleged in the charge, to determine, whether the charge is sustainable and, if so, which of the common objects is made out 25 C. 718; 28 C. 155. On a charge under s. 143 I P C., the judgment should contain as one of the points for determination a statement as to existence of the elements constituting the unlawful assembly, 27 C. 194.

(iii) *Theft*—The judgment on a charge under s. 379, I P C., should contain as one of the points for determination the question as to the dishonest intention and a finding on it especially when a *bona fide* claim of right is set up, 27 C. 194.

23. Duty of the Court of limited jurisdiction to state in conviction its legal justification.—Every conviction by a Court of limited jurisdiction ought to contain a statement of its legal justification within itself. Therefore where the accused was convicted under s. 47 of Bom. Act V of 1878 (*Abkari*) for being in possession of more than one gallon of country liquor without a permit from the Collector and sentenced to pay a fine of Rs. 10 the conviction was reversed as being insufficient on its face and no other authority being cited in support of it Ratanlal 310.

24. *Judgment must be self-contained and cannot be supported by subsequent explanation.*—A Magistrate cannot supplement his judgment by his explanation to the superior Court. If there are no material findings in the judgment, the defect cannot be cured by the Magistrate's explanation, 7 C. L. J. 333 = 7 Cr. L. J. 312.

25. Personal knowledge of Magistrate may be stated in judgment.—It is not improper for a Magistrate to state in his judgment as an additional ground for believing certain evidence that it is in accord with what he had himself personally seen or heard, *M H C Pro, 6th September*, 1883. But where the judgment in a criminal trial is based partly upon evidence and opinions formed in another criminal case the conviction was set aside on the ground of prejudice to the accused, 11 C. W. N. 151.

26. Reasons for not passing capital sentences to be stated, when accused convicted of offences punishable.—Sub-sec. (5) of s. 367 must be complied with, 8 M. L. T. 81 = 11 Cr. L. J. 431. Judges must not shrink from doing their duty and they are bound to pass the death sentence in a case of murder when they believe the evidence, 7 W. R. 32. The fact that the accused is a woman is no ground for not passing the death sentence, 1883 A. W. N. 136. Even where the accused is a pregnant woman capital sentence should be passed, but the execution of the sentence shall be deferred till after delivery, 15 W. R. 68. Where a Judge passes on conviction for murder, the alternative sentence of transportation for life, he should set forth his reasons for not passing the capital sentence, 1884 W. R. 27. The circumstance that the body of the murdered man has not been found should not influence the Court in passing the death sentence, 2 A. 253; 1882 A. W. N. 163. But see 11 W. R. 37. Where, however, the condition of the accused rendered it likely that if he were hanged, decapitation would ensue, the sentence of death was commuted to transportation for life, 2 C. L. R. 213. In 16 M. L. T. 533 = (1915) M. W. N. 24, *the fact that the evidence was all circumstantial and the age of the accused were taken into* consideration.

27. Benefit of doubt as to propriety of death—sentence to be given to accused.—Where a Judge is in doubt whether a sentence of death or a sentence other than death should be passed in a capital case, the doubt like all other doubts should result in favour of the accused. It is quite erroneous and illegal, that feeling reasonable doubt as to whether death alone can be the proper penalty, the Judge should yet pass a sentence of death leaving the responsibility to the High Court of commuting it, if necessary. There is no authority in law for holding that a Sessions Judge has any right to devolve his responsibility in the matter of sentence in a capital case on a higher tribunal 2 L. B. R. 111 = 3 Cr. L. J. 23, where 1 L. B. R. 218 is *dissented from*. It is highly improper for a Sessions Judge to pass sentence of death and, at the same time in his reference to the High Court recommend the prisoner for mercy, *M H C Pro*, 24th *April* 1866.

28. Judgment in the alternative.—The provision in sub-sec. (3) applies only where the facts are established but there is a doubt as to the application of the law to the proved facts and not where the doubt in the mind of the Judge is whether there was sufficient proof that the accused had committed one of two offences, e.g., murder of the deceased or merely caused evidence of the murder to disappear 11 P. R. 1913. *See* 3 A. 619

V.—RECORD OF CHARGE TO THE JURY.

(*See* s. 297 and Notes under Heading I thereto.)

34. **Charge to the jury need not be written before being delivered.**—It is not necessary that the direction to the jury should be reduced to writing before delivery, but it is essential that the "heads of the charge" placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly whether the case was fairly and properly placed before the jury, *Wilkins*, 116; **34 C. 698; 36 C. 281.**

35. **Charge must be written out as soon as possible after the delivery of the charge.**—In a case the verdict was delivered on the 29th May, and the sentence was passed on the 5th June, but the charge to the jury was not written out until the 29th June. On appeal the High Court remarked though there was nothing in the section as to when the charge must be written as in the case of a judgment, it was very unsatisfactory that the charge was not written out until nearly three weeks after the sentence. "We are strongly of opinion that in these cases such charges ought to be written out as soon as possible after the charge to the jury has been actually delivered, and when the facts of the case are fresh in the mind of the Judge," **36 C. 281.**

36. **Reference to heads of charge not sufficient when jury become assessors.**—When an accused person is charged at the same trial with several offences some of which are, and some are not, triable by jury, and with respect to the heads of charge on which the Sessions Judge convicts, the jury become assessors, it is the duty of the Judge to pronounce a judgment containing the particulars specified in s. 367. A reference to the heads of the charge to the jury is not a sufficient compliance with the requirements of the section, **Ratanlal 426.**

37. **What "the heads of the charge to the jury" should contain?**—These words must be construed reasonably, and must be held to include such statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury, or whether there has been any misdirection in the charge, **23 W. R. 32**; and must represent with absolute accuracy the substance of the charge, **36 C. 281** *referring to Circular Orders of the Cal. H. C. Ch. I., Ord.* 59. Although a Judge is not bound to record a judgment, yet he should give sufficient indication in his record of the heads of the charge that he has complied with the law so as to enable the Appellate Court to determine whether or not he has acted in accordance with this section, **25 C. 736.** In a trial by jury before a Sessions Judge, the record made by the Judge of the heads of his charge to the jury under the provisions of this section should include such a statement as will enable an Appellate Court to decide whether the evidence was properly laid before the jury, or whether there has been any misdirection in the charge, **1903 A. W. N. 232; 39 A. 348; 4 Pat. 626** *following* **3 Pat. L. J. 655** and **1 Pat. L. J. 317.** *See* **30 C. W. N. 693.**

VI.—EXPUNGING REMARKS FROM JUDGMENT.

38. **Judge himself may expunge remarks.**—It is open to a Judge to reconsider and expunge damaging observations regarding a witness in a criminal case who had at the trial no chance of defending himself. This does not amount to the reviewing of a criminal judgment as there is no question of re-considering the guilt of the accused, **2 P. W. R. 1910 = 11 Cr. L. J. 178.**

39. **Power of High Court to expunge improper remarks from judgment of Subordinate Court.**—*G. S.* and *G. C.* were prosecuted under ss. 181 and 199, I.P.C., for making a false statement on oath, the alleged false statement being that *G. C.* was 21 years old and eldest son of his father. The Magistrate discharging the accused recorded his opinion that both the accused had deliberately perjured themselves. Only one witness was examined for the prosecution who gave no evidence tending to show whether the statement was false or true. The accused asserted the truth of their statement, but no evidence was adduced for the defence also; *held, per* CLARKE, C. J. and CHATTERJEE, J., that under the circumstances, it was obviously most improper for the Magistrate to express any opinion that the accused had deliberately perjured themselves and the words "I am of opinion that both the accused have deliberately perjured themselves" were ordered to be expunged from, the judgment, *Punj. Gazette*, *23rd November*, 1901. *See* also **22 P. W. R. 1908 = 157 P. L. R. 1908 = 8 Cr. L. J. 462.** An application to expunge several paragraphs from the appellate judgment in the *Kodar Case* was made to the Madras High Court by the Public Prosecutor, but the Court merely enhanced the sentence expressing its disapproval of the views of the Sessions Judge, *M. H. C. Cr. Rev. Case* 535 *of* 1907. In **5 Bur. L. T. 20 = 13 Cr. L. J. 259**; the High Court directed several parts of the judgment to be expunged. *See* also **4 Bur. L. T. 173 = 12 Cr. L. J. 464.** In **15 Cr. L. J. 420 (Oudh)** the High Court directed the expunging from

judgment of an Appellate Court dealing with the case of several accused in a joint trial must show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as may be necessary to show that the Appellate Court has devoted judicial attention to the case of each accused. **33 C. 133; 37 C. 91; 15 Cr. L. J. 455. (M.)**

32. Instances of informal and defective appellate judgments.—Where an additional Sessions Judge, after admitting an appeal without dismissing it under s. 421, disposed of it in these terms—"No one appears to argue the appeal. I have read the record myself and I think the conviction is right, appeal dismissed," it was *held* this order did not comply with the provisions of this section and that the Appellate Court ought to have written a judgment even if no one appeared for the accused. **11 C. W. N. 155.** Even if the counsel for the appellant does not refer to the defence evidence it is the duty of the Appellate Court to look into that evidence and after dealing with it come to its own decision, **40 C. 876**, and *see* Note 11 under s. 367. The Appellate Court in finally deciding the appeal should record its reasons for confirming, reversing or modifying the sentences or orders of Lower Courts **5 M. H. C. R. Appx. XII.** Although as a general rule it is not incumbent on an Appellate Court to record its reasons in full when confirming a decision yet in the circumstances of a case anything peculiar should be noted **8 B. H. C. R. Cr. Ca. 101;** and where no facts were stated and no reasons given in the judgment for the conclusion arrived at on appeal by a Sessions Judge the appeal was ordered to be re-heard **7 C. W. N. 30; 9 C. W. N. 21.** Similarly where a Sessions Judge after hearing an appeal gave the following judgment: "It is urged that the evidence is quite untrustworthy and that the decision should be reversed. The depositions have been gone through and commented on at considerable length. The Court finds no ground for interference. The application is dismissed." It was *held* that this was not a sufficient compliance with this section and s. 424 of the Code and that the case should be re-tried **11 C. 455** [illegible] *ed* in **13 C. 110.** Similarly, when the judgment contained inconsistent findings of guilt [illegible] it was not possible to decide which set of findings was correct without going through the whole evidence the appeal was directed to be re-heard **13 Cr. L. J. 525 (C.)** Again when on appeal the Sessions Judge gave the following judgment: "After reading the evidence and hearing the learned counsel for the appellant and the learned Government pleader, I am convinced that the Deputy Magistrate has decided the case rightly. The appeal is dismissed." *Held* that the judgment was not in accordance with the law within the meaning of this section and s. 424. **23 C. 430.** But a Magistrate is not bound to give his opinion as to the character of the evidence in great detail, much less the Judge in confirming the sentence passed by the Magistrate, **1884 W. R. Sup. Vol. Cr. 8; 19 A. 508; 20 C. 353.** The judgment of an Appellate Court must comply with the provisions of s. 367. If it does not consider the evidence of the defence nor even allude to it, it is defective **7 M. L. T. 132 = 11 Cr. L. J. 211; 15 C. W. N. 157; 13 M. L. T. 333 = (1912) M. W. N. 831 = 13 Cr. L. J. 712.** So an Appellate judgment which merely states "I have heard the arguments and have perused the records. The conviction is in my opinion thoroughly justifiable on the evidence on record" is defective, **13 C. W. N. 171.** *See also* **11 P. R. 1917; 1899 A. W. N. 251; 22 C. 241; 15 B. 11; 31 P. R. 1958; 8 A. 516; 17 Bom. L. R. 1935 = 15 Cr. L. J. 853** and *see* Notes under s. 424.

33. Even order of acquittal may be set aside if judgment defective.—In **5 C. L. J. 453 = 5 Cr. L. J. 382** it was *held* that the High Court should not interfere with an order of acquittal unless there has been a miscarriage of justice. Where, however, an appellate judgment of acquittal was so meagre that it was impossible to form an opinion as to the merits of the case or to say whether there has been a miscarriage of justice or not the High Court on the application of the complainant set aside the order of acquittal and directed the appeal to be re-heard. *See also* **7 C. W. N. 33, 13 Cr. L. J. (1912); 23 Cal. 871** and *see* next Note.

33-A. Appellate Court not to remand for insufficiency of original judgment.—The orders of High Courts directing [illegible] hearing by the insufficiency of judgments being passed [illegible] it is not to be supposed that an Appellate Court is competent to remand a case because the Court [illegible] to record a proper judgment [illegible] **33 C. 1563.** [illegible] that a judgment is not a proper judgment [illegible] (s. 537) [illegible] the Appellate Court [illegible] with no decision was given or reasons stated. The [illegible] that the appeal [illegible] that it was necessary [illegible] before the Appellate Court, nor that the [illegible] of the Appellate Court [illegible] more than [illegible] the arguments [illegible] at the hearing of an appeal **31 C. 131 at p. 135.** *See* however Notes 30 and 37.

Note.—Referring to the amendment of this section, the Select Committee say—

"The proposal to repeal the words 'other than a High Court' was intended to remove the possibility of reading s. 369 as if it gave High Courts unlimited powers of altering or reviewing their judgments. But there are cases other than those referred to in ss. 395 and 484 in which a review of judgment is possible. We would refer to s. 484 and also to clause 26 of the Letters Patent of the Presidency High Courts. The Indian Legislature has power to amend the Letters Patent of the High Courts, and the amendment introduced by clause 27 might be interpreted as an intention to amend the Letters Patent in this respect. We have, therefore, re-drafted the amendment so as to provide that no Court shall alter or review its judgment save as provided by or under any law for the time being in force or, in the case of a High Court, in its Letters Patent."

Notes.—1. Undelivered judgment is inoperative and may be changed.—A Bench of Magistrates after writing a judgment convicting and sentencing the accused but before delivering the same changed their mind and referred the case under s. 349. On its being contended that they could not refer after having written out the judgment; *held*, as the judgment though signed was never pronounced, it was inoperative as a judgment and must be merely taken as an expression of opinion, **11 A. L. J. 745 = 14 Cr. L. J. 562.**

2. Section must be read subject to s. 437.—Where the District Magistrate who had discharged the accused under s. 259, owing to the absence of the complainant, revised the case on an application by the complainant and made over the inquiry to another Magistrate. *Held*, on the reference of the Sessions Judge that this section was no bar to the District Magistrate making further inquiry into a case dismissed by himself, **28 C. 102.** But when a Magistrate has already dealt with a case in revision and decided that there was no cause for interference he cannot subsequently under s. 437 direct further inquiry. Such an order would be one reviewing the earlier order and he is prohibited by s. 369, **5 Bur. L. T. 37 = 13 Cr. L. J. 301.** *See* Notes to s. 437.

3. Section applicable to final order in miscellaneous proceedings.—(*i*) *Sanction.—See* Notes under Heading XXV at pp. 543-544. A Magistrate cannot grant a sanction having once refused it, **10 M. L. T. 389 = (1911) 2 M. W. N. 431 = 12 Cr. L. J. 556; 40 C. 423.**

(*ii*) *Order under Chap. XXI.—See* Notes under Heading XVII at pp. 305-306. A Magistrate having once passed an order under s. 146 cannot cancel the order and pass an order under s. 147 in lieu thereof, **16 O. C. 192 = 14 Cr. L. J. 605; 35 C. 350** *followed.*

(*iii*) *Order directing delivery of property.*—The same considerations which prevent Subordinate Courts from altering their judgments on review, hold good in respect of final orders passed by them and which are of the nature of a judgment and this rule was in **22 B. 949** at **p. 959** applied to an order refusing to send to a foreign State, property seized in execution of a search warrant, which was reviewed by the Magistrate and withdrawn. But *see* **28 C. 652** at **p. 660 (F.B.)** and **29 C. 726 (F.B.)**.

(*iv*) The section applies equally to final orders under s. 488, **21 C. W. N. 344.**

4. Where judgment has been signed it cannot be altered.—After signing and pronouncing judgment in open Court, a Magistrate on the same day enhanced imprisonment by one day at the request of the accused in order to make his order appealable. *Held*, that although the Magistrate acted with the best of motives, yet nevertheless the alteration of the sentence was illegal, **1883 A. W. N. 16.** No Magistrate can add to or alter the proceedings or judgment in any case after they are signed and published. It is especially irregular when made in the absence of the accused and without notice to him, **10 C. W. N. 1062 = 4 C. L. J. 415 = 4 Cr. L. J. 210; 12 Bom. L. R. 521 = 11 Cr. L. J. 486.** *See* also **12 Cr. L. J. 473 (Bur.).**

5. Sessions Judge not competent to alter judgment, once signed.—A Sessions Judge has no power to alter or set aside a conviction and sentence once made and signed by him, **28 W. R. 49; 23 B. 50.** On the 27th August, 1895, a Sessions Judge sentenced the accused to three years' rigorous imprisonment. On the 29th *idem* he directed that the sentence should run from the 26th June, as the prisoner was on that day convicted and sentenced by the Magistrate and thereafter in appeal conviction and sentence being set aside, re-trial resulted in his committal to the Sessions, where he was convicted and sentenced as above. *Held*, that under s. 367 the sentence is part of the judgment, and the express words of this section forbid the Sessions Judge to alter it; the altering order dated the 29th August was a nullity, **Ratanlal 804.** Where the statement of the points for determination and the reasons for decision were not prepared until three weeks after the pronouncement of the judgment in open Court, *held* that the provisions of ss. 367 and 369 were not complied with and that the conviction and sentence must be set aside, **8 Pat. 904.** Where a Judge added a note to his judgment

judgment of the Lower Court remarks against the accused's counsel to the effect that a suggestion was a daring attempt to mislead the Court.

VII.—MISCELLANEOUS

40. Particulars to be endorsed on the copy of judgment.—In order to aid the Appellate Courts in determining whether appeals are time-barred by limitation, every Criminal Court subordinate to High Court shall cause to be endorsed the following particulars on every copy of a judgment, order or charge to a jury furnished under the provisions of s. 371 or s. 548, Cr. Pro. Code:—(1) The date on which the copy was applied for, (2) the date on which it was ready for delivery, and (3) the date on which it was delivered. To prevent unauthorised alterations being made the date should be written in letters in addition to figures, and each endorsement should be signed by some responsible officer of the Court on the date to which it refers. *Bom. H. C. Cr. Cir., p. 72. Wilkins 138.*

41. Copies of conviction and sentences of persons in the Military Department.—When any person serving under the Government of Bombay in the Military Department is convicted in a Criminal Court, that Court shall inform the officer commanding the regiment or corps to which the convict belongs. *Bom. H. C. Cr. Cir., p. 58; see also Pun. Cir., p. 374. Wilkins 139.*

42. Copies of convictions and sentences of military pensioners.—When a military pensioner is convicted and sentenced to imprisonment in a Criminal Court, the facts of the case should be reported without delay to the Pension Paymaster of the Circle to which the pensioner belongs. *Bom. H. C. Cr. Cir., p. 73; see also Pun. Cir., p. 325.*

43. Immediate discharge of prisoner on acquittal.—A prisoner entitled to be discharged from custody immediately on the judgment of acquittal being pronounced when there is no other charge pending against him and his further detention is illegal. 5 M. H. C. R. Appx. 11.

44. Distribution of copies of judgment of Court of Sessions.—Under the Madras Rules every Court of Session must print all its Sessions judgments and distribute copies to the District Magistrate, all [illegible] Magistrates, the Inspector-General of Police, the Superintendent of Police, High Court, accused, [illegible] Local Police Prosecutor and to the Superintendent of Jail, Chemical Examiner and Inspector-General of Registration where they are concerned.

45. European soldiers not to be sentenced to rigorous imprisonment for petty offences.— The Lieutenant Governor would be obliged if the Judges of the Chief Court would point out to Magistrates that a sentence of rigorous imprisonment or hard labour when passed upon a soldier in Her Majesty's Service involves his discharge under military regulations, and that consequently, though unconsciously, they may in passing such a sentence give a far higher punishment than they in any way intend. This point the Lieutenant Governor thinks should be borne in mind by Magistrates when trying [illegible] for petty offences.—*Extract from letter No. 3365, dated 30th October 18[illegible], from Secretary to Government, Punjab, to Registrar, Chief Court, Punjab.*

Why should not the above rule be extended to all Government servants like Village Munsifs, Kurnams, Policemen, etc.?

Sentence of death.

368. (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Sentence of transportation.

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

Notes.—1. Form of warrant of execution of sentence of death.—See Sch. V, Form No. 32.

2. No sentence of transportation shall specify the place, etc.—Under the *Prisoners* [illegible] s. 32, printed in Appendix, in cases in which the sentence passed is one of transportation [illegible] the judgment must be preserved until a report is received of the convict's death or release.—*M. H. C. Letter 14th January* 1882.

Court not to alter judgment.

369. ** Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

* The words [illegible] were substituted for the words "no Court other than a High Court" by Act XX [illegible]

10-B. An order under s. 204 is not a judgment within the meaning of s. 369.—On a complaint being made, the Magistrate ordered issue of process under s. 204. Subsequently on that date a cross-complaint being made, the Magistrate rescinded the order and sent both the cases to a Subordinate Magistrate for local inquiry and report. *Held*, that the order passed by the Magistrate under s. 204 was not a judgment under s. 369 of the Code. There is nothing in the Code which forbids a Magistrate to reconsider an order of this kind on sufficient grounds, **27 C. W. N. 651.**

11. Dismissal of appeal for non-appearance of pleader may be set aside.—In **7 M. H. C. R. Appx.** XXIX it was held, a District Magistrate could re-hear an appeal rejected for non-appearance of appellant's pleader when sufficient cause was shown for such non-appearance. *See* also **5 N. L. R. 76 = 9 Cr. L. J. 553.** But this view has not been accepted in Bombay, where even a summary dismissal under s. 421 was held not open to review, **4 B. 101; 19 B. 732.** Anyhow an Appellate Criminal Court cannot dismiss an appeal for mere default of appearance. It is bound to go into the case, even if the accused is not present in person or by pleader, **5 N. L. R. 76 = 9 Cr. L. J. 553.**

But in **46 M. 382** it is *held*, that it is the duty of the Court to go into the matter and to dispose of an appeal on the merits. When a criminal appeal or revision petition is dismissed for default of appearance, there is no decision on the merits and no proper disposal of the case and therefore the Court may re-hear it. In such a case the order of dismissal for default of appearance is no judgment at all. The order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him. (In *re*: *Ranga Rao*, **(1912) 23 M. L. J. 371** *doubted.*)

11-A. Where an accused was charged under s. 379, I.P.C., and also under ss. 75 and 379, I.P.C., and at the trial the Sessions Judge tried the accused on the first charge, alone and convicted and sentenced him and then inquired into the second charge, *viz.*, as to previous convictions and then sentenced on that charge; *held*, the subsequent proceedings were not valid as they amounted to a review which is not allowed by this section, **20 Bom. L. R. 87 = 42 B. 202.**

POWER OF HIGH COURT TO ALTER ITS JUDGMENT.

(*See* Note 7 to s. 439.)

12. High Court has no power to alter or review its judgment.—As soon as the judgment is pronounced and signed by the Judge, the High Court is *functus officio*, **14 C. 42; 7 A. 672; 24 A. L. J. 61 = 17 Cr. L. J. 47; 1 P. R. 1909 = 9 Cr. L. J. 306; 4 P. R. 1909 = 9 Cr. L. J. 378.** *See*, however, s. 434, **8 C. 63.** There is no inherent power to revise a judgment once pronounced—*Per* SUBRAHMANIA AYYER, J., in **29 M. 126 (F.B.); 23 M. L. J. 371 = 12 M. L. T. 350 = 13 Cr. L. J. 710.** The words '*other than a High Court*' do not give to a Division Bench of the High Court power to review its judgment in a criminal appeal. The words are to be accounted for by the power of review given to the High Court under s. 434, on points specially reserved by the Judge presiding at the High Court Sessions, **Ratanlal 791; 1 P. R. 1909 = 9 Cr. L. J. 306; 46 C. 60.** It should be noted that s. 369 as amended makes it clear that even the High Court have no unlimited powers of altering or reviewing their judgment save as provided by their Letters Patent.

13. Judgment or order not complete until signed and sealed.—A judgment of the Allahabad High Court was held not complete until it was sealed in accordance with Rule 83 of Rules of 1898, and that up to that time it may be altered by the Judge or Judges concerned therewith, without any formal procedure by way of review of judgment, **21 A. 177** *followed* in **27 A. 92,** where it was *held*, that the High Court is not precluded from entertaining an application for revision merely because an appeal petition from the same conviction has been previously dismissed on the ground that no appeal lay, coupled with the remark to the effect that there appeared no ground for taking up the case in revision. These two rulings were recently *followed* in **14 A. L. J. 61 = 17 Cr. L. J. 47.** An application to re-hear must be disposed of by the Judge who originally heard the case. *See* also **10 C. L. J. 80 = 10 Cr. L. J. 287.** It is competent to the Judges of the High Court to review a judgment before it is signed, **33 C. 828.** Where an application to the High Court was dismissed for non-appearance of the vakil for the accused and without any hearing on the merits, and an application was made before the order had been fair-copied and signed and sealed and communicated to the Court below, the application was ordered to be restored, **7 C. W. N. 7.**

14. Dismissal of revision application for non-appearance of pleader.—The High Court has no power under this section to review an order dismissing an application for revision made by an accused person, and

throwing doubt on the conclusion at which he had arrived on the evidence STUART, C.J. described the proceedings as most unwarrantable, 2 A. 23. But in 3 M. 48, where a Sessions Judge on appeal annulled the conviction by a Magistrate but omitted at the time to order a retrial, it was *held* that he was not precluded from passing such an order subsequently. A Judge may also expunge improper remarks from his judgment, 2 P. W. R. 1910 = 11 Cr. L. J. 178, as there is no question of reconsidering the guilt of the accused.

6. Even when judgment has been obtained by fraud or trick, Court cannot alter judgment.—The accused obtained his acquittal under s. 217 by preventing the complainant from appearing when the case was called on by wrongfully arresting and detaining him on a false charge; though the order was obtained by a fraud on the Court, the Code does not permit the Court which made the order to vacate it on proof of fraud. There is no provision resembling Order IX, r. 4 of the *Civil Procedure Code* by which a case can be restored to file by the Court which dismissed it, 33 M. 1025. The only course is to move the Local Government to file an appeal.

7. Judgment final, even though based on erroneous view as to limitations.—A Sessions Judge after receiving a criminal appeal recorded a written order of rejection on the ground that it was barred by limitation but on a later representation by the prisoner admitted the appeal and at the hearing acquitted him. *Held* that the order of acquittal was made without jurisdiction, the previous order rejecting the appeal being final and not open to review by the Sessions Judge, 10 B. 731. *See* Note 9 below.

8. Not open to Judge to differ from jury, after accepting verdict.—After accepting the verdict of the jury, it is no longer open to the Sessions Judge to change his mind and refer the case to the High Court under s. 307. The only course open to him is to refer the case to the Local Government, 4 C. W. N. 652.

9. Proper course when mistake made.—(i) *Magistrates.*—A judgment cannot be reviewed. The proper course is to apply to the High Court under s. 438 (*Vide H. C. Pro.* 15th November 1873), through the Sessions Judge, 1 Bur. S. R. 354. Where a Magistrate erroneously dismisses an appeal as out of time, he cannot subsequently readmit it on his file on the discovery of his mistake, but the case may be referred to the High Court for revision, 6 Bom. L. R. 350. On finding that he has passed an illegal sentence a Magistrate may, if the prisoner is suffering prejudice, direct the Jailor to suspend the execution and merely keep the prisoner in detention, which should in no case be allowed to exceed the term of imprisonment awarded, while the case is referred to the High Court, Ratanlal 137. (ii) *Sessions Judge.*—Where a Sessions Judge discovers he has made a mistake, he cannot himself alter the sentence but must refer the case to the High Court, 23 W. R. 61; 22 B. 949—955. *See* also Note 8.

10. Does section apply to orders of dismissal and discharge?—(i) *Cases under s. 203.*—See Notes 26 to 30 at pp. 555-557. *See* Note 1 to s. 204. An order of dismissal under s. 203 is not a judgment within the meaning of this section. *Per* WHITE, C.J. [illegible] 27 M. 125 (F.B.). But in 4 C. W. N. 35 it was *held* that where a Presidency Magistrate orders the dismissal of a case, it is not open to him to revive the proceedings. It has been *held* that an order of a Magistrate dismissing a case for default of appearance of the complainant is not a judgment, but when after examining the complainant and after taking evidence [illegible] evidence may be, the Magistrate exercises his judgment upon the merits of the case and makes an order of discharge, it is a judgment which under this section cannot be reviewed or altered by himself.—*Per* GHOSE, J. in his dissenting judgment, 25 C. 632 (F.B.) at p. 654—665. *See* also L. L. R. 1923 Rang. 235, where it was held that a dismissal for default of appearance is not a judgment as contemplated by this section.

(ii) *Cases under s. 253.*—*See* Note 18 at p. 719. An order of discharge under s. 253 (1) is not a judgment, as it is not a final order in a trial terminating either in the conviction or acquittal of the accused, 21 M. 583; 9 Bom. L. R. 250. Order of discharge passed by a Magistrate under s. 253 when the complainant has withdrawn from the complaint is not a judgment, 27 C. 718 (F.B.).

(iii) *Cases under s. 259.*—*See* Note 10 at p. 737, 25 C. 633 F.B.

(iv) *Dismissal of an appeal.*—An order dismissing an appeal for non-appearance of an appellant is not a judgment, 8 N. L. R. 78 = 9 Cr. L. J. 333; 10 C. L. J. 83 = 15 Cr. L. J. 217.

10 A. An order for costs under s. 148, subsequent to the final order under s. 112.—Under s. 148 (3) of the Code a Magistrate who makes an order under s. 145 may at any time subsequently order the same [illegible] and such later order is not an alteration or review of his judgment in the original case within the meaning of s. 369 of the Code, 47 C. 971.

10-B. An order under s. 204 is not a judgment within the meaning of s. 369.—On a complaint being made, the Magistrate ordered issue of process under s. 204. Subsequently on that date a cross-complaint being made, the Magistrate rescinded the order and sent both the cases to a Subordinate Magistrate for local inquiry and report. *Held*, that the order passed by the Magistrate under s. 204 was not a judgment under s. 369 of the Code. There is nothing in the Code which forbids a Magistrate to reconsider an order of this kind on sufficient grounds, **27 C. W. N. 651.**

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14. Dismissal of revision application for non-appearance of pleader.—The High Court has no power under this section to review an order dismissing an application for revision made by an accused person, and

the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government, 7 A. 672 *followed* in 10 B. 176, *see* also 16 C. 42 and 1 P. R. 1909 = 9 Cr. L. J. 209. Even if the application for revision is dismissed for default the High Court cannot rehear 23 M. L. J. 371 = 12 M. L. T. 250 = 13 Cr. L. J. 712. But *see* 48 M. 332 in which 23 M. L. J. 371 is dissolved. *See* above Note 11. The High Court can set aside its own order dismissing a revision application for non-appearance of pleader 10 C. L. J. 89 = 13 Cr. L. J. 277; but not if it has been disposed of on the merits. Similarly, when the High Court has passed an order in revision under s. 439 it has no power to review its own order (1925) U. B. R. (Cr. Pr. Code) 33 = 2 Cr. L. J. 443. It would not do so on the ground of the discovery of fresh evidence (or the prosecution show they ought to have produced the evidence as to previous conviction) at the trial. Ratanlal 452. High Court has no power to review an order passed by it rejecting an appeal, 48 C. 80; 47 M. 623 = 145 M. L. J. 458.

15. Judgment of single Judge or Division Bench of High Court cannot be interfered with by himself or by Division or Full Bench.—The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot in any way be controlled by a Bench or Full Bench of the Court. As no appeal lies so no revision lies. Both procedures imply subordination or inferiority which does not exist. 1 P. R. 1909 = 9 Cr. L. J. 105; 4 P. R. 1909 = 9 Cr. L. J. 378; 8 P. R. 1909 = 10 Cr. L. J. 316. *See* also 8 C. 43; 14 C. 42 (F. B.); 10 B. 176 (F. B.); 7 A. 672 and 27 A. 92. But *see* Note 11 above.

16. Remedy for erroneous order.—Remedy against an erroneous order of High Court in its appellate jurisdiction is to petition the Local Government—the authority with whom rest the discretion either of executing the law or of commuting the sentence. Ratanlal 791; B. L. R. Sup. Vol. 445 (F. B.) = 8 W. R. 61; 14 A. L. J. 61 = 17 Cr. L. J. 47. In *Referred Trial No.* 40 of 1905 WHITE, C.J. and MOORE, J., after confirming the sentence of death on the accused, entertained serious doubts as to the propriety of the conviction. Their Lordships holding that they had no power to *review* their judgment reported the case to the Local Government with a strong recommendation for a free pardon under s. 401.

LOSS OF JUDGMENT.

17. In case of loss of judgment and records after conviction, Court may restore by memory.—There seems to be no provision of law which empowers the High Court to quash the conviction and sentence because some of the material records of the Sessions trial have been lost. There is no provision of law which enacts that unless all the records of a case are in the Court before at the time of convicting and sentencing, the conviction and sentence are void and should be quashed or that the trial has been held without jurisdiction or the sentence was passed without jurisdiction. Where a judgment has been lost it is open to the Judge to re-write from memory the substance of it *see* 8 C. L. J. 82. A Court has inherent power in case of loss or destruction of a judicial record to restore such record *see* 11 C. L. J. 243; 33 M. 471.

Presidency Magistrate's judgment.

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:—

(*a*) the serial number of the case;

(*b*) the date of the commission of the offence;

(*c*) the name of complainant (if any);

(*d*) the name of the accused person and (except in the case of an European British subject) his parentage and residence;

(*e*) the offence complained of or proved;

(*f*) the plea of the accused and his examination (if any);

(*g*) the final order;

(*h*) the date of such order; and

(*i*) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees or both, a brief statement of the reasons for the conviction.

Notes.—*See* s. 263 for summary trials; s. 362 as to record of evidence by a Presidency Magistrate; s. [illegible] as to power to [illegible] his decision and s. 537 as to irregularities in judgment, etc.

1. **In petty cases reasons for conviction need not be stated.**—Imprisonment in default of payment of fine is not a sentence of imprisonment within the meaning of cl. (*i*) of this section. The meaning of that clause is that, where the offence found is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly, **14 C. 174.**

1-A. **Omission to record.**—The omission to record all the particulars required by this section, when the omission is not of real importance is a mere irregularity, **30 C. W. N. 981**; *see* also **56 Cal. 1067.**

2. **Effect of not giving reasons.**—Where reasons are stated, they should be stated in such a manner that the High Court on revision may judge whether there were sufficient materials before the Magistrate to support the conviction, **13 C. 272.** If reasons are not clearly stated in an appealable case, the conviction is liable to be quashed, in spite of s. 537. But the law does not demand a full and complete statement of reasons, **31 C. 983.**

3. **In non-appealable cases reasons for conviction should generally be stated.**—In every case which is not appealable to High Court, a Presidency Magistrate should state his reasons for convicting the prisoners so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction. Where the notes of evidence taken by a Presidency Magistrate did not afford sufficient materials upon which the prisoner could legally be convicted, and the Magistrate had omitted to record his reasons for the conviction under clause (*i*), the conviction was set aside by the High Court, notwithstanding the provisions of s. 537, **13 C. 272.** In **8 C. W. N. 567,** it was further *held* that the reasons for the conviction ought to show the previous convictions, in order to justify the punishment imposed, *see*, however, **31 C. 983; 6 C. 579.**

4. **When sentence of imprisonment is passed, reasons for conviction to be recorded.**—This section requires that in case in which the accused is sentenced to imprisonment, a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reason for the conviction, **27 C. 461.** In **17 Bom. L. R. 890 = 16 Cr. L. J. 771,** the High Court set aside the judgment of a Presidency Magistrate, which was to the following effect: 'I convict the accused. I believe the evidence of the complainant and the witnesses, for the prosecution,' as it did not satisfy the provisions of this section, which required the Magistrate to give a brief statement of his reasons for the conviction.

5. **Section does not apply to cases under Workmen's Breach of Contract Act.**—The provisions of this section do not apply to cases under Act XIII of 1859, where no offence is committed and where there is no accused, **72 C. 131; 4 C. W. N. 253; 20 M. 235** at **p. 238; 16 B. 368; 11 A. 262** and **4 M. 234.**

Copy of judgment, etc., to be given to accused on application.

371. (1) On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

Case of person sentenced to death.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Notes.—1. Limitation.—An appeal against a sentence of death must be filed within seven days from the date of the sentence.—*Act XV of* 1877, *Sch. II, Art.* 150 and *Art.* 150, *Sch. II of Act IX of* 1908.

2. **Remission of Court-fee on copy of judgment.**—In the exercise of powers conferred by s. 35 of the Court-fees Act (No. VII of 1870), the Governor-General-in-Council is pleased to remit the Court-fee on a copy or translation of judgment in a case other than a summons-case, and a copy of the heads of the Judge's charge to the jury when the copy or the translation is given under this section; also on a copy or translation of a judgment in a summons-case when the accused is in jail.—*Notification, Government of India, No.* 4650, *dated 10th September*, 1889 (*Gazette of India*, 1889, *Part I*, p. 506).

the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government 7 A. 673 *followed* in 10 B. 176, *see* also 14 C. 42 and 1 P. R. 1909 = 9 Cr. L. J. 208. Even if the application for revision is dismissed for default the High Court cannot rehear 23 M. L. J. 371 = 11 M. L. T. 250 = 13 Cr. L. J. 712. But *see* 43 M. 353 in which 23 M. L. J. 371 is doubted. *See* above Note 11. The High Court can set aside its own order dismissing a revision application for non-appearance of pleader 10 C. L. J. 40 = 10 Cr. L. J. 217; but not if it has been disposed of on the merits. Similarly when the High Court has passed an order in revision under s. 439, it has no power to review its own order (1905) U. B. R. (Cr. Pr. Code) 33 = 2 Cr. L. J. 665. It would not do so on the ground of the discovery of fresh evidence for the prosecution since the Crown ought to have produced the evidence (as to previous conviction) at the trial. Ratanlal 452. High Court has no power to review an order passed by it rejecting an appeal 48 C. 80; 47 M. 473 = 165 M. L. J. 458.

15. Judgment of single Judge or Division Bench of High Court cannot be interfered with by himself or by Division or Full Bench.—The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot in any way be controlled by a Bench or Full Bench of the Court. As no appeal lies so no revision lies. Both procedures imply subordination or inferiority which does not exist 1 P. R. 1909 = 9 Cr. L. J. 208; 4 P. R. 1909 = 9 Cr. L. J. 378; 8 P. R. 1909 = 10 Cr. L. J. 318. *See* also 8 C. 61; 14 C. 42 (F. B.), 10 B. 176 (F. B.), 7 A. 672 and 27 A. 92. But *see* Note 11 above.

16. Remedy for erroneous order.—Remedy against an erroneous order of High Court in its appellate jurisdiction is to petition the Local Government—the authority with whom rest the discretion either of executing the law or of commuting the sentence. Ratanlal 791; B. L. R. Sup. Vol. 456 (F. B.) = 5 W. R. 61; 14 A. L. J. 61 = 17 Cr. L. J. 47. In *Referred Trial* No. 40 of 1905 White C. J. and Moore J. after confirming the sentence of death on the accused, entertained serious doubts as to the propriety of the conviction. Their Lordships holding that they had no power to *review* their judgment, reported the case to the Local Government with a strong recommendation for a free pardon under s. 401.

LOSS OF JUDGMENT.

17. In case of loss of judgment and records after conviction, Court may restore by memory.—There seems to be no provision of law which empowers the High Court to quash the conviction and sentence because some of the material records of the Sessions trial have been lost. There is no provision of law which enacts that unless all the records of a case are in the Court house at the time of convicting and sentencing the conviction and sentence are void and should be quashed or that the trial has been held without jurisdiction or the sentence was passed without jurisdiction. Where a judgment has been lost, it is open to the Judge to re-write from memory the substance of it *see* 8 C. L. J. 82. A Court has inherent power in case of loss or destruction of a judicial record to restore such record *see* 11 C. L. J. 243; 33 M. 473.

Presidency Magistrate's judgment

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:—

(*a*) the serial number of the case;

(*b*) the date of the commission of the offence;

(*c*) the name of complainant (if any);

(*d*) the name of the accused person and (except in the case of an European British subject) his parentage and residence;

(*e*) the offence complained of or proved;

(*f*) the plea of the accused and his examination (if any);

(*g*) the final order;

(*h*) the date of such order; and

(*i*) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees or both, a brief statement of the reasons for the conviction.

Notes.—See s. 263 for summary trials, s. 362 as to record of evidence by a Presidency Magistrate and s. 441 for power to [illegible] his decision and s. 537 as to irregularities in judgment, etc.

1. **In petty cases reasons for conviction need not be stated.**—Imprisonment in default of payment of fine is not a sentence of imprisonment within the meaning of cl. (*i*) of this section. The meaning of that clause is that, where the offence found is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly, **14 C. 174.**

1-A. **Omission to record.**—The omission to record all the particulars required by this section, when the omission is not of real importance is a mere irregularity, **30 C. W. N. 981**; *see* also **56 Cal. 1067.**

2. **Effect of not giving reasons.**—Where reasons are stated, they should be stated in such a manner that the High Court on revision may judge whether there were sufficient materials before the Magistrate to support the conviction, **13 C. 272.** If reasons are not clearly stated in an appealable case, the conviction is liable to be quashed, in spite of s. 537. But the law does not demand a full and complete statement of reasons, **31 C. 983.**

3. **In non-appealable cases reasons for conviction should generally be stated.**—In every case which is not appealable to High Court, a Presidency Magistrate should state his reasons for convicting the prisoners so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction. Where the notes of evidence taken by a Presidency Magistrate did not afford sufficient materials upon which the prisoner could legally be convicted, and the Magistrate had omitted to record his reasons for the conviction under clause (*i*), the conviction was set aside by the High Court, notwithstanding the provisions of s. 537, **13 C. 272.** In **8 C. W. N. 587,** it was further *held* that the reasons for the conviction ought to show the previous convictions, in order to justify the punishment imposed, *see*, however, **31 C. 983; 6 C. 579.**

4. **When sentence of imprisonment is passed, reasons for conviction to be recorded.**—This section requires that in case in which the accused is sentenced to imprisonment, a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reason for the conviction, **27 C. 461.** In **17 Bom. L. R. 890 = 16 Cr. L. J. 771,** the High Court set aside the judgment of a Presidency Magistrate, which was to the following effect: 'I convict the accused. I believe the evidence of the complainant and the witnesses, for the prosecution,' as it did not satisfy the provisions of this section, which required the Magistrate to give a brief statement of his reasons for the conviction.

5. **Section does not apply to cases under Workmen's Breach of Contract Act.**—The provisions of this section do not apply to cases under Act XIII of 1859, where no offence is committed and where there is no accused, **72 C. 131; 4 C. W. N. 253; 20 M. 235 at p. 238; 16 B. 368; 11 A. 262 and 4 M. 234.**

Copy of judgment, etc., to be given to accused on application.

371. (1) On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

Case of person sentenced to death.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Notes.—1. Limitation.—An appeal against a sentence of death must be filed within seven days from the date of the sentence.—*Act XV of* 1877, *Sch. II, Art.* 150 and *Art.* 150, *Sch. II of Act IX of* 1908.

2. **Remission of Court-fee on copy of judgment.**—In the exercise of powers conferred by s. 35 of the Court-fees Act (No. VII of 1870), the Governor-General-in-Council is pleased to remit the Court-fee on a copy or translation of judgment in a case other than a summons-case, and a copy of the heads of the Judge's charge to the jury when the copy or the translation is given under this section; also on a copy or translation of a judgment in a summons-case when the accused is in jail.—*Notification, Government of India, No.* 4650, *dated 10th September*, 1889 (*Gazette of India*, 1889, *Part I*, p. 506).

3. Appeal not to be rejected for copy of judgment not being stamped.—Where an Appellate Court rejected an appeal from a conviction under s. 323 I. P. C., because the copy of judgment of the Lower Court was not stamped, the High Court reversed the order of the Lower Appellate Court under the above [illegible] Ratanlal 254.

4. Who are entitled to obtain copies.—All prosecutors whose charges are dismissed are affected by the order of discharge, and are therefore entitled to obtain copies of the order made by, and of the depositions taken before the Magistrate, **8 C. 165 = 10 C. L. R. 160.** An [illegible] against whom remarks have been made by a Court in a judgment imputing to him misconduct should have furnished to him on application a copy of the judgment containing those remarks in order to enable him to explain his conduct, **6 Bom. L. R. 362.** *See also* s. 548.

372. The original judgment shall be filed with the record of proceedings, and where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Judgment when to be translated.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

Court of Session to send copy of finding and sentence to District Magistrate.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

Notes. *See* s. 31.

1. For Form of warrant of commitment under sentence of death *see* No. 31, Sch. V.

2. Description of weapons, etc., produced in Court should be on record in certain cases.—When death or grievous hurt has been caused by a blow from a stick or other weapon, the weight and dimensions of the weapon should be stated in the Sessions Court proceedings, with such particularity as may enable the High Court (which has no opportunity of seeing it) to form an opinion as to the character of the weapon, and the intention with which it was probably used. The mere entry of "a lathi" or "a stick" in the list of property produced before the Sessions Court does not enable the High Court to judge whether the [illegible] was a deadly or a comparatively harmless weapon.—*Pun. H. C. Cr. Cir.*, p. 33. In all cases referred to the Chief Court for confirmation of sentence of death, and in all cases where death or grievous hurt [illegible] to have been caused by an accused person a full and accurate description of all weapons produced in Court in connection with the trial should form part of the record transmitted. Such description should, in the case of cutting instruments of all kinds, include mention of the condition of the edge, and in the case of weapons not being firearms, their dimensions and weight.—*Pun. Cir.*, p. 228. [illegible] are produced in evidence before a Criminal Court, a description [illegible] such arms [illegible] the Court's signature [illegible] part of the record. This [illegible] always [illegible] weight, [illegible] dimensions and weight are material [illegible] regard [illegible] and weight [illegible] regard to the use that was made of it [illegible] be [illegible] by a letter [illegible] and [illegible] in the course of the evidence the letter [illegible]—*C. P. Cr. Cir.*, Part V, No. 11.

3. Practice—High Court must be satisfied on facts as well as law.—[illegible] cases sent up to the High Court for confirmation of sentence of death, it is the practice [illegible] the facts as well as law [illegible] Ratanlal 718. In the Bombay High Court [illegible] the [illegible] High Court [illegible] **17 Bom. L. R. 1072 = 2 Bom. Cr. Ca. 151 = 16 Cr. L. J. 812.** [illegible] ward [illegible]

8-A. The High Court set aside the death sentence passed by the Sessions Judge on the unanimous verdict of the jury on the ground that the prosecution witnesses could not be believed and the confessions could not be relied on as being genuine, **32 C. W. N. 702 = 29 Cr. L. J. 833**, *see* also **32 C. W. N. 345 = 29 Cr. L. J. 546.** Where it was held that the High Court has to come to an independent conclusion as to the guilt or innocence of the accused independently of the verdict of the jury or the opinion of the Judge.

Calcutta.—When the case is referred to the High Court under s. 374, the Court is bound under this section to go into the facts of the case, although the conviction was by the verdict of a jury, **18 W. R. 57.** But this rule will not be followed in hearing the appeal of a co-accused not sentenced to death, along with reference under s. 374, in the case of a person sentenced to death, **2 C. W. N. 49.** Thus a person sentenced only to transportation for life, may be in a worse position as regards invoking the Appellate Court than one setenced to death, **11 B. L. R. 14.** *See* also **20 W. R. 19.** Where there is a case of clear failure of justice to a person sentenced to transportation for life, in a trial by jury, the High Court can only bring his case to the notice of the Local Government, to be dealt with under s. 401, **30 C. W. N. 166.**

Power to direct further inquiry to be made or additional evidence to be taken.

375. (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Notes.—1. This section is an exception to s. 353.

2. **High Court's power to take additional evidence.**—Under this section and s. 428 the High Court when recording the further evidence, could dispense with the presence of the accused, especially where the additional evidence was recorded by itself, as in the *Ranga Reddi Murder Case*, **25 M. 523.** See *Criminal Appeal* 52 *of* 1906, *Allahabad High Court* Under the powers conferred by this section, the Bombay High Court in **28 B. 168** admitted a confession rejected by the Sessions Judge. In **16 P. W. R. 1911 = 12 Cr. L. J. 412**, the High Court admitted further evidence in an appeal from a conviction of murder and inspected the building where the offence was alleged to have been committed.

Power of High Court to confirm sentence or annul conviction.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(*a*) may confirm the sentence, or pass any other sentence warranted by law, or

(*b*) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(*c*) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Notes.—1. Power of High Court to annul conviction and direct fresh trial.—On a case sent up under s. 374 for confirmation of the sentence of death, the High Court in **6 C. W. N. 129** ordered a new trial as the evidence was incomplete and further evidence was necessary. *See* also **19 C. W. N. 556 = 21 C. L. J. 495 = 16 Cr. L. J. 481,** where the High Court directed the re-trial of the accused, who was undefended in the Sessions Court, on the same charge after arrangement being made for his defence.

3. Appeal not to be rejected for copy of judgment not being stamped.—Where an Appellate Court rejected an appeal from a conviction under s. 323 I. P. C. because the copy of judgment of the lower Court was not stamped, the High Court reversed the order of the lower Appellate Court under the above provision. Ratanlal 261.

4. Who are entitled to obtain copies.—All persons whose charges are dismissed are affected by the order of discharge and are therefore entitled to obtain copies of the order made by and evidence taken before the Magistrate. 8 C. 165 = 10 C. L. R. 152. A Magistrate against whom remarks have been made by a Court in a judgment in [illegible] to his misconduct should have [illegible] and to him on application a copy of the judgment containing those remarks in order to enable him to explain his conduct, 6 Bom. L. R. 342. *See also* s. 548.

Judgment when to be translated.

372. The original judgment shall be filed with the record of proceedings and where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Court of Session to send copy of finding and sentence to District Magistrate.

373. In cases tried by the Court of Session the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

Sentence of death to be submitted by Court of Session.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Notes. *See* s. 31.

1. For Form of warrant of commitment under sentence of death *see* No. 34 Sch. V.

2. Description of weapons, etc., produced in Court should be on record in certain cases.—When death or [illegible] has been caused by a blow from a stick or other weapon, the weight and size of such weapon should be stated in the Sessions Court proceedings with such particulars as may enable the High Court (which has no opportunity of seeing it) to form an opinion as to the character of the weapon and the [illegible] with which it was probably used. The mere entry of "a stick" or "a stone" [illegible] produced before the Sessions Court does not enable the High Court to [illegible] was a deadly or a comparatively harmless weapon.—*I. H. C. Cr. Circ.* [illegible] In all cases referred to [illegible] for confirmation of sentence of death and in all cases where [illegible] to have been caused by an accused person, all articles and weapons [illegible] in connection with the trial should form part of the record [illegible] of cutting instruments of all kinds, include mention of the [illegible] of the edge and [illegible] weapons [illegible] firearms, their dimensions and weight.—*Ibid. Circ.* [illegible] are produced in evidence before a Criminal Court, a [illegible] [illegible] weight [illegible] [illegible]—*C. I. Cr. Circ.* [illegible]

3. Practice.—High Court must be satisfied on facts as well as law.—[illegible] High Court [illegible] Ratanlal 737. In the [illegible] High Court [illegible] 17 Bom. L. R. 1[illegible] = 2 Bom. Cr. Ca. 141 = 16 Cr. L. J. 316. [illegible]

4. **Superior Magistrate may even acquit.**—In **1915 U. B. R. 1st Qr. 53 = 16 Cr. L. J. 535**, it was *held* that the Magistrate to whom the proceedings were submitted under s. 562, was not prevented from acquitting the accused under the powers vested in him by this section, if on a perusal of the evidence, he comes to the conclusion that the conviction ought not to stand, **4 L. B. R. 277 = 8 Cr. L. J. 475** *referred to.*

5. **Appeal lies against conviction to Sessions Court.**—A conviction under this section must for purposes of appeal be considered to be passed by a first-class Magistrate and appealable within the meaning of s. 408 and not a conviction within the meaning of s. 407, **17 Bom. L. R. 895 = 16 Cr. L. J. 738.**

CHAPTER XXVIII.

Of Execution.

Execution of order passed under s. 376.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Sessions shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Notes.—1. For Form of warrant of execution on a sentence of death, *see* Sch. V, No. 35 and on commutation No. 36.

2. **Order of High Court to be communicated to Superintendent of Jail.**—Sessions Judges are directed to make arrangements for communicating every order of confirmation, reversal or commutation of sentence of death to the Superintendent of jail wherein the prisoner is confined, within 24 hours of receipt of the order in the Sessions Court. *Madras Rules of Practice*, s. 249.

3. **Reference to Government in cases of infanticide.**—In all cases where women are convicted for the murder of their infant-children a reference should be made through the High Court to the Government with an expression of his opinion by the Sessions Judge as to the propriety or otherwise of reducing the sentence. *Madras G. O. No.*[404, *dated* 13*th February*, 1884.

Postponement of capital sentence on pregnant women.

382. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Notes.—1. For Form of warrant after a commutation of sentence, *see* Sch. V, No. 36.

2. **It is only the High Court that can postpone execution.**—The High Court is the only tribunal in which the law vests the power of postponing the execution of a sentence of death (passed and) confirmed on a woman found to be pregnant, **Weir II, 441.** Such a case, the Sessions Judge is competent only to direct the postponement of the execution of the sentence, until further orders of the High Court. The High Court is now under such circumstances empowered to commute the sentence to one of transportation for life, if it thinks fit and this is an instance of a case contemplated by s. 369 in which the High Court after signing or passing judgment, may alter or review the same.

3. **English Practice.**—This is an instance of a 'Reprieve' or 'Respite.' In England when a woman is convicted and sentenced to death, the Clerk of the Crown after sentence is to ask whether the woman has anything to say in stay[of execution of the sentence. If she then alleges or the Court then or later has reason to suppose that she is pregnant, a jury of twelve matrons should be empanelled sworn to try whether or not she is quick with child. If the jury require the assistance of a medical man, a medical man is requested by the Court to retire and examine the prisoner and is then examined as a witness. If the jury find that the prisoner is quick with child, the Court stays execution of the capital sentence until the prisoner is delivered of a child, or it is no longer possible that she should be so delivered. See *Halsbury*, Vol. IX, p. 375, *Archbold*, p. 242. It is for the prisoner to plead pregnancy and unless she so pleads, the right to a jury of matrons is said not to be absolute, *R.* v. *Hunt*, **2 Cox. 261.**

2. Power of High Court on acquittal of murder, to convict accused of minor offence though no finding on the minor charge.—In a case where the appellant was tried for murder and concealment of ... ss. 302 and 201, I P.C., and was convicted of murder but no finding was given on the minor charge the Chief Court on appeal acquitted the accused of the charge of murder, ... *Held* that it was competent ... to convict the appellant on the minor charge although no finding was recorded provided there was evidence on record to support it. 8 P. R. 1913 = 223 P. L. R. 1913 = 22 P. W. R. 1913 = 14 Cr. L. J. 378.

Confirmation of new sentence to be signed by two Judges.

377. In every case so submitted the confirmation of the sentence, or any new sentence or order passed by the High Court shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

Procedure in case of difference of opinion.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion the case, with their opinions thereon, shall be laid before another Judge, and such Judge after such hearing as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion.

Note.—Judge to whom case is referred may decide according to his own opinion.—In a case ... referred to a third Judge, it is the duty of that Judge to express and act upon the ... which he has himself definitely arrived, and not necessarily to hold that the opinion of the one in favour of an acquittal should prevail, 1887 A. W. N. 125 *dissenting* from the judgment of Mahmood, J. in 1885 A. W. N. 273 who was of opinion that the principle ought to be that wherever one Judge was for acquittal the accused ... has the benefit of the same and be acquitted. *See* a. o. s. 429. In 17 C. W. N. 1913 = 14 Cr. L. J. 612, ... to whom the case was referred, there being a difference of opinion between the Judges who first heard the appeal, upheld the conviction for murder but did not pass the capital sentence for the reason that ... had the capital sentence hung over their heads for six months owing to the delay in the High Court.

Procedure in cases submitted to High Court for confirmation.

379. In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session.

Procedure in cases submitted by Magistrate not empowered to act under section 562.

380. Where proceedings are submitted to a Magistrate of the first class or a Sub-Divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Notes.—1. This section is new. The Select Committee in their report say: "We have ... clause in ... introduced for reasons already given under s. 31, *ante*. We have ... providing the procedure to be followed when a Magistrate not empowered under clause 562 ... a first offender should be dealt with under that section."

2. Superior Magistrate cannot refer the case back.—A second class Magistrate ... guilty of an offence under s. 323, I. P. C., and ... sent the record and the accused to the District Magistrate under s. 562. The District Magistrate sent the case back to the second class Magistrate ... that s. 562 was inapplicable. *Held* the District Magistrate ... was ... that such Magistrate may pass such sentence or order as he might have passed or made if the case had originally been heard by him and he could not have sent the case to the second class Magistrate for the purpose of sentence if he had originally heard it. 4 L. B. R. 150 = 7 Cr. L. J. 443; 4 L. B. R. 135 *referred to*.

3. What order superior Magistrate may make.—*Query*—Whether a Magistrate to whom a case is submitted under s. 562 primarily can pass under this section any order other than a sentence or an order for release on probation? 4 L. B. R. 277 = 8 Cr. L. J. 418.

If at the trial any previous conviction has been established, the following particulars shall also be given — (*a*) name of the offence of which the convict was previously convicted; (*b*) sentence passed upon him; (*c*) date of such sentence, and (*d*) name, designation of the trying authority.

The above particulars shall be written in the same language in which the warrant itself is written.—*Bom. H. C. Cr. Cir., p.* 38.

9. **Warrant of execution—directions as to.**—See *C. I. Cr. Cir., Part II, No.* 35.

Direction of warrant for execution.

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined.

Notes.—1. Separate warrant for each prisoner.—A separate warrant should be issued in case of each prisoner and a definite period of imprisonment should be stated. Thus, an order directing a person to be imprisoned 'until he gives security' is bad, **8 C. 644.**

2. **Confinement in jail other than that stated in warrant unlawful.**—In **11 C. 527,** it appeared that a Sheriff's officer delivered over to the officer in charge of the Alipore Jail, a judgment-debtor who had been duly committed to the Presidency Jail. It was *held* that the imprisonment was unlawful. *See* also **29 C. 286 (F.B.).**

Warrant with whom to be lodged.

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

***386.** (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—

Warrant for levy of fine.

(*a*) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(*b*) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The Local Government may make rules regulating the manner in which warrants under sub-section (1), clause (*a*), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (*b*), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

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* *Note.*—This section is substituted for the original section by Act XVIII of 1923, s. 102.

Execution of sentences of transportation or imprisonment in other cases.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is or is to be confined and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Notes.—**1. Sentence of transportation on woman, if not appealed against, to be referred to Government.**—Under the orders of Government, the Chief Court has directed that in every case in which a sentence of transportation for life is passed on a woman for the murder of her [illegible] and the sentence is not appealed against, the file of the case shall after the expiration of the period allowed for appeal, be forwarded to the Chief Court for submission to Government with a view to the consideration of the question whether any commutation or reduction of the sentence to be allowed, *Pun. Cir.*, Chapter XLIV, [illegible]

2. Warrant of Imprisonment.—Schedule V, Form 20, gives the form of a warrant of commitment on a sentence of imprisonment passed by a Magistrate. The signature of a Magistrate to warrant should not be attached [illegible] stamp, **6 M. 296.**

3. Sentence of imprisonment commences when it is passed.—A sentence of imprisonment [illegible] commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence at some future period, **3 B. L. R. Ap. Cr. 50 = 12 W. R. 47.** A sentence once passed might be postponed by Legislative enactment (s. 397) or by judicial order warranted by law (ss. 33 and 426). Where a Magistrate after sentencing two persons to separate terms of imprisonment, admitted them to bail in order that they might have the means of appealing, it was *held* that admission to bail did not make the sentence one to commence at a future time and consequently illegal, **7 C. L. R. 333; 12 W. R. 47.**

4. Commencement of imprisonment cannot be antedated.—A sentence of imprisonment for period passed in the lock-up is illegal, but sentence of imprisonment until the rising of the Court is not against the requirements of the law, **9 P. W. R. 1907 = 5 Cr. L. J. 217; 6 L. B. R. 152 = 7 Cr. L. J. 453.**

5. Power of High Court to commit prisoner to jail outside the limits of its ordinary original criminal jurisdiction.—Where, in a case referred under s. 307 the High Court convicts and passes a sentence it does so as a Court of Reference and not in the exercise of its ordinary original criminal jurisdiction and therefore even if the accused surrenders to the warrant within the territorial limits of such original jurisdiction the High Court is required to send the accused to the jail, in which he would be confined by the Court submitting the case subject to any rules under s. 541, ss. 7, 8 and 9 of *the Prisoners Act* III of 1900, do not apply to such a case **32 C. 293 (F.B.).**

6. Illegal to order confinement in 'Police Lock-up.'—In the absence of a notification by Local Government declaring a 'Police Lock-up' as a place where person sentenced to imprisonment may be confined, it is illegal for a Magistrate to direct the prisoner to suffer imprisonment in such a place, **7 L. B. R. 81 = 15 Cr. L. J. 10.**

7. Period of imprisonment how to be calculated.—In calculating sentence of imprisonment, the day upon which the sentence is passed and the day of release ought both to be included and considered as days of imprisonment, for example a man sentenced on the 1st January to one month's imprisonment should be released on the 31st January not on the 1st February *Madras G. O. No. 2411, dated 22nd November, 1881.* In calculating the sentences of imprisonment, the rule laid down in para. 774 (*Reed's Legal* [illegible]) is that the day on which the sentence is signed and the day of release shall both be included. * * * This rule is founded on the principle of English Law, which omits to take notice of fractions of days, and considers a year completed on the last day of the year. A soldier who is sentenced to imprisonment for one year on the 1st January, is entitled to be released on the 31st December, and if detained on the following day he is illegally in custody. This method of reckoning sentence is further explained in *the Bengal Military Regulation* [illegible] para. 2" *Oudh Cr. Dig.*, p. 25.

8. Endorsement of previous conviction on back of warrant.—Every Criminal Court, when it passes a sentence of imprisonment or transportation, shall endorse on the back of the warrant, with which under s. 383 it forwards the convict to jail, the following particulars:—(*a*) age of the convict, (*b*) caste of the convict, (*c*) place of residence of the convict, (*d*) plea of the convict, and (*e*) opinion of the assessors (where the trial is conducted with the aid of assessors).

4. Is it legal to pass sentence of fine against several accused collectively and individually?—A sentence of fine must be specific as to each person fined. It is not legal to pass a sentence of fine on the prisoners individually and collectively, **5 M. H. C. R. Appx. V.** When, however, the payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or anyone of them, and if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent, **Ratanlal 90.**

5. Fine may be levied at any time within six years.—Fine may be levied at any time within six years after the passing of the sentence or during the term of imprisonment if it exceeds six years, and the death of the offender does not discharge any of his property from liability which would, after his death, be legally liable for his debts—*vide* s. 70, I.P.C., **Ratanlal 207.** The attention of Sessions Judges and Magistrates is called to the fact that proceedings are seldom taken to recover fines after the imprisonment in default has expired. If, at any time, subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine, or any part of it, remains unpaid, and the Court, from information gained, has reason to think that there is any movable property belonging to the offender, it should issue a fresh warrant for the attachment and sale of that property within a special period, returnable within a certain time—*Bom. H. C. Cr. Cir.*, p. 53; also *Wilkins*, 118.

6. Liability to fine does not cease when imprisonment is undergone in default.—An offender who has undergone the full term of imprisonment to which he was sentenced in default of the payment of fine, is still liable to have the amount levied by distress and sale of any movable property belonging to him, which may be found within the jurisdiction of the Court passing the sentence, whether the officer who inflicted the fine issued any special direction on the subject or not, **3 W. R. 61.** The imprisonment which the Court is authorised to impose in default of payment is intended as a punishment for non-payment, not as a satisfaction and discharge of the amount due. **Ratanlal 91.** But *see* the new amendment made by the insertion of the proviso under which no warrant can be issued without special reasons when the accused has undergone the full term of imprisonment in default of payment of fine.

7. Court should exercise its discretion whether fine should be recovered even after imprisonment.—The law is merely permissive and not imperative. When efforts have been made to realise a fine by distress and sale, and when the offender has undergone the imprisonment awarded in default of payment of fine, the Court should exercise its discretion, according to the circumstances of each particular case, as to whether, after the release of the prisoner, any further steps should be taken towards the realisation of the fine within the period allowed by law. If there is reason to believe that the offender was able to pay and would not, preferring to undergo imprisonment, the law should be strictly enforced; but if it appears that the fine was not paid for want of means, or that its realisation would be ruinous to the offender or his family, it is not desirable that further steps should be taken.—*Pun. Cir.*, Chap. LI, p. 264. But *see* preliminary Note above.

DISTRESS AND SALE.

8. Formalities to be observed in attachment and sale.—Formalities will be observed in attachment, sale and adjudicating upon objections similar to those in force in the execution of civil decrees, with this difference, that the process issues on the criminal side.—*Pun. Cir.*, Chapter LI, p. 268. But *see* s. 538. Thus the officer attaching movables must have the warrant at the time of attachment, otherwise the attachment is illegal, **27 A. 258.**

9. Signature on warrant should not be affixed by means of Stamps.—This practice besides being illegal, is objectionable on other grounds, and is strictly prohibited. No officer of a jail would be justified in receiving or detaining a prisoner on a warrant so signed.—*Pun. Cir.*, p. 253; also **6 M. 396.** The impression of a stamp bearing the officer's name is insufficient and illegal, *Wilkins*, 125.

10. What property may not be sold.—*See* Note 9 at p. 127.

(*i*) *Agricultural implements.*—Although agricultural implements are not exempt from distress and sale in realisation of a fine, the measure is one which should be resorted to with discretion; otherwise it may entail undue hardship in cases which do not require such severity.—*Pun. Cir.*, Chap. LI, p. 269.

(*ii*) *Joint family property.*—This language denotes things which may be taken by distress and then sold so as by mere act of sale to pass the property in them, not mere rights and interests or shares in

Note.—Referring to the amendment of this section the Select Committee say:—

"We approve generally of the principle embodied in this clause in that it enables fines to be recovered by process against immovable property through the agency of the Civil Court, but we do not think that the matter can suitably be dealt with as a provision to a rule making power dealing with warrants of attachment against movable property. We have therefore redrafted a great deal of this clause [illegible] through the Civil Court as a substantive provision. We think it should be made clear that the Civil Court should not arrest or detain an offender who has already been sentenced to imprisonment in default of payment of the fine.

"We recognise that the procedure prescribed may in some cases [illegible] as compared with the summary method of proceeding against immovable property [illegible] laws which allow moneys due to the Crown to be recovered as arrears of land revenue. We have, however, found it impossible to devise any procedure which will not be open to [illegible] against the present clause."

The principal changes introduced by the new amendment of the section are.—(1) Under the new section a fine can be recovered by the attachment and the sale of immovable property through a Civil Court. Under the old Code this could not be done. (2) Under the old section [illegible] the term of imprisonment awarded in default of payment of fine. But under the present section no Court can issue such warrant without special reasons.

Notes.—**Form of warrant**—*See* Sch. V Form XXXVII for Distress Warrant.

1. Provisions of ss. 386—389 applicable to all penalties and the fines imposed under any act.—The provisions of ss. 386 to 389 both inclusive of this Code with respect to fines shall apply to penalties and fines imposed under Act V of 1861 (*General Police*) on conviction before a Magistrate—Section 37 Act V of 1861 as amended by Act No. VII of 1895. Sections 63 to 70 I.P.C., and the provisions of the Cr. P. Code for the time being in force in relation to the issue and execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, Rule or By-law, unless the Act, Regulation, Rule or By-law contains an express provision to the contrary.—*S. 25 General Clauses Act X of 1897.*

2. Application of section to payments other than fine.—

(i) *Compensation under the Cattle Trespass Act.*—Compensation under the *Cattle Trespass Act* [illegible] may be levied as fine may be recovered under this section but the payment of such compensation cannot be enforced by imprisonment. **18 M. 335.**

(ii) *Compensation under s. 250.*—When compensation is ordered to be paid under s. 250 the proper procedure is to recover the fine in the first instance under this section and s. 387 and if not recovered then alone can the Magistrate order imprisonment. **3 L. B. R. 37; 25 C. 144 at 1251; 25 M. 117.** *See* Notes on s. 250 at p. [illegible]

(iii) *Compensation under s. 545*, [illegible]

(iv) *Excess charge and rule [illegible] fine.*—The excess charge [illegible] s. 113 of Act IX of 1890 *Indian Railways* is not a fine though it may be recovered as fine [illegible] in default [illegible] **20 M. 331.** *See* Note 11 to s. 33 at p. 85.

(v) *Costs and process fees.*—A Magistrate can recover the costs [illegible] process fees from the accused, [illegible]
1 Bur. L. R. 3.

3. Fine must be levied by the same Court with as little delay as possible.— *See C. P. Cr. C. [illegible]* [illegible] No. 391. The [illegible] Judge or Magistrate [illegible] performance [illegible] **9 W. R. 50.** It is the Court that levies the fine [illegible] the same as the Court which [illegible] There [illegible] be no [illegible] the levy of a fine directly on passing a sentence which includes a fine [illegible] when [illegible] the only punishment [illegible] the Magistrate [illegible] a warrant for the levy [illegible] by distress and sale of the goods of the offender [illegible] simultaneously ordered the law nowhere providing that fines may be levied by means of imprisonment. **22 C. 133; 3 B. L. R. Appx. XLVII at p. 49; see 3 W. R. 61.** The levy of the fine [illegible] the defendant [illegible] of any appeal the convict may prefer [illegible] can the Appellate Court order a Lower Court to abstain from issuing such a warrant. **2 W. R. (Cr. Let.) 12.**

4. Is it legal to pass sentence of fine against several accused collectively and individually?—A sentence of fine must be specific as to each person fined. It is not legal to pass a sentence of fine on the prisoners individually and collectively, **5 M. H. C. R. Appx. V.** When, however, the payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or anyone of them, and if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent, **Ratanlal 90.**

5. Fine may be levied at any time within six years.—Fine may be levied at any time within six years after the passing of the sentence or during the term of imprisonment if it exceeds six years, and the death of the offender does not discharge any of his property from liability which would, after his death, be legally liable for his debts—*vide* s. 70, I.P.C., **Ratanlal 207.** The attention of Sessions Judges and Magistrates is called to the fact that proceedings are seldom taken to recover fines after the imprisonment in default has expired. If, at any time, subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine, or any part of it, remains unpaid, and the Court, from information gained, has reason to think that there is any movable property belonging to the offender, it should issue a fresh warrant for the attachment and sale of that property within a special period, returnable within a certain time—*Bom. H. C. Cr. Cir.*, p. 53; also *Wilkins*, 118.

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7. Court should exercise its discretion whether fine should be recovered even after imprisonment.—The law is merely permissive and not imperative. When efforts have been made to realise a fine by distress and sale, and when the offender has undergone the imprisonment awarded in default of payment of fine, the Court should exercise its discretion, according to the circumstances of each particular case, as to whether, after the release of the prisoner, any further steps should be taken towards the realisation of the fine within the period allowed by law. If there is reason to believe that the offender was able to pay and would not, preferring to undergo imprisonment, the law should be strictly enforced; but if it appears that the fine was not paid for want of means, or that its realisation would be ruinous to the offender or his family, it is not desirable that further steps should be taken.—*Pun. Cir.*, Chap. LI, p. 264. But *see* preliminary Note above.

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9. Signature on warrant should not be affixed by means of Stamps.—This practice besides being illegal, is objectionable on other grounds, and is strictly prohibited. No officer of a jail would be justified in receiving or detaining a prisoner on a warrant so signed.—*Pun. Cir.*, p. 253; also **6 M. 396.** The impression of a stamp bearing the officer's name is insufficient and illegal, *Wilkins*, 125.

10. What property may not be sold.—*See* Note 9 at p. 127.

(*i*) *Agricultural implements.*—Although agricultural implements are not exempt from distress and sale in realisation of a fine, the measure is one which should be resorted to with discretion; otherwise it may entail undue hardship in cases which do not require such severity.—*Pun. Cir.*, Chap. LI, p. 269.

(*ii*) *Joint family property.*—This language denotes things which may be taken by distress and then sold so as by mere act of sale to pass the property in them, not mere rights and interests or shares in

joint movables to have a ... of an undivided Hindu family. Weir II, 441; 20 C. 873. See also 25 P. L. R. 1915 = 16 Cr. L. J. 156. In Weir II, 443 it was held that an attachment of movable property belonging to an *Aliyasantana* family, of which complainant and accused were members, in execution of the warrant for the levy of the amount of compensation ... under s. 250 (1) being ... [illegible] the accused ... was illegal. But a Full Bench of the Madras High Court has however recently held that ... [illegible] ... in the joint family of which he is a member can be attached under s. 386. The rule of levying fines ... penalties should be strictly confined to the provisions of the law that gives the power ... In 27 Bom. L. R. 1063 the question whether a share of joint Hindu family estate can be attached and sold by a Magistrate came before the High Court and it was *held per* FAWCETT, J., that under s. 386 (1), read with s. 386 (1) (a) a Magistrate can attach and sell property even if such property consists of a share in a joint Hindu family estate. See *Mad. Pol. Man. Vol. I p.* 15. See 31 M. L. J. 88 (F.B.); 31 M. L. J. 120.

(iii) *Growing crops* are movable property for the purpose of this section. Weir II, 441.

(iv) *Property in foreign State*.—There is no authority in the Code to attach the property of the offender in a foreign State as the Code is only applicable to British India. Weir II, 441.

(v) Where money was deposited by a person as surety for his brother's appearance at a criminal trial and the latter being convicted in the case, and sentenced to a fine, the money was seized in realisation of the fine on the ground that the depositor and his brother were members of a joint Hindu family, but there was nothing to show that the money deposited was not the depositor's own. *Held* that the deposit could not be seized in levy of the fine. 19 A. L. J. 837.

CLAIMS OF THIRD PARTIES.

10 A. Under the new amendment by sub-section (2)—The Local Government under the amended sub-section (2) is authorised to frame rules regarding the execution of warrants and the determination of claims preferred by third parties on an attachment of property in execution of a warrant of fine. Under the old law, upon a claim preferred by a third party, the Magistrate could not try any such claim because the section did *not provide for such contingency*.

Under the old Code.—It was *held* that the principles applicable to attachments under s. 88 apply equally to attachments under this section. 25 P. L. R. 1915 = 16 Cr. L. J. 156; what may be said with regard to s. 88 would equally apply to s. 386. 20 M. 83.

11. Is a Magistrate bound to inquire and decide claims?—The Code does not contain any provision for the trial of claims which may be preferred to property distrained under s. 386. 25 P. L. R. 1915 = 16 Cr. L. J. 156. In cases of dispute the Magistrate should stay the sale of the property ... giving the claimant time to establish his right. 20 M. 83. The Magistrate is nowhere required by law to try any claim that may be preferred to the ownership of any property distrained. 22 C. 813. A Magistrate is bound to ... judicially inquire and decide a claim to property attached under his orders in attempting to recover a fine. A claimant must be given an opportunity of showing *bona fide* in what ... the property ... was attached. 4 Bur. L. R. 332. Also see 10-A above.

A Magistrate, who has issued a distress warrant under this section, is not required by law to try any claim which may be preferred to the ownership of the property distrained. 22 C. 813. ... was sentenced to pay a fine. Proceedings were taken under this section to realise the fine ... and certain movable property supposed to belong to him was ... [illegible] ... who thereupon sued the Secretary of State praying for restoration of the said ... movable ... *per* ... J. that the order of the Magistrate for the sale of particular chattels is not ... [illegible] ... was not a judicial proceeding and was not the proper ... [illegible] ... aggrieved third party was by a suit against Magistrate or Government, but against the person in whose possession the goods were found. *Per* ... J. that a claimant may ... [illegible] ... does not prevent his proceeding against the Crown ... [illegible] 1895 A. W. N. 173.

12. Claims and objections how disposed of.—... [illegible] ... forward ... [illegible] ... to prevent its seizure in satisfaction of fine. After that ... [illegible] ... disposed of either by admitting the claim or referring to civil suit ... [illegible]

Pun. Cir., p. 269. If any claim is made to the attached property, the Magistrate before ordering its sale should allow the claimant an opportunity of establishing his title in a Court having jurisdiction to determine civil rights, **Weir II, 445.**

13. **Postponement of sale of attached property when necessary.**—When claim is made to property attached under this section, the Court should direct the postponement of the sale of property seized for such time as in its opinion would be sufficient to give the claimant time to establish his right to the property, unless by the reason of the nature of the property an immediate sale would be for the benefit of the owner, in which case the proceeds should be held over, **Ratanlal 976,** where **22 C. 935** and **20 M. 88** are *followed.*

14. **Claims to be decided by Magistracy and not by Police.**—A warrant issued under this section for the levy of a fine should ordinarily be directed to a Police-officer, and the authority issuing it should set a time for the sale and for the return of the warrant. If no one claims the property, the Police have the power of selling it within the time specified in the warrant, without any previous reference to the Magistrate; if a claimant comes forward, then the ownership of the property distrained must be determined by the Magistrate, and not by the Police, *Wilkins*, 118.

15. **Revision.**—If the Magistrate errs the remedy is by civil suit and not by application to the High Court in revision, **20 M. 88 ; 28 P. L. R. 1915 = 16 Cr. L. J. 166.** But *see* **9 P. R. 1908 = 29 P. W. R. 1908 = 8 Cr. L. J. 260.** Where it was held that the High Court has jurisdiction under s. 439 to revise the orders of a Magistrate. *See* Note 20 at p. 128.

MISCELLANEOUS.

16. **Information to jailor about recovery of fine.**—As soon as a fine or any part of it is recovered information should immediately be given to the jailor of the same. The responsibility is with the Court—*Bom. H. C. Cr. Cir.*, p. 54. The responsibility for intimating to the jail authorities, the fact of the payment rests entirely with the Court; such information should invariably be acknowledged by the jail authorities and the acknowledgment should be filed by the Court for future reference. *Madras Rules of Practice*, p. 177.

17. **Refund of fine to be made without application.**—In cases where an Appellate Court has ordered a fine inflicted by a Court of First Instance to be refunded, the Appellate Court should forthwith certify its order to the Court of First Instance, and the Court of First Instance should, on receipt of the Appellate Court's order for such refund of the fine, immediately prepare a payment order, if the fine has been levied, and deliver it to the payee, whether he applies for it or not. The Court of First Instance should at the same time assertain from the payee at what treasury or sub-treasury he desires the refund to be made and at once direct the officer in charge of such treasury or sub-treasury to make the refund and inform the Appellate Court of having done so. The officer in charge of the treasury or sub-treasury should, on presentation of the payment order and without requiring the applicant to furnish an official copy of the Appellate Court's order or judgment or any other document besides his bare application, make the refund upon demand of the applicant as soon as he has furnished satisfactory proof of his identity. In such cases a written application from the person entitled to the repayment of the fine is not required; and should an applicant for refund present at any time such a written application, it should be accepted on plain paper without any Court-fee (vide *Government Gazette* for 1896, Part I, pp. 427 and 428)—*Bom. H. C. Cr. Cir.* Whenever an Appellate Court other than the High Court reduces or reverses a sentence of fine, it shall, if the fine has been levied, grant to the appellant an order of refund. When the order of refund is presented to the Court of First Instance it shall forthwith prepare the necessary order and deliver it to the payee without requiring any formal application therefor. *Madras Rules of Practice*, p. 65.

18. **Liability of judicial officers for judicial act done illegally within the limits of their jurisdiction.**—"A judicial officer, who in the discharge of his judicial duties issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction. That word means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. *See* **2 M. I. A. 293** and *cf.* **39 C. 953 (P.C.).** Where a Magistrate of the first class, having sentenced an accused person to three years' rigorous imprisonment and Rs. 500 fine under ss. 379 and 411 of the Penal Code, and having issued a warrant purporting to act under this section for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, Sch. V and s. 554 of the Code, and Form D in Chap. V of the Circular Orders of the High Court, *held* that he was acting in the discharge of his judicial duty within

joint movables, such as that of an undivided Hindu family. Weir II, 442; 22 C. 672. See also 21 P. L. R. 1915 = 16 Cr. L. J. 156. In Weir II, 443 it was *held* that an attachment of movable property belonging to an *Aliyasantana* family (of which complainant and accused were members) in execution of the warrant for the levy of the amount of compensation ordered under s. 250 to be paid by the complainant to the accused was illegal. But a Full Bench of the Madras High Court has, however, recently held that the interest of an accused in the joint family of which he is a member can be attached under s. 386. The mode of levying pecuniary penalties should be strictly confined to the provisions of the law that gives the jurisdiction. In 27 Bom. L. R. 1553 the question whether a share of joint Hindu family estate can be attached and sold by a Magistrate came before the High Court and it was *held per* FAWCETT, J., that under s. 386(1)(a) read with s. 386(1)(b) a Magistrate can attach and sell property even if such property consists of a share in a joint Hindu family estate. *See Mad. Pol. Man.*, *Vol. I*, p. 1 5. See 31 M. L. J. 86 (F.B.), 31 M. L. J. 129.

(iii) *Growing crops* are not movable property for the purpose of this section. Weir II, 444.

(iv) *Property in a foreign State*.—There is no authority in the Code to attach the property of the offender in a foreign State, as the Code is only applicable to British India. Weir II, 444.

(v) Where money was deposited by a person as surety for his brother who appeared as accused at the trial and the latter being convicted in the case, and sentenced to a fine, the money was seized in realisation of the fine, on the ground that the depositor and his brother were members of a joint Hindu family, but there was nothing to show that the money deposited was not the depositor's own. *Held*, that the deposit could not be seized in levy of the fine. 19 A. L. J. 257.

CLAIMS OF THIRD PARTIES.

10-A. Under the new amendment by sub-section (2)—The Local Government under the amended sub-section (2) is authorised to frame rules regarding the execution of warrants and the determination of claims preferred by third parties on an attachment of property in execution of a warrant of fine. Under the old law upon a claim preferred by a third party, the Magistrate could not try any such claim because the section did not provide for such contingency.

Under the old Code.—It was *held* that the principles applicable to attachments under s. 88 apply equally to attachments under this section, 21 P. L. R. 1915 = 16 Cr. L. J. 168; what may be said with regard to s. 88 would equally apply to s. 386. 23 M. 33.

11. Is a Magistrate bound to inquire and decide claims?—The Code does not contain any provision for the trial of claims which may be preferred to property distrained under s. 386. 21 P. L. R. 1915 = 16 Cr. L. J. 168. In cases of dispute the Magistrate should stay the sale of the property and give the claimant time to establish his right, 20 M. 83. The Magistrate is nowhere required by law to try any claim that may be preferred to the ownership of any property distrained, 21 C. 915. A Magistrate is bound to inquire judicially into and decide a claim to property attached under his orders in attempting to recover a fine. A claimant must be given an opportunity of showing *bona fide* interest in such property before it was attached, 1 Bar. & R. 232. But see 10-A above.

A Magistrate, who has issued a distress warrant under this section, is not required by law to try any claim which may be preferred to the ownership of the property distrained. 21 C. 915. A was sentenced to pay a fine. Proceedings were taken under this section to recover the fine by the attachment of certain moveable property supposed to belong to him [illegible]. The property [illegible] who thereupon sued the Secretary of State praying for a declaration that the said property belonged to him. *Held per* BLAIR, J., that the order of the Magistrate for the sale of particular chattels under the circumstances was not a judicial proceeding and was not the proper subject of criminal revision, that the remedy of an aggrieved third party was not one against Magistrate or Government, but against the person in whose possession the goods were found. *Per* AIKMAN, J., that a claimant making [illegible] does not prevent his proceeding against the Crown if he prefers to do so. 1898 A. W. N. 172.

12. Claims and objections how disposed of.—See Sir [illegible] at p. 125.—When an objection is put forward, he should be warned of the penal provisions of s. 207, I. P. C., against dishonestly making a false claim to property to prevent its seizure in satisfaction of fine. After this warning the objection should be heard and disposed of either by allowing the claim or rejecting it; until this is done, if the claim seems *prima facie* good and [illegible]

Note.—Change of incumbent does not change the Court.—The successor in the office of a Judge may levy a fine imposed by his predecessor. The power is restricted to the Court which sentences the offender, but the word 'Court' is not restricted to the particular individual who held the office, **9 W. R. 80.**

Execution of sentence of whipping only.

390. When the accused is sentenced to whipping only, the sentence shall* "subject to the provisions of section 391" be executed at such place and time as the Court may direct.

Notes.—1. Whipping not to be inflicted in public.—The punishment of whipping is never to be inflicted in public, or in front of the Court-house, but always within some walled enclosure, and in the presence of a Magistrate or the Superintendent of a jail and, when practicable, of a medical officer.—*Pun. Cir.*, p. 277. Judicial floggings shall be inflicted in private either at a jail or in an enclosure near the Court-house and, if possible, in the presence of a medical officer. *Madras Rules of Practice*, s. 80. *See* also Note 16 to s. 32.

2. **Execution of sole sentence of whipping not to be deferred.**—This section authorises a Court passing a sentence of whipping, only to fix the place and time for its execution, but it does not contemplate a postponement of the execution of the sentence to a future day. It must take place at once, **Ratanlal 906; 26 M. 465.** It is illegal to state in the warrant that execution of the sentence of whipping shall take place at some future day, such as the date of the expiry of the sentence of imprisonment, **6 M. H. C. R. Appx. XXXVIII.** Where execution, has been so deferred, the sentence was cancelled as inoperative, **20 W.R. 72.** But where a sentence of whipping was passed by the Court at 5 p.m. on Saturday the next day being Sunday the sentence could be executed on Monday, **30 Bom. L. R. 389 = 29 Cr. L. J. 573.** *See* Notes 2 and 3 to s. 391.

391. (1) When the accused—

Execution of sentence of whipping in addition to imprisonment.

† "(*a*) is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(*b*) is sentenced to whipping in addition to imprisonment." The whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate Court; but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.

Note.—Under the new clause (*a*).—A sentence of whipping can be postponed though in addition to whipping no sentence of imprisonment is passed. The old section contemplated cases of whipping in addition to which a sentence of imprisonment was also passed. So under the old section a sentence of whipping alone could not be postponed.

Notes.—1. "Sentence"—whipping when to be carried out.—The word 'sentence' in this section means the total punishment inflicted at one trial. Therefore when an accused is convicted at one trial of two offences and sentenced to a separate term of imprisonment for each, and also to whipping for the second and the sentences are directed to be consecutive; *held*, that the sentence of whipping ought not to be delayed until the expiry of the first sentence, but shall be carried into effect according to the provisions of this section, **Ratanlal 803.**

2. **No provision for postponement of execution of sole sentence of whipping when convicted by a second-class Magistrate.**—The refusal of a second-class Magistrate to postpone a sole sentence of whipping only, pending an intended appeal, is quite proper, as that is the only order he could legally pass. The Code makes

* These words and figures were inserted by Act XII of 1923.

† These words were substituted for the words "is sentenced to whipping in addition to imprisonment in a case which is subject to appeal" by *ibid*.

his jurisdiction as a Magistrate of the first class, that under such circumstances it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and that the fact, that he acted with gross ... irregularity did not deprive him of the protection afforded by Act XVIII of 1850, 12 A. 115."

387. * A warrant issued under s. 386, sub-section (1), clause (a), by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorise the [illegible] attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

Effect of such warrant.

†388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

Suspension of execution of sentence of imprisonment.

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.

Notes.—1 The words "and the Court issues a warrant under s. 386" and the words "order a [illegible] for in return of such warrant" of the old section have been omitted by the present amendment 1923. [illegible] [illegible] a warrant under s. 386 and the release ... Magistrate is [illegible] [illegible] warrant. The effect of the change ... [illegible] ... was a condition precedent to the carrying out of the sentence of imprisonment.

2. This section inapplicable if no alternative sentence of imprisonment.—Where a Magistrate sentences an offender to a fine and fails to pass a sentence of imprisonment in default of payment of fine, he has under this section no power to release the offender on his own recognizance, [illegible] W. R. II, 482.

3. Issue of distress warrant a condition precedent to suspension of sentence.—The accused was sentenced to pay a fine and in default to three months' imprisonment. The Magistrate [illegible] sentenced to pay the fine and released her on her giving security. [illegible] the proceeding was illegal [illegible] to pay the fine and released her [illegible] a distress warrant for the levy of the fine was issued. The [illegible] in that case, 8 L. B. R. 151 = 7 Cr. L. J. 452. [illegible] and the present amendment [illegible] a Magistrate [illegible] section 386 without the issue of a warrant ... now [illegible] distress warrant ... [illegible]

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence or by his successor in office.

Who may issue warrant.

* The words and figures in the brackets [illegible] for the words "such warrant" [illegible] of 1923.
† The word [illegible] for the word "Court" [illegible]
‡ This section was [illegible] by Act XXXV of 1923.

Limit of number of stripes.

(2) In no case shall such punishment exceed thirty stripes and in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

Notes.—Amendment.—The words in brackets in sub-sec. (2) have been added by *the Whipping Act* IV of 1909.

1. On which part of the person whipping shall be inflicted.—(1) In the case of a person of, or over, sixteen years of age—

Bombay.—The punishment of whipping shall, when inflicted in private (*i.e.*, within precincts of prison), be inflicted on the bare buttocks, when inflicted in public (*i.e.*, without precincts of prison) across the bare shoulders—*Bom. G. R.* No. 608 of 1897.

Central Provinces.—The rattan shall be applied to the bare posterior, the offender being tied to triangle and a leather apron fastened round his waist.—*Notification* No. 20, dated 4th January, 1899, *C. P. Gazette.*

Madras.—The punishment of whipping shall be inflicted on the posteriors, and that care is to be taken that the person undergoing punishment is tied to a triangle, or that his mobility be otherwise secured, in order to preclude the possibility of the rattan falling on any other part of the body.—*Fort St. George Gazette*, dated 1st January, 1883; *Gazette*, 1898, Part I, p. 1248. A thin cloth soaked in antiseptic should be spread over prisoner's buttocks.

Burma.—The punishment of whipping shall be inflicted on the breech.—*Notification* No. 203, dated May, 1891, *Burma Gazette*, 1891, Part I, p. 201.

Assam.—See *Assam Gazette*, 1899, Part II, p. 384.

(2) In the case of a person under sixteen years of age—

Bombay.—The punishment of whipping shall be inflicted in private with a light rattan across the bare buttocks—*Bom. G. R.* No. 6222, dated the 16th September, 1898.

The United Provinces of Agra and Oudh.—The whipping shall be inflicted on the buttocks with a light rattan half-an-inch in diameter.—*G. O.* No. 1290, dated 12th May, 1898.

Central Provinces.—The whipping shall be inflicted on the bare posterior or in the case of a boy under the age of twelve on the hands, at the discretion of the Magistrate. The instrument shall be a rattan lighter than that used for adults; and while the whipping is being administered, the prisoner shall be held, but not tied on a triangle or in any other convenient way, as the Magistrate or officer present may think fit.—*C. P. Gazette Notification* No. 20, dated 4th January, 1899.

Madras.—A still lighter cane shall be employed.—*Madras Rules of Practice*, s. 180.

Punjab.—The punishment of whipping shall be inflicted on the buttocks in the way of school discipline with a rattan not more than half-an-inch in diameter.—*Notification* No. 677, dated 16th May, 1899 —*Punjab Gazette*, 1899, Part I, p. 314.

Burma.—The punishment of whipping shall be inflicted with a light rattan on the breech in the way of school discipline—*Burma Gazette Notification* No. 193, dated 1st July, 1898, Part I, p. 307.

2. Only one sentence of whipping permissible.—Under the provisions of this and the next section, not more than one sentence of whipping and that not exceeding thirty stripes should be awarded at one time, **1906 U. B. R. (Cr. P. C.) 47 = 4 Cr. L. J. 281**, where **1892—96 U. B. R. 1** and **44**; **1897—1901 U. B. R. 1** and **247**; **9 W. R. 41**; **14 W. R. 7** and **P. J. L. B. 582** are *referred to.*

Not to be executed by instalments. Exemptions.

393. No sentence of whipping shall be executed by instalments and none of the following persons shall be punishable with whipping, namely :—

(*a*) females;

(*b*) males sentenced to death, or to transportation or to penal servitude, or to imprisonment for more than five years;

(*c*) males whom the Court considers to be more than forty-five years of age.

no provision whereby a second class Magistrate [illegible] a sentence of whipping [illegible] can [illegible] in execution, nor does it provide for the [illegible] [illegible] appearing [illegible] re-arrest to undergo the whipping [illegible] [illegible] *to imprisonment* in an appealable case [illegible] [illegible] 26 M. 465 at p 466. But now a second class Magistrate can [illegible] pass a sentence of whipping. See s 32 as amended by *Act IV of 1909*. [illegible] (a) to sub-sec. (1).

3. Postponement of whipping illegal. [illegible] where a person was [illegible] convictions, first, to a term of imprisonment [illegible] the term of the imprisonment, and third [illegible] *whipping* was carried out, *held*, that the [illegible] expired is illegal, 6 M. H. C. R. Appx. XXXVIII, 7 M. H. C. R. Appx. XXIX; Ratanlal 209. See also 4 Bom. L. R. 877. Similarly, in 4 Bom. L. R. 426 it was *held* [illegible] he is sentenced to imprisonment and [illegible] whipping [illegible] is illegal (*i*) that no appeal lay against [illegible] whipping ought [illegible] merely because the accused appeals against the sentence of imprisonment. The [illegible] sentence of whipping is not illegal [illegible] whipping [illegible] offence and imprisonment for another. Weir II, 443. See [illegible] See [illegible] also cl. (*a*) to sub-section (1).

4. When sentence becomes inoperative, it should be cancelled.—Where a Deputy Magistrate [illegible] that the prisoner should be brought before him at the expiration of his imprisonment and that the sentence of *whipping* should then be *carried out*, the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out by lapse of time, 20 W. R. 72. The words "as soon as *practicable*" in sub-sec. (1) renders this [illegible] practically obsolete. But where an accused person was ordered to receive thirty stripes on the day of his release from prison the High Court set aside the order as [illegible] illegal and improper. 1891 A. W. N. 133.

5. When does sentence of whipping become inoperative?—A sentence of whipping [illegible] the period prescribed by the Act, [illegible] carried into effect, Weir II, 448, *e.g.*, where a [illegible] Magistrate passes a sentence of four [illegible] rigorous imprisonment and whipping and the order of the *Appellate Court* is not received within the [illegible] the prisoner must be released at the expiration of the *sentence* of imprisonment and the sentence of whipping [illegible] inoperative, [illegible] for obtaining the attendance of the prisoner [illegible] Sub-section (3) [illegible] cases rare.

6. Prisoner not freed from liability to whipping through breach of duty, etc., of [illegible].—The punishment *of whipping* is to be inflicted immediately on the expiration [illegible] But if through accident or neglect or wilful breach of duty the directions as to whipping [illegible] prisoner is not thereby in any way freed from his liability. The sentence [illegible] Ratanlal 135.

7. When whipping is illegal.—When the term of imprisonment [illegible] less than three months the additional sentence of whipping is illegal, 3 Bom. L. R. 84 [illegible] *High Court* has power to set aside such illegal sentence of whipping [illegible] who could have appealed. Weir II, 447. [illegible] (3) of this section [illegible] 4 *Bom*. L. R. 436.

8. Double sentence of whipping illegal.—[illegible] sentenced to two years [illegible] sentence that it was [illegible] illegal [illegible] Ratanlal 955.

392. (1) In the case of a person [illegible] sixteen years of age whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode and on such part of the person as the Local Government [illegible]; and in the case of a person under sixteen years of age it shall be inflicted in such mode and on such part of the person and with such instrument as the Local Government directs.

Mode of inflicting punishment.

order under s. 397 that the sentence of imprisonment shall take effect at the expiry of the term of detention in the Civil Jail as detention under the order of a Civil Court is not a sentence of imprisonment, penal servitude or transportation within the meaning of s. 397, **3 Rang. 93.**

Notes.—1. Sentence for substantive offence must be first carried out before imprisonment in default of security for good behaviour.—*See* Note 72 at p. 200. Imprisonment in default of giving security for good behaviour cannot be considered a sentence of imprisonment within the meaning of this section. Sentence of imprisonment implies the punishment awarded on conviction of an offence, **14 P. R. 1895.** *See* also **27 M. 525,** where it was *held*, that an imprisonment which a person is undergoing in consequence of default in complying with an order under s. 123 to give security, is not within the terms of this section. So where a person so imprisoned was convicted and sentenced to imprisonment for an assault on a jail-warder, execution of that sentence could not be deferred until the termination of the imprisonment under s. 123, **Weir II, 452; 1914 M. W. N. 500 = 16 Cr. L. J. 137; 3 S. L. R. 114 = 11 Cr. L. J. 16.** Where a person undergoing rigorous imprisonment in fault of giving security for good behaviour was convicted of an offence under s. 224, I.P.C., and sentenced to rigorous imprisonment for two months, *held* that the sentence for a substantive offence must commence at once and cannot be postponed to take effect after the expiration of the sentence which the prisoner was undergoing, **Ratanlal 970; 5 Bom. L. R. 26** *followed* in **6 Bom. L. R. 1098** and **31 M. 515; 34 B. 326; 37 B. 178; 3 S. L. R. 114 = 11 Cr. L. J. 16; 7 S. L. R. 203 = 15 Cr. L. J. 592; 8 N. L. R. 20 = 13 Cr. L. J. 189; 17 Cr. L. J. 480** *contra* **30 A. 334** (F.B.) where it was held that a substantive sentence of imprisonment passed on a person who has been committed to prison under s. 123 (1) for failing to give security must commence after the first sentence. *See* Preliminary note above and the second proviso which is newly added.

2. Concurrent sentences.—Section 35 provides for sentences being concurrent if they are passed at one trial. The passing of concurrent sentences otherwise than at one trial is opposed to the provisions of this section, **15 C. P. 57.** As to previous law, *see* **20 A. 1** and Notes under Heading IV at p. 63.

3. Only sentences passed at one and same trial can be made to run concurrently.—*See* Notes under Heading IV at p. 65. A Court has no power to direct that a sentence passed at a trial against an accused person do run concurrently with a sentence passed against him in a previous trial and supersede it, **Weir II, 453.** *See* also **Ratanlal 552; 4 Bom. L. R. 876; 2 Bom. L. R. 111, Ratanlal 18; 11 A. L. J. 263 = 14 Cr. L. J. 240; 14 Cr. L. J. 368** (Bur.); **4 L. B. R. 147 = 7 Cr. L. J. 445; 11 M. L. T. 213 = 1912 M. W. N. 396 = 13 Cr. L. J. 466; 20 P. L. R. 1912=13 P. W. R. 1912 = 13 Cr. L. J. 3.** In **13 Bom. L. R. 200 = 12 Cr. L. J. 241,** however, it was *held* that inasmuch as the trials took place on the same day and one after the other, it was for all practical purposes one trial and the sentences could be made to run concurrently. Accused was convicted at two trials held on the same day, of two distinct offences under ss. 75 and 379, I.P.C., and was sentenced on each to seven years' transportation the sentences to be concurrent. *Held* there is no provision in the Code which enables any Court to pass concurrent sentences, **12 P. R. 1894.** Nor has the Court power to direct that a sentence of transportation should take effect concurrently with a sentence of rigorous imprisonment that the accused was then undergoing, **2 S. L. R. 23 = 10 Cr. L. J. 236.** In **15 Cr. L. J. 66,** it was held that a sentence of transportation and a sentence of rigorous imprisonment passed at one trial can be made to run concurrently, and *see* Notes under Heading I at pp. 57-58.

4. Sentence usually to take effect when it is passed.—This section provides for an exception to the general rule that sentences commence to run from the time of their being passed, **3 B. L. R. Apl. Cr. 50; 20 W. R. 70.** The direction that a sentence in one case is to run from the date of the expiration of the sentence in a previous case passed on the same day should appear in the body of the sentence and should also be inserted in the warrant, **Weir II, 451.** Sentences of imprisonment imposed upon the same person in separate trial on the same day take effect by the terms of this section one after the other in the order in which they were passed and a Magistrate need not therefore give any direction in his judgment in respect of the same, **Weir II, 451.**

5. Procedure in consecutive sentences.—When a convict is imprisoned under two warrants which order consecutive punishments, the first warrant should be completely executed, both in regard to the substantive sentence of imprisonment and imprisonment in default of payment of fine, before any effect is given to the second warrant, **Ratanlal 132.** *See* now s. 398 (2).

6. Sentences taking effect in succession.—It is only sentences mentioned in para. (1) of this section that can be pronounced to take effect in succession, **Ratanlal 300.** But it is competent to a Magistrate in British India to pass a sentence of imprisonment for an offence committed in India, which should take effect after the expiration of the sentence which the accused is undergoing in foreign territory, **20 M. 444.**

Notes.—1. Sentence of whipping cannot be enhanced.—An accused person was convicted under s. 3[illegible], I.P.C., and sentenced to whipping. The whipping was inflicted and an application was made for enhancement of the sentence on the ground that it was [illegible], held that the sentence was legal and could not be enhanced as no sentence of whipping can be [illegible]. Ratanlal 377.

2. Sentence of whipping may subsequently become inoperative.—A sentence of whipping passed on a person who is already under sentence of [illegible] transportation or of penal servitude or imprisonment for more than five years is illegal. Even if [illegible] whipping precede [illegible] the other sentence the passing of the latter sentence renders the [illegible] of the punishment of whipping illegal. 1 M. 55.

Whipping not to be inflicted if offender not in fit state of health

394. [illegible] punishment of whipping shall not be inflicted unless a medical officer [illegible] present certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Stay of execution

(2) If during the execution of a sentence of whipping a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Note.—Medical officer cannot certify for part of sentence before commencement.—A sentence of whipping is wholly prevented from being executed when a medical officer certifies under this section that the offender is not in a fit state of health to undergo the punishment. It is partially prevented from being executed if *during* the execution of the sentence the medical officer certifies that the offender is not in a fit state of health. But there is no provision of law authorising a medical officer to give a certificate before the commencement of whipping that the accused is fit to receive [illegible] portion of the sentence and such a certificate cannot be held as one granted under this section. The Magistrate is not in such a case empowered by s. 395 to sentence the offender to imprisonment in lieu of so much of the sentence as was not executed. 31 M. 85.

Procedure if punishment cannot be inflicted under section 394

395. (1) In any case in which, under section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may at its discretion either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months,* or to a fine not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term * or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Notes.—1. Under the old law no Court could inflict fine in lieu of whipping where the sentence of whipping could not be carried out. But now under the present section as amended the Court has power to revise its sentence of whipping by [illegible] a fine. So under the new amendment 11 A. 301 and 3 Weir II, 440 have become obsolete.

2. *Section deals with substantive sentence of imprisonment.*—The word *Imprisonment* in this section means a substantive sentence and not imprisonment for default in payment of a fine. 11 A. 301.

3. "The Court which passed the sentence."—When a sentence of imprisonment and whipping passed by a District Magistrate is confirmed on appeal by the Sessions Judge, the power of the former to revise the sentence of whipping is not affected by [illegible] of health [illegible] the Court which can act when a sentence of whipping cannot be carried out under the circumstances referred to in s. 394 is the Court which passed the original sentence. 10 P. R. 1883. The words "the Court which passed the sentence" do not mean the same officer who inflicted the sentence of whipping originally [illegible] therefore, a District Magistrate who passed

* These words were inserted by Act XVIII of 1923.

rigorous imprisonment, and ordered that in place of this sentence the offender should be confined in a Reformatory for 14 months. *Held*, that the Magistrate having once passed a sentence of imprisonment for a particular term, cannot direct that the offender shall be confined in a Reformatory for a longer term, **Ratanlal 109.**

5. **Period of detention must be fixed.**—A sentence ordering a person to be detained in a Reformatory School until he attains the age of 18 years is not legal. The period of detention must be for a fixed period, **24 M. 13; 15 Bom. L. R. 306 = 2 Bom. Cr. Ca. 57 = 14 Cr. L. J. 256.**

6. **Sentence on juvenile offenders must be irrespective of the establishment of Reformatories.**—A Judge or Magistrate is not at liberty in estimating the proper sentence, to consider the fact that there is no Reformatory. The fact that the provisions of law as to Reformatories have not been carried out should not prevent the Judge or Magistrate from passing an adequate sentence, **Weir II, 453.**

7. **Only first-class Magistrates can send juvenile offenders to a Reformatory.**—*The Reformatory Schools Act* (V of 1876) was extended to the Madras Presidency by a notification in the *Official Gazette* in 1887. It provided only for male juvenile offenders being sent to Reformatory Schools by Magistrates of the first class, and s. 399 of the 1882 Code, so far as it authorised a Magistrate not of the first class, to direct that a male juvenile offender be sent to a Reformatory, was thereby repealed. *Held*, therefore, when a second-class Magistrate directed a boy to be sent to a *Reformatory* under s. 399 of the 1882 Code, that the order was illegal, **12 M. 94; 25 C. 333; 21 M. 400.** *See* now Act VIII of 1897, *Reformatory Schools Act*, s. 9, which provides for such a contingency. Under this section, any Criminal Court may also direct that a female juvenile offender be sent to a Reformatory when one is established, **Weir I, 875.**

8. **On release, juvenile offenders to be made over to their friends.**—All juvenile offenders who have been detained in a Reformatory may be made over on release by the Superintendent of the Jail to the District Superintendent of Police and shall be escorted to their homes by the Police and made over to the charge of their friends in the presence of the *lambardar*, or headman of the village. The report of the Police-officer, who actually made over charge, will be forwarded to the District Superintendent of Police of the district from which the released offender was despatched; the latter will then return the warrant of release to the Superintendent of the jail concerned. Before despatching such juvenile offenders, the District Superintendent of Police will personally satisfy himself that a sufficient subsistence allowance has been supplied by the jail authorities.—*Reg. and Ord.*, *N.-W. P.*, p. 288

9. **Rules under Reformatory Schools Act.**—*See* Appendix IV where the Act is set forth with annotations and rules. Subsec. (3) is new and follows **25 C. 333 and Ratanlal 864, 915 and 929.**

Return of warrant on execution of sentence.

400. When a sentence has been fully executed the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

Note.—Shall return the warrant.—If the sentence be one of both imprisonment and whipping, a certificate of the execution of the whipping should be endorsed on the warrant at the time of inflicting that punishment, but the warrant should not be *returned*, but detained (except when the prisoner dies) until the sentence of imprisonment has been undergone, *Wilkins*, 120

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

Power to suspend or remit sentences.

401. (1) When any person has been sentenced to punishment for an offence, the Governer-General in Council or the Local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Governor-General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or

7. Sentence to take effect on expiration, i.e., whether by reversal or completion.—Gr ... p. 65. When a person was convicted in two distinct trials by two different ... and on appeal the conviction in one of the cases was set aside it was *held* that the imprisonment ... as imprisonment under the sentence in the conviction which was not reversed. Wer II, 452. A ... was sentenced to two years imprisonment by a Magistrate of the first class on ... afterwards he was sentenced to three years imprisonment by the Court of Session which ... to take effect on the expiration of the sentence passed by the Magistrate. On appeal the ... passed by the Magistrate were reversed. *Held* that the sentence by the Sessions Court ... commenced from the time it was ordered to commence, *viz.*, from the expiration of the sentence ... whether by reversal or completion of the punishment. Ratanlal 137 and 323. When a prisoner has ... committed to jail under two separate warrants the sentence in the one to take effect from ... sentence in the other the date of such second sentence shall in the event of the first sentence ... appeal, be presumed to take effect from the date on which he was committed to jail ... sentence. *Rs Kres* 120

8. Order under this section is no part of judgment.—An order made by a Court ... not a part of its judgment and may therefore be made after the judgment has been signed. Ratanlal. Where therefore in ignorance that the person under trial before him was already ... Magistrate convicted and sentenced him dating the warrant irrespective of the previous sentence ... the Magistrate was competent to alter the date of the warrant as the alteration referred ... which the sentence should commence and not to the sentence itself. 3 W. R. (Cr. Let.) 16

Saving as to sections 396 and 397

398. (1) Nothing in sections 396 or 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

Confinement of youthful offenders in Reformatories.

399. (1) When any person under the age of 15 years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being, in force.

Notes.—1. Section applies only to Coorg.—*See* ... is in force only in Coorg, *see* ... *Reformatory Schools Act* (VIII of 1897, printed in Appendix IV and s. 3(1) ... Province also on the extension to it of that Act, *see* s. 3 of that Act.

2. Order of detention in a Reformatory is not a sentence within the meaning of s. 423.—A ... Judge cannot under s. 423 prevent carrying out of the order of detention ... 15 Cr. L. J. 134 (M.). *See* Note 5 at p. XXXIX of the Appendix.

3. Sentence of imprisonment is indispensable.—Where there is no previous sentence of imprisonment, an order under s. 399 cannot be passed. 31 P. R. 1912.

4. Confinement for short period in Reformatory is not good.—*Section ... the powers of the sentencing Court.*—A Magistrate, finding a juvenile offender guilty of theft in a building ...

which any accused person has been sentenced the recommendation shall be submitted with the proceedings in the case though the Court of the Judicial Commissioner, *i.e.*, High Court.—*C. P. Cr. Cir.*, Part II, No. 40. *See* also 23 C. 604 *followed* in 16 P. W. R. 1909 = 11 Cr. L. J. 105; *Referred Trial No.* 40 *of* 1905, *Madras*, 7 A. 672; 10 B. 176.

See *the Madras Police Manual*, Vol. I, pp. 319-320, as to form of conditions to be assented to by a prisoner when released on medical grounds. *See* also s. 21 of *the Prisoners Act* III of 1900, printed in Appendix X.

4. **Together with his reasons for such opinion.**—In cases of murder, the Judge may record any extenuating circumstances rendering it expedient that there should be a mitigation of the sentence required by law, and submit the same to Government and the Government may under this section act in such manner as to it seems proper, 1864 W. R. 27.

5. **Object of sub-sec. (6)**—Sub-sec. (6) is new; it will enable the different Government to make rules for respites in emergent cases, so that execution of a sentence—especially one of death—may be suspended until the orders of Government shall have been received on a petition made to it under this section by a convicted person. It will be useful also in cases where the Local Government had refused to interfere and an application is afterwards made to the Governor-General in Council.

Power to commute punishment.

***402.** (1) The Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:

Death, transportation, Penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

†(2) Nothing in this section shall affect the provisions of sections 54 or 55 of the Indian Penal Code.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

Person once convicted or acquitted not to be tried for same offence.

403. (1) A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former, trial under section 235, sub-sec. (1).

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

* This section was renumbered by Act XVIII of 1923.
† Sub-section (2) was added by *ibid.*

by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion * and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor General in Council or of the Local Government as the case may be, not fulfilled, the Governor General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested *by any Police-officer without warrant and remanded to undergo the unexpired portion of the sentence

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will

† (4 A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property '

(5) Nothing herein contained shall be deemed to interfere with the right of ‡ His Majesty or of the Governor-General when such right is delegated to him to grant pardons, reprieves, respites or remissions of punishment

§ (5-A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him by the Governor General, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly

(6) The Governor General in Council and the Local Government may by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with

Note.—' The new clause (4 A) is intended to make it clear that the power to remit [illegible] by section 401 can be exercised in the case of orders of a penal nature [illegible] Code. The object of the new clause (5-A) is to enable any condition on which a pardon has been granted by His Majesty or by the Governor-General when such power has been delegated to him to be enforced in the same way as a sentence of a Court. *Statement of Objects and Reasons*

' In section (4 A) the word Law has been used instead of the more common [illegible] clear that this section applies to the case of persons sentenced [illegible] Ordinances." *Report Joint Committee* 1922

Notes.—1. When any person has been sentenced.—The special [illegible] relates to persons sentenced to punishment and "does not touch cases under s. 337" in which the conditions precedent, upon which the pardon was tendered [illegible] at p. 82.

2. Convicting Court to state its opinion. A Sessions Judge required to state his opinion under this section, must forward his reply through the High Court whether the [illegible] through the High Court or no —*M H C Cir* [illegible]

3. Procedure where Court is of opinion that Local Government should act under this section.—When any Court shall be of opinion that there are grounds for recommending to the Local Government to exercise the powers vested in it by s. 401 of [illegible] suspending, remitting or commuting the [illegible]

* The words in inverted commas were added by Act XVIII of [illegible]

† This sub-section was inserted by [illegible]

‡ These words were substituted for the words "[illegible] Majesty" by ibid

§ This sub-section was inserted by ibid

the person to whom it relates," *R.* v. *Plummer*, (1902) 2 K. B. 339 *followed* in **38 C. 559.** When once an accused has been acquitted of an offence, his innocence must be presumed. A verdict of acquittal is immune from challenge, **37 B. 658.** A complaint which is based on part of the facts which were the foundation of previous proceedings cannot be entertained. Where a false complaint was made to the Police on the 5th and repeated at the Police inquiry on the 11th, who therefore took proceedings under s. 211, I.P.C., which resulted in an acquittal, a fresh proceeding under s. 182, I.P.C., in respect of the false complaint of the 5th cannot be entertained, **36 M. 308.** The prisoner was charged originally with an offence under s. 498, I.P.C., of having enticed away a married woman from her husband and was finally acquitted on appeal by the District Magistrate who found the whole case was a deliberate fabrication. The prisoner was next charged under s. 353, I.P.C., of having kidnapped two infants of *K*, who were with her when she left the husband's house and the prisoner was convicted and the conviction upheld by the Sessions Judge, who held that the prisoner was the person who induced *K* to leave her husband's house along with the infants and convicted the prisoner; *held*, that so long as the acquittal under s. 498 remained in force, the Judge was bound to take it as proved that the accused did not so take or entice away *K*. Though the acquittal is no bar to the trial, the finding was perverse and contrary to every recognised principle of law and the Judge had no right to arrogate to himself the right to adjudicate upon the finding of the District Magistrate in the previous case, **56 P. L. R. 1911 = 12 Cr. L. J. 94.**

Propriety of ordering further inquiry into offences, some of which formed component parts of an offence of which the accused was acquitted.—Where an accused was charged with being a member of an unlawful assembly with the common object of assaulting the complainant and that he so assaulted the complainant and was acquitted under s. 147, I.P.C., after trial; but notwithstanding the order of acquittal, the District Magistrate directed further inquiry into an offence under s. 323, I.P.C.; *held*, that the matter cannot be re-opened until the order of acquittal shall have been set aside; and further, no order within the terms of s. 437 having been passed regarding the offence under s. 342, I.P.C., the District Magistrate had no jurisdiction to order further inquiry with regard to that offence, **5 C. W. N. 72.**

3. **Burden of proof is on accused.**—The burden of proving *autrefois acquit* or *autrefois convict* when such a plea is set up by a party, is on him, **1889 A. W. N. 3.** The *onus* of proving the plea is on the accused; he may prove it by producing a certificate copy of the record or proceedings of the alleged conviction of acquittal, and showing by such copy or other evidence if necessary, that he has been convicted or acquitted of the offence on which he has been arraigned, or that he might have on his former trial been convicted of the offence on which he has been arraigned, or that his previous conviction or acquittal is by statute a bar to subsequent proceedings for the same cause. *Halsbury's Laws of England, Vol. IX, p.* 356.

4. **Procedure—pleading.**—Section 403 has nothing to do with pleading, being in terms a limitation on the jurisdiction of the Court, and is not to be construed with reference to the English Law of criminal pleading, **41 C. 1072.** Under English Law, the accused cannot plead double, that is, a defendant having pleaded not guilty to an indictment is not entitled whilst that plea is standing, to have a plea of *autrefois acquit* put on the record. The verdict of the jury must be taken at once on the special plea and then the general issue must be pleaded to by the defendant. *See* **41 C. 1072.**

(*i*) *Method of proof.*—*See* s. 511. When the second trial is in the same Court, the Judge is entitled to refer to his own notes, *see* remarks of STEPHEN, J., in **41 C. 1072.**

(*ii*) *When plea may be set up.*—Unlike English procedure, a defence under this section may be set up, at any time before verdict, **41 C. 1072.**

(*iii*) *Judge or jury to decide the plea.*—In England the jury are sworn *instanter* to try the issue whether there has been a previous acquittal or conviction on the same facts. The counsel or the prisoner opens his case in support of the plea and calls his witnesses, the counsel from the Crown afterwards addresses the jury and calls witnesses and the counsel for the prisoner replies. See *R.* v. *Sheen*, **2 C.** and **P. 634.** *Russell on Crimes*, pp. 1993—1996; *Archbold*, pp. 179-180.

Wherever the offences charged in the two indictments are capable of being identified as the same offence, it is a question of fact whether the offences are the same, and the identity must be proved; but where a plea of *autrefois acquit* upon its face shows that the offences are legally distinct and incapable of identification, the Court may determine the question as a matter of law, **7 W. R. 15** *citing R.* v. *Vandercomb*, **1 Leach, 712.** In **41 C. 1072,** STEPHEN, J., *held*, that under the circumstances arising in that case, the question whether the accused

(5) Nothing in this section shall affect the provisions of s. 26 of the General Clauses Act 1897 or of s. 188 of this Code

Explanation —The dismissal of a complaint, the stopping of proceedings under section 24[illegible] the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

Illustrations.

(*a*) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(*b*) *A* is tried upon a charge of murder and acquitted. There is no charge of robbery but it appears from the facts that *A* committed robbery at the time when the murder was committed, he may afterwards be charged with and tried for robbery

(*c*) *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide.

(*d*) *A* is charged before the Court of Session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried on the same facts for the murder of *B*.

(*e*) *A* is charged by a Magistrate of the first class with, and convicted by him of voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts, unless the case comes within paragraph 3 of the section.

(*f*) *A* is charged by a Magistrate of the second class with and convicted by him of theft of property from the person of *B*. *A* may be subsequently charged with and tried for robbery on the same facts

(*g*) *A* *B* and *C* are charged by a Magistrate of the first class with, and convicted by him of, robbing *D*. *A* *B* and *C* may afterwards be charged with, and tried for dacoity on the same facts.

I.—PRELIMINARY.

Notes.—1 Explanation of terms—*Tried.—See* 33 M. 220 at pp. 223 and 224; 26 M. 253; 8 N. L. R. 6 = 16 Cr. L. J. 230; 15 C. 608; *see* also 39 I. C. 833 = 23 Cr. L. J. 183. Notes 1 to 3 at pp. 12-13 [illegible] s. 251 and Notes 18—20 below Chapters XXI, XXII and XXIII deal with trials in summons, warrant and sessions cases respectively

Offence.—For definition *see* s. 4 (*o*) at p. 15 and Notes thereunder

Conviction.—"Undoubtedly 'conviction' is *verbum equivocum* It is used sometimes to denote the verdict of the jury, and at other times in its strict legal sense to denote the judgment of the Court."—*Per* TINDAL C.J., in *Burgess* v. *Boetefeur* 8 Scott N. R. 194 *cited* in 33 M. 128 (F.B.) For judgment of conviction, *see* ss. 243 245, 255 258 301 305 306 307 309 423, 450 and 455

Sentence "does not in all cases follow a conviction," *see* s. 562.

Acquitted.—"The word *acquitted* is an equivocal expression In common parlance a party is said to be acquitted by the verdict of the jury finding him not guilty" But it is only the formal [illegible] of the Court [illegible] in legal intendment satisfies the word "acquittal"—*Per* TINDAL, C J *quoted above* [illegible]

BOUVIER in his "Law Dictionary" explains 'acquittal' as "the absolution of a party accused on a trial before a traverse jury" and also as "the [illegible] of a party charged with a crime [illegible] SUBRAMANIA IYER J. is of opinion that the word 'acquittal' is used in the Code in a sense [illegible] what is ordinarily attached to it as a term of English law Under that law a [illegible] technically available only where there is a [illegible] verdict or sentence But the Code [illegible] modification in several instances (*see* Note 2[illegible], 33 M. 128 (F.B.) For acquittal [illegible] *see* ss. [illegible], 247 and 248 [illegible] summons cases, s. 258 in warrant cases [illegible] in Sessions trials, and *see* also ss. 2[illegible] 345, 427 470, 4[illegible] and 4[illegible].

2. Acquittal must be accepted as completely establishing innocence of accused on all facts charged—"It is a very dangerous practice to regard a verdict of 'not guilty' as not fully establishing the innocence

homicide he will be protected from a trial for any offence involving hurt, but where a charge was made, the case falls outside the provisions of the law dealing with cases where it might have been made," **41 C. 1072.** STEPHEN, J., *held*, that even according to the law of England in such a case the acquittal for murder is no bar to the re-trial for culpable homicide and the authority of *R.* v. *Grimwood*, **60 J. P. 809** *cited* at p. 235 of *Archbold* was doubted.

9. **Does section bar second application for maintenance under Chapter XXXVI?**—A dismissal of a previous application for maintenance does not constitute a legal bar to an order granting a maintenance on a subsequent application. *Res judicata* does not bar any proceedings by general principle, but only by a special enactment, as contained in s. 13 of the Civil Procedure Code, and s. 403 of the Criminal Procedure Code; but where a Magistrate, to whom an application is made, knows or has reason to believe that a similar application on the same facts has been adjudicated on, he ought not to act on the application without considering the previous decision, but that, when he does so, he is not wrong in law, nor are his proceedings bad and void, regardless of the merits, **4 L. B. R. 337 = 9 Cr. L. J. 21,** *dissenting from* **5 A. 224** and *see* Note 14 under Heading II to s. 488.

10. **Does section apply to security proceedings under Chapter VIII?**—S. 403 applies only when the proceedings could end in an acquittal or discharge. In **33 M. 85** and **27 C. 662** it is explained that the expression 'discharge' in s. 119 means merely 'discharged from custody' and is not used in the technical sense of 'discharged' as opposed to acquittal from an offence as used in s 253. *See* Notes 131 and 132 at p. 213. Even though a Magistrate enters an acquittal in security proceedings it is unmeaning and does not bar further proceedings on the previous facts, **36 M. 315.** "We are not to be understood as countenancing the idea that it would be right to vex a party repeatedly with proceedings under those sections on the same facts as formed the foundation for previous proceedings whom those facts were found insufficient to justify an order for security. *See* also **14 Cr. L. J. 189 (C.)** and **15 Cr. L. J. 69 (A.)**. But *see* **35 C. 401,** and Notes 21 and 22 to s. 437.

11. **Section does not apply to proceedings under the Workman's Breach of Contract Act.**—This section does not bar a second prosecution under Act XIII of 1859, when the complainant withdrew the first case before the Magistrate made any order. It is the non-compliance with the Magistrate's order that constitutes the offence, a wrong order of acquittal on the withdrawal does not bar prosecution. In **21 C. 262** it was *held*, that where a person was convicted and imprisoned it is a bar to any subsequent conviction on the same contract for not returning to service. *See* Notes 5 and 6 at p. lxxvii of the Appendix, **24 M. 660.**

12. **Does section bar subsequent prosecution of persons jointly implicated with accused who was acquitted?**—There is no provision of law which renders the subsequent prosecution of persons jointly concerned in the commission of an offence illegal, where on a previous trial others concerned in the offence have been tried and acquitted, but the principle of the section was in **7 C. W. N. 493** applied to such persons and it was held that until that order of acquittal declaring the facts on which the prosecution proceeded were false, was set aside on the appeal of Government, the Magistrate was not competent to take proceedings against others for the same offence. Where, however, on a complaint charging a number of persons with offences under ss. 148, 326 and 302, I.P.C., only three were sent up for trial and acquitted on the ground that the prosecution story was not a true one; and subsequently others implicated in the complaint were placed on trial and it was objected on the authority of **7 C. W. N. 493** that they could not be prosecuted until the previous judgment declaring the case untrue was set aside; *held*, there was no bar, **37 C. 680. 7 C. W. N. 493** was a peculiar case. There five persons were indicted for various offences, which included the offence of unlawful assembly, as to which it was necessary that there should be five persons. Three out of the five were placed on trial and acquitted. Two others who were alleged with the other two to make up the five were put for trial for having abetted the offence of which the other three had already been acquitted and the High Court *held*, that such prosecution ought not to proceed. It did not lay down any general rule. In **10 C. W. N. 1031 = 4 Cr L. J. 173,** where on a charge of theft against *A*, *B* and *C* under s. 380, I.P.C., *A* and *B* were placed on their trial and acquitted by a competent Magistrate and subsequently on the discovery of some stolen property in the house of *C*, *C* was put on his trial for an offence under s. 411, I.P.C., it was *held*, *dissenting from* **4 C. W. N. 346** and **7 C. W. N. 493,** that the previous acquittal of *A* and *B* was not a bar to the subsequent trial of *C*, as there were certain additional facts before the Court ascertained subsequent to the acquittal, which supported the charge under s. 411, I.P.C. *See* also in **41 C. 754** where in a previous trial two persons were acquitted by the jury of the offence of conspiring with a third person who was not a party to that trial, it was *held*, that such an acquittal was no bar to fresh proceedings being taken against the third party. *See* also **36 A. 168.**

who was acquitted of the offence of murder could be tried for the offence of culpable homicide is a question of law to be decided by the Judge and not by the Jury. *See* ss. 310 and 311 for procedure in cases of previous conviction.

5. Effect of loss of records of previous trial.—*See* s. [illegible] and 38 M. 453 where [illegible] [illegible]

be discovered, the High Court directed that the conviction and sentence and all other proceedings in the case be set aside and a new trial of the accused held by the Sessions Judge, on the counsel for the accused, arguing in the High Court that no legal pleas in bar of a new trial could be put forward by or for his client, 1932 A. W. N. [illegible]

6. S. 26 of the General Clauses Act deals with the same acts constituting offences under two or more enactments.—"Where an act or omission constitutes an offence under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." This is almost identical with s. 33 of the *Interpretation Act* 1889 (52 and 53 *Vic.* c. 63), which does no more than extend to statutory offences the common law rule as laid down in *R.* v. *Miles*, 24 Q. B. D. 423, *Archbold*, p. 177. The editors observe that the enactment would have been clearer if for the word 'offence' at the end had been substituted the words 'act or omission.'

II.—SCOPE OF SECTION.

7. Section applies to second trial and not to powers of Court of Appeal and Revision.—Under s. 403 it is the duty of the Court before the plea of *autrefois acquit* is taken in bar, to decide on evidence, and not merely by hearing the parties and looking into the papers of the previous trial. Where the petitioner charged the opposite party with cheating and criminal breach of trust, and the accused took the plea of *autrefois acquit* and the Magistrate on hearing both the parties and looking into the papers of the previous trial discharged the accused. *Held*, that whether the facts in the present case were the same as those in the previous case had to be determined after hearing the evidence and ascertaining what the facts are in this case and what were the facts found in the previous case. 23 C. W. N. 589 *following* 23 C. W. N. 563. This section refers only to a second trial and bars it, if it comes within its terms. It does not affect the powers of a Court of appeal or Revision in the same proceedings, as those proceedings are only a continuation of the same trial. 33 C. 975 at p. 977. An appeal is not a second trial, but a continuation of the trial in the Lower Court and s. 403 has therefore no application, 37 M. 192. Thus an Appellate Court can, under s. 423, convict on a charge of which the accused had been acquitted by the Court of First Instance, or order a new trial on the same charge. *See also* 33 C. 377; 27 C. 172; 40 C. 163 and Note 62 to s. 423 and Note 49 to s. 433.

8. Section does not apply to re-trial of accused under s. 308 after discharge of jury.—The accused who was charged with several charges and had pleaded not guilty, was acquitted on two of the charges and the jury disagreeing on the other charges were discharged and the accused when put up for trial before a fresh jury pleaded *autrefois acquit*. STEPHEN, J. *held* that for the purposes of s. 403, the accused was not being tried again. "He is being tried on the original indictment and I consider that he is being tried on his first plea of 'not guilty.' The duty of the Court is to continue the trial of the accused before another jury and the process may continue till a verdict is passed on all the counts without the accused being tried again under s. 403. I am aware that s. 308 refers to the accused being retried, but that does not affect the considerations [illegible] 41 C. 1272.

8-A. Does acquittal on some of several charges bar re-trial after disagreement of jury on the other charges?—N was committed and tried before a jury on a charge containing five counts. The [illegible] charged him with the murder of *A. T.* under s. 302 I.P.C., and the fifth count charged him with culpable homicide of *A. T.* under s. 304, I.P.C. The accused pleaded not guilty and the jury [illegible] acquitted the accused of the fourth [illegible] as to the fifth count. The jury was [illegible] and the accused was put up for trial on the fifth count [illegible]. It was urged in defence that as he [illegible] had been acquitted of the charge of the murder of *A. T.*, he could not be tried again [illegible] homicide of *A. T.* *Held*, that s. 403 protects him only against a trial for murder and any [illegible] for which a different charge from the one made against him might have been made. But the charge of culpable homicide for which he was to be tried again was the same charge that was made against him, and on the terms of this section the defence must fail. "If he had been charged with murder alone, no doubt a verdict of not guilty would protect him from another trial for culpable homicide, and should he be acquitted of culpable

MUST HAVE BEEN TRIED.

18. There must have been a 'trial' for the application of the rule.—Under English Law unless acquittal was on the merits, *i.e.*, by verdict on the trial, or in summary cases by dismissal on the merits followed by a judgment of acquittal, it does not operate as a bar. *See* judgment of SUBRAMANIYA IYER, J., in **29 M. 126.** Where a jury sworn and charged with a prisoner is discharged without giving a verdict, such a discharge does not bar a fresh indictment. *Winsor* v. *R.*, **L. R. 2 Q. B. 289,** 390 and *R.* v. *Lewis*, **78 L. J. (F.B.) 722.** Where the Judge disagreeing with the divided verdict of the jury discharges them and orders the re-trial of the accused under s. 308, the section has no application, **11 C. 1073.** Under the Code trial in the literal sense of the word does not seem to be necessary. Throughout the Code clear directions are given as to when an order of acquittal or discharge should be entered. To set up the plea dealt with by this section, there must have been a previous trial in which some final order has been passed, *i.e.*, of conviction or acquittal. The explanation to this section makes the point clear. So when, after an investigation, the Police reported that theft (a cognisable offence) had not been established, and the Magistrate passed an order striking off the offence, it was *held* that such order could not affect the subsequent trial of another non cognisable offence regarding which no proceedings had been taken. The Magistrate could not take cognisance of that offence on a Police report, but only on a complaint and he had not done so, **5 B. 405.** *See* also **30 Bom. L. R. 342.**

19. When may a person be said to be "tried"?—*See* Note 1 above. A process must have issued to the accused for his appearance, **36 W. 315.** In a summons-case when the accused appears and answers to the charge, he is said to be "tried," although the case is dismissed owing to non-appearance of the complainant. In such a case the accused cannot be tried again upon the same facts for the same offence at the complaint of another person, **Weir II, 457.** Even though the accused also was absent in spite of having been served with a process and the case is dismissed under s. 247, the accused is entitled to the full benefit of s. 403, **34 M. 253** *following* **4 C. W. N. 316; 7 C. W. N. 711** and **493.** If the trial has otherwise been regularly conducted, even though no formal charge has been framed therein, the order of acquittal would still be a bar to further proceedings, **3 A. 129; 10 M. 9766.**

20. Judgment of aquittal without adducing any evidence would still operate as bar.—(i) Under s. 247 on the non-appearance of the complainant in a summons-case the accused has to be acquitted for the effect of such an acquittal, *see* Notes 17—20 thereto and **34 M. 253;** *see* also **31 Bom. L. R. 795** and **33 C. W. N. 260.** (ii) Under s. 248, a Magistrate may permit the withdrawal of a summons-case and acquit the accused. (iii) *See* s. 333 where the Judge of a High Court can enter a judgment of acquittal on a *Nolle prosequi* by the Advocate-General (iv) Under s. 345, a compromise has the effect of an acquittal, **Ratanlal 519; 29 P. R. 1914 = 16 Cr. L. J. 81.** (v) Under s 494, an acquittal follows where a Public Prosecutor withdraws from the prosecution after the charge has been framed or there is no charge required, **9 N. L. R. 26 = 14 Cr. L. J. 135; 12 M. 35.** (vi) *See* also s. 240, where the withdrawn of remaining charges on conviction on one of several charges has the effect of an acquittal, **19 W. R. 55.**

An acquittal under s. 247, equally with an acquittal after trial on the merits acts as a bar to further proceedings by virtue of s. 403. **45 A. 58.**

BY COURT OF COMPETENT JURISDICTION.

(See *Notes* 39—41.)

21. 'Council of Elders' is a Court of competent jurisdiction.—For the purposes of this section, the Council of Elders established under *Punjab Frontier Regulation* (IV of 1887) is a Court of competent jurisdiction, and a person convicted by such council cannot be ordered to be committed on the same facts on which he was convicted, **30 P. R. 1884.**

22. Order of incompetent Court of no avail under this section.—The principle is that the accused must have been in jeopardy at the previous trial; where, therefore, owing to the incompetency of the Court he was not lawfully liable to suffer judgment in the previous proceeding, the section does not apply. *See Russell on Crimes*, p. 1983. Where a former trial is set aside on the ground of want of jurisdiction and illegality, it is no bar to the second trial. For, when the High Court quashed the whole of the original proceedings as being altogether without jurisdiction and therefore illegal, their result cannot be pleaded as *autrefois acquit*, it being necessary to that plea that the first Court should have had competent jurisdiction to try the offence, **2 W. R. 10.** A Magistrate cannot convict or acquit a prisoner whom he has no jurisdiction to try.

13. Rule equally applies where first trial is against accused jointly with others and subsequent charge is against him alone.—The rule is equally applicable though the first indictment is against the defendant jointly with others and the second against him alone: *R.* v. *Dann*, 1 Mood. 424.

14. Plea in the nature of, or analogous to, "autrefois acquit."—The reason for the plea *autrefois acquit* is that an accused person should not in respect of any offence be in jeopardy of prosecution more than once. Though technically, such a plea cannot be raised upon where there has been no trial resulting in an actual acquittal, it would be impossible to conceive that the great principle which the [illegible] to which the law allows the said plea should be inapplicable to cases where the prosecution failed before it reached that stage without any fault on the part of the accused. If it is justice that a person [illegible] on a former occasion upon evidence sufficiently strong to warrant his being put upon his trial and being called upon for his defence and his evidence should not be vexed again in the matter when the trial terminates [illegible] his favour, it must, *a fortiori*, be so when evidence on which his prosecution was initiated was so weak as not to justify the trial and the accused discharged and saved from the necessity of entering upon the vindication of his innocence. Bishop in his "Commentaries on the Law of Criminal Procedure," after pointing out that according to the better doctrine a person is in legal jeopardy when the jury is empanelled and ready to try him on a valid indictment and there is no latent or patent obstacle in the judicial path to prevent the cause from proceeding to the end, observes: "then if contrary to his rights and without his consent the cause is suffered to break off before a verdict of acquittal or conviction is reached, there can be [illegible] be a plea of *autrefois acquit* or *autrefois convict* by reason of this jeopardy yet the prisoner is entitled [illegible] way [illegible] to [illegible] protection." The same jurist lays down that a plea *analogous* to the plea of *autrefois acquit* setting out the special facts which show the jeopardy may be brought forward as the proper method of taking the objection and calls it the defence of former jeopardy.—*Per* SUBRAMANIA IYER, J., [illegible] in 22 M. 125 (F.B.). But in 31 M. 543 it is stated that the Code is exhaustive on the subject of *autrefois acquit* and it is not permissible to add to its provisions.

15. "Section bars second trial and no judgment can be passed in respect of second complaint."—Where a prosecution is barred on account of a previous trial, s. 403 directs that the accused "*shall not be liable to be tried.*" An order of acquittal on a subsequent complaint is therefore, improper as no such order can be passed without a trial, 5 L. B. R. 13 = 9 Cr. L. J. 575. The section bars any trial and therefore no order regarding the disposal of property can be made under s. 517 on a second complaint after a previous acquittal, as an order under s. 517 could only be made "when an inquiry or trial in a Criminal Court is concluded," 4 L. B. R. 329 = 7 Cr. L. J. 450.

16. Liability of accused to be tried after acquittal, for using false evidence in his defence.—Where an accused person obtained an acquittal, and in the course of his defence which he knew to be false. *Held* (LINDSAY, J., *dissenting*), that he was liable to be tried under s. 196 Indian Penal Code, for using such evidence. *Per* LINDSAY, J.—The second trial, i.e., that under s. 196 I.P.C., was in effect a trial of the accused for the offence of which he had been already acquitted, 35 P. R. 1870.

III.—GENERAL RULE OF AUTREFOIS ACQUIT OR CONVICT.

17. A person shall not be in jeopardy in respect of any offence more than once.—"It is an [illegible] rule of the common law that a man may not be put twice in peril [illegible]": 2 Hawk. C. 35. The principle on which the right to plead "*autrefois acquit*" or "*autrefois convict*" [illegible] is that a man should not be put twice in jeopardy for the same matter and it does not rest on any [illegible] p. 176. At common law a man who has once been tried and acquitted of a crime may not be tried again for the same offence if he was "in jeopardy" on the first trial. He was so in jeopardy if (1) the Court was competent to try him for the offence, (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered and (3) the acquittal was on the merits [illegible] Cowen p. 142.

The general rule of the common law forbids a man to be *twice vexed* for one and the same offence. This is now read as meaning for the same acts and omissions [illegible] and as meaning that the evidence to sustain a legal conviction on the first charge was in substance the same as was necessary to sustain the second charge, *see R.* v. *King*, (1897) 1 Q. B. 214—216.

endorsed on the charge-sheet that the accused were acquitted, second charge-sheet was subsequently laid by the Police; *held*, that the order passed by the Magistrate on the first charge-sheet was no bar to proceedings on the second charge-sheet. "It appears to be clear that neither an order of discharge nor of acquittal could properly be made in a case when the accused has not been directed to appear at all. The provisions regulating trials and inquiries all contemplate the appearance of the accused as essential for the commencement of the proceedings." *See* ss. 242, 252, 208 (I) and 271. The order of acquittal on the first proceedings was unmeaning and could not be availed of, **36 M. 815. 17 A. L. J. 867.**

(*iii*) *Order for release not amounting to acquittal.*—Where the nature of the charge was explained to the accused, but no formal charge in writing was drawn up against him as required by s. 254; *held*, that the order for release (s. 249) did not amount to an acquittal under s. 258, **4 B. L. R. Ap. Cr. 1.** But an order for the release of the accused as "*Nirdoshi*" has been held by the Calcutta High Court to operate as an acquittal. Where a complaint was made of extortion under s. 384, I.P.C., and the Magistrate allowed the dispute to be referred to arbitration and discharged the accused; but the arbitration having fallen through, the Magistrate allowed the complaint to be revived. The High Court held the discharge to be improper, but refused to interfere with the order reviving the prosecution, **1 C. W. N. 49; 36 M. 315; 17 O. C. 18.**

JUDGMENT MUST BE IN FORCE.

27. Bar only so long as such conviction or acquittal remains in force, *i.e.*, so long as such judgment or order has not been set aside by a Court of Appeal or Revision. When so set aside, the result will be that the proceedings on the trial will be annulled, and this will not prevent the prisoner being again put on his trial, **7 W. R. 2.** If the order of acquittal is set aside by a Court of Appeal or Revision, the proceedings on the trial will be annulled and there is no prohibition against the prisoner being again put on his trial, **7 W. R. 3.** Where the Appellate Court reverses the verdict of a jury and orders a re-trial, unless it has limited the scope of the re-trial such re-trial must be taken to be one upon all the charges originally framed, **22 C. 377; 40 C. 693.** A judgment reversed by a Court of error is the same as no judgment, and in that case, therefore, the plea of *autrefois acquit* is not available, *Drury*, **(1849) 3 C. and K. 193.**

28. So long as previous order is in force, irregularity of proceedings is of no consequence.—It is not necessary that the judgment of acquittal should be, in fact, correct and proper, for, while unreversed, it will support a plea of *autrefois acquit* in bar of a second trial. Thus a judgment for the defendant, though consequent on a misdirection or erroneously given on a special verdict, or on an insufficient indictment, so long as it stands unreversed, is a bar to a new indictment. *Russell on Crimes*, p. 1983. If the offence is the same, the former conviction or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not, **7 W. R. 15.** Even if the judgment of acquittal was passed under a misapprehension of the law it would still operate as a bar. When a Sessions Judge considering that two charges under ss. 302 and 201, I.P.C., could not be combined, separated the charges and tried the accused on a charge of murder only and acquitted her, it was *held* that the accused could not be tried again for the offence under s. 201, I.P.C., as the two charges might have been combined in the former trial and though he clearly intended that the accused should thereafter be tried on a charge under s. 201, **4 S. L. R. 174 = 11 Cr. L. J. 731.** *See* also **9 N. L. R. 26 = 14 Cr. L. J. 135,** where the accused was acquitted of a charge, under s. 203, I.P.C., on a withdrawal of the case under a misapprehension and it was held he could not be tried again under s. 177, I.P.C., on the same facts. Even if the acquittal had been obtained by a trick on the part of the accused, the acquittal would operate as a bar. *See* **38 M. 1028.** *See* **35 P. R. 1870.** The Court before which an order of acquittal is produced is not entitled to impeach the competency of the Court which passed the order, on the ground that the presiding officer was disqualified under s. 556, **8 A. L. J. 1129.** *See* Note 24 and Note 19.

IDENTITY OF OFFENCE.

29. Offence must be the same—immaterial differences do not affect identity of offence.—When it is said that the offences must be the same, it is merely meant that they must be in reality the same; and therefore, a defendant may plead his previous acquittal, though the two charges differ in immaterial circumstance, for it would be absurd to suppose that by varying the day, place or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant and subject him to a second trial for what in reality is the same offence. Thus if a prisoner be indicted for murder alleged to have been committed on a certain day and acquitted and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar notwithstanding this difference, for the day stated in the indictment on the former trial was not material. If a prisoner should be charged with murdering *A* and should plead a former

Such an order is of no avail under this section, 8 W. R. 13. Where it appeared that the Bench of Magistrates had no jurisdiction to deal with the offence of a lottery ... ted the accused *held* that the acquittal was not a *bar* under this section and also that section 531 was not applicable to such a case, 33 Bom. L. R. 1433 = 53 Bom. 69. Where a prisoner is ... by the Court of Session on the ground that the proceedings had in his case were illegal and irregular, this section is no bar to his being ... tried and convicted of the same offence 13 W. R. 43. *See* also 23 C. 413 at p. 414, where it was held that if the trial is void *absolutely* for want of jurisdiction in the Magistrate it cannot be called a *trial*, and that a discharge by the Appellate Court, without an order for trial by the proper Court, does not bar fresh proceedings being taken in the proper Court. Where an offence is tried by a Court without jurisdiction, *i.e.*, a Court not competent, ... the trial is void under s. 530 and the order of acquittal, is liable to be retried under this section. It is not necessary for the High Court to reverse the acquittal before the retrial can be had 8 B. 307. A Court which has no jurisdiction *to try* has no jurisdiction *to acquit* the accused; it can only *discharge*, 7 P. R. 1910 = 7 P. W. R. 1910, 19 A. L. J. 813.

Effect of absence of complaint.—See Note 41.

23. Is want of sanction under s. 195 condition of the competency of a Court?—Want of sanction under s. 195 is only a condition precedent for the institution of a proceeding before a tribunal, it is not a condition of the competency of the tribunal, 35 M. 308. But in 37 A. 107 it was held following 22 B. 711 that where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained. *See* also Note 41 and 5 Pat. 452. S. 403 does not bar the retrial of the accused after sanction on the same facts in respect of which he was acquitted for an offence which required no sanction 37 A. 107. *See* Note 20 under s. 195; *see* also 40 B. 97 and 3 M. 48. But it should be noted that the necessity of a sanction is done away with under the present Code as amended.

24. Does personal disqualification under s. 556 affect competency of Court?—If a person put on his trial for an offence produces an order of acquittal passed by a Court which on the face of it is a Court of competent jurisdiction, in that it had both territorial jurisdiction and jurisdiction under the several Schedules of the Code in respect of the offence charged, the Court before which such order of acquittal is produced is not allowed to impeach the competency of the Court which passed the order, on the ground that the presiding officer of that Court may perhaps have laboured under the disqualification prescribed by s. 556 of the Code. Until the order of acquittal has been set aside and a new trial ordered by some competent Court the person acquitted is entitled to plead it under s. 403 in connection with any further proceeding that may be taken against him 8 A. L. J. 1123 = 12 Cr. L. J. 575. The accused were tried and acquitted by two Justices of the Peace. One of them was under statute (*Coal Mines Act*) disqualified to have acted as a Justice without the consent of parties for the offence of which the accused were acquitted. This fact was not known to the prosecutor at the time. *Held* on an application to quash the conviction that the principle *nemo debet bis vexari* applied. *R.* v. *Simpson* (1914) 1 K. B. 66.

25. Acquittal by foreign Court may operate as bar.—An acquittal by a Court of competent jurisdiction outside England has been held to be a bar to an indictment for the same offence before any tribunal in England. It does not matter whether the Court is one in the King's Dominions or of a foreign country. *Archbold Crimes*, p. 1964 citing *R.* v. *Hutchinson*, (1678) 3 Keb. 785, *R.* v. *Roche* (1775) 1 Leach 134.

MUST HAVE BEEN CONVICTED OR ACQUITTED

26. Substance and not form of previous order must be looked to.—Where a prisoner who was entitled to be acquitted owing to the prosecution having withdrawn the case ... was ... discharged, and was subsequently tried and convicted on the same ... 13 M. 55; 43 M. 976. Where the prisoner have pleaded to a formal charge the Magistrate ... refused to ... ... order only dismissing the case will amount to an acquittal 5 C. L. R. 2.0; 23 P. R. 1916; 28 M. 144.

(i) *Discharge order for ...*—If a Magistrate issues a warrant ... the accused, it must be regarded as an order of discharge ... 1883 A. W. N. at p. 263. *See* also 28 M. 660 where ... order of acquittal was ...

(ii) *Acquittal before issue of process.*—Where ... a complaint ... before a Magistrate ... process was issued ... which was ... The Magistrate

disappear (s. 201, I.P.C.), on the alternative is legal. Where the Sessions Judge considering that the two charges could not be combined, separated the charge and tried the accused on a charge of murder only and acquitted her He next tried her for an offence under s. 201 and convicted her; *held*, that the conviction was bad. Though he clearly intended that the accused should thereafter be tried on a charge under s. 201, I.P.C., such subsequent trial is absolutely prohibited by s. 403, for as the two charges might have been combined in the former trial she cannot be tried again on the same facts, **4 S. L. R. 174 = 11 Cr. L. J. 373.** In **5 S. L. R. 16 = 12 Cr. L. J. 224** PRATT, C.J., was of opinion that this case was wrongly decided. The offences are distinct offences committed in the same series of acts and fall under s. 235 (1) and sub-sec. (2) of s. 403. **43 C. 727; 26 Bom. L. R. 440.**

(*i*) *Acquittal under s. 203 bars trial under s. 177, I.P.C., on same facts.*—*U* was killed by a shot from the gun of *Z*. The Police patel, though aware of this fact, falsely reported that *U* died of fever. The patel was prosecuted for an offence under s. 203, I.P.C., on the ground that he gave false information regarding an offence which he knew to have been committed. After a charge was framed against him, the shooting of *U* by *Z* was found to be accidental. Thereupon the prosecution of the Police patel under s. 203, I.P.C., was withdrawn, and he was acquitted under s. 494; *held*, that the Police-officer could not afterwards be tried again for an offence under s. 177, I.P.C., on the basis of the same false report, **9 N. L. R. 26 = 14 Cr. L. J. 135.**

(*ii*) *Acquittal under s. 352 operates as bar to trial under s. 323, I.P.C.*—A person tried and acquitted on a charge of using criminal force under s. 352 cannot be tried in respect of the same criminal matter on a charge of hurt, **16 W. R. 3 = 7 B. L. R. Appx. XXV**; *see* **30 P. R. 1884.**

(*iii*) *Acquittal under s. 201 bar to trial under s. 176, I.P.C.*—Similarly, a person who has been tried for offences under ss. 201 and 202, I.P.C., and acquitted by the Sessions Court, cannot be tried again for an offence under s. 176, I.P.C., based on the same facts, by an inferior Criminal Court, as the case of such a person comes not within sub-sec. (1), but within sub-sec. (2) of s. 235. The charge under s. 176, I.P.C., might have been framed at the former trial on the very same facts and the Sessions Court which tried him under s. 202, I.P.C., was also competent to try him under s. 176, I.P.C., **10 C. W. N. 518 = 3 Cr. L. J. 388.**

(*iv*) *Person convicted of secreting letter cannot on same evidence be again convicted of making away with that letter.*—Where a prisoner was convicted and sentenced under s. 5 of Act XVII of 1854 (now s. 52 of Act VI of 1898) upon a charge of fraudulently secreting a postal letter, and on appeal such conviction and sentence were confirmed; *held*, that he could not subsequently be convicted under the same section of having fraudulently made away with the same letter upon the same occasion, both acts being connected and substantially a part of one criminal transaction, **1 M. H. C. R. 83.**

(*v*) *Acquittal under s. 411 is bar to trial under s. 414, I.P.C.*—So also, where a person had been convicted under s. 411, I.P.C., in respect of certain property stolen on a particular occasion from a particular person, he could not, subsequently, be tried for an offence under s. 414, I.P.C., in respect of other property stolen on the same occasion from the same person, **28 A. 313**, where **15 A. 317** is *referred to.* **27 C. W. N. 554; 3 Pat. 503.**

(*vi*) *Theft and mischief.*—*E* was charged with theft and mischief in respect of certain branches cut from a tree claimed by complainant, and was acquitted on the charge of mischief on the ground that, as against the complainant *E* had title to the property. The District Magistrate ordered further inquiry under s. 437. *Held*, that a trial on the charge of theft was barred under this section, as the offences were not distinct and the facts were common to both offences and had been found in favour of the accused, **8 M. 296.** Similarly, an accused person who was charged with theft of an animal was held not liable to be separately charged with and convicted of mischief for the subsequent killing of it, **Weir I, 497.**

(*vii*) *Acquittal in summons-case for one of several offences alleged operates as bar to trial of the other offences.*—Where a Magistrate issued processes against, and summoned the accused persons for one of several offences alleged against them and acquitted them of the offence for which they were summoned; *held*, that no fresh process could in view of the provisions of s. 403 (1), be issued against them in respect of all the offences alleged against them on the previous occasion, including the one for which they were summoned and acquitted, **2 C. L. J. 622 = 3 Cr. L. J. 115**, *distinguishing* **15 C. 608** and **29 C. 726.** *See* also Note 17 to s. 247.

(*viii*) *Trial and acquittal under special law may be pleaded in bar.*—All offences against *the Abkari Law* (Bombay Act V of 1878) being cognisable by a Magistrate of the second class (s. 3, cl. 5 and s. 56), a person tried for any such offence by any such Magistrate, and acquitted, is not liable by reason of this section to be tried

acquittal, and prove that he had been acquitted upon a charge of murdering *B*, evidence would be admissible to prove that the two charges related to the same person and to the same killing. But if the offences are different identity of evidence is no bar. Therefore, where, the prisoner was charged with forging the document *A*, but evidence was given in respect of both the documents *A* and *B* [illegible], and the accused acquitted, *held*, that such acquittal was no bar to his being tried again for forging the document *B*. A conviction and acquittal both fall under the same category in this section. It would be no answer on a trial for one, to say that the prisoner had been acquitted of another on a trial at which evidence was given respecting both and which, it be sewed, would have proved the prisoner guilty of both. 7 W. R. 15. It was *held* in Weir I, 743, that an illegal and inoperative conviction under s. 21 of *the Forest Act*, will not bar a prosecution under the Penal Code for such other offence as the accused may be proved to have committed. Where a charge of kidnapping from lawful guardianship under s. 363 I P C., is in general terms and does not state from whose guardianship the kidnapping took place, an acquittal on such a charge of the offence of kidnapping from the lawful guardianship of a particular person may be pleaded in bar of a trial on a charge of kidnapping from the guardianship of another person, 24 M. 284. Where it was the duty of the prosecution to put before the Court the evidence respecting the measurement of the timber which the accused cut in excess of his licence, the failure to do this at the first trial does not entitle the Crown to prosecute the offender again in respect of the same timber, on the ground that the measurement stated at the first trial was incorrect and below the quantity actually cut. 3 L. B. R. 253 = 5 Cr. L. J. 412.

30. **Test for finding whether the offences are same.**—The true test by which the question whether such a plea is a sufficient bar in any particular case may be tried is whether the evidence necessary to support *the second indictment would have been sufficient to procure a legal conviction upon the first*. R. v. *Clark*, 1 B. and B. 473; *Archbold* p. 177. A trial is said to be upon the same facts if the evidence in the first case would have supported a conviction for the offence charged in the second case. *Q. v. Bird* 2 Den. C. C. 94 and 1 Bom. L. R. 15 *cited* 5 S. L. R. 12 = 18 Cr. L. J. 224. 117 I. C. 623 = 30 Cr. L. J. 103. Except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as that which forms the subject of the second charge, the Court before which the second trial is held has nothing to do with the evidence given on the former trial. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence or a different Court is bound to apply its own judgment to the evidence before it. Two distinct offences cannot be converted into one such offence by reason of any evidence which the prosecutor may think fit to adduce upon the trial for one of them, 7 W. R. 15.

31. **The rule prohibits second trial not merely for same offence, but also upon same facts, for any other offence.**—Where a person has been tried and convicted or acquitted of an offence arising out of a particular set of facts, he cannot while such conviction or acquittal remains in force be again tried in respect of any offence based on the same facts, unless the case can be brought under one or the other special exceptions to the rule provided by this section, 9 N. L. R. 28 = 16 Cr. L. J. 135. The two offences may not be the same but this standing by itself is not sufficient for disposing of the applicability of s. 403. A bar under that section operates not only where a person has been tried for an offence and convicted or acquitted of it, and is sought to be tried again for the same offence but also when he is sought to be tried on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 236 or for which he might have been convicted under s. 237. Where on the same facts a person has been tried and acquitted on a charge under s. 182, I P C., he cannot be tried again on a charge under s. 211, I P C., a[illegible], 33 M. 303. It has long been fully established that acquittal on an indictment is a bar to a second [illegible] for any offence of which the accused could have been lawfully convicted on the first [illegible], whether the offence was or was not specifically stated in the first indictment, and whether the proper evidence was not adduced at the first trial. Under the present practice, the substance rather than the form of charges in the two indictments is considered, *R. v. Skeen*, 2 C. and P. 636. See *Russell on Crimes*, [illegible].

32. **Where on same facts a charge 'might have been framed' under s. 236 and is not so framed, subsequent trial for that charge will not lie.**—*See* Notes 3 and 6 under s. 236 at pp. 671-672. The protection afforded by this section extends only to other and different offences of which the accused could be charged if they were supported by the same facts and fell within the category of offences mentioned in ss. 236 or 237, 1 Bom. L. R. 15. The joinder of charges of murder (s. 302, I.P.C.) and of causing evidence of the murder to

(*ii*) *So also ss.* 395 *and* 400, *I.P.C.*—The acquittal of accused on a charge under s. 400, I.P.C., cannot operate under this section as a bar to his being prosecuted again on a charge under s. 395, I.P.C., for committing one of the dacoities in respect of which evidence was given in the previous trial under s. 400, **1 Bom. L. R. 15.**

(*iii*) *Being in possession of excisable articles and putting false trade-marks.*—The trial and conviction of the accused for being in possession of excisable articles without a license under s. 61 of *the Bengal Excise Act* (VII of 1868) is no bar under this section to his trial upon the same facts under ss. 486 and 487, I.P.C., and ss. 6 and 7 of *the Merchandise Marks Act* of 1889, *i.e.*, for putting false trade-marks upon cases containing excisable articles and making use of false trade-marks for his own trade, **23 C. 174.** *See*, however, s. 26, *Genl. Cl. Act* X of 1897 and **22 C. 377.**

(*iv*) *Conviction under s.* 325 *no bar to trial under s.* 365, *I.P.C.*—When the accused attacked the complainant's house, inflicted a beating on him and his two sons and carried away *K*, a woman, and on the first trial they were convicted for the attack on his house and for beating him and his sons, and at the second trial the accused were charged under s. 365, I.P.C., for the abduction of *K*; *held*, that the case fell under s. 235 (*i*) and the previous conviction was no bar under s. 403 (*ii*), **3 A. L. J. 2 = 1906 A. W. N. 32 = 3 Cr. L. J. 93.**

(*v*) *Acquittal under s.* 182, *I.P.C., no bar to trial under s.* 500, *I.P.C.*—Where the accused who had in a petition to a Tahsildar under the Court of Wards falsely made certain allegations against an Inspector of Police was tried under s. 182, I.P.C., but was acquitted on the ground that the person to whom the application was made was not a public servant; and a subsequent prosecution by the Inspector under s. 500, I.P.C., was objected to; *held*, the previous acquittal was no bar, **37 C. 604,** where **10 C. W. N. 518** is *distinguished.* **48 C. 388.**

(*vi*) *Section* 467 *or* 109, *I.P.C., and s.* 82 *of the Registration Act*, 1908.—Acquittal in respect of the offence of aiding and abetting the forgery of a document presented for registration does not bar the trial for an offence under s. 82 (*a*) of the Registration Act in respect of the same document, **37 A. 107.** But *see* **1 Rang. 299** where it is *held* that if an accused is already tried and acquitted for offences of forgery and abetment thereof, their re-trial for a separate offence under the Registration Act, s. 82, was barred under s. 403 as no sanction is necessary for a prosecution under s. 82, I. R. Act and as the accused might have been charged and tried for an offence under s. 82, Registration Act.

(*vii*) *Acquittal of abetment of forgery, s.* 467/109, *I.P.C., does not bar trial for offence of using as genuine the forged document, s.* 471, *I.P.C.*—The series of acts beginning with the forgery and ending with the use of the forged document in a Civil Court must be regarded as so connected together as to form one transaction, so that under s. 235 (1) it would have been competent to try the accused for both the offences at the same trial, the case therefore fell under sub-sec. (2) of s. 403 and was not governed by sub-sec. (1), **40 B. 97; 30 C. W. N. 432.**

(*viii*) *Conviction under s.* 243, *I.P.C., no bar to trial under s.* 240, *I.P.C.*—*C* gave 50 counterfeit coins to *P* to pass for him. Subsequently *C* was convicted under s. 243, I.P.C., for being in possession of other counterfeit coins. He was again tried jointly with *P* in respect of the 50 coins under s. 240, I.P.C., and convicted. On appeal it was contended that *C* could not be tried for an offence under s. 240, I.P.C., after the previous conviction under s. 243, I.P.C., *held* that the delivery of the 50 coins by *C* to *P* with a view to its being changed was a distinct offence from that for which *C* was previously convicted and that the second conviction of *C* was good, **31 C. 1007.**

(*ix*) *Offences under ss.* 302/34, *I.P.C.*—*Effect of acquittal under ss.* 302/34, *I.P.C., on re-trial under ss.* 302/109 *and* 302/114, *I.P.C.*—Where the Judge directed an acquittal under ss. 302/34, *I.P.C.*, on legal grounds, the verdict of that jury to that effect has not determined any question of fact and the acquittal has no effect on the trial of charges under ss. 302/109 and 302/114, I.P.C., **41 C. 1072.**

(*x*) *An acquittal under s.* 342, *I.P.C., no bar to trial under s.* 147, *I.P.C.*—Several Police constables were convicted of rioting. Two of them were previously tried and acquitted on charge of wrongful confinement for having taken into custody some persons in the course of such rioting. *Held*, that the second trial was not vitiated by contravention of the rule embodied in s. 403, sub-sec. (1) of the Cr. Pro. Code. (*R.* v. *Barron*, **1914 2 K. B. 570** *followed;* **2 C. L. J. 622** *distinguished* **48 C. 78.**)

(*xi*) *A conviction under s.* 379, *I.P.C., no bar to a trial again under s.* 9 *of the Opium Act* (*I of* 1878).—An accused previously convicted of theft under s. 379 in respect of some opium can be tried again for an offence of illicit possession of the same opium under s. 9 of *the Opium Act.* **24 A. L. J. 559.**

again for the same offence, unless the acquittal has been set aside by the High Court on appeal by the Government. The jurisdiction conferred by the Code does not affect any special jurisdiction or power conferred by any law in force at the time when the Code came into force, 19 B. 181. The accused was convicted under section 68 of the Calcutta Police Act, his subsequent trial under section 103 of the Indian Merchant Shipping Act was held to be barred under this section, 31 C. W. N. 195.

(ix) *Composition of offence under s. 324, I P C, may be pleaded in bar on charge under s. 324, I P C*—An accused person charged under s. 324, I.P C., cannot, if the offence has been compounded with the permission of the Court, be again tried on the same fact on the charge under s. 243, I P C., if the composition which has the effect of an acquittal is still in force, Ratanlal 512.

(x) *Acquittal under s. 211 may bar trial under s. 182 I P C*—Where the accused made a complaint to the Police that certain articles had been stolen from his house and the Police made an enquiry when the accused repeated his complaint and said that he suspected *C* and it was found that no theft took place and the complaint was false. *C* laid a charge against the accused under s. 211, I P C., sanction for a complaint of an offence under s. 182, I.P C., having been refused, the accused was convicted but the High Court set it aside stating that the offence was one under s. 182, I P C., and not under s. 211. *C* then obtained sanction and instituted a complaint for an offence under s. 182, I.P C., and it was contended that the previous acquittal was no bar as the offences were not the same, *held*, that the previous acquittal under s. 211, I P C., operated as a bar on the same facts because a charge under s. 182, I P C., might have been framed under s. 236 and the case came under sub-sec. (1) and not sub-sec. (2) of s. 403, 38 M. 308. In 23 P. R. 1910 = 11 Cr. L. J. 420, however it was *held* that acquittal of the accused under s. 182, I P C., was no bar to the trial for an offence under s. 211, I P C., as a person could not be charged in the alternative under s. 236 of offences under ss. 182 and 211, I P C., and the offences are essentially distinct. *See* 32 C. 150 and 31 B. 234 and also 8 R. L. R. 178 = 16 Cr. L. J. 104.

(xi) *Acquittal under s. 302, I P C, may bar trial under s. 304 I P C*—*See* 33 C. 377—343.

(xii) *Acquittal on charge under s. 193 bars trial on charges under ss. 465, 471, 120-B, I P C*—Petitioners were tried under s. 193 and upon a careful and exhaustive consideration of the whole evidence acquitted. They were again put on trial under ss. 465, 471 and 120-B., I P C. *Held* that inasmuch as the facts on which the complainant founded the present case were inseparable from those upon which the previous case was proceeded with, the proceedings should be quashed, 20 C. W. N. 354.

32-A.—Effect of the amendment of s. 238 by the insertion of sub-sec. (2) (A) and its removal from s. 237.—Where in an appeal to the Sessions Judge, the Sessions Judge altered the conviction of the accused under ss. 255 and 508, I P C., holding that ss. 420 and 507, I P C., were not applicable to the facts, *held* in revision that the accused's offence did not fall under ss. 507 or 508 or 385 or 420, I P C., but amounted to an attempt to cheat under ss. 420 and 511, I P C., read together, that by virtue of the new amendment of s. 238 of the Code cl. (2) (A) the accused were liable to be convicted under these sections, though he had been charged only under s. 420, and that as the Sessions Judge had not acquitted the accused of the offence of attempting to cheat, s. 403 (4) of the Code was no bar to the accused being convicted in revision of the offence of attempting to cheat under ss. 420 and 511, I.P C., read together, 45 M. 778 = 43 M. L. J. 190.

EXCEPTION I.—DISTINCT OFFENCES UNDER SUB SECTION (2).

33. Section does not bar trial for distinct offence for which separate charge might have been made under s. 235 (1).—*See* illustration (b) to s. 235 and the cases cited at pp. 657—[illegible]. The [illegible] to sub-sec. (1) of s. 235 necessarily involves the exclusion of cases falling under the other sub-sections of s. 235, where the several offences are separate for the purposes of charging [illegible] punishment. But the Legislature even here recognizes a special case [illegible] subsec. (3) of s. 403 makes an exception in respect of a case within [illegible] sub-sec. (3) of s. 235, 9 N. L. R. 28 = 16 Cr. L. J. 135; 10 C. W. N. 518 = 3 Cr. L. J. 355. [illegible] evidence necessary to prove one will not prove the other, it cannot [illegible] the acquittal of one is a bar to a prosecution for the other [illegible].

(i) *Acquittal of charge under s. 324, I P C, does not bar trial under [illegible], I P C*—Where certain persons trespassed into a house and [illegible] it was *held* that their conviction under s. 452 was no bar to their being tried [illegible], I P C., 1906 A. W. N. 22 = 3 A. L. J. 2 = 3 Cr. L. J. 82.

than that of which he was convicted, he may merely on that ground alone be put upon his trial for the graver offence. Clauses 2, 3, 4 and 5 lay down under what circumstances alone a previous conviction is not a bar to a subsequent trial for the same matter, *held*, therefore, a person convicted under s. 31 of *the Rangoon Police Act*, 1899, for being in possession of an article, supposed to be stolen cannot be again tried later for an offence under s. 457, I.P.C., merely on the ground that the owner of the article is traced and some further evidence is available, **8 Bur. L. T. 129; 16 Cr. L. J. 267.**

37. **The new facts must have happened after or not known to the Court at the first trial.**—Where *A* causes hurt to *B*, and, as a consequence of the injury so inflicted, *B* dies and *A* is tried and convicted of the hurt. If death took place before the trial and the fact was known to the Court which convicted *A* of hurt, then *A* could not again be tried for the homicide under this sub-sec. (3) though he might be under sub-sec. (4), **9 N. L. R. 26 = 14 Cr. L. J. 135.** A summary conviction for common assault may be a bar to an indictment for wounding with intent to murder, *R.* v. *Stanton*, **(1851) 5 Cox. 344**; *R.* v. *Elrington*, **1 B. and s. 688**; *R.* v. *Miles*, **24 Q. B. D. 423.** In 1901 the accused was prosecuted by the Bombay Municipality under s. 476 of *the City Municipal Act* II of 1888 for proceeding to erect certain balconies contrary to the Act. He was acquitted. Subsequently in 1902, the accused was called upon under ss. 308 and 309 of that Act to remove the balconies which had been in existence at the time of the previous prosecution, and on the accused's failure to comply with the notice, he was again prosecuted; *held*, that the former acquittal did not preclude the Magistrate from trying the present charge, as the second offence could not have been committed until the notice to remove was served on the accused and this notice to remove was not served on the accused until the year following that in which he was acquitted of the previous charge, **4 Bom. L. R. 575.** *See* also **9 Cr. L. J. 578 (Burma)** where an acquittal of the offence of disobedience of an order under s. 92 (2) of *the Burma Municipal Act* III of 1898 was *held* no bar to the trial for the disobedience of an order under s. 92 (3). *See* **3 P. R. 1901** and **36 A. 4**, where a man was first tried for hurt and later, the injured person dying, *held* the previous trial was no bar to a fresh trial for culpable homicide.

EXCEPTION III.—SCOPE OF SUB-SEC. (4).

38. **'Was not competent to try' means 'had no jurisdiction to try.'**—It is only when the Court which first tried the accused had no jurisdiction to try the offence with which the accused is subsequently charged, that this sub-sec. (4) prevents the operation of the general rule enacted in sub-sec. (1). *See* **24 M. 641** and illustrations (*f*) and (*g*). The clause refers to the character and status of the tribunal when it refers to the competency to try the offence, **36 M. 308**; *see* also **110 I. C. 792 = 29 Cr. L. J. 760.** The words "competent to try" in this section are equivalent to "in a legal position to have tried and convicted or acquitted," that is to say, the words refer narrowly to the legal position of the Court at the time of the formal trial in relation to the particular offence committed by the accused and not to the class of offence in general, **117 I. C. 625.** Upon a charge of dacoity the Magistrate, having split up the charge, convicted the accused of rioting, using criminal force and misappropriating the property of a deceased person. On appeal, the Sessions Court reversed the conviction, holding that the offence, if any, was dacoity, but that the facts alleged being incredible, there was no need to order a committal. The complainant thereupon lodged a fresh complaint of dacoity based on the same facts before another Magistrate. *Held*, that the judgment of the Sessions Court was no bar to further proceedings by virtue of sub-sec. (4), **7 M. 557.** So, where an accused person appears to have committed culpable homicide, his conviction by a Magistrate for a minor offence does not prevent his trial for murder, etc., **Ratanlal 337.** In **5 Bom. L. R. 125** the accused was charged with an offence under s. 304, I.P.C., but the trying Magistrate convicted and sentenced him under s. 323, I.P.C., being of opinion that the evidence was not sufficient for commitment. The District Magistrate, however, taking a different view, ordered a commitment and it was *held*, that the order was not bad as the previous conviction under s. 322, I.P.C., was no bar to a trial under s. 304 which the Magistrate, was not competent to try. This case was followed in **7 P. R. 1912 = 39 P. W. R. 1912; 243 P. L. R. 1912 = 13 Cr. L. J. 742,** where the accused were acquitted of offences under ss. 325, 326 and 148, I.P.C., and were subsequently tried and convicted under s. 302, I.P.C. *See* **18 Cr. L. J. 643; 48 M. L. J. 490.**

39. **That offence is triable by jury does not affect competency of Court.**—A Sessions Judge with the aid of assessors tried and acquitted the accused of the offence of abetment of murder with dacoity, ss. 396 and 109, I.P.C. Subsequently on the same facts, the accused was charged with an offence under s. 412, I.P.C., and tried by the Sessions Judge and a jury and convicted. The conviction was sought to be sustained under this sub-section inasmuch as the Court which tried the accused on the first occasion. Sessions Judge aided by assessors, was not competent to try the offence under s. 412, which was triable by a jury; *held*, setting aside

34. Acquittal in respect of some of several sums misappropriated whether bar to trial in respect of others?—The accused was tried for and acquitted of criminal breach of trust in respect of Rs. 12 misappropriated between July 1907-08. He was subsequently tried and convicted in respect of another sum of Rs. 13 misappropriated during the same period. On appeal the Sessions Judge being of opinion that when the prosecution had made its election and s. 222 (2) and proviso, by choosing some out of the different amounts misappropriated during the period they were estopped by s. 403 from instituting any further prosecution in respect of any fresh items covering the same period, and set aside the conviction, *held*, the previous acquittal was no bar. Sections 234, etc. do not bar the separate trial of the accused for each separate offence. *See* the case noted above under ss. 233 and 235, **12 Bom. L. R. 228 = 11 Cr. L. J. 257.** Where, however, a charge has been framed under s. 222 (2) in respect of a gross sum of money misappropriated during a certain period and a conviction obtained the accused cannot be tried again in respect of another gross sum of money misappropriated during the same period. The charge in the previous case should be taken to include all the items misappropriated by the accused in the course of the same transaction during that period. That ought to be the interpretation of s. 222, because otherwise it seems difficult to conceive that the Legislature should have intended that under s. 222 the prosecution should be at liberty to prosecute for a gross sum misappropriated during a particular period consisting of certain items more than three in number and obtain a conviction for the same, and then choose another gross sum consisting of different items alleged to have been misappropriated during the same period and have a separate trial for the second group of items. What the Legislature apparently intended was that where there is to be a trial for misappropriation of a gross sum, "there should be only one trial for such an offence during the period covered by the defalcation" **17 Cr. L. J. 33 (M.); 27 C. W. N. 578;** *see* also **33 C. W. N. 434.**

Acquittal on trial for criminal breach of trust of a sum between certain dates does not bar a subsequent trial for criminal breach of trust committed on an intermediate date, of a separate sum not included in the amount forming the subject of the first trial. **50 C. 632** (*following* **12 Bom. L. R. 228**).

35. Similarity of offences does not render them identical.—

(i) *Forgery of several documents.*—*See* Note 12 at p. 625. When a person was first tried in respect of three out of six documents alleged to be forged under such circumstances which constituted the forgery of all six documents one and the same transaction, and acquitted in respect of those three documents, *held* that there was nothing in this section which could prevent his being tried again in respect of the other documents but that in the circumstances of the case, it was inexpedient to take proceedings in respect of the remaining three documents, **1905 A. W. N. 233 = 2 A. L. J. 673 = 2 Cr. L. J. 790.** *See* **7 W. R. 15.**

(ii) *Threatening three witnesses at same time.*—Each person brought a separate case, *held* separate sentences were legal, **9 W. R. 30.**

(iii) *Stealing of several articles at the same time.*—It has happened that a man acquitted of stealing a horse has yet been arraigned and convicted for stealing the saddle, though both were done at the same time. *Hale's Pleas of the Crown* cited in **7 W. R. 15.** The tendency now is to extend the rule for the same acts and omissions irrespective of the exact terms of the indictment. *See* **28 A. 313.**

(iv) *Possession of stolen property.*—Accused was found to be in possession of property stolen from two different persons on different occasions. He was separately tried and sentenced on each charge, *held*, that there was nothing in the fact that the goods were stolen at different times, to constitute by itself proof that they were received at different times, or under such circumstances as to show that more than one offence was committed in receiving them. Conviction on the second trial was set aside, **15 C. 511; 13 A. 337; 37 C. W. N. 33.**

EXCEPTION II.—SCOPE OF SUB-SEC. (3).

36. The new facts must constitute different offence.—*See* Illustration (3) and **28 A. 8.**—It is not enough to defeat the plea of *autrefois acquit* to show that the second indictment charges circumstances of aggravation not included in the first, or serious consequences of the offence which have occurred since the first indictment, unless the new facts or circumstances are such as to make it a different kind of offence of which there could be no conviction for the first trial. A man who has been acquitted on an indictment for manslaughter cannot be indicted for the same death of murder. *Russell on Crimes*, pp. 1846—47. There is no authority for holding that when a man has been convicted of committing an act constituting an offence, and further evidence subsequently comes to light which shows that he act committed a graver offence

following **1895 A. W. N. 86** and *see* Note 27 to s. 203. Where, however, the order of the Magistrate dismissing the complaint has been upheld by the Sessions Judge, it is not open to the Magistrate to entertain a fresh complaint. The complainant's remedy is to move the High Court by way of revision, **68 P. L. R. 1902** *distinguished,* **11 P. W. R. 1910 = 11 Cr. L. J. 347.**

44. Withdrawal having the effect of acquittal.—Where a conviction has been had on one or more of several charges, the withdrawal of the remaining charges under s. 248 has the effect of an acquittal on such charges, unless the conviction be set aside, **19 W. R. 56,** and *see* Note 28 for other instances.

45. Stopping of proceedings under s. 249.—An order under s. 249 is specifically excluded by the explanation from being an acquittal and fresh proceedings are not barred, **9 P. R. 1913 = 8 P. W. R. 1913 = 13 Cr. L. J. 860.** A Magistrate trying an accused person upon charges under ss. 193 and 204, I.P.C., convicted him under the former section and with regard to the latter observed that the facts appeared to him to constitute an offence under another section and he therefore directed the file to be laid before the District Magistrate with a view to having such offence enquired into. On appeal, the conviction under s. 193, I.P.C., was set aside and subsequently proceedings under s. 204, I.P.C., were taken against the accused before another Magistrate. *Held,* that as the first Magistrate expressly refrained from dealing with and disposing of the charge under s. 204, I.P.C., and did not, in express terms, acquit the accused upon such charge, his sanction might be taken as a stay of the trial of such charge under s. 249 and the subsequent trial was not barred by this section, **1889 A. W. N. 8.**

46. Discharge and its effect.—(*i*) An accused person may, in an inquiry preliminary to commitment, be discharged by the Magistrate under s. 209, before a charge is framed or under s. 213, after the framing of the charge. In **4 Bom. L. R. 779 at p. 785** it was *held,* that an order of improper discharge under s. 209 need not be set aside before an order of committal of the accused person improperly discharged, can be made. (*ii*) In a warrant case an accused person may be discharged under s. 253 before a charge is framed and under s. 259 when the complainant is absent and the offence is compoundable. It is now *held* by all the High Courts that the Magistrate is competent to re-hear a case when the accused is discharged. See 4 C. **W. N. 49; 28 C. 211; 28 C. 652 (F.B.)** where **4 C. W. N. 26** and **46** are *dissented from*; **29 C. 726 (F.B.); M. 126 (F.B.); 36 A. 53; 1 B. 64** and *see* Notes 18 and 20 to s. 253 and Notes 7 and 8 to s. 259. (*iii*) In a Sessions trial before the High Court, the accused may be discharged by the Advocate-General entering a *nolle prosequi*. *See* s. 333. An order of discharge on a *nolle prosequi* is no bar to fresh proceedings, **16 C. W. N. 983 = 13 Cr. L. J. 488.** (*iv*) In cases of contempt of Court when the offender submits an apology, the Court may discharge him. *See* s. 484. (*v*) When a Public Prosecutor withdraws from the prosecution before a charge is framed the accused shall be discharged, s. 494. (*vi*) The word 'discharge' in s. 119 is used in the sense of "permission to depart." Its meaning in that section is non-technical as no 'charge' need be drawn up, **33 M. 85.** *See* Notes 19, 26 and also **10 Bur. L. R. 1 = 2 L. B. R. 27,** where all the authorities are reviewed. No order under ss. 435 and 437 is necessary, to enable proceedings to be taken afresh after an order of discharge, **8 W. R. 61; 9 ibid. 16; 14 ibid. 65; 18 ibid. 39; 20 ibid. 46** and **47; 25 ibid. 31; 1 C. 282; 2 C. 405; 4 C. 16** and **647; 10 C. 268; 1 B. 64; 2 B. 534; 10 Bur. L. R. 1; 4 M. H. C. R. Appx. VIII; 4 N.-W. P. H. C. R. 23; 28 C. 211; 29 C. 726; 28 M. 310; 29 A. 7; 32 M. 220; 17 O. C. 273 = 15 Cr. L. J. 638** and Notes to s. 437.

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

Unless otherwise provided, no appeal to lie.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Notes.—**1. Limitation for presentation of appeal.**—*Appeal under this Code to any Court other than a High Court.*—An appeal must be preferred within thirty days from the date of the sentence or order appealed from. *The Limitation Act* IX of 1908, Sch. I, Art. 154.

Appeal to High Court from a sentence of death passed by a Court of Session.—Appeal must be preferred within seven days from the date of the sentence.—*Ibid.*, Art. 150.

the conviction that the words "*not competent to try*" means "*had not jurisdiction to try*" but the Court *by which he was first tried, i.e., the Court of Sessions,* was competent as a Court of Session to try the offence under s. 412 I P C, **24 M. 641.** *See* **7 M. 557.**

40. Want of complaint under s. 199 renders Court incompetent.—The accused was tried under ss. 366 358 376, I P C., and acquitted. On complaint by the husband, the accused was tried and convicted on the *same facts under s. 498, I P C., held* that the conviction was not bad by virtue of s. 403 as the *earlier* Court was incompetent to try the accused under s. 498 in the absence of a complaint by the husband, **17 Bom. L. R. 873 = 3 Bom. Cr. Ca. 91 = 16 Cr. L. J. 657.** *A* intimated to the District Magistrate that he had authorised his brother *B* to institute a complaint against *C* for enticing away of his wife (s. 498, I P C) and the charge was heard and evidence on both sides recorded, but the Magistrate discovering that *B* had no authority [illegible] to acquit *C*. On the husband *A* instituting a fresh complaint, it was *held* that the previous acquittal was no bar to the trial as the Magistrate's finding amounted to this, that there was no complaint before him of which he could take cognisance **31 A. 317.** *See* Note 10 at p. 868.

41. Effect of absence of sanction on competency of Court.—(i) *Sanction under s. 195 is only a condition precedent for institution of proceeding before tribunal, it is not a condition of the competency of the tribunal.*—The clause refers to the character and status of the tribunal when it refers to competency to try the offence. *See* illustrations (*f*) and (*g*). Where, therefore, a person was acquitted of an offence under s. 211 I P C., and no charge under s. 182, I P C, was framed for want of sanction though it could have been jointly tried in the first trial *held* that the acquittal was a bar to a trial under s. 182, I P C. **26 M. 224.**

(ii) *Contra.—Want of sanction renders Court incompetent.*—A complaint was made to a Magistrate of offences under ss. 182 and 500, I.P C. When accused appeared, the Magistrate passed the following order —"As there is no sanction, prosecution withdraws the charge. Accused is discharged." Sanction having been obtained a fresh complaint was lodged against the accused for the same offences. The Magistrate ordered that the proceedings be stopped as they could not be taken by reason of the provisions of this section. *Held*, that as the accused had not been *acquitted by a Court of competent jurisdiction,* the order was illegal. As owing to absence of sanction the Court could not take cognisance of the offence under s. 182, it could not acquit him of that offence. And as the offence under s. 500 is not a summons-case, the only legal order that the Magistrate could have passed was one of discharge under s. 253, **22 B. 711; 3 M. 48.** An accused was placed upon trial for aiding and abetting the cheating of a Sub-Registrar in respect of a forged document presented for registration and was acquitted, the Registrar thereupon gave sanction for his trial for an offence under s. 82 (a) of the Registration Act. *Held*, that the former trial was no bar as the first Court was not competent by want of sanction to try the offence with which the accused was subsequently charged **27 A. 197.** So also in **63 B. 87** it was *held* following **22 B. 711** that want of sanction under s. 195 rendered the Court incompetent. Where a person has been acquitted of the abetment of the forgery of a document, he may after sanction obtained under s. 195 be put upon his trial for using the same forged document as genuine, as the first Court was not competent to try the offence subsequently charged for want of sanction. *See also* **27 A. 242.** *But it should be noted that under the present Code as amended the necessity of sanction is done away with and a complaint under section 476 is a condition precedent to the institution of a prosecution under s. 195.*

41-A. Where the prosecution of the accused for an offence under s. 21 of *the Bengal Food Adulteration Act* fell through for want of valid sanction and the accused was acquitted under s. 245 *held* that the previous acquittal of the accused did not operate as a bar to his subsequent trial after sanction being obtained in writing of the Municipal Commissioner for such prosecution because the previous prosecution was incompetent as there was no sanction and there could have been no trial of the accused within the meaning of s. 403. **39 C. W. N. 332.**

SCOPE OF EXPLANATION.

42. Purpose of explanation.—SUBRAMANIA AYYAR, J. in [illegible] (**25 M. 124 F.B.**) is of opinion that this explanation does not [illegible] *to defence of* [illegible] [illegible] *for the purposes of this section*" was [illegible] offence.

43. Dismissal of complaint.—Where a Magistrate dismisses a complaint [illegible] [illegible] *a competent tribunal* [illegible] or to re-hear and act upon the complaint already on record. *See* **25 C. 226; 23 C. 613; 25 M. 124 (F.B.), 20 A. 23**

7. **Jurisdiction of the Appellate Court to dispose of pending appeal is not affected by locality of offence ceasing to be British India.**—An offence was committed at a place in British India and on conviction by the Magistrate an appeal was filed to the Sessions Judge. Pending the disposal of the Appeal the place where the offence was committed was constituted an Independent State. The Sessions Judge returned the memorandum of appeal to the appellants for presentation to the proper Court in the Native State on the ground that he had no jurisdiction to hear the appeal. *Held*, the Sessions Judge was in error. The offence was committed in British India, the appeal was presented to the proper Court, the appellants were then confined in a jail in British India, and the mere fact that the particular locality has ceased to be British India before the appeal has been determined does not oust the jurisdiction of the Judge, **38 A. 578.** *See* also **34 A. 118.**

8. **This Chapter does not exhaust all appeals.**—*See* ss. 250 (3), 486, 515, 524, etc. In addition to the matters appealable under this chapter, it should be noted, that an order under ss. 517 or 518 or 519 regarding the disposal of property before a Criminal Court, may be considered by a Court of Appeal, solely with reference to such order, although no appeal might have been presented in the case in which such order was passed, **9 M. 448**; for, it may often happen that the question of the propriety of such an order may in no way concern the convicted person, **3 C. 379 = 1 C. L. R. 339.** Such an order may be passed when the accued is acquitted or discharged and application should be made to the Court of Appeal, before an application for revision can properly be made to the High Court, **2 A. 276.** *See* also **29 C. 724** *overruling* **25 C. 630.**

9. **Appeals under other Acts.**—(*i*) *Cattle Trespass Act.*—A complaint under s. 20 of *the Cattle Trespass Act* is now included in the term "offence," *see* s. 4, cl. (*o*); therefore a person, against whom an order is made under s. 22 of Act I of 1871, is "a person convicted on a trial"; and an appeal lies from an order of a second-class Magistrate awarding compensation for illegal seizure of cattle, **29 M. 517.** The Rulings in **10 B. 230; 11 M. 359; 15 C. 712** and **19 M. 238** are now superseded. *See* **Weir I, 712.** *See* Note 9 at p. lxvi, Appx. vi.

(*ii*) *Bengal Excise Act.*—Section 84 of *the Bengal Excise Act V of* 1909 which excludes the application of s. 191, Cr. P. C., provides ample indication that this Code is applicable to trials before a Magistrate, subject to specified restrictions, **41 C. 694.**

(*iii*) *Frontier Crimes Regulation III of* 1901.—*See* **19 P. R. 1910.**

(*iv*) *Workman's Breach of Contract Act*, 1859.—*See* Notes 25 and 26 at p. lxxxix of the Appendix.

10. **Appeals under the Letters Patent.**—*See* Notes under s. 15 of *the Letters Patent* at p. iv of the Appendix and Note 176 at p. 275, Note 221 at p. 476.

11. **Appeals to the Privy Council.**—*See* Notes to s. 41 of the Letters Patent at p. ix of the Appendix as to the conditions and circumstances under which appeals might be allowed to the Privy Council, **32 C. 1.** Before granting the certificate that the case is a fit subject for appeal to the Privy Council, the High Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice, **33 B. 221 at p. 235.** An order under cl. 10 of the Letters Patent dealing with professional misconduct is not a matter of criminal jurisdiction within the meaning of cl. 39 and the High Court cannot therefore grant leave to appeal against the order granting sanction to prosecute an attorney for alleged perjury, passed in the courts of proceedings under cl. 10, **41 C. 734.** In *Louis Edward Lani* v. *The King*, **18 C. W. N. 98 (P.C.) = 26 M. L. J. 1 = 1 Cr. L. J. 305**, their Lordships of the Privy Council *held*, that though the proceedings taken were unobjectionable in form, justice had gravely and injuriously miscarried and the sentence pronounced against the appellant formed such an invasion of liberty and such denial of his just rights as a citizen that their Lordships felt called on to interfere.

12. **In revision High Court may exercise all powers of Appellate Court.**—In a case in which the law allows no appeal, the High Court as a Court of Revision may exercise under s. 439, the powers of an Appellate Court, when exceptional grounds exist as where the conviction is not in any degree supported by the evidence, **8 B. 197; 14 B. 331; 22 C. 998.** The proper course for a person to follow when he finds that his petition of appeal has been rejected, on the ground that no appeal lay from the order, is to file a petition of revision, **1898 A. W. N. 147**, *see* also **9 C. 513 = 12 C. L. R. 500** and **2 A. 53.**

13. **No appeals from High Court to High Court.**—*From single Judge to Division or Full Bench.*—The powers of a single Judge in a matter which he has jurisdiction to deal with are the powers of the Court and cannot in any way be controlled by a Bench or Full Bench of the Court. As no appeal lies, no revision lies. Both procedures imply subordination which does not exist, **1 P. R. 1909 = 9 Cr. L. J. 306.**

Appeal to High Court from an order of acquittal.—Appeal must be preferred within six months from the date of the order appealed from.—*Ibid.* Art. 157.

Appeal to High Court in other cases within sixty days from the date of the sentence or order appealed from.—*Ibid.* Art. 155. 2 C. 436.

2. Extension of period of limitation.—If the period of limitation prescribed for any appeal expires on the day when the Court is closed, the appeal may be preferred on the day that the Court reopens. Section 4, *Act IX of 1908.* But any appeal may be admitted after the period of limitation prescribed therefor when the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period.—*Ibid.* s. 5, formerly s. 5 of *Act XV of 1877.* 1891 A. W. N. 12.

Sufficient cause.—These words ought to receive a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of *bona fides* is imputable to the appellant. Delay in the filing of an appeal ought not to be excused unless there are special circumstances, *e.g.*, a mistake by the other side, a mistake in the office itself or some sudden accident, 9 Bom. L. R. 832 = 6 Cr. L. J. 221, *following* 13 M. 269. *See* 18 Cr. L. J. 300 (P.). In the case of a convict in jail, the presentation of the petition of appeal to the officer in-charge of the jail, is for the purpose of *the Limitation Act* equivalent to presentation to the Court. 9 M. 253; 29 P. R. 1890. In 2 A. 336, SPANKIE, J. treated an appeal presented long after the period of limitation, as a petition for revision and decided it on the merits as an appeal. Where one of several accused appealed and was acquitted *held* that his acquittal was a sufficient cause for admitting the appeals of others, 7 P. R. 1871.

3. Mode of computation of the period of limitation.—(i) In computing the period of limitation prescribed for any appeal etc. the day from which that period is to be reckoned shall be excluded. (ii) In computing the period of limitation prescribed for an appeal ... the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the sentence or order ordered appealed from ... shall be excluded.—*S.* 12, *Act IX of* 1908.

The time requisite for obtaining copy, etc.—The words imply that the appellant is not to lose his right of appeal by reason of the neglect of the officials who issue copies, or who are required to give notice when such copies are ready, 13 A. 105. They (the words) do not mean requisite by reason of the ignorance or negligence of the applicant; they mean the time occupied by the officer who has got to provide the copy, in making the copy. The important date with reference to s. 12 is not the date when the copy of the judgment is delivered but the date when it is ready for delivery to the applicant if the applicant chooses to apply where he has had notice that the copy will be ready on that date.—*Per* KNOX, C. J., 33 A. 79; 23 A. L. J. 227.

Computation of time when appellant is in jail.—The time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded. 9 M. 253; 5 P. R. 1888; 10 C. 647.

4. Petition of appeal how presented.—*See* Note 7 to s. 419.

5. When appeals require stamps each must be presented separately.—Except where the petition requires a stamp, it is not material whether the appeals of several convicted persons in the same case are made jointly in one petition or separately. Where a stamp is required, the petitions must be separate and separately numbered and be accompanied by separate copies of judgment or orders appealed against.—*F. H. C. Cr. Cir.*, p. 42. Weir II, 487. Where certain appellants undergoing a sentence of imprisonment had presented an appeal accompanied by an unstamped copy of a judgment, *held*, that other persons sentenced in the same trial but who were not undergoing imprisonment in presenting an appeal against the same judgment, were not entitled to take advantage of the unstamped copy of the judgment put in by the appellants who were in jail, but must present along with their appeal, a stamped copy of the judgment appealed against. For remissions of Court fees on copies of judgment, etc., *see* Note 2 to s. 371.

6. No appeal from Magistrate exercising special jurisdiction outside British India.—(i) The Magistrate of Simla was specially deputed by the Punjab Government to try certain Native Indian subjects of His Majesty for offences committed in a Native State outside British India. The trial took place and sentences were passed outside British India. *Held*, the Chief Court had no jurisdiction to hear appeals against the sentences. 18 P. R. 1919 = 23 P. W. R. 1919 = 11 Cr. L. J. 363.

(ii) *Murshidabad and Tributary Mahals.*—No appeal lies from convictions of Superintendent of Tributary Mahals when exercising jurisdiction over offences committed in Mohals, a place not within British India. *See* 9 C. 255; 10 C. 647; 8 C. 545 and 7 C. 322.

7. **Jurisdiction of the Appellate Court to dispose of pending appeal is not affected by locality of offence ceasing to be British India.**—An offence was committed at a place in British India and on conviction by the Magistrate an appeal was filed to the Sessions Judge. Pending the disposal of the Appeal the place where the offence was committed was constituted an Independent State. The Sessions Judge returned the memorandum of appeal to the appellants for presentation to the proper Court in the Native State on the ground that he had no jurisdiction to hear the appeal. *Held*, the Sessions Judge was in error. The offence was committed in British India, the appeal was presented to the proper Court, the appellants were then confined in a jail in British India, and the mere fact that the particular locality has ceased to be British India before the appeal has been determined does not oust the jurisdiction of the Judge, **38 A. 578.** *See* also **34 A. 118.**

8. **This Chapter does not exhaust all appeals.**—*See* ss. 250 (3), 486, 515, 524, etc. In addition to the matters appealable under this chapter, it should be noted, that an order under ss. 517 or 518 or 519 regarding the disposal of property before a Criminal Court, may be considered by a Court of Appeal, solely with reference to such order, although no appeal might have been presented in the case in which such order was passed, **9 M. 448**; for, it may often happen that the question of the propriety of such an order may in no way concern the convicted person, **3 C. 379 = 1 C. L. R. 339.** Such an order may be passed when the accued is acquitted or discharged and application should be made to the Court of Appeal, before an application for revision can properly be made to the High Court, **2 A. 276.** *See* also **29 C. 724** *overruling* **25 C. 630.**

9. **Appeals under other Acts.**—(*i*) *Cattle Trespass Act.*—A complaint under s. 20 of *the Cattle Trespass Act* is now included in the term "offence," *see* s. 4, cl. (*o*); therefore a person, against whom an order is made under s. 22 of Act I of 1871, is "a person convicted on a trial"; and an appeal lies from an order of a second-class Magistrate awarding compensation for illegal seizure of cattle, **29 M. 517.** The Rulings in **10 B. 230**; **11 M. 359**; **15 C. 712** and **19 M. 238** are now superseded. *See* **Weir I, 712.** *See* Note 9 at p. lxvi, Appx. vi.

(*ii*) *Bengal Excise Act.*—Section 84 of *the Bengal Excise Act V of* 1909 which excludes the application of s. 191, Cr. P. C., provides ample indication that this Code is applicable to trials before a Magistrate, subject to specified restrictions, **41 C. 694.**

(*iii*) *Frontier Crimes Regulation III of* 1901.—*See* **19 P. R. 1910.**

(*iv*) *Workman's Breach of Contract Act*, 1859.—*See* Notes 25 and 26 at p. lxxxix of the Appendix.

10. **Appeals under the Letters Patent.**—*See* Notes under s. 15 of *the Letters Patent* at p. iv of the Appendix and Note 176 at p. 275, Note 221 at p. 476.

11. **Appeals to the Privy Council.**—*See* Notes to s. 41 of the Letters Patent at p. ix of the Appendix as to the conditions and circumstances under which appeals might be allowed to the Privy Council, **32 C. 1.** Before granting the certificate that the case is a fit subject for appeal to the Privy Council, the High Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice, **33 B. 221 at p. 235.** An order under cl. 10 of the Letters Patent dealing with professional misconduct is not a matter of criminal jurisdiction within the meaning of cl. 39 and the High Court cannot therefore grant leave to appeal against the order granting sanction to prosecute an attorney for alleged perjury, passed in the courts of proceedings under cl. 10, **41 C. 734.** In *Louis Edward Lani* v. *The King*, **18 C. W. N. 98 (P.C.) = 26 M. L. J. 1 = 1 Cr. L. J. 305,** their Lordships of the Privy Council *held*, that though the proceedings taken were unobjectionable in form, justice had gravely and injuriously miscarried and the sentence pronounced against the appellant formed such an invasion of liberty and such denial of his just rights as a citizen that their Lordships felt called on to interfere.

12. **In revision High Court may exercise all powers of Appellate Court.**—In a case in which the law allows no appeal, the High Court as a Court of Revision may exercise under s. 439, the powers of an Appellate Court, when exceptional grounds exist as where the conviction is not in any degree supported by the evidence, **8 B. 197**; **14 B. 331**; **22 C. 998.** The proper course for a person to follow when he finds that his petition of appeal has been rejected, on the ground that no appeal lay from the order, is to file a petition of revision, **1898 A. W. N. 147,** *see* also **9 C. 513 = 12 C. L. R. 500** and **2 A. 53.**

13. **No appeals from High Court to High Court.**—*From single Judge to Division or Full Bench.*—The powers of a single Judge in a matter which he has jurisdiction to deal with are the powers of the Court and cannot in any way be controlled by a Bench or Full Bench of the Court. As no appeal lies, no revision lies. Both procedures imply subordination which does not exist, **1 P. R. 1909 = 9 Cr. L. J. 306.**

14. Disqualification for hearing appeals.—No Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself. *See* s. 556 and Notes thereunder. where a District Magistrate as executive head of the District is actively concerned in the institution of proceedings against a person under Chap. VIII he is debarred from hearing an appeal under s. 406 without the permission of the Sessions Judge under s. 556 1 S. L. R. 93 = 8 Cr. L. J. 3.6; 23 C. 328 *referred to*. A Magistrate who takes cognizance of a case under s. 190 (1) (c) cannot hear an appeal in the case, 12 C. W. N. 133 = 7 Cr. L. J. 224. He must follow the procedure laid down in s. 17... but mere directing the issue of a summons does not make the Magistrate incompetent to hear the appeal 38 C. 869. *See* Note 8 at p. 427

15. Proceedings of Magistrates not empowered to hear appeals, void.—If any Magistrate not being empowered by law decides an appeal his proceedings shall be void s. 530 (r).

16. Proceedings of Judges not empowered to hear appeals, void.—*In Criminal Reference No. 133 of* 1906 (Allahabad High Court), a Sessions Judge erroneously entertained an appeal from the conviction of a second-class Magistrate and acquitted the appellant. *Held*, the order of the Sessions Judge disposing of the appeal was *ultra vires*. *See* also **Ratanlal 17**, where it was *held* that an accused person acquitted and discharged by a Sessions Judge on hearing an appeal which he was not entitled by law to hear may be re-arrested even after the expiration of the period to which he was originally sentenced and made to undergo the remaining portion of the sentence. But in **4 L. B. R. 49 = 6 Cr. L. J. 257**, it was *held* that an appellate judgment of a Sessions Judge not competent to hear the appeal, is not to be treated as a nullity till it is set aside

17. Appeal is a continuation of the case and accused cannot be put on oath.—A criminal appeal is a continuation of the criminal case and except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false verification or statement **12 M. 431**. *See* Note 3 to s. 423

Appeal from order rejecting application for restoration of attached property

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court, may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Note.—Appeals 'ordinarily lie,' *i.e.* In the majority of cases, **11 B. 438**. *See* **26 M. 6.6 (F B.)** and *see* Notes under Heading XXII at pp. 470—472.

Appeal from order requiring security for keeping the peace or for good behaviour

***406.** [1]Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

(*a*) if made by a Presidency Magistrate, to the High Court

(*b*) if made by any other Magistrate, to the Court of Session

Provided that the Local Government may by notification in the local Official Gazette direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-sec. (2) or sub-sec. (3-A) of s. 123[1]

Notes.—1. *See* ss. 124 and 125 for powers of District Magistrates in security cases ... powers on appeal. And *see* Note 14 to ss. 404 and 556 as to disqualification of District Magistrates to hear appeals.

2. Change.—Considerable change has been effected by the new amendment ... Under the old law an appeal was allowed to the District Magistrate against the orders under s. 118 in cases of security for good behaviour passed by Magistrates other than the District or Presidency Magistrate. Under the new

* This section was substituted by Act XVIII of 1923.

7. **Jurisdiction of the Appellate Court to dispose of pending appeal is not affected by locality of offence ceasing to be British India.**—An offence was committed at a place in British India and on conviction by the Magistrate an appeal was filed to the Sessions Judge. Pending the disposal of the Appeal the place where the offence was committed was constituted an Independent State. The Sessions Judge returned the memorandum of appeal to the appellants for presentation to the proper Court in the Native State on the ground that he had no jurisdiction to hear the appeal. *Held*, the Sessions Judge was in error. The offence was committed in British India, the appeal was presented to the proper Court, the appellants were then confined in a jail in British India, and the mere fact that the particular locality has ceased to be British India before the appeal has been determined does not oust the jurisdiction of the Judge, **38 A. 578.** *See* also **34 A. 118.**

8. **This Chapter does not exhaust all appeals.**—*See* ss. 250(3), 486, 515, 524, etc. In addition to the matters appealable under this chapter, it should be noted, that an order under ss. 517 or 518 or 519 regarding the disposal of property before a Criminal Court, may be considered by a Court of Appeal, solely with reference to such order, although no appeal might have been presented in the case in which such order was passed, **9 M. 448**; for, it may often happen that the question of the propriety of such an order may in no way concern the convicted person, **3 C. 379 = 1 C. L. R. 339.** Such an order may be passed when the accued is acquitted or discharged and application should be made to the Court of Appeal, before an application for revision can properly be made to the High Court, **2 A. 276.** *See* also **29 C. 724** *overruling* **25 C. 630.**

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(*ii*) *Bengal Excise Act.*—Section 84 of *the Bengal Excise Act V of* 1909 which excludes the application of s. 191, Cr. P. C., provides ample indication that this Code is applicable to trials before a Magistrate, subject to specified restrictions, **41 C. 694.**

(*iii*) *Frontier Crimes Regulation III of* 1901.—*See* **19 P. R. 1910.**

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10. **Appeals under the Letters Patent.**—*See* Notes under s. 15 of *the Letters Patent* at p. iv of the Appendix and Note 176 at p. 275, Note 221 at p. 476.

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13. **No appeals from High Court to High Court.**—*From single Judge to Division or Full Bench.*—The powers of a single Judge in a matter which he has jurisdiction to deal with are the powers of the Court and cannot in any way be controlled by a Bench or Full Bench of the Court. As no appeal lies, no revision lies. Both procedure may imply subordination which does not exist, **1 P. R. 1909 = 9 Cr. L. J. 306.**

14. Disqualification for hearing appeals.—No Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself. *See* s. 556 and Notes thereunder where a District Magistrate as executive head of the District is actively concerned in the institution of proceedings against a person under Chap. VIII he is debarred from hearing an appeal under s. 406 without the permission of the Sessions Judge under s. 556, **1 S. L. R. 93 = 8 Cr. L. J. 346; 23 C. 328** *referred to*. A Magistrate who takes cognizance of a case under s. 190 (1) (*c*) cannot hear an appeal in the case, **12 C. W. N. 435 = 7 Cr. L. J. 231**. He must follow the procedure laid down in s. 192. But mere directing the issue of a summons does not make the Magistrate incompetent to hear the appeal, **38 C. 659**. *See* Note 8 at p. 427.

15. Proceedings of Magistrates not empowered to hear appeals, void.—If any Magistrate not being empowered by law decides an appeal his proceedings shall be void. s. 530 (*r*).

16. Proceedings of Judges not empowered to hear appeals, void.—*In Criminal Reference No. 130 of* 1903 (Allahabad High Court), a Sessions Judge erroneously entertained an appeal from the conviction of a second-class Magistrate and acquitted the appellant. *Held*, the order of the Sessions Judge disposing of the appeal was *ultra vires*. *See* also **Ratanlal 17**, where it was *held* that an accused person acquitted and discharged by a Sessions Judge on hearing an appeal which he was not entitled by law to hear may be re-arrested even after the expiration of the period to which he was originally sentenced and made to undergo the remaining portion of the sentence. But in **4 L. B. R. 49 = 6 Cr. L. J. 257**, it was *held* that an appellate judgment of a Sessions Judge not competent to hear the appeal, is not to be treated as a nullity till it is set aside.

17. Appeal is a continuation of the case and accused cannot be put on oath.—A criminal appeal is a continuation of the criminal case, and except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false verification or statement. **12 M. 451**. *See* Note 3 to s. 423.

Appeal from order rejecting application for restoration of attached property

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court, may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Note.—Appeals 'ordinarily lie,' *i.e.*, in the majority of cases. **11 B. 438**. *See* **26 M. 656 (F. B.)** and *see* Notes under Heading XXII at pp. 470—473.

Appeal from order requiring security for keeping the peace or for good behaviour

***406.** "Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

(*a*) if made by a Presidency Magistrate, to the High Court;

(*b*) if made by any other Magistrate, to the Court of Session:

Provided that the Local Government may by notification in the Local Official Gazette direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session:

Provided further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-sec. (2) or sub-sec. (3-A) of s. 123.

Notes.—1. *See* ss. 124 and 125 for powers of District Magistrates in security matters, distinct from powers on appeal. And *see* Note 14 to ss. 404 and 556 as to disqualification of District Magistrates to hear appeals.

2. Change.—Considerable change has been effected by the new amendment of this section. Under the old law an appeal was allowed to the District Magistrate against the orders under s. 118 in cases of security for good behaviour passed by Magistrates other than the District or Presidency Magistrates. Under the new

* This section was substituted by Act XVIII of 1923.

Amendment all orders under s. 118, whether to give security for keeping the peace or for good behaviour are made appealable; and an appeal ordinarily lies to the Court of Sessions against an order of any Magistrate except the Presidency Magistrate in which latter case the appeal lies to the High Court.

Under the proviso the Local Government is authorised to direct by notification that in any particular distinct appeals from such orders made by a Magistrate, other than a District or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Sessions.

So the following cases, *viz.*, **27 A. 623 = 11 Bom. L. R. 740; 25 C. W. N. 383** have, owing to the new changes in the section become obsolete.

3. **Under s. 406 an Appellate Court is competent to order a re-trial.** Where the applicants were bound over by a Magistrate to keep the peace and on appeal the Sessions Judge directed that the Magistrate's order be reversed and that proceedings subsequent to the stage of the issue or notice under s. 107 be cancelled and that the Magistrate should proceed from the stage of the issue of the notice, *held*, that the order of the Sessions Judge was an incidental order which he was authorised to make, **24 A. L. J. 566; 48 A. 501.**

Appeal from order refusing to accept or rejecting a surety.

* **406-A.** "Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order—

(*a*) If made by a Presidency Magistrate, to the High Court;

(*b*) If made by the District Magistrate, to the Court of Session; or

(*c*) If made by a Magistrate other than the District Magistrate, to the District Magistrate."

Appeal from sentence of Magistrate of the second or third class.

407. (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 † "or in respect of whom an order has been made or a sentence has been passed under section 380" by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

Transfer of appeals to first-class Magistrate.

(2) The District Magistrate may direct that any appeal under this section or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate; or, if already presented to the District Magistrate, may be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Referring to the enactment of this section, the Select Committee say—

"We note that there has been considerable criticism on this clause which provides for an appeal against an order refusing to accept a surety. But we think that if no appeal is provided most cases are bound to be taken up in revisions and we would retain the clause. We have made a slight amendment consequential on our proposals regarding s. 122.

We do not agree that all appeals under ss. 406 and 406-A should lie to the Sessions Judge, Saiyd Raza Ali dissents from this view."

Notes.—1. S. 349 relates to procedure when a Magistrate cannot pass a sentence sufficiently severe.

2. **Section as amended.**—The words 'may be presented' were substituted for the words 'shall be presented.' The District Magistrate is still competent to hear appeals filed in his Court even when he has taken action under sub-sec. (2).

3. **Appeal from second-class Magistrate invested with first-class powers during trial.**—Where a trial was held by a Magistrate holding second-class powers, the fact that he was appointed a Magistrate of the first-class before the conclusion of the trial was *held* to make no difference, with reference to the question of appeal, which, therefore, was held to lie to the District Magistrate, **4 L. B. R. 239 = 8 Cr. L. J. 48.**

* This section was inserted by Act XVIII of 1923.

† Words in inverted commas were inserted by *ibid.*

4. Appeal against conviction by Bench of Magistrates.—An appeal lies under this section fr conviction by a Bench of Magistrates invested with second or third-class powers, *see* s. 15 (2), 9 M. 36. Bu from a Bench invested with first-class powers, 9 C. 58 = 11 C. L. R. 423.

5. Validity of wholesale delegation by District Magistrate.—Where a District Magistrate directed Assistant Collector under him to perform the routine work of the Collector's office, including the Crim Appellate and Revisional work," and it was contended that the order was invalid being a wholesale delega of appellate and revisional power not contemplated by sub-sec. (2) of this section, *held* that as rega revisional powers, it was *ultra vires* as the section does not refer to work of that kind; but as regards appel powers the order was valid whether it included all the appeals of the district or the appeals which in the o nary course of procedure came to the District Magistrate's office. 2 Bom. L. R. 538.

5-A. Appeals under section 476-B.—A Deputy Magistrate invested with powers under sec. 40 has no jurisdiction to hear appeals under s. 476-B, from the orders of the subordinate Magistrates. 56 Cal.

6. District Magistrate has powers to withdraw part-heard appeals.—A District Magistrate has juris tion to withdraw a part-heard appeal to his own file from the file of a Sub-Divisional Magistrate. Where Sub-Divisional Magistrate had issued summons for the examination of certain witnesses as Court witnes it is not incumbent on the District Magistrate on the withdrawal of the case to his own file to examine th witnesses, 31 M. 277, where 23 M. 314 and L. R. 29 I. A. 198 are *referred to*. The Court to which an appea transferred for disposal and on which the responsibility for correct disposal rests, is not bound by any opin as to the necessity for further evidence formed by the Court from which the appeal was transferred.

7. Order as to disposal of property under s. 520 can be passed in an appeal under s. 407.—A S Divisional Magistrate hearing an appeal under s. 407 (2) has power to pass orders under s. 520 regarding disposal of property, 48 M. 162.

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.

*408. Any person convicted on a trial held by an Assistant Sessio Judge, a District Magistrate or other Magistrate of the first class or a person sentenced under section 349 † or in respect of whom an order h been made or a sentence has been passed under s. 380 † by a Magistrate the first class may appeal to the Court of Sessions:

Provided as follows:—

(a) ‡ * * * *

(b) When in any case an Assistant Sessions Judge or a Magistrate specially empowere under section 30 passes any sentence of imprisonment for a term exceeding four years, or a sentence of transportation, the appeal § of all or any of the accused convicted at such trial § shall l to the High Court;

(c) When any person is convicted by a Magistrate of an offence under section 124-A the Indian Penal Code the appeal § of all or any of the accused convicted at such trial § shall l to the High Court.

Notes.—1. Scope of Section.—Section 408 lays down the general rule and s. 413 is an exception Section 415 is explanatory and apparently was entered in the Code to remove all possible doubts which migh arise in the cases mentioned therein. 33 A. 510.

1A. The accused was tried by a Magistrate having second class powers. After the charge wa framed the Magistrate was invested with powers of the first-class and then delivered judgment. *Held* that a appeal against the conviction and sentence lies to the Court of Sessions and not to the District Magistrate 29 Bom. L. R. 452 = 101 I. C. 602 also 28 Cr. L. J. 781.

* As to appeals from sentences of District Magistrates, Upper Burma, in cases other than those affecting Europeans, British subject see the *Upper Criminal Burma Justice Regulation* V of 1892, Schs., cl. X and XVII as to appeals in British Baluchistan, see s. 10 the *British Baluchistan Criminal Justice Regulation* VIII of 1896. As to appeals from sentences under the *Punjab Frontier Crime Regulation*, III of 1901, see Chapter III of that Regulation.

† The words in inverted commas were inserted by Act XVIII of 1923.

‡ Clause (a) of the proviso was omitted by Act XII of 1923.

§ The words in inverted commas were inserted by Act XVIII of 1923.

2. **Joint trials—How far s. 413 limits appeals.**—When more persons than one are convicted at one trial by a Magistrate of the first class, and an appealable sentence is passed on anyone of them, s. 413 does not take away from the other convicts, their right of appeals conferred by s. 408, even though the sentence passed on any one of such persons may not be an appealable one under s. 413 if they had been tried singly, **4 L. B. R. 354 = 9 Cr. L. J. 356 (F.B.); 15 O. C. 386 = 14 Cr. L. J. 170; 30 P. R. 1915 = 17 Cr. L. J. 27.** *See* also **14 A. L. J. 518** *Contra* MADRAS and BOMBAY, *see* Note 1 to sec. 413.

3. **Jurisdiction of Sessions Court how determined, where district has two Sessions divisions and Magistrate has jurisdiction throughout the District.**—Under s. 435, the Sessions Judge may call for and examine the records of any inferior Criminal Court "*situate*" within the local limits of his jurisdiction. The word "*situate*" means fixed or located, and when applied to a Court, it must be taken to refer to the place where the Court ordinarily sits. In the absence of any indication to the contrary in the Code, the principle thus laid down in regard to the analogus powers of revision under s. 435 should be followed in the case of appeals also. Thus, where a Magistrate against whose decision appeals are preferred, has his head-quarters, within the limits of one or two Sessions Divisions in the district (Malabar) though he is authorised to try offences throughout the whole district, including cases arising within the other Sessions Division, appeals lie to the Sessions Court within whose jurisdiction the head-quarters of the Magistrate are situate, irrespective of the place where it was committed, **30 M. 136.** This case is distinguished in **23 M. L. J. 670.** *See* next Note.

4. **Appeal from Magistrate in Agency Tracts does not lie to Sessions Judge but to Agent.**—The Magistrates of the Agency District are not as such in any way subordinate to the Sessions Court of a Non-Agency Sessions Division, nor does the facts that the same person is a first class Sub-Divisional Magistrate in both districts, make him subordinate to the Sessions Court in regard to the Magistrate's jurisdiction in the Agency District. *See* Note 5 at p. 29. An offence was committed within the limits of the Ganjam Agency Tracts. The case was transferred by the Agent to the first-class Magistrate, Gumsur, who had local criminal jurisdiction over certain Agency as well as certain Non-Agency Tracts. The Sessions Judge of the Non-Agency Sessions Division set aside the conviction. *Held*, that the proper form of appeal was the Agent and not the Sessions Judge as the Magistrate tried the cause as an Agency Magistrate, **23 M. L. J. 670 = 12 M. L. T. 601 = 13 Cr. L. J. 850** where **30 M. 136** *distinguished.*

5. **"Convicted on a trial."**—*Conviction without a sentence under* s. 562.—This would include the case of a person released under s. 652, **24 P. R. 1904 = 1 Cr. L. J. 1098**; *followed* in **10 Bur. L. R. 321 = 1 Cr. L. J. 543** and **5 L. B. R. 129 = 11 Cr. L. J. 152.** Just as a sentence passed by a first-class Magistrate under s. 349 is appealable to the Sessions Court, so a sentence by a first-class Magistrate under s. 380 must, also be held appealable to the Sessions Court, **17 Bom. L. R. 895 = 3 Bom. Cr. Ca. 107 = 16 Cr. L. J. 738.** *See* also **29 C. W. N. 161.**

Order under s. 123 *is no sentence.*—No appeal lies to the High Court from an order passed by a District Magistrate under s. 123 and on reference by the Magistrate confirmed by the Sessions Judge, as such an order is not a sentence, **9 C. 878; 15 P. R. 1900.** *See* Notes 135—137 at p. 214.

6. **Proviso (b)—appeal lies to High Court in case where anyone of the accused jointly tried is sentenced to imprisonment for more than four years, etc.**—Under provisio (*b*) when any sentence of over four years' imprisonment is passed by an Assistant Sessions Judge in any case the appeal lies to the High Court. The language of the proviso requires that an appeal by any person convicted in a case in which an Assistant Sessions Judge has passed a sentence of imprisonment of four years or upwards on anyone of the accused, whether he be appellant or any other person tried with him in the same case, shall be only to the High Court and the Sessions Judge has no jurisdiction to hear an appeal from the persons sentenced to less than four years in the same case, **17 M. L. J. 248 = 5 Cr. L. J. 496; 13 A. L. J. 272 = 16 Cr. L. J. 353.** The appeal lies to the High Court even though the accused against whom the sentence of imprisonment exceeding four years was passed has not appealed, **37 A. 471.** Similarly, when a Sessions Judge has confirmed the sentences passed by an Assistant Sessions Judge on some of the accused persons in a case, he has no jurisdiction to hear the appeals preferred by anyone of the prisoners in that case, as such appeals would lie under this proviso to the High Court, irrespective of the length of the sentence, **Ratanlal 655.** *See* also **23 C. L. J. 595; 19 P. R. 1918 (Cr.).**

7. **Sentences in a case must be aggregated for purposes of appeal.**—*See* s. 35 (3) at p. 59. **12 P. R. 1900; 161 P. L. R. 1911 = 12 Cr. L. J. 236.** Where the accused was convicted by a District Magistrate under s. 124-A, I.P.C., and sentenced to two years' rigorous imprisonment, and also under s. 153-A, and sentenced to one year's rigorous imprisonment; *held*, having regard to s. 35 (3) that the aggregate sentence of three years should be considered as one sentence for the purposes of appeal and taking into consideration proviso (*c*) it is

a reasonable inference that the appeal against the single sentence of three years under both the sections would lie to the High Court, 38 C. 214. In this case the accused filed one appeal in the High Court against conviction under s. 124 A and one appeal against the sentence under s. 153 A to the Sessions Court, but the latter appeal was called up by the High Court and the two were heard together. *See* also 5 P. R. 1918 = 17 Cr. L. J. 239. *See* now cl (3) to section 35.

8. **Can concurrent sentence be added together for purposes of appeal?**—*See* Note 36. When sentences are to run concurrently each being four years or less the appeal lies to Sessions Judge, 17 Cr. L. J.

9. **Appeal lies to Sessions Court from District Magistrate vested with powers under s. 30 acting under s. 349.**—Appeal lies to Sessions Court even where a District Magistrate vested with powers under s. 30 sentences accused to five years imprisonment in a case sent up under s. 349. The sentence is *ultra vires*; having regard to the last clause of s. 349 appeals from conviction in all cases sent up for enhanced sentence under s. 349, will lie to the Court of Session, 4 L. B. R. 53 = 6 Cr. L. J. 239. *See* Note 13 to s. 349. In 5 P. R. 1918, it was held that no appeal lies against the sentence of a first-class Magistrate exercising enhanced powers under s. 30 to the Court of the Session, but such an appeal lies to the High Court and *see* 2 R. 358.

10. An order awarding compensation and repayment of fines etc., under s. 22 of *the Cattle Trespass Act* 1871 is appealable under s. 408 of the Code. The compensation so awarded is not a fine and consequently the restrictive provisions of s. 413 of the Code do not apply, 46 B. 55.

Appeals to Court of Sessions how heard.

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

* Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him."

Notes.—1. Competency of Assistant Sessions Judges to hear appeals.—The word "case" in s. 193 does not include appeals, therefore that clause does not confer on the Sessions Judge any power to transfer appeals to the Assistant Sessions Judge, 37 A. 288 where 9 B. 168 and 2 A. L. J. 578 are referred to and 7 A. not followed.

2. **Competency of Additional Sessions Judge to hear application under s. 195 (4).**—Under s. 409 read with s. 9 an Additional Sessions Judge is competent to hear and determine applications under s. 195 transferred to him by the Sessions Judge. A Magistrate is subordinate to the Additional Sessions Judge under s. 195 (7), 14 Cr. L. J. 195 (C.). *See* Note 182 at p. 538.

Appeal from sentence of Court of Session.

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge may appeal to the High Court.

Notes.—1. May appeal.—This section gives *right* of appeal, as distinguished from an indulgence to be heard or not to be heard, 1891 A. W. N. 45.

2. **This section does not give right of appeal from appellate judgment merely because fresh evidence is taken on appeal.**—*See* Note 13 to s. 428.

3. **High Court to which appeals by European British subjects lie.**—Where an accused is dealt with as an European British subject and convicted by the Sessions Court the appeal lies to the High Court as defined in s. 4 (i) *vide* p. 20. The High Court in reference to proceedings against European British subjects in Oudh is the High Court of Judicature for the North Western Provinces and not the Court of the Judicial Commissioner of Oudh, 13 O. C. 335 = 11 Cr. L. J. 723.

4. **Appeal to High Court in a case of insult under s. 228, I.P.C.**—*See* s. 486. An appeal lies to the High Court against an order of the Sessions Court imposing a fine upon a witness under s. 228, I P C., for intentional insult offered to the Sessions Judge, 4 M. H. C. R. 148.

5. **Special exclusion of appeal to High Court.**—In 27 C. 854, it was *held* that having regard to s. 1 of Act XXII of 1860 (*Chaugong Act*), no appeal lies to the Calcutta High Court from a conviction for any offence committed within *the Chaugong Hill Tracts*.

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* This proviso was added by Act XVIII of 1923.

2. **Joint trials—How far s. 413 limits appeals.**—When more persons than one are convicted at one trial by a Magistrate of the first class, and an appealable sentence is passed on anyone of them, s. 413 does not take away from the other convicts, their right of appeals conferred by s. 408, even though the sentence passed on any one of such persons may not be an appealable one under s. 413 if they had been tried singly, **4 L. B. R. 354 = 9 Cr. L. J. 356 (F.B.); 15 O. C. 386 = 14 Cr. L. J. 170; 30 P. R. 1915 = 17 Cr. L. J. 27.** *See* also **14 A. L. J. 518** *Contra* MADRAS and BOMBAY, *see* Note 1 to sec. 413.

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5. **"Convicted on a trial."**—*Conviction without a sentence under* s. 562.—This would include the case of a person released under s. 652, **24 P. R. 1904 = 1 Cr. L. J. 1098**; *followed* in **10 Bur. L. R. 321 = 1 Cr. L. J. 543** and **5 L. B. R. 129 = 11 Cr. L. J. 152.** Just as a sentence passed by a first-class Magistrate under s. 349 is appealable to the Sessions Court, so a sentence by a first-class Magistrate under s. 380 must, also be held appealable to the Sessions Court, **17 Bom. L. R. 895 = 3 Bom. Cr. Ca. 107 = 16 Cr. L. J. 738.** *See* also **29 C. W. N. 151.**

Order under s. 123 is no sentence.—No appeal lies to the High Court from an order passed by a District Magistrate under s. 123 and on reference by the Magistrate confirmed by the Sessions Judge, as such an order is not a sentence, **9 C. 878; 15 P. R. 1900.** *See* Notes 135—137 at p. 214.

6. **Proviso (b)—appeal lies to High Court in case where anyone of the accused jointly tried is sentenced to imprisonment for more than four years, etc.**—Under provisio (*b*) when any sentence of over four years' imprisonment is passed by an Assistant Sessions Judge in any case the appeal lies to the High Court. The language of the proviso requires that an appeal by any person convicted in a case in which an Assistant Sessions Judge has passed a sentence of imprisonment of four years or upwards on anyone of the accused, whether he be appellant or any other person tried with him in the same case, shall be only to the High Court and the Sessions Judge has no jurisdiction to hear an appeal from the persons sentenced to less than four years in the same case, **17 M. L. J. 248 = 5 Cr. L. J. 496; 13 A. L. J. 272 = 16 Cr. L. J. 353.** The appeal lies to the High Court even though the accused against whom the sentence of imprisonment exceeding four years was passed has not appealed, **37 A. 471.** Similarly, when a Sessions Judge has confirmed the sentences passed by an Assistant Sessions Judge on some of the accused persons in a case, he has no jurisdiction to hear the appeals preferred by anyone of the prisoners in that case, as such appeals would lie under this proviso to the High Court, irrespective of the length of the sentence, **Ratanlal 655.** *See* also **23 C. L. J. 595; 19 P. R. 1918 (Cr.).**

7. **Sentences in a case must be aggregated for purposes of appeal.**—*See* s. 35 (3) at p. 59. **12 P. R. 1900; 161 P. L. R. 1911 = 12 Cr. L. J. 236.** Where the accused was convicted by a District Magistrate under s. 124-A, I.P.C., and sentenced to two years' rigorous imprisonment, and also under s. 153-A, and sentenced to one year's rigorous imprisonment; *held*, having regard to s. 35 (3) that the aggregate sentence of three years should be considered as one sentence for the purposes of appeal and taking into consideration proviso (*c*) it is

a reasonable inference that the appeal against the single sentence of three years under both the sections would lie to the High Court, 38 C. 214. In this case the accused filed one appeal in the High Court against conviction under s. 124 A and one appeal against the sentence under s. 153 A to the Sessions Court, but the latter appeal was called up by the High Court and the two were heard together. See also 5 P. R. 1918 = 17 Cr. L. J. 239. See now cl (3) to section 35.

8. Can concurrent sentence be added together for purposes of appeal?—See Note 26. When the sentences are to run concurrently each being four years or less the appeal lies to Sessions Judge, 17 Cr. L. J. 24.

9. Appeal lies to Sessions Court from District Magistrate vested with powers under s. 30 acting under s. 349.—Appeal lies to Sessions Court even where a District Magistrate, vested with powers under s. 30, sentences accused to five years imprisonment in a case sent up under s. 349. The sentence is *a fortiori* as, having regard to the last clause of s. 349 appeals from conviction in a case sent up for enhanced sentence under s. 349, will lie to the Court of Session 4 L. B. R. 53 = 8 Cr. L. J. 259. See Note 13 to s. 349. In 5 P. R. 1918, it was held that no appeal lies against the sentence of a first-class Magistrate exercising enhanced powers under s. 30 to the Court of the Session but such an appeal lies to the High Court and see 8 R. 358.

10. An order awarding compensation and repayment of fines, etc. under s. 22 of *the Cattle Trespass Act* 1871, is appealable under s. 408 of the Code. The compensation so awarded is not a fine and consequently the restrictive provisions of s. 413 of the Code do not apply. 48 B. 53.

Appeals to Court of Sessions how heard.

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

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Notes.—1. Competency of Assistant Sessions Judges to hear appeals.—The word "case" in s. 193(2) does not include appeals, therefore that clause does not confer on the Sessions Judge any power to transfer appeals to the Assistant Sessions Judge, 37 A. 258 where 9 B. 184 and 2 A. L. J. 576 are referred to and 7 A. 681 not followed.

2. Competency of Additional Sessions Judge to hear application under s. 155 (6).—Under s. 409 read with s. 9 an Additional Sessions Judge is competent to hear and determine applications under s. 155 (6) transferred to him by the Sessions Judge. A Magistrate is subordinate to the Additional Sessions Judge under s. 195 (7), 15 Cr. L. J. 195 (C.). See Note 182 at p. 536.

Appeal from sentence of Court of Session.

410. Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court.

Notes.—1. May appeal.—This section gives *right* of appeal as distinguished from an indulgence to be heard or not to be heard, 1891 A. W. N. 45.

2. This section does not give right of appeal from appellate judgment merely because fresh evidence is taken on appeal.—See Note 13 to s. 428.

3. High Court to which appeals by European British subjects lie.—Where an accused is dealt with as an European British subject and convicted by the Sessions Court the appeal lies to the High Court as defined in s. 4 (i) *vide* p. 20. The High Court in reference to proceedings against European British subjects in Oudh is the High Court of Judicature for the North Western Provinces and not the Court of the Judicial Commissioner of Oudh, 13 O. C. 335 = 11 Cr. L. J. 723.

4. Appeal to High Court in a case of insult under s. 323, I. P. C.—See s. 416. An appeal lies to the High Court against an order of the Sessions Court in a case of the upon a [illegible] under s. 323, I. P. C., the [illegible] transferred to the Sessions Judge 4 M. H. C. R. 148.

5. Special exclusion of appeal to High Court.—In 27 C. 651, it was held that having regard to s. 3 of Act XXII of 1860 *Chittagong Act*, no appeal lies to the Calcutta High Court from a conviction for any offence committed within the *Chittagong Hill Tracts*.

* This proviso was added by Act XVIII of 1923.

2. **Joint trials—How far s. 413 limits appeals.**—When more persons than one are convicted at one trial by a Magistrate of the first class, and an appealable sentence is passed on anyone of them, s. 413 does not take away from the other convicts, their right of appeals conferred by s. 408, even though the sentence passed on any one of such persons may not be an appealable one under s. 413 if they had been tried singly, **4 L. B. R. 354 = 9 Cr. L. J. 356 (F.B.); 15 O. C. 386 = 14 Cr. L. J. 170; 30 P. R. 1915 = 17 Cr. L. J. 27.** *See* also **14 A. L. J. 518** *Contra* MADRAS and BOMBAY, *see* Note 1 to sec. 413.

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a reasonable inference that the appeal against the single sentence of three years under both the sections should lie to the High Court, 38 C. 214. In this case the accused filed one appeal in the High Court against the conviction under s. 124 A and one appeal against the sentence under s. 153 A to the Sessions Court, but the latter appeal was called up by the High Court and the two were heard together. *See* also 3 P. R. 1915 = 17 Cr. L. J. 239. *See* now cl. (3) to section 3a.

8. Can concurrent sentence be added together for purposes of appeal?—*See* Note 36. When the sentences are to run concurrently each being four years or less the appeal lies to Sessions Judge, 17 Cr. L. J. 255.

9. Appeal lies to Sessions Court from District Magistrate vested with powers under s. 30 acting under s. 349.—Appeal lies to Sessions Court even where a District Magistrate, vested with powers under s. 30 sentences accused to five years' imprisonment in a case sent up under s. 349. The sentence is *a fortiori* and having regard to the last clause of s. 349 appeals from conviction in all cases sent up for enhanced sentence under s. 349, will lie to the Court of Session, 4 L. B. R. 53 = 8 Cr. L. J. 252. *See* Note 13 to s. 349. In 5 P. R. 1915, it was held that no appeal lies against the sentence of a first-class Magistrate exercising enhanced powers under s. 30 to the Court of the Session but such an appeal lies to the High Court and *see* 2 R. 358.

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* Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

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410. Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court.

Appeal from sentence of Court of Session

Notes.—1. May appeal.—This section gives *right* of appeal, as distinguished from an indulgence to be heard or not to be heard. 1891 A. W. N. 65.

2. This section does not give right of appeal from appellate judgment merely because fresh evidence is taken on appeal.—*See* Note 13 to s. 428.

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5. Special exclusion of appeal to High Court.—In 27 C. 454, it was *held* that having regard to s. 1 of Act XXII of 1860 (*Chittagong Hill Tracts*) no appeal lies to the Calcutta High Court from a conviction for any offence committed within *the Chittagong Hill Tracts*.

* This proviso was added by Act XVIII of 1923.

Explanation—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has *also* been passed

Note.—Under the new amended section right of appeal is given in all cases of sentences of imprisonment passed by a District Magistrate or Magistrate of the first class even though the period of imprisonment be one month or less Under the old law in such cases an appeal lay only when the sentence passed exceeded one month. It should be noted that a sentence of whipping is appealable under the new amended section.

"We consider that outside the Presidency towns in the case of all persons, both European and Indian, there should be an appeal against any sentence of imprisonment passed by a Magistrate. This involves a substantial modification in the general law of the land and will, to certain extent, increase the work of the Sessions Court. Nevertheless we are of opinion on general grounds, that apart from the particular case of European British subject, that an appeal should lie against any sentence. It is to be noted that short sentences of imprisonment should, where possible be avoided, and the number of sentences of one month and under passed by District Magistrates and first-class Magistrates should not, as far as we can judge, be very large. In the case of a sentence passed in a trial by a Court of Session we would allow no appeal in respect of a sentence of one month or under" *Report of the Racial Distinctions Committee*

Notes.—1. Is right of appeal in a 'case' in which two or more are convicted, regulated by sentence passed on each or anyone of the sentences?—Where several prisoners were tried together, and some of them were sentenced to a fine of Rs 50 only while others were more severely punished, *held*, that the existence of the latter fact does not give jurisdiction to an Appellate Court to take cognisance of appeal as regards the sentence of fine of Rs 50, **7 B. H. C. R. Cr. Ca. 35; 5 B. H. C. R. Cr. Ca. 24; 7 M. H. C. R. Appx. V; 9 M. L. T. 322 = 12 Cr. L. J. 63; 39 A. 293; 10 S. L. R. 153; 16 M. L. T. 33 = 15 Cr. L. J. 371** where it was *held*, that **17 M. L. J. 243 = 5 Cr. L. J. 496** which was decided on the interpretation of s. 408 (*b*) throws no light on the construction of s 413 *Contra*—In **4 L. B. R. 354 = 9 Cr. L. J. 356 (F.B.)** the above ruling was dissented from and it was held that the word "case" in this section includes a trial at which two or more persons are convicted and the grammatical meaning of the section is that there shall be no appeal in a case in which no sentence exceeding any of those described in the section is passed on any of the persons convicted and therefore where more persons are convicted at one trial, and an appealable sentence is passed on anyone of them this section does not take away from the others convicted, their right of appeal under s 408 This case was followed in **15 O. C. 386 = 14 Cr. L. J. 170** and in **30 P. R. 1915 = 17 Cr. L. J. 27.** S 413 applies only to cases in which the only sentence passed is imprisonment of one month or less or fine of Rs. 50 or less or whipping In **14 A. L. J. 518 = 38 A. 395** and **28 P. W. R. 1916**, it was held that each one convicted in a trial in which an appealable sentence is passed is entitled to appeal even if the sentence against him is not appealable. But in **40 M. 591** it is held that s. 413 of the Code prohibits an appeal by a person against whom a non appealable sentence has been passed even though appealable sentences have been passed against others jointly tried with him. It was further held that though for convenience a joint trial of several accused persons under certain circumstances might be allowed, on conviction each accused must be deemed to have been convicted in a separate case of his own for the purposes of s. 413 of the Code. **38 A. 395 = 14 A. L. J. 518** not followed It should be noted that in **15 A. L. J. 136** the ruling in **14 A. L. J. 518** is dissented from and **40 M. 591** is followed. But the doubt and conflict is set at rest now by the addition of the new section 415 A And the Legislature does not seem to follow, **40 M. 591.** S. 415-A adopts the view expressed in **38 A. 395.**

2. Order to pay costs of Court-fees is not an order of fine.—An order under s 31 of *the Court fees Act* to pay to the complainant the cost of the Court fees is no part of the sentence so as to make it a sentence of fine within the terms of this section, therefore an order sentencing the accused to 14 days' imprisonment and to pay the costs of Court fees is not appealable **20 C. 637; Weir I, 724 = 18 M. 423; 31 M. 347.**

3. Compensation awarded under s. 22, Cattle Trespass Act, is not fine.—An order awarding compensation and repayment of fine, etc., under s. 22 of *the Cattle Trespass Act*, 1871, is appealable under s. 408 of the Code. The compensation so awarded is not a fine and consequently the restrictive provisions of s. 413 of the Code do not apply, **46 B. 55.**

4. Aggregation of separate sentences in one trial.—*See* Note 9 to s. 408 and s. 35 (3) Where a person is charged with two separate sentences in one trial, the amount of the whole punishment must be regarded as one sentence for the purpose of determining whether an appeal lies, **3 C. L. R. 511; 1 B. 223.**

Note.—"It has been pointed out that even with the amendment proposed there *will* be *still* anomalies, in that the cases of persons who will have a right to appeal under s. 415 and who do not appeal will not be covered. We think, however, that the Legislature has gone as far as it can in giving a right of appeal in the cases referred to And if injustice results the powers of remission can always be exercised under s. 401" *Report Sel. Com*, 1922.

By the addition of this section the conflict in law is once for all set at rest. The legislature does not follow the ruling in **40 M. 591.** The ruling in **38 A. 395** is adopted by the present section. *See* Note 1 to s 413 (*supra*).

Note.—Right of the other accused to appeal.—Where two persons were jointly tried and convicted and leave was granted to one of them to prefer an appeal under *section 449 of this Code* as amended by Act XII of 1923, *held* that leave to appeal should be granted to the other accused also by reason of the provisions of this section. **54 Cal. 52**; *see* also **28 Bom. L. R. 671.**

416. (Omitted by Act XII of 1923.)

Appeal on behalf of Government in case of acquittal.

417. The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Notes.—*See* s 423 (1) (*a*) for powers of Appellate Court in acquittals and s. 427 for powers of arrest pending appeal

1. Limitation.—Appeal must be preferred within six months, *see* Note 1 to s. 401 But it is highly desirable, the appeal should be preferred as expeditiously as possible, **5 A. 253** at **p. 255** and **2 C. 436** (**F.B**). Section 5 of *the Limitation Act*, however, allows the High Court to admit, for sufficient cause shown, an appeal against an acquittal after the prescribed period of limitation. But where there has been unexplained delay in taking the necessary steps to present the appeal, the discretion allowed by that section will not be exercised, **Weir I, 791; II, 467.** *See* Note 2 to s. 404

2. What amounts to "an order of acquittal."—*The acquittal need not be an absolute acquittal.*—On a trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him under s. 304, I P C. The Sessions Judge declined to submit the case to the High Court, although he disagreed with the verdict. Against this decision Government appealed. *Held*, that the appeal was duly made, and that the judgment passed by the Court of Sessions, following the verdict of a jury acquitting the prisoner of murder is a judgment of acquittal within the meaning of this section, **2 C. 273.** The words '*an order of acquittal*' include also all judgments of an Appellate Court by which a conviction is set aside, **24 W. R. 41.**

3. Right to appeal restricted to Local Government.—The High Court has no authority to entertain an appeal against an acquittal except upon an appeal by Local Government, **19 W. R. 35; 6 C. L. R. 243; 14 M. 353, 1 A. 139.** This is the construction most favourable to liberty of the subject, *and it is not likely* that the power should have been given to reverse an acquittal without a right on the part of the accused to be heard by the High Court, **3 B. 150**; but *see* **2 A. 448.**

4. Only Public Prosecutor may present appeal under this section.—*See* s. 4 (*t*) for definition of "Public Prosecutor" and s. 492 for his appointment. A private complainant cannot seek to set aside the acquittal. In a case under this section where the liberty of the subject is involved, and an appeal is sought to be preferred against the order of acquittal, the statute must be strictly construed, and full compliance with its provision is required Therefore the mere fact that a person has been directed to present an appeal does not involve his appointment as Public Prosecutor An appeal presented by the Legal Remembrancer of Bengal at the instance of the Government of Behar and Orissa was *held* not properly presented, **41 C. 423.** *Contra* **45 C** [illegible]

5. No [illegible] tained an appea [illegible] a re-hearing on [illegible] had appeared at the Court shortly after the case has been dismissed by the Subordinate Magistrate. *Held*, that the order of the District Magistrate was illegal, as cl. (1) (*a*) of this section applies only to a High Court, **7 M. 213; 25 C. 528.** The High Court has the same power under cl. 28 of *the Letters Patent* of 1865, **28 C. 746.** A difference of opinion was expressed in **27 C. 126** as to the authority under which such powers are exercised by the High Court.

by this section an appeal by the Local Government in the widest terms and without any limitation whatever, 2 C. 273, *per* SPENCER, J, in 33 M. 1023. It has to be noted that 2 C. 273 was decided under the Code of 1872.

8. Procedure and principles guiding the High Court in deciding appeals against acquittals.—*See* Notes under Headings V and XI to s. 423 *See* also 8 Pat. 496 where it is *held* that the *onus* is on the prosecution that the accused was guilty and that the decision of the Lower Court was wrong. The prosecution must stand or fall upon its own legs. It can gain no strength from the weakness or improbability of the case of the accused

9. High Court does not ordinarily interfere with acquittals in exercise of the powers of revision.—*See* Notes under Heading VIII to s. 439

10. Complainant cannot move High Court under s. 15; Charter Act.—The only course to be pursued where it is sought to set aside the order of discharge made by a Presidency Magistrate is that laid down in s. 168, Act IV of 1877, and as by that section there is no appeal allowed to a complainant, who is a private individual, it is not open to him by invoking the aid of the High Court under s 15 of *the Charter Act* to obtain under the Court's extraordinary powers that which he might obtain had he a right of appeal, 7 C. 417, but now *see* 38 C. 994. *See* 3 C. 673; 1 A. 139, as to when the High Court is likely to interfere, if at all under s. 439 at the instance of a private complainant, 5 A. 434; 188 P. R. 1883.

11. The proper course for a complainant who is aggrieved by an order of acquittal by a Magistrate is to move the District Magistrate to initiate an appeal by Government under this section.—A. I. R. 1923, Sindh 176.

12. On admission of appeal Appellate Court may order arrest of accused.—*See* s 427 The admission of an appeal under this section has the effect of revising the proceedings against an accused person who has been acquitted, and the Appellate Court can order the arrest of such person, pending the appeal 2 A. 340 (F.B.); 1 C. 281. Where the accused so arrested is convicted, the sentence will run, not from the date of arrest but only from the actual date of the committal of the accused to jail, 6 C. L. R. 349.

Government must apply for arrest of accused—In capital cases, where the Local Government appeals under this section, from an order of acquittal, it is, generally speaking, undesirable that the prisoner's fate should be discussed while he remains at large, and the Government should in such cases, apply for the arrest of the accused under s. 427 *Per* EDGE, C J, 9 A. 528. *See* 1 C. 281; 2 A. 340 and 356.

13. Procedure when Magistrate in the United Provinces opines that appeal should be filed.—Whenever the Magistrate of the District is of opinion that an appeal should be filed from an order of acquittal he will prepare a brief narrative of the facts of the case and a statement of the reasons why he considers an appeal advisable, and will forward them with the original record to the Commissioner That officer will forward the case to Government (with whom the ultimate decision rests) whatever may be his opinion as to its worth Magistrates are held responsible for addressing Government on good and sufficient grounds only, and should be careful to refrain from urging an appeal solely because the judgment which it is sought to set aside happens not to be in harmony with that of the Lower Court.—*Reg and Rul*, *N-W P.*, s. 10, para 33, p 223

14. In exceptional cases Government to be allowed access to original documents.—When Government desires to make an appeal under s 417, it is ordinarily sufficient that the Public Prosecutor or other officer appointed by Government should have an opportunity of taking copies of the record But in exceptional cases in which Government may consider it essential to see any original documents, such documents may be given into the possession of the officer appointed by Government to receive them under such precautions for securing their safe keeping and return as the Court may deem necessary —*Bom H C Cr Cir*, p 64

15. Procedure when Police desire to appeal against acquittals.—If it is considered advisable to appeal against an order of acquittal in a case where a Police-officer prosecutes in his capacity of general prosecutor on behalf of or at the instance of his own department, the proposal to appeal should be submitted to Government through the Inspector General of Police or his Deputy; in other cases through the head of the department concerned —*Pun Rul and Ord*, Chapter XXIV, p. 377 When Superintendents of Police wish for an appeal on behalf of Government against judgment of acquittal, they should report on the subject, without loss of time, to the District or Sub-Divisional Magistrate after judgment is passed —*Bom Pl Man*, p 88.

Appeal on what matters admissible.

***418.** (1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

*Section 418 was renumbered by Act XVIII of 1923

7-A. Dismissal of jail appeal when the accused also appears through a Mukhtyar.—Where a Sessions Judge, in ignorance of the fact that an appeal in the same case had been filed by a Mukhtyar, dismissed a criminal appeal submitted from jail, it was *held* that though the Sessions Judge could not review his own order, the High Court could set it aside in revision, and it was so done, **43 A. 208.**

8. Hearing includes right of reply.—The section lays down that the appellant or his pleader should have a reasonable opportunity of being heard in support of the appeal and this must be taken to include the possible right of reply if necessary, for it is obvious that if the Crown in its reply raises any points or displaces in the opinion of the learned Judge, the points which were raised in the opening the appellants or their pleaders will have reasonable opportunity of supporting their case unless they are allowed to reply (*Cr Rev* No 874 of 1906 *followed*), **38 C. 307.**

9. Desirable that Judge goes through record.—The powers conferred by this section should be exercised sparingly and with great caution, and reasons however concise, should be given for rejecting an appeal, **8 A. 514; 9 C. W. N. 229.** Where the appellant is content to leave the question of admission or rejection of appeal to be determined by the Sessions Judge on the papers, the Judge is bound to peruse them and the appellant is not bound to appear a second time, either by counsel or in person, **Ratanlal 739.** 'Although a Judge acts within his powers in rejecting an appeal without sending for record, I think such a course is ordinarily very inconvenient and should not be adopted.'—*Per* STRAIGHT, J, **1883 A. W. N. 145** Where there are in the memorandum of appeal allegations of withholding witnesses, or refusals to grant warrants and summonses to witnesses and of disregard of certain evidence filed in the case, it cannot be said that there are no sufficient grounds for interfering, **Ratanlal 916.** Similarly, where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, the Appellate Court ought to call for the records, **29 M. 238.**

10. Time for hearing appeal must be fixed in each case and notice given.—A general notice posted in a Sessions Court house that appeals will be heard for admission only on the first Court-day after the date of presentation of the appeal is not a compliance with the requirements of this section. A time is by law required to be fixed in each case, **8 M. 11.** If the appeal is not admitted at once, notice must be given, **38 C. 333.**

Notice of appeal must be posted two days before the day fixed for hearing.—In the case of an appeal presented under s. 419 there shall be posted up in the Appellate Court, in place accessible to the public notice of the day appointed for considering the petition of appeal, in order to afford the appellant or his pleader a reasonable opportunity of being heard in support of the same. Such notice shall be posted two days at least before the day so appointed, unless the appellant or his pleader consents to a shorter notice or to dispense with a notice. *Bom. H C Cr Cir*, p. 42.

11. Disposing of appeal before day fixed for hearing is material error.—The disposal of an appeal before the day fixed for the adjourned hearing is a material error of procedure, **Weir II, 475;** and the High Court in revision will set aside the order and order the Appellate Court to re-hear the appeal, **7 P. R. 1891.** The fact that the pleader of the accused is present in Court, when an order is made admitting an appeal does not relieve the Court from the necessity of giving notice to the appellant of the day fixed for the hearing of the appeal, **10 C. L. R. 57.**

12. When notice to appellants in jail may be dispensed with?—The practice of sending notices to persons who have transmitted criminal appeals from jail may be discontinued when the Appellate Court considers, after perusal of the petition of appeal and judgment, that there is not sufficient ground for interfering, and resolves to reject the appeal summarily.—*M H C Pro*, 11th and 27th Nov, 1884 Nos. 3327 and 3465.

13. Principles which should govern consideration of appeals.—*See* Notes to s. 423 under Heading IV

14. Right of counsel to refer to certified copies of evidence at the hearing.—At the hearing of an appeal under this section, counsel for the appellant is entitled to refer to certified copies of the evidence Where the Judge declined to allow this to be done and dismissed the appeal, the dismissal was set aside, **11 O. C. 380 = 9 Cr. L. J. 55.**

15. Form of judgment—whether reasons to be given?—'*Summarily*' *means* "*in an informal manner and without delay of formal proceedings*"—This would seem to show that a Judge is entitled to *reject* an appeal without any formality at all, therefore without the formality of either a recorded judgment or reasons of any description, **21 C. 92; 20 B. 540; 9 C. W. N. 523; Weir II, 473; 1908 U. B. R. 42 = 4 Cr. L. J. 234; 23 C. 125.** Though every order passed in the exercise of judicial discretion should show the ground on which it is so passed, **4 C. P. 34;** yet the order under this section need not comply with all the requirements of s. 367, **25 M. 554;** or give any

of the Appellate Court is that, before disposing of the appeal it must peruse the records, and if the appellant is present or is represented by a pleader, the appellant in person or the pleader must be heard 13 A. 171 (F B), MAHMOOD J *dissenting*

9 **Complainant cannot as of right be heard in appeal** —*See* Note 9 to s 423

10 **Notice on appeal by complainant against order under s 250** —Where on the appeal of a complainant an order under s. 250 was reversed without notice either to the accused or to the Public Prosecutor *held* on revision setting aside the appellate order that though there be no express provision directing that notice should be given to the accused in such a case yet on the principle *audi alteram partem* the accused should be given notice of the appeal so as to afford him an opportunity of supporting the order passed in his favour Also according to the letter of the law notice should also be given to the officer if any appointed by the Local Government and referred to in Note 5 above The safer course in such an appeal therefore unless it be summarily rejected is to give notice to both the accused and the officer referred to 29 M 187 *See* Note 54 at p 710

11 **Order under s 250 or 545** —Though there is no express provision of law in case of an order under s. 250 or 545 with regard to notice upon the other party one of the fundamental principles of law is that no order should be passed to the detriment of a party without giving him an opportunity of being heard in defence 83 C 869

Powers of Appellate Court in disposing of appeal.

***423.** (1) The Appellate Court shall then send for the record of the case if such record is not already in Court After perusing such record and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears and in case of an appeal under section 417, the accused, if he appears the Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal or may—

(*a*) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made or that the accused be re-tried or committed for trial as the case may be or find him guilty and pass sentence on him according to law,

(*b*) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial or (2) alter the finding, maintaining the sentence, or with or without altering the finding reduce the sentence, or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence but subject to the provisions of section 106, sub-sec. (3) not so as to enhance the same

(*c*) in an appeal from any other order, alter or reverse such order

(*d*) make any amendment or any consequential or incidental order that may be just or proper

(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him

Notes.—1 Changes in the section —Sub-sec. (*d*) is necessary to give effect to the amendment of s. 106—*Statement of Objects and Reasons* Sub-sec. (2) corresponds with clause (*d*) of s. 423 of the 1882 Code.

2. Analogous law —*See* the provisions of the (*Criminal Appeal Act* 1907 *Edw VII C.* 23) ss. 4 and 5 for the powers of the Appellate Court in England. *Archbold* pp. 303—315 Compare s. 543 of N Y Cr Pro Code which is as follows —Upon hearing the appeal Appellate Court may in cases where an erroneous judgment has been entered upon a lawful verdict or finding of fact, correct the judgment to conform to the judgment or finding in all other cases they must either reverse or affirm the judgment appealed from and in cases of reversal may if necessary or proper order a new trial

* As to enhancement of punishment by Appellate Court in Upper Burma except in cases affecting European British subjects, *See* Reg. V of 189[illegible], ss. 12 and 17 For similar provisions in the Sonthal Parganas and in British Baluchistan, see *the Sonthal Parganas Justice Reg* V of 1893 s. 4 (VI) *and the British Baluchistan Criminal Justice Reg* VIII of 1896 s. [illegible], *respectively*

the Court that there does exist some good and strong ground apparent upon the record for interfering with the deliberate determination by a Judge who has had all the evidence before him and has arrived at the determination with that great advantage in his favour, **20 A. 459, 36 A. 168, Weir II, 462, 17 C. 485.** Sound principles of criminal jurisprudence require that the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of conviction, **7 P. R. 1914 = 97 P. L. R. 1904 = 1 Cr. L. J 731.** It is immaterial that the Appeal Court might have arrived at a different conclusion. The indications of mistake must be obvious or the evidence too strong to be rejected before the Appeal Court should interfere **125 P L. R. 1914 = 15 Cr. L. J. 203.** *See* also **7 P W. R. 1916 = 17 Cr. L. J. 97; 27 P. W. R. 1914 = 125 P. L. R. 1914 = 15 Cr. L. J. 203** and **17 Cr. L. J. 194 (Pun.)**

Contra—High Court will not usually interfere unless the Original Court has grossly blundered through perversity or incompetence.—Unless the judgment of the Court below was wrong and perverse or without jurisdiction and based on obvious errors in procedure the High Court should uphold the decision of the Magistrate though wrong, because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter going to the jurisdiction or the regularity of the trial **18 C. W. N. 660 = 15 Cr. L. J. 160.** The High Court will not interfere in appeal from an acquittal unless the judgment of the Court was clearly wrong and the judgment either perverse or based on obvious errors of procedure, **30 M. 44, 16 Cr. L. J 529 (M)** It is not because a Judge or a Magistrate has taken a view of a case in which that of Government does not coincide, and has acquitted the accused persons that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on it by this section. The doing so should be limited to those instances in which the Lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interest of the public **4 A. 143,** *followed* in **9 A. 528 (F B) 1882 A. W. N. 64** and **16 A. 212,** where it was *held* that when the judgment appealed from is based upon the facts and the conclusions of the Court are such as may be reasonably arrived at upon the facts found an appeal on behalf of Government should not be entertained *See* also **16 C. 310; 11 P R. 1903** and **14 P. L. R 1909 = 11 Cr. L. J. 65** and **28 P W. R. 1913 = 14 Cr. L. J. 525.** The Ruling in **4 A. 143** was *dissented from* by the Chief Court of Punjab They said 'Section 417 appeals to us to place the Local Government in no better or worse position in appealing from an acquittal than a convicted person in appealing from a conviction and it appears to us legislating rather than interpreting the law, to weight a Government appeal with the necessity of showing that the Court below, 'obstinately' blundered or 'has so gone wrong as to produce result mischievous at once to the administration of justice and the interests of the public, unless every illegal acquittal be held to fulfil the latter description while the former requirement would make the provisions of this section a dead letter in almost every conceivable case, **23 P. R. 1883.** (*See* however, **7 P. R. 1904.**) Technically speaking no doubt, the learned Judges are right but appeal against an acquittal is an extraordinary remedy not recognised in any civilised country, introduced in this country for the first time by the Code of 1872 (see **14 W R. 23**) like many others of similar kind, *viz*, enhancement of punishment (by Court of appeal now partially abolished) differential treatment of European British subjects from the rest of the population, the rule for calling out and employing the military in aid of the civil power, etc.' (*See* Dr WHITLEY STOKES' remarks in the Note at the head of Chapter IX)

(ii) In an appeal from an acquittal the High Court is a Court of appeal on matters of fact as well as of law and must decide questions of fact from the whole of the evidence on record, **9 C. L. J. 378 = 10 Cr L. J 423.**

34. High Court will not interfere with order of acquittal unless case is of sufficient consequence.—*See* Notes 4 to 12 to s. 417 The powers conferred by cl. (1) (*a*) of this section are exceptional, and the High Court will not exercise its discretion by setting aside an order of acquittal unless it be satisfied that the case is of sufficient consequence. The accused were charged under s. 24 of *the Sea Customs Act* VI of 1863, and convicted upon appeal the Sessions Judge quashed the conviction on the ground that the offence of importation of salt did not fall under that section, but under s. 194. On appeal by Government the High Court said that in strictness of law the Sessions Judge was right in saying that the offence was not made out still they were inclined to think that, instead of acquitting the prisoners, he (the Judge) might properly have come to the conclusion that they had not really been prejudiced in their defence, and have allowed the conviction to stand for the offence of which they were manifestly guilty On such a matter of discretion it would be a strong thing to re-establish the conviction even if so doing would be legal, **7 M. H. C. R. 332.** In a similar case, the Bombay High Court ordered re trial **12 B. H. C. R. 1.**

43. Re-trial should not be ordered when there is no irregularity or defect.—Where the evidence recorded by the Magistrate was as full as the law required it to be and where there was no irregularity of procedure or defect in the inquiry which made it necessary that the case should be re-tried the Sessions Judge had no authority to order the re-trial of the accused on appeal. He should have considered, on the evidence given before the Magistrate whether the conviction should be sustained, or whether it ought to be altered, or whether the accused was entitled to an acquittal, **Ratanlal 530.**

44. Re-trial should not be ordered to enable prosecution to fill up gaps in the evidence.—A re-trial should not be ordered where the charges fail not because they were deficient in form but because the evidence adduced is not enough to support the charges **17 C. W. N. 479 = 14 Cr. L. J. 219; 28 M. L. J. 379.** A re-trial should not be ordered where the evidence is untrustworthy and discrepant, **20 P. W. R. 1909 = 11 Cr. L. J. 131.** A re-trial should not be ordered for the sole object of enabling the prosecution to reconcile discrepancies and fill up deficiency in their evidence pointed out by the appellant **3 Bur. L. T. 9 = 11 Cr. L. J. 634.** A re-trial should not be ordered where the prosecution of its own negligence failed to produce evidence which it was bound to. *Per* SUNDARA AIYAR J. in **36 M. 457.** But if the prosecution was ready to adduce evidence *e.g.*, the publication of a libel and the Magistrate intervened and held that it was unnecessary as it had already been proved by the production of the newspaper *held* that the case was one in which a re-trial may properly be ordered. **36 M. 457.** An Appellate Court should not order a re-trial on the sole ground that some additional witnesses ought to have been examined for the prosecution, especially when the prosecution was conducted by a pleader and it was not shown that he had exercised an improper discretion in not calling the witnesses. **31 C. 710.** *See* **38 M. 1028,** where it was *held* that an acquittal may be set aside on appeal when it has been obtained by fraud or trick of the accused. *See* also **17 Cr. L. J. 193 (M.).**

45. Proper order when Magistrate has refused to take defence evidence.—Where the Magistrate had refused to take the defence for the accused the proper order for the Sessions Judge to pass in appeal under this section is to set aside the conviction and sentence passed on the accused and direct the Magistrate to re-commence the proceedings against the accused from the stage when his evidence was refused, **28 P. R. 1884.** An Appellate Court should not set aside a conviction on the ground that all the witnesses cited for the defence were not examined. The proper course in such a case is to have the evidence taken of the other witnesses before disposing of the appeal. **Weir II, 481; 18 A. L. J. 325.**

46. When re-trial may be ordered.—*Re-trial may be ordered when trial was illegal, irregular or defective. Power not confined to cases where trial was held by Court having no jurisdiction.*—A re-trial may be ordered where the trial is held to be illegal on the ground of misjoinder of charges. A re-trial would also be proper where evidence has been improperly rejected or where the accused was rightly acquitted of one offence, the Appellate Court comes to the conclusion that he ought to have been tried for another. Appellate Court should come to the conclusion that the trial was not properly held for one reason or other. **36 M. 457.** In **27 C. 172,** it was *held* that the power of an Appellate Court to order a new trial conferred on it by sub-sec. (1) cl. (*b*), is not confined to the case where the conviction and sentence is set aside for want of jurisdiction in the Court that tried the case. A re-trial may properly be ordered where the original trial is void for want of jurisdiction or for misjoinder, or where the enquiry has been obviously superficial and material witnesses have not been examined, **3 Bur. L. T. 9 = 11 Cr. L. J. 631.** But it is not in every case of error that the High Court will direct a re-trial. In **7 W. R. 3,** where the appellants had been wrongly convicted, as *abettors*, instead of as *principals* the High Court declined to interfere. So too in **3 B. H. C. R. 42,** where the accused was wrongly convicted of cheating by personation when he should have been convicted of giving false information.

(*i*) *When charge is defective and has misled accused.*—Apart from the general power conferred by cl. (*b*) of this section, a Session Judge is empowered by s. 232 to direct a re-trial to be had upon a charge framed in whatever manner he thinks fit on the ground that the accused has been misled in his defence by the absence of a charge or a defect in the charge. Thus when certain owners of land were convicted under s. 154 or s. 155 I. P. C. for acts or omissions on the part of their agents and the charges framed by the Magistrate against them referred only to the knowledge and belief and acts and omissions of the accused themselves the Sessions Judge on appeal *held* that by reason of the omission to insert the words "or their agents or managers" in the charge the accused had been seriously prejudiced in their defence and directed a re-trial upon charges as amended. It was contended that the words "order him to be retried by a Court of competent jurisdiction" in s. (1) (*b*) were borrowed from s. 284 of the 1872 Code and they indicated that the Appellate Court had no power to order a re-trial except in cases where the previous trial was held by a Court having no jurisdiction. But it was decided that the power to order re-trial was not so limited **7 C. W. N. 301,** which *f*[illegible] **13 A. 203, 23 C. 975**

Court on the ground of non-compliance with the provisions of s. 360, leaving the question of re-trial to the District Magistrate is not an order of acquittal of the accused. The order of the Appellate Court leaving the question of re-trial to the discretion of the Crown authorities is legal, and the District Magistrate has power to direct the same. **53 C. 192.**

49. Jury trials—Power of High Court.—*See* Notes 37 and 101 and s. 417.

50. Appellate Court can order re-trial by particular Subordinate Court.—When an Appellate Court reverses a conviction and sentence under this section, it can order re-trial of the appellant by a competent Subordinate Court, and there is nothing in the section which prevents the specification by the Appellate Court of a particular Subordinate Court. **Ratanlal 367.**

51. Is Appellate Court itself competent to re-try or must re-trial be by Subordinate Court?—An Appellate Court cannot, while reversing the conviction recorded against and the sentence passed upon the accused by Subordinate Magistrate, direct that the case should be tried by itself. Such a direction is plainly illegal and the re-trial under this section, if ordered, must be by a Court of competent jurisdiction subordinate to the Appellate Court, **Ratanlal 982.** *See* **4 C. W. N. 576,** where MACLEAN C.J. expressed a doubt whether the High Court could itself re-try. But in **30 M. 223,** it was held, *following* **Weir II, 491,** that where a conviction by a second-class Magistrate is appealed against the Appellate Magistrate may himself proceed to try the offender although the offence is one within the ordinary jurisdiction of the Subordinate Magistrate, the Appellate Magistrate need not necessarily refer it to another competent Magistrate. The words '*order him to be tried by a Court ... subordinate to such Appellate Court*' are not words of limitation and do not exclude the Appellate Court from itself trying the offender, if the offence is one within the ordinary jurisdiction of the Appellate Magistrate, but if the Appellate Court happens to be the Court of Session except in cases in which it is expressly empowered to take cognisance of an offence as a Court of Original jurisdiction it has no power itself to hold the re-trial, unless a valid commitment has been made by a Magistrate duly empowered in that behalf, **1907 A. W. N. 178 = 6 Cr. L. J. 7,** where **22 C. 50** is *referred to* and *see* s. 193.

52. High Court may direct re-hearing of appeal by Lower Appellate Court.—*See* Note 12 to s. 424. In **43 P. W. R. 1912 = 7 P. L. R. 1913 = 13 Cr. L. J. 737** *following* **13 B. 566,** it was *held* that the High Court has power under this section to order re-trial of an appeal by a Sessions Court. Where a Sessions Judge as an Appellate Court reversed a conviction erroneously on a technical point and acquitted the accused, the High Court set aside his order, on appeal by Government, and directed the Sessions Court to hear the appeal on the merits, **24 W. R. 41.**

53. Re-trial may be directed on fresh charge framed on recorded evidence.—When an Appellate Court orders under sub-sec. (1) (*b*) that a convicted person be re-tried, it may, in a suitable case, direct at the same time that the new proceedings should commence with the framing of a proper charge on the evidence already on record, **9 N. L. R. 42 = 16 Cr. L. J. 230; 25 C. 863** *explained.*

54. Where no express limitation stated, order of re trial applies to all charges framed by Original Court.—Where an accused person is charged with and tried for various offences arising out of a single act or series of acts, it being doubtful which of those offences the act or acts constitute, and where he has been acquitted by the verdict of a jury of some or such offences and convicted of others and appeals against such conviction, and where the Appellate Court reverses the verdict of the jury and orders a re-trial without any express limitation as to the charges upon which such trial is to be held, such re-trial must be taken to be upon all the charges as originally framed, and the acquittal by the jury on the previous trial upon some of such charges is no bar to the accused being tried on them again, as, having regard to the provisions of this section, s. 403 in that respect cannot apply to such cases, **22 C. 377.** When a conviction is set aside and a re-trial is ordered the whole case is re-opened and the accused must be tried again on all the charges originally framed, **13 Cr. L. J. 437 (C.).** The High Court has no jurisdiction in ordering a re-trial to uphold the conviction under one section and also order him to be re tried under another, **16. C. W. N. 909 = 13 Cr. L. J. 715.**

55. Evidence cannot be restricted when re-trial ordered.—Where an Appellate Court passes an order of remand under this section it cannot restrict the evidence to be taken to that mentioned in its order, but it should refer the case to be re-tried in view of the instructions contained in its order. In such a case it is open to the accused person to adduce such additional evidence as he may desire, **3 C. L. J. 333 = 3 Cr. L. J. 304.** *See* s. 428.

B.—COMMITTAL FOR TRIAL—SUB-SEC. (1) (*b*) (1).

56. Where Appellate Court orders committal, no preliminary inquiry needed.—Where a Sessions Judge on appeal acting under sub-sec. (1) (*b*) annulled conviction and directed the committal of the accused, it

In an appeal from conviction, the Appellate Court can under this section alter the finding of the Lower Court and find the appellant guilty of an offence of which he was acquitted by that Court, provisions of s. 403 notwithstanding **3 C. 975** *followed* in **27 C. 172.** The charge against the accused was under ss. 148 and 325 I P C The Magistrate acquitted the accused under s 148, but convicted under s. 325 I P C. The accused then appealed to the Sessions Judge who was of opinion that the accused should have been convicted under s. 147 but thought he could not interfere with the acquittal, *held following* **23 W. 975** that it was open to the Sessions Judge under sub-sec. (*b*) (2) to alter the finding maintaining the sentence and there is nothing to restrict the finding which may be altered to a finding of conviction. (**26 M 478** not *followed*) **34 M 545; 8 A. L. J. 1239 = 12 Cr. L. J. 572; 35 M. 243; 37 M. 119; U. B. R (1911) 4 Qr. 100 = 13 Cr. L. J. 457; 12 P. R. 1904; 31 A. 115.** There is only one restriction on the powers of a Court of Appeal It cannot enhance the sentence under appeal, **24 C. 975; 15 A. 205; 22 C. 377, 23 C. 975** holds in general terms that under s. 423 in an appeal from conviction the Appellate Court can alter the finding of acquittal into one of conviction. The reason given is that there is no reason to limit the meaning of the words "alter the finding" in s. 423 (*b*) (2) only to a finding of conviction. Therefore as long as the sentence is maintained without enhancement a Court of Appeal can convert a finding of acquittal into one of conviction under s 423 (*b*) (2)

In **26 M. 478** it was held that under s 423 a Deputy Magistrate has no power to reverse an order of acquittal The words "reverse the finding and sentence" in clause 1 (*b*) of that section mean reverse a finding upon which a conviction is based and do not empower the appellate tribunal (or at any rate an appellate tribunal other than a High Court) to reverse or set aside an acquittal In this case **23 C. 975** was explained

And in **35 M. 243** it is held that in cases not falling under ss. 237 and 238 of the Code the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court. But where he has been charged and the first Court has recorded a finding of acquittal on that charge there is no reason for holding that the Appellate Court can alter the finding provided the sentence is not enhanced

In **27 C. W. N. 835** where the trial Court convicted the accused under s. 143, I P C but acquitted them of the offence under s 379, I P C., and the Appellate Court while upholding the conviction under s. 143 I P C and the sentence set aside the acquittal under s. 379, *held*, that the Appellate Court had no jurisdiction to set aside the acquittal of the petitioner when he upheld the conviction under s. 143 I P C It was not a case of *altering the conviction which was within his powers under s. 423 of the Code*

62. On appeal High Court may alter finding and enhance sentence.—The effect of reading ss. 423 and 439 together is that the High Court when hearing an appeal against a conviction may under cl. (*d*) of s. 423 alter the finding and then as a Court of Revision may under s. 439 enhance the sentence so as to make it appropriate to the altered finding S. 439 (4) does not limit the powers of a Court of Appeal, **37 M. 119.** It is only the High Court that is given this power In this case the High Court on appeal altered the finding from s. 304 to s. 302, I P C., and enhanced the sentence *See* **1 Rang 438,** also **30 Bom. L. R. 967.** But *see* **27 Bom. L. R. 355 = 49 Bom. 450.**

63. When Appellate Court may alter charge or finding and convict accused for offence which his acts properly constitute?—(*i*) *When accused has met the new charge and is not prejudiced by alteration.*—*If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging* and convicting an accused person for an offence other than that for which he should have been properly charged, and if, notwithstanding such error, the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding Such an error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding would not necessitate a re-trial expressly on a charge of the offence **18 C. 652.** *See* also **52 Bom. 355 = 30 Bom L. R. 330.** The exercise of this discretion must be regulated largely by a consideration of what was the nature of the evidence in respect of the charge upon which a person was convicted and whether the evidence reasonably support the particular charge to which the former charge is to altered, and whether the accused person will in any way be prejudiced or injured by the alteration of the charge (s. 474 to s. 193 I P C.), **1890 A. W. N 86.** The Appellate Court must look to the offence as charged and determine whether it is proved or not. It has nothing to do with the form the offence may take owing to subsequent events. A conviction for an offence for which the accused was tried, will not prevent his conviction if guilty, of another distinct offence subsequently committed, **9 W. R. 65.** Where the evidence showed that there were six robbers, but three were acquitted the conviction of the rest under s. 391, I P C., was on appeal altered into one for robbery, s. 392, I P C., **7 M. L. T. 349 = 1910 M. W. N. 52 = 11 Cr. L. J. 247.** In (1912) **M. W. N. 1110 = 14 Cr. L. J. 219,** a conviction under s 353, I P C., altered into one under s 183, I P C. *See* also **17 Cr. L. J 334 (M.)**

In an appeal from conviction, the Appellate Court can under this section alter the finding of the Lower Court and find the appellant guilty of an offence of which he was acquitted by that Court, [illegible] notwithstanding **3 C. 975** *followed* in **27 C. 172.** The charge against the accused was under ss. 144 and 325 I P C The Magistrate acquitted the accused under s. 144, but convicted him under s. 325 I P C. The accused then appealed to the Sessions Judge who was of opinion that the accused should have been convicted under s. 147 but thought he could not interfere with the acquittal, *held following* **23 W. 975** that it was open to the Sessions Judge under sub-sec. (*b*) (2) to alter the finding maintaining the sentence and [illegible] finding which may be altered to a finding of conviction. (**26 M. 478** *not followed*) **34 M. 545; 8 A. L. J. 1233 = 12 Cr. L. J. 572; 35 M. 243; 37 M. 119; U. B. R. (1911) 4 Qr. 100 = 13 Cr. L. J. 437; 11 P. R. 1904; 31 A. 115.** [illegible] is only one restriction on the powers of a Court of Appeal. It cannot enhance the sentence under appeal. **24 C. 975; 15 A. 205; 22 C. 377, 23 C. 975** holds in general terms that under s. 423, in an appeal from conviction the Appellate Court can alter the finding of acquittal into one of conviction. The reason given is that there is no reason to limit the meaning of the words "alter the finding" in s. 423 (*b*) (2) [illegible]. Therefore as long as the sentence is maintained without enhancement a Court of Appeal can convert a finding of acquittal into one of conviction under s. 423 (*b*) (2)

In **26 M. 478** it was held that under s. 423 a Deputy Magistrate has no power to reverse an order of acquittal. The words "reverse the finding and sentence" in clause 1 (*b*) of that section mean reverse a finding upon which a conviction is based and do not empower the appellate tribunal (or at any rate an appellate tribunal other than a High Court) to reverse or set aside an acquittal. In this case **23 C. 975** was dissented.

And in **35 M. 243** it is held that in cases not falling under ss. 237 and 238 of the Code the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court. But where he has been charged and the first Court has recorded a finding of acquittal on that charge there is no reason for holding that the Appellate Court can alter the finding provided the sentence is not enhanced.

In **27 C. W. N. 555** where the trial Court convicted the accused under s. 143, I P C but acquitted him of the offence under s. 379, I P C., and the Appellate Court while upholding the conviction under s. 143 I P C and the sentence set aside the acquittal under s. 379, *held,* that the Appellate Court had no jurisdiction to set aside the acquittal of the petitioner when he upheld the conviction under s. 143 I P C. It was not a case altering the conviction which was within his powers under s. 423 of the Code.

62. On appeal High Court may alter finding and enhance sentence.—The effect of reading ss. 423 and 439 together is that the High Court when hearing an appeal against a conviction may under cl. (*b*) of s. 423 alter the finding and then as a Court of Revision may under s. 439 enhance the sentence so as to make it appropriate to the altered finding. S. 439 (4) does not limit the powers of a Court of Appeal, **37 M. 119.** It is only the High Court that is given this power. In this case the High Court on appeal altered the finding from s. 304 to s. 302, I P C., and enhanced the sentence. *See* **1 Rang. 454,** also **20 Bom. L. R. 947.** But *see* **17 Bom. L. R. 555 = 40 Bom. 452.**

63. When Appellate Court may alter charge or finding and convict accused for offence which facts properly constitute?—(*i*) *When accused has met the new charge and is not prejudiced by alteration*—[illegible] the prosecution establishes certain acts constituting an offence and the Court erroneously frames the charge and convicting an accused person for an offence other than that for which he should have been properly charged, and if, notwithstanding such error, the accused has by the evidence been clearly called to meet the charge of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him of an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration of the finding. Such an error is one of form rather than of substance, and the accused is not prejudiced by an alteration of the charge or finding would not necessitate a retrial except for a charge [illegible] **18 C. 613.** *See* **43 Bom. 333 = 20 Bom. L. R. 232.** The exercise of this discretion [illegible] of what was the nature of the evidence in respect of the charge upon which a person was [illegible] the evidence reasonably support the particular charge to which the [illegible] accused person will in any way be prejudiced [illegible] **1903 A. W. N. 66.** The Appellate Court [illegible] [illegible] an offence for which the accused was tried, was not [illegible] subsequently committed, **8 M. L. J. 65.** Where the [illegible] [illegible] the conviction of the trial under s. 325, I P C., was on appeal [illegible] **11 M. L. T. 343 = 1912 M. W. N. 33 = 11 Cr. L. J. 348.** In **(1913) M. W. N. 1113 = 14 Cr. L. J. 319,** a conviction under s. 325, I P C., was altered to one under s. 143, I P C. *See* also **13 Cr. L. J. 248 M.**

(i) *Conviction for offence cannot be altered into conviction for abetment of that offence.*—Though under this section the Appellate Court has power to alter a finding, that power cannot be used arbitrarily but only in accordance with other provisions of this Code which are to be found in ss. 237, 238. When a person has been charged with a certain offence and has been convicted of that offence, the Appellate Court cannot, on finding that the conviction is not sustainable, convict the accused of abetment of that offence. 11 Bom. H. C. R. 240 *followed* 33 M. 264; 13 Cr. L. J. 203 (M.); 13 Cr. L. J. 223 (M.); 15 Cr. L. J. 674 (M.). See however Note 2 under s. 237 at p. 674. *See* also 42 C. 1094 = 19 C. W. N. 1239. *See* 25 Bom. L. R. 323, [illegible] *see* 3 Rang. 11 [illegible].

( ) *Conviction ought not to be altered into one for a more serious offence.*—As a general rule, it would be improper and unfair to an accused person that on his appeal he should be convicted of a more serious offence to which he had never pleaded on his trial, especially if the offence which the Appellate Court might consider to be established was not cognate to the offence of which he had been tried and convicted, if there were circumstances of aggravation of an offence to which the accused had not [illegible] 25 C. 63; 3 C. W. N. 267; 6 C. L. R. 437. For exceptions to this rule *see* ss. 236, 237 and 238. It is not competent to an Appellate Court to find a prisoner on appeal guilty of a graver offence than that with which he was charged at his trial, unless an opportunity is afforded to the accused of defending himself against the charge so altered (*e.g.* from ss. 143 to 147, I. P. C.), 6 C. L. R. 437. In 4 B. H. C. R. Cr. Ca. 16 the accused was convicted of cheating. Though the facts found constituted criminal breach of trust, the conviction and sentence were maintained. *See* 7 W. R. 3.

63. Alterations which have been held to be illegal.—(i) *Alteration of ss. 211 and 109 to s. 193 I. P. C.*—In proceedings taken in a charge of abetment of an offence punishable under s. 211, I. P. C. it would be improper to convict the accused of intentionally giving false evidence (s. 193), as the two offences are entirely of a different character, and in making a defence on a charge of the first named offence the accused could not be regarded as pleading to a charge of intentionally giving false evidence in regard to some particular statement. 3 C. W. N. 367.

(ii) **Alteration of the charge illegal when the nature of the case is changed.**—A charge cannot be so altered by an Appellate Court as to make it necessary for an accused to meet an altogether different case from that with which he is charged in the Court of the committing Magistrate. 23 A. L. J. R. 914.

(iii) *Alteration of s. 376 to s. 366 I. P. C.*—The alteration of the finding must be of an offence charged or of some cognate offence and not of an offence which should have formed the subject of a new and separate charge. Thus where, on appeal, the conviction under s. 376 I. P. C., was altered into one under s. 366 I. P. C., the alteration was held to be improper, as the latter charge involved different elements and different [illegible] of fact from the former. 8 Bom. L. R. 110; 3 Rang. 65.

(iv) *Alteration of s. 379 to s. 143 I. P. C.*—The appellate judgment altering a conviction under s. 379 I. P. C. into one under s. 143, I. P. C. was set aside on the ground that the latter was an offence with which the accused was never charged and regarding which he had never been called upon to [illegible] and moreover it was an offence of an entirely different character from the one which alone the accused had been tried. 27 C. 660.

(v) *Alteration of s. 323 to s. 143 I. P. C.*—The accused were convicted of an offence under s. 323 I. P. C. On appeal the Appellate Court confirmed the conviction under s. 323 and also [illegible] under s. 147 for which they were not tried. *Held* [illegible] the Appellate Court could not legally convict them of [illegible]. Ratanlal 331, [illegible] *see* 13 A. 331.

( ) *Charge under s. 143 I. P. C. ought not to be added.*—A [illegible] charges under ss. 451 and 452 I. P. C. [illegible] a charge under s. 143 I. P. C. [illegible] section would have the effect of [illegible] were members at the time of the assembly [illegible] was charged for his individual act as if the charges were only under ss. 451 and 452 I. P. C. 16 Cr. L. J. 737 M.

(vi) *Alteration of s. 143 to s. 323 I. P. C.*—Where a Magistrate [illegible] charge of rioting and on appeal the Sessions Judge [illegible] *trespass and hurt*. *Held* [illegible] these latter offences were [illegible] have formed the subject of separate charges, and as the accused were [illegible] the conviction could not be sustained. 30 C. 214. In 31 C. 293 and 11 C. W. N. 1371 = 15 Cr. L. J. 718 it was [held] that a conviction under s. 147 could not be altered into one under s. 323 I. P. C. See also Ratanlal 30 C. W. N. 823.

(vii) *Alteration of ss. 447 and 217 to s. 379 I. P. C.*—In 7 N. L. R. 173 = 11 Cr. L. J. 387, it was held [illegible] where an Appellate Court altered the conviction under ss. 447 and 217 I. P. C., [illegible] under s. 379 I. P. C.

conviction was wrong as the accused had no opportunity of answering the charge of theft, **27 C. 660** and **36 C. 288** *referred to.*

(*viii*) *Alteration of s.* 406 *to s.* 417, *I.P.C.*—An accused charged under s. 406, I.P.C., was convicted under s. 417, I.P.C., without any charge framed against him of having committed any other offences. On appeal the Sessions Judge *held* that the Magistrate was irregular in convicting of offences under s. 417, but he found the evidence recorded disclosed that the appellant had committed offences under s. 406, I.P.C., and he accordingly altered the finding without giving however any opportunity to the accused of showing cause against being convicted by him of offences of which he had been acquitted by the Magistrate. *Held*, that the Sessions Court's order must be set aside and the appeal must be re-heard, **3 L. B. R. 283 = 5 Cr. L. J. 420.**

(*ix*) *Different common object for an unlawful assembly.*—It is not competent to an Appellate Court while disbelieving the common object of an unlawful assembly, to find out a different common object regarding which the accused were never called upon to plead nor tried, and then to affirm the conviction, **33 C. 295** *which follows*; **27 C. 990**; **11 C. W. N. 158,** and *see* s. 215.

(*x*) *Conviction under s.* 411, *alteration to s.* 379 *or s.* 411.—Where the accused was convicted of the offence of dishonestly receiving stolen property, and the Appellate Court altered the conviction to one under either s. 379 or s. 411, I.P.C., *held* that the alternative conviction in appeal was illegal, the accused not having been charged with theft and having had no opportunity of meeting such a charge, **Ratanlal 368.**

66. Power of High Court on revision.—Under s. 439, the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal by this section. *See* Notes to s. 439.

B.—REDUCTION OF SENTENCE.

67. Where conviction is partly annulled sentence ought to be reduced.—Where a second-class Magistrate convicted the accused under ss. 147 and 379, I.P.C., but passed only a single sentence for both the offences and the Appellate Court, while acquitting the accused of the offence under s. 379, maintained the sentence in its entirety and also passed an order under s. 106. *Held*, that the Appellate Court having acquitted the accused of one of the offences, some reduction of the sentence must be made, unless the Court thinks that the sentence ought not to be reduced, in which case, it should refer the matter to the High Court for enhancement of the sentence, **30 M. 48,** where **Weir II, 487** (*a*); **24 C. 316** and **22 B. 760** are *followed*; **3 M. L. T. 312 = 7 Cr. L. J. 361; 12 Cr. L. J. 454.** In **7 M. L. T. 81 = 11 Cr. L. J. 243** it was, however, *held* that sentence need not be reduced when the conviction for one of two offences charged is set aside by Appellate Court if the inference can be drawn that the Magistrate did not intend to pass any sentence for the offence set aside. Also an Appellate Court is not competent to make an order under s. 106 unless the conviction was in the first instance by a Court of the description specified in the first paragraph of that section. *See* also **29 M. 190; 21 C. 322** and Note 69.

68. When combined sentence is passed on conviction of two separate offences, Appellate Court cannot allot part of it to any particular offence.—When a Magistrate on conviction of an accused person of two offences (for which separate sentences ought to have been passed) passed a single sentence, combining imprisonment and fine, *held* that the Appellate Court on reversing the conviction for one offence was not justified in treating the sentence of fine as the punishment for the one offence and the sentence of imprisonment as the punishment for the other (no such distinction having been made by the trying Magistrate) and retaining the full sentence of imprisonment, **Ratanlal 409.**

VIII.—ALTERATION OF NATURE OF SENTENCE SO AS NOT TO ENHANCE SAME.

69. Where conviction on one of several charges is reversed, sentence must also be set aside.—*See* Note 67. Where an accused is convicted and sentenced by the Lower Court on two separate charges, an Appellate Court has no power in appeal to retain intact the whole sentence when it reverses the conviction on one of the charges, as such a retention has virtually the effect of an enhancement of sentence, **22 B. 760; 45 P. R. 1887; 24 C. 316.** It is not competent for a District Magistrate to enhance a sentence on appeal, which would be the case, if he maintains the whole sentence while annulling the conviction under one of several sections under which the Court of First Instance has convicted the accused, **Ratanlal 618; Weir II, 487 (a).** *See* also **10 M. L. T. 115 = (1911) 2 M. W. N. 97 = 12 Cr. L. J. 454** and **3 M. L. T. 312 = 7 Cr. L. J. 361,** where **30 M. 48** is *followed.* Thus, where a Magistrate had sentenced the accused separately for the two offences he found to be committed, the second offence being under s. 221, I.P.C., and the Sessions Judge on appeal, when reversing the conviction under s. 221, allowed both sentences passed by the Magistrate to stand as an aggregate sentence for the convictions substituted in his own Court for the other conviction pronounced by the Magistrate, *held*

this was virtually an enhancement of the sentence on altering the finding, and therefore in contravention of sub-sec. (1) (b) (3), 45 P. R. 1887. Where the offences are distinct and require separate charges and separate sentences, then, no doubt, the reversal of one of the two or more convictions must carry with it the sentence appended to it, or in case of an erroneous combined sentence, might necessitate a fresh trial. But where only one offence has been committed, and the Magistrate erroneously splits it into two and passes either two sentences or a combined sentence, the joining up of the erroneous split and either its conviction or its sentence and the maintaining of the original sentence cannot be regarded as beyond the powers of the Appellate Court under this section, 3 N. L. R. 67 = 8 Cr. L. J. 43, where 24 C. 316; and 317 (N [illegible]) 22 B. 760; 45 P. R. 1897; 35 C. 863 and 8 C. P. L. R. (Cr.) 23 are *referred to*.

70. Appellate Court cannot on appeal pass sentence which original Magistrate was not competent to pass.—*See* 7 N. L. R. 102 = 12 Cr. L. J. 444, Note 3 at p. 1004.

71. If conviction is confirmed, some sentence, though nominal, must be passed.—When an Appellate Court confirms a conviction but reverses the sentence, it should, if it disapproves of the sentence, pass some other sentence, even though a nominal one, Ratanlal 245. But *see* s. 401 (5) [illegible] Note [illegible] and 1924 W. R. 27.

72. Is whipping more severe than imprisonment?—"We have no *data* from which the comparative severity of the two sentences of whipping and rigorous imprisonment can be determined, and it is impossible to say how many lashes would be equivalent to a sentence of rigorous imprisonment for a specified period" 6 B. L. R. Appx. XCV = 15 W. R. 7. *See* also 7 Rang 319. Thus when the first Court in addition to a sentence of imprisonment passed a sentence of whipping which was contrary to law, and the Appellate Court in setting aside the sentence of whipping, substituted for it, a sentence of an additional term of imprisonment, the additional term of imprisonment was cancelled as illegal. Conversely where the Appellate Court reduced the sentence of imprisonment but awarded whipping, it was *held* the latter sentence was illegal as it virtually amounted to enhancement of sentence. *See* also Ratanlal 131 and Weir II, 437.

73. Reduction of imprisonment with fresh imposition of fine, whether an enhancement of sentence.—Alteration of a sentence of four months rigorous imprisonment to one of three months rigorous imprisonment and a fine Rs. 10 or, in default, a further term of six weeks' rigorous imprisonment is practically an enhancement of the sentence, because if fine were not paid, the sentence to be undergone would be four months and two weeks' rigorous imprisonment. Such a sentence was in excess of the powers of the Appellate Court having regard to this section, 17 A. 67; 23 A. 497. When an Appellate Court alters a conviction under s. 323 I. P. C. punishable with imprisonment or fine into one under s. 325 punishable with imprisonment *and* fine and sentences accordingly, it practically enhances the sentence. The point was considered at length by a [illegible] Bench of the Madras High Court in 30 M. 103, and it was *held* the mere fact that a *fine* was imposed by the Appellate Court would not in law be an enhancement of sentence, if the aggregate period of imprisonment which the accused would have to undergo is to any extent less than the period of the original sentence. But where such an alteration of the sentence, has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of a superior Court may be called for. *See* also 22 B. 423 and 27 C. 173. In *Criminal Revision Case* 254 *of* 1900, the Madras High Court *held* that where the sentence of the first Court is imprisonment and fine, if the Appellate Court resolves to set aside the sentence of imprisonment, it cannot impose a fine in lieu of that imprisonment, as this would be virtually an enhancement of the sentence. Weir II, 437 is virtually *overruled* by the above *Full Bench ruling*. An alteration of sentence by the Appellate Court from simple imprisonment for one month to a sentence of simple imprisonment for three weeks and a fine of Rs. 50 and further an imprisonment of one week in default of payment is a [illegible] enhancement and is consequently illegal, 3 N. L. R. 93 = 6 Cr. L. J. 102, where 27 C. 173 and 23 A. 497 are *followed* and 22 B. 423 *dissented from*.

(i) *Modification of three months' rigorous imprisonment into two months and fine of [illegible] [illegible] cases*.—A prisoner was sentenced to three months' rigorous imprisonment [illegible]. On appeal the sentence was modified into one of two months' rigorous imprisonment and Rs. 20 [illegible] it was *held* that though the sentence would be an altered one it would [illegible] the sentence [illegible] 1 N. L. J. 186 (Note). In 7 P. R. 1915 = 16 Cr. L. J. 6[illegible] [illegible] imprisonment to one month's rigorous imprisonment and a fine of Rs. 10 [illegible] imprisonment was not considered to be an enhancement because the fine was paid and the [illegible] with [illegible] the original sentence [illegible].

(ii) *Reduction of [illegible] [illegible]*.—[illegible] 26 A. 111 [illegible] interfere with the sentence in that case, stated that he was [illegible] 27 C. 173 [illegible] the

conviction was wrong as the accused had no opportunity of answering the charge of theft, **27 C. 660** and **36 C. 288** *referred to.*

(*viii*) *Alteration of s.* 406 *to s.* 417, *I.P.C.*—An accused charged under s. 406, I.P.C., was convicted under s. 417, I.P.C., without any charge framed against him of having committed any other offences. On appeal the Sessions Judge *held* that the Magistrate was irregular in convicting of offences under s. 417, but he found the evidence recorded disclosed that the appellant had committed offences under s. 406, I.P.C., and he accordingly altered the finding without giving however any opportunity to the accused of showing cause against being convicted by him of offences of which he had been acquitted by the Magistrate. *Held*, that the Sessions Court's order must be set aside and the appeal must be re-heard, **3 L. B. R. 283 = 5 Cr. L. J. 420.**

(*ix*) *Different common object for an unlawful assembly.*—It is not competent to an Appellate Court while disbelieving the common object of an unlawful assembly, to find out a different common object regarding which the accused were never called upon to plead nor tried, and then to affirm the conviction, **33 C. 295** *which follows*; **27 C. 990; 11 C. W. N. 158,** and *see* s. 215.

(*x*) *Conviction under s.* 411, *alteration to s.* 379 *or s.* 411.—Where the accused was convicted of the offence of dishonestly receiving stolen property, and the Appellate Court altered the conviction to one under either s. 379 or s. 411, I.P.C., *held* that the alternative conviction in appeal was illegal, the accused not having been charged with theft and having had no opportunity of meeting such a charge, **Ratanlal 368.**

66. Power of High Court on revision.—Under s. 439, the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal by this section. *See* Notes to s. 439.

B.—REDUCTION OF SENTENCE.

67. Where conviction is partly annulled sentence ought to be reduced.—Where a second-class Magistrate convicted the accused under ss. 147 and 379, I.P.C., but passed only a single sentence for both the offences and the Appellate Court, while acquitting the accused of the offence under s. 379, maintained the sentence in its entirety and also passed an order under s. 106. *Held*, that the Appellate Court having acquitted the accused of one of the offences, some reduction of the sentence must be made, unless the Court thinks that the sentence ought not to be reduced, in which case, it should refer the matter to the High Court for enhancement of the sentence, **30 M. 48**, where **Weir II, 487** (a); **24 C. 316** and **22 B. 760** are *followed*; **3 M. L. T. 312 = 7 Cr. L. J. 361; 12 Cr. L. J. 454.** In **7 M. L. T. 81 = 11 Cr. L. J. 243** it was, however, *held* that sentence need not be reduced when the conviction for one of two offences charged is set aside by Appellate Court if the inference can be drawn that the Magistrate did not intend to pass any sentence for the offence set aside. Also an Appellate Court is not competent to make an order under s. 106 unless the conviction was in the first instance by a Court of the description specified in the first paragraph of that section. *See* also **29 M. 190; 21 C. 322** and Note 69.

68. When combined sentence is passed on conviction of two separate offences, Appellate Court cannot allot part of it to any particular offence.—When a Magistrate on conviction of an accused person of two offences (for which separate sentences ought to have been passed) passed a single sentence, combining imprisonment and fine, *held* that the Appellate Court on reversing the conviction for one offence was not justified in treating the sentence of fine as the punishment for the one offence and the sentence of imprisonment as the punishment for the other (no such distinction having been made by the trying Magistrate) and retaining the full sentence of imprisonment, **Ratanlal 409.**

VIII.—ALTERATION OF NATURE OF SENTENCE SO AS NOT TO ENHANCE SAME.

69. Where conviction on one of several charges is reversed, sentence must also be set aside.—*See* Note 67. Where an accused is convicted and sentenced by the Lower Court on two separate charges, an Appellate Court has no power in appeal to retain intact the whole sentence when it reverses the conviction on one of the charges, as such a retention has virtually the effect of an enhancement of sentence, **22 B. 760; 45 P. R. 1887; 24 C. 316.** It is not competent for a District Magistrate to enhance a sentence on appeal, which would be the case, if he maintains the whole sentence while annulling the conviction under one of several sections under which the Court of First Instance has convicted the accused, **Ratanlal 618; Weir II, 487 (a).** *See* also **10 M. L. T. 115 = (1911) 2 M. W. N. 97 = 12 Cr. L. J. 454** and **3 M. L. T. 312 = 7 Cr. L. J. 361,** where **30 M. 48** is *followed*. Thus, where a Magistrate had sentenced the accused separately for the two offences he found to be committed, the second offence being under s. 221, I.P.C., and the Sessions Judge on appeal, when reversing the conviction under s. 221, allowed both sentences passed by the Magistrate to stand as an aggregate sentence for the convictions substituted in his own Court for the other conviction pronounced by the Magistrate, *held*

this was virtually an enhancement of the sentence on altering the finding, and therefore in contravention of sub-sec. (1) (b) (3): 45 P. R. 1897. Where the offences are distinct, and require separate charges and separate sentences then no doubt, the reversal of one of the two or more convictions must carry with it the sentence appended to it or in case of an erroneous combined sentence might necessitate a fresh trial. But where only one offence has been committed and the Magistrate erroneously splits it into two and passes either two sentences or a combined sentence, the joining up of the erroneous split—whether in conviction or in sentence—and the maintaining of the original sentence cannot be regarded as beyond the powers of the Appellate Court under this section, 3 N. L. R. 67 = 6 Cr. L. J. 43, where 24 C. 316; and 317 (A. *dr*) 22 B. 760; 45 P. R. 1897; 25 C. 253 and 6 C. P. L. R. (Cr) 23 are *referred to*.

70. Appellate Court cannot on appeal pass sentence which original Magistrate was not competent to pass.—*See* **7 N. L. R. 109 = 12 Cr. L. J. 466,** Note 3 at p. 1001.

71. If conviction is confirmed, some sentence, though nominal, must be passed.—When an Appellate Court confirms a conviction but reverses the sentence, it should, if it disapproves of the sentence, pass some other sentence even though a nominal one, **Ratanlal 245.** But *see* s. 401 (5), s. 562 Note 69 and **1854 W. R. 27.**

72. Is whipping more severe than imprisonment?—"We have no *data* from which the comparative severity of the two sentences of whipping and rigorous imprisonment can be determined, and it is impossible to say how many lashes would be equivalent to a sentence of rigorous imprisonment for a specified period: **6 B. L. R. App. XCV = 15 W. R. 7.** *See* also **7 Rang 319.** Thus when the first Court in addition to a sentence of imprisonment passed a sentence of whipping which was contrary to law and the Appellate Court in setting aside the sentence of whipping, substituted for it a sentence of an additional term of imprisonment, the additional term of imprisonment was cancelled as illegal. Conversely where the Appellate Court reduced the sentence of imprisonment but awarded whipping, it was *held* the latter sentence was illegal, as it virtually amounted to enhancement of sentence. *See* also **Ratanlal 131** and **Weir II, 457.**

73. Reduction of imprisonment with fresh imposition of fine, whether an enhancement of sentence.—Alteration of a sentence of four months rigorous imprisonment to one of three months rigorous imprisonment and a fine Rs. 10 or, *in default, a further term of six weeks' rigorous imprisonment,* is practically an enhancement of the sentence because if fine were not paid, the sentence to be undergone would be four months and two weeks rigorous imprisonment. Such a sentence was in excess of the powers of the Appellate Court having regard to this section, **17 A. 67; 23 A. 497.** When an Appellate Court alters a conviction under s. 323 I. P. C. punishable with imprisonment *or* fine into one under s. 335 punishable with imprisonment *and* fine and sentences accordingly, it practically enhances the sentence. The point was considered at length by a Full Bench of the Madras High Court in **30 M. 103,** and it was *held* the mere fact that a fine was imposed by the Appellate Court would not in law be an enhancement of sentence, if the aggregate period of imprisonment which the accused would have to undergo is to any extent less than the period of the original sentence. But where such an alteration of the sentence, has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of a superior Court may be called for. *See* also **23 B. 429** and **27 C. 173.** In *Criminal Revision Case* 35 *of* 1906, the Madras High Court *held* that where the sentence of the first Court is imprisonment and fine, if the Appellate Court resolves to set aside the sentence of imprisonment it cannot impose a fine in lieu of that imprisonment, as this would be virtually an enhancement of the sentence. **Weir II, 457** is virtually *overruled* by the above *Full Bench Ruling*. An alteration of sentence by the Appellate Court from simple imprisonment for one month to a sentence of simple imprisonment for three weeks and a fine of Rs. 50 and further an imprisonment of one week in default of payment is an enhancement of sentence and is consequently illegal, **3 N. L. R. 93 = 6 Cr. L. J. 100,** where **27 C. 173** and **23 A. 497** are *followed* and **23 B. 429** *dissented from*.

(1) *[illegible] of three months' rigorous imprisonment to [illegible] months and fine of Rs. 50 [illegible] case.*—A prisoner was sentenced to three months rigorous imprisonment for cheating. On appeal the sentence was modified [illegible] one of two months rigorous imprisonment and [illegible]. On reference it was *held* [illegible] the sentence [illegible] altered one it would [illegible] an enhancement of the sentence. **1 N. L. J. 196** (Note). In **7 P. R. 1915 = 16 Cr. L. J. 823** an alteration [illegible] a sentence of three months rigorous imprisonment [illegible] rigorous imprisonment and a fine of Rs. 100 or in default one month's rigorous imprisonment was not considered to be an enhancement because the fine was paid and the appellant did not wish to have the original sentence restored.

(2) *[illegible]*—[illegible] J. in **24 A. 463** [illegible] declined to interfere with the sentence in that case stated that he was [illegible] to prefer the ruling in **27 C. 173** to the

rulings in 23 B. 439 and 30 M. 103 and *held* that no general rule can be laid down to determine what is or what is not an enhancement of sentence, when only a portion of the sentence is altered to a punishment of lesser degree of severity. In this case a sentence of one month's imprisonment and Rs. 5 fine was altered by the Appellate Court to three days' imprisonment and Rs. 100 fine, but the total imprisonment including the imprisonment in default of fine was less.

(*iii*) The accused was convicted by the trial Court of two offences under sections 379 and 341, I.P.C., and a sentence of fine was imposed. The Appellate Court set aside the conviction under section 379 but still upheld the same order of fine. *Held,* that it amounted to an enhancement of the sentence imposed by the trial Court and was contrary to the provisions of section 423 (1) (*b*), **49 All. 484.**

74. Fine considered to be less severe than imprisonment.—Altering a sentence of fine into one of imprisonment is an enhancement of the sentence within the meaning of cl. (1) (*b*) (3) and a Sessions Judge in appeal has no power to alter a sentence in this way, **18 B. 751; 18 A. 301.** S. 402 follows human sentiment and commonsense in regarding the substitution of fine for imprisonment as a merciful commutation of punishment, **7 N. L. R. 109 = 12 Cr. L. J. 444.** But altering a sentence of nine months' rigorous imprisonment and a fine of Rs. 1,000, or in default of its payment rigorous imprisonment for three months, is not an enhancement of sentence. A sentence of fine is always considered lighter than a sentence of imprisonment. A sentence therefore of fine of Rs. 1,000 would not be so severe as a sentence of three months' rigorous imprisonment, and the substitution of the former for the latter would not be an enhancement. The sentence of three months' rigorous imprisonment in default of payment of fine did not make the whole sentence of imprisonment larger than it was before, **23 B. 439,** where **17 A. 67** *is distinguished.*

Quære.—But if the accused were unable to pay the fine, and had therefore to suffer imprisonment still his liability to pay the fine would remain and it could be realised from his estate; would not the sentence be then an enhancement? **27 C. 175** seems to leave it for the determination of the Court of Revision, whether the substitution of a heavy fine for imprisonment is or is not an enhancement of sentence. In **5 P. W. R. 1916,** alteration of a sentence of one week's imprisonment only to Rs. 50 fine or one week's imprisonment was held to be an enhancement as the accused had already undergone several days' imprisonment.

75. Adding imprisonment to sentence of fine is enhancement of sentence.—When an Appellate Court alters the conviction of an offence (hurt) punishable with imprisonment *or* fine into one (grievous hurt) punishable with imprisonment *and* fine and to make the sentence legal, passes a nominal sentence of one day's imprisonment (in addition to the fine already imposed), it practically enhances the sentence. In such a case the proper course is to let the conviction for the former offence stand, or to refer the case to the High Court, **Weir II, 486.** The correctness of this seems open to doubt because the enhancement of a sentence pre-supposes that the sentence was a legal sentence.

76. Transferring sentence.—Where an accused is charged with two separate offences and distinct sentences are passed for each of them, an Appellate Court cannot transfer the sentence given for the offence of which the accused was acquitted to the other offence, conviction regarding which was upheld. The effect of such transference of sentence is to enhance the punishment which such Appellate Court has no power to do under sub-sec. (1), cl. (*b*) (3) of this section, **24 C. 318** *following ibid.* **317 (Note).** *See* **Ratanlal 618; 3 M. L. T. 312 = 7 Cr. L. J. 361.** But where a Magistrate finds an accused person guilty of acts which in law constitute a single offence, but by erroneously splitting them convicts him of two distinct offences and passes either two distinct sentences or one combined sentence, the Appellate Court if it concurs in the finding, is competent to alter the two convictions to the proper one for the single offence committed while maintaining the aggregate of two sentences or the whole of the combined sentence inflicted by the Magistrate. Such an alteration is one of form only and does not involve an enhancement of sentence in violation of this section, **3 N. L. R. 67 = 6 Cr. L. J. 43.** Under the sub-sec. (1) (*b*) (3) the only restriction on the power of an Appellate Court in an appeal from a conviction, is that it cannot enhance the sentence. On an appeal from a conviction of two accused under ss. 323 and 325, I.P.C., respectively, the Appellate Court, finding that the accused were guilty of rioting and grievous hurt, convicted both of them under ss. 147 and 325, I.P.C., taken with s. 149. *Held,* that the alteration of the finding was in no way prohibited by this section.

77. Order as to payment of cost, whether an enhancement?—On conviction of the accused, a Magistrate passed an order to the effect that out of the fine Rs. 2 should be paid to the complainant for his expenses. On appeal, the Appellate Court confirmed the conviction, and directed the accused to pay a further sum to complainant. *Held,* that the order was illegal as it was virtually an enhancement of the sentence, **22 M. 153; 5 M. H. Cr. Appx. XXVIII.** But these rulings have been *overruled* in **29 M. 188** where it was *held following* **20 C. 687** that an order passed by an Appellate Court directing an accused person to pay the costs of

the complainant under s 31 of *the Court fees Act*, correcting omission of the Court below to order such payment, does not amount to an enhancement of such sentence, the order under *the Court fees Act* forming no part of the penalty or sentence passed in the case Such an order is perfectly legal under sub sec (1)(*d*), *see* **26 M. 421**, where on the acquittal of one of two accused ordered to pay court and process fees to the complainant in equal proportions, the other was directed to pay the whole of the costs by the Appellate Court, such an order was upheld as legal *See* also **47 M. 914.**

78. Requiring security to keep the peace is not enhancement.—The power of the Appellate Court to order the accused to furnish security to keep the peace is new, **16 C. 779; 21 P. R. 1884** and **23 P. R. 1888**, but does not amount to an enhancement of the sentence, **21 P. R. 1905.**

79. Inadequacy of sentence should be reported to High Court for revision.—Though Appellate Court are no longer able to enhance sentences themselves, the power of Sessions Judges and District Magistrates to refer inadequate sentences to the Chief Court for enhancement has not been altered When a setence comes before a Subordinate Court on appeal which is manifestly inadequate, the Judge should, if a Sessions Judge or District Magistrate, report the case for revision, and if a Subordinate Magistrate, bring the case to the notice of the District Magistrate, with a view to its being reported *Pun. Cir.*, Chap LXVIII, p 289 The High Court may, in revision, enhance a sentence so as to alter its nature, **6 A. 622 (F.B.), 11 C. 538.**

IX.—ALTERATION OF SENTENCE ON PRISONER WHO HAS NOT APPEALED.

80. Appellate Court not competent to alter sentence of prisoner who has not appealed.—An Appellate Court (other than the High Court) has no authority to alter the sentence of a prisoner who has not appealed and whose sentence is not appealable, **8 M. H. C. R. Appx. VII**, nor to reverse it The proper course is to report the case to the High Court, **Ratanlal 358.** Where of two persons jointly tried one is convicted and the other acquitted and the convicted appeals, the Appellate Court in dealing with the appeal has no jurisdiction to pass any order which would affect the order of acquittal of the other accused, **8 A. L. J. 1129 = 12 Cr. L. J. 576.**

81. Only High Court may alter sentence of prisoner not appealing.—Where on an appeal by one of several accused, the High Court disbelieves the entire evidence for the prosecution and sets aside the conviction of the appellant, it has jurisdiction to set aside the convictions of the other accused who have not appealed, s 439 (5) does not affect such jurisdiction, **8 C. W. N. 330; 14 P. W. R. 1909 = 11 Cr. L. J. 99; 4 Bur. L. T. 87 = 12 Cr. L. J. 250.** In **1893 A. W. N. 81** three persons were jointly tried and convicted on the same evidence for an offence Two of them appealed and were acquitted The third did not appeal, but it appeared that it was by mistake that his name had been omitted from the Memorandum of Appeal and that reasons for the acquittal of the others applied also to him *Held*, that under the circumstances, it was competent to the High Court, to acquit or order the release of the third accused, on a reference made to it by the Appellate Court.

X—POWER TO MAKE ANY AMENDMENT OR CONSEQUENTIAL OR INCIDENTAL ORDER.—SUB-SEC. (1) (d).

82. What is a consequential or incidental order?—Section 423 (1), which defines the powers of an Appellate Court in disposing of an appeal begins by setting forth those powers in precise terms, and concludes with clause (*d*), which enables it to 'make any consequential or incidental order that may be just or proper' Now, in a Criminal Court, the phrase cannot be construed so liberally as to embrace any and every ancillary order which is capable of being described as "consequential or incidental." Otherwise an Appellate Court, affirming, for instance, a conviction of kidnapping a woman, might add, and enforce, a direction that the offender should pay her by way of maintenance, a monthly allowance This can hardly be it would seem, therefore that "consequential or incidental" orders within the purview of the provision, must fall under one or other of two heads

'First, there are orders which follow as a matter of course, being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective Such are directions as to the refund of fines realised from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under s 250, and for these no separate authority is needed

'Secondly there are orders which, though ancillary in character, require more than the support of a Criminal Court s inherent jurisdiction, and could not be passed without express authority'

If this be so, then the clause can be relied upon only if it be sufficient to extend to an Appellate Court, to be exercised by it, *mutatis mutandis*, the special power given to an original Magesterial Court alone by s. 250. But it falls short of this, and so far as appears, it never occurred to the learned Judges who decided

3 Bom. L. R. 841 that it could be appealed to in this connection. It does not like s. 2 of *the Supreme Court of Judicature (Jurisdiction) Act*, 1894 (57 and 58 Vict., clause 16), or O. XLI, *R*. 33 of the Code of Civil Procedure, 1908, invest an Appellate Court with authority "to make any order which ought to have been given or made" by the Court below; nor does it like s. 107 of the latter, confer upon Appellate Courts "the same powers" as Courts of original jurisdiction. It does not amplify the powers of Appellate Courts; but what it does is to modify the exhaustive character which, without it, s. 423 (1) would apparently have, and so to prevent any conflict between its special provisions and the general provisions of, *e.g.*, s. 517 or s. 522, **39 C. 157.** *See* also **39 C. 1050.**

83. **Order under s. 106.**—*Appellate Court competent to require security for keeping the peace.*—Clause (3) of s. 106 giving power to Appellate Courts to demand security is new and **16 C. 779** is now superseded. The Bombay, Allahabad, Madras and Oudh Courts hold that this power may be exercised whether the original Court was competent or not to pass such an order, **33 B. 33; 33 A. 48; 37 M. 163 (F.B.); 16 O. C. 281 = 14 Cr. L. J. 592,** but the Calcutta and Punjab Courts, in **21 C. 622; 35 C. 434; 21 P. R. 1908; 7 P. R. 1909 = 10 Cr. L. J. 309** (**6 P. R. 1907 = 6 Cr. L. J. 275** *approved*) have held that in conviction by second and third-class Magistrates the Appellate Court cannot require security. *See* Notes 24 to 26 at pp. 153-154.

May cancel order under s. 106.—An order in appeal, setting aside an order requiring security to keep the peace made by the first Court under s. 106 is an incidental order; and therefore an Appellate Court can pass such an order even when upholding the conviction, **30 C. 101.** *See* Note 27 to s. 106. *See* also **6 C. W. N. 422** and **424.**

84. **Cannot order compensation under s. 250.**—An Appellate Court is not empowered to grant compensation under s. 250. In view of the express terms, "*the Magistrate by whom the case is heard*" in that section, sub-sec. (1)(*d*) of this section cannot be taken to confer such power, **28 A. 625; 39 C. 157 (F.B.).** *See* Notes under s. 250.

85. **Power to allow parties to compound.**—*See* s. 345 and Notes thereto. When an Appellate Court alters the sentence to one of those mentioned in s. 345, it may allow the parties to compound, **13 O. C. 161 = 11 Cr. L. J. 496.** *See* also **3 O. C. 314.** The power to sanction to compound is given by s. 345 (5). *Quære* whether sub-sec. (*d*) of s. 423 covers such powers, *see* **11 A. L. J. 13 = 14 Cr. L. J. 46** where **32 A. 153** is doubted. In **29 M. L. J. 521 = 16 Cr. L. J. 750** it was *held* that an order allowing composition of an offence is not an incidental order and **32 A. 153** was *dissented from.*

86. **Order committing accused to Lunatic Asylum, s. 47 (1), is an incidental order.**—An order under s. 471 (1) is clearly an order which the acquitting Court, whether original or appellate, not only has power to make but is bound to make, under s. 423 (*d*) **16 Cr. L. J. 670 (Bur.).**

87. **Power to order restoration of property, ss. 517—520.**—*See* s. 520 which specially deals with powers of Appeal Court. Orders under ss. 517 or 522 are consequential or incidental orders within the meaning of sub-sec. (1)(*d*) **6 C. W. N. 424.** Any order passed under s. 517 may be amended under cl. (*d*) by an Appellate Court, **18 C. W. N. 959 = 15 Cr. L. J. 184.** Even where the accused while preferring an appeal against their conviction omit to appeal against the order under s. 522 owing to want of notice the Appellate Court may make any order for the consequential relief, **14 Cr. L. J. 172 (C.)** The order directing restoration of property which was found to have belonged to the complainant, but the restoration of which was not ordered by the Court of First Instance, is therefore a proper order for the Appellate Court to make. It may also cancel or modify an order passed by the Lower Court under s. 517, and even extend such an order to property which it did not previously include, **1906 A. W. N. 266 = 3 A. L. J. 770 = 4 Cr. L. J. 370.** In this case the Appellate Court extended the order of restoration made by the first Court to property which it did not previously include.

88. **Order restoring possession of immovable property, s. 522.**—(*i*) *Appellate Court may amend orders made by first Court under s.* 522.—In **29 C. 724** it was held that the Appellate Court in dealing with an appeal has power to interfere with an order made by the first Court under s. 522 and **25 C. 630** was declared obsolete. *See* also **19 C. W. N. 890 = 16 Cr. L. J. 607.** In a case in which the accused had been convicted under ss. 352 and 448, I.P.C., the prosecutor had obtained an order under s. 522, from the convicting Magistrate, restoring possession of the property, the subject-matter of the offence under s. 448, I.P.C. The accused having been acquitted on appeal, applied for restitution and the appellate Magistrate referred the case to the High Court. On a preliminary objection that the High Court had no power to order restoration of property; *held*, reading together sub-sec. (1) (*d*) and s. 522, the High Court had power to order restitution, **27 A. 415** *followed* in **36 C. 45,** where it was *held* that the High Court can revise an order made under s. 522, *see* also **7 O. C. 28 = 1 Cr. L. J. 697.**

(*ii*) *Appeal Court cannot for first time make such order*—In **39 C. 1050** referring to **39 C. 157 (F.B.)**, it was however, *held* that where the first Court did not pass an order under s 522 it was not open to the Appellate Court for the first time to pass an order under s 522 ' It is clear that the confirming of a conviction on appeal where the Magistrate had not thought it necessary to act under s 522 cannot make such an order a consequential relief or an order ancillary in character for which no separate authority is needed Separate authority under s 522 is distinctly needed before any Criminal Court could have such extraordinary powers as are given thereby It is one certainly not inherent in the ordinary Courts of criminal jurisdiction and it certainly could not be exercised by any person other than the Court which convicts the accused

89 **May suspend sentence and give appellant benefit of s. 562**—Under sub sec (1) (*d*) in an appeal from a conviction the appellate Court is competent to suspend the sentence passed by the Court of First Instance and in lieu thereof make an order under s 562 provided it is satisfied on taking evidence or otherwise that the case is covered by that section **24 A. 306; 29 M. 567.** *See* also **2 Bom. L. R 817.**

90 **Power to order removal of cause of obstruction**—In **5 C. W. N. 432** it was *held* that on a conviction for wrongful restraint an order for removal of the cause of obstruction could properly be made, and under sub-sec (1) (*d*), the Appellate Court ought not to make an amendment by way of setting aside the order as that would make the entire proceeding infructuous and absurd But this Ruling was *overruled* in **31 C. 691 (F.B.)**, where it was *held* that the powers of an appellate Court to make such an order, would depend on the power conferred by law on the original Court, and this is limited to matters regarding which a Court is expressly empowered to make an order So on a conviction for wrongful restraint by erecting a hut or other means of obstruction an order cannot be issued for the removal of the obstruction

91. **Cannot order confiscation under the Indian Forests Act.**—An order of confiscation under s 54 of *the Indian Forests Act* VII of 1878 is not *incidental* on a conviction under that Act, it is regarded as a punishment in addition to the sentence passed Hence an Appellate Court is not competent to make such an order of confiscation **27 C. 450; 4 A. 417.**

92. **Cannot set aside order for payment of costs**—An Appellate Court is not competent to set aside the order of the trying Magistrate under s 31 of *the Court fees Act* as the order directing the accused to repay to the complainant the fee on the complaint is not a part of the sentence **31 M. 547; 29 M. 188** *followed*

93. **No power to direct expunging of portion of Lower Court's judgment.**—An Appellate Court has no power to issue orders to a Lower Court to expunge any portion of a judgment of another Court which comes before it on appeal, **Weir II, 634** But *see* **2 C. W. N. 256.** *See* Note 39 to s 367 But in **44 A. 401** the case in **2 C. W. N. 256,** was distinguished and it was *held* that where certain witnesses against whom certain remarks were made by the trial Magistrate preferred an application to the High Court for expunction of these remarks and that the High Court had no power to expunge from judgments of Lower Court remarks reflecting unfavourably upon the credibility or the character of witnesses in cases in which the effective orders of the Courts are not before the High Court either in appeal or in revision But see now s 561 A (newly added) and the Select Committee Report thereon *See* section 439, Note 67 (*c*).

93-A. **Power to order judgment to be returned for being signed by one of the members of the Bench who had omitted to sign**—A District Magistrate, on an appeal from the decision of a Bench of Honorary Magistrates found that, although the case had apparently been heard by a Bench of two Magistrates the judgment was signed by only one member of the Bench and accordingly returned the judgment to be signed by the other Magistrate who had heard the case, *held* that this procedure was in no way opposed to s 423 of the Code **41 A. 217.**

93-B. **Order to accused to repay Court-fees to complainant under sec. 31 of the Court-fees Act is no enhancement**—An order passed by the Appellate Court directing the accused under section 31 of *the Court fees Act* to repay to the complainant the Court fee paid on the complaint does not amount to an enhancement of sentence but is only an incidental order which an Appellate Court can make under section 423 (*d*) **47 M 914.**

XI—LIMITATION ON APPELLATE COURT'S POWER TO INTERFERE WITH VERDICT OF JURY.—SUB-SEC (2).

94. **Power of High Court to interfere with verdict of jury under s 307 are wider than powers conferred by s 423**—*See* s 307 and Notes thereunder Under s 307 the High Court is authorised to go into facts, **21 C. 955 at p. 957.**

95. To enable High Court to interfere with verdict of jury, there must be misdirection or some error in law.—*See* 5 **W. R. 13.** The High Court is not authorised, by s. 423 to alter or reverse the verdict of the jury unless it is of opinion that that verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge, **32 M. 179; 4 M. L. T. 483 = 9 Cr. L. J. 93.** *See* also **32 C. W. N. 673 = 29 Cr. L. J. 819.** If it comes to that opinion, then it has the power to reverse the verdict; but that power ought not to be lightly exercised. It is manifestly the intention of the Legislature that the power of interference conferred on the High Court should be exercised on accasions, **10 Bom. L. R. 565 = 8 Cr. L. J. 35.** *See* Notes 3 and 5 to s. 518 at p. 863.

96. Meaning of 'misdirection.'—Technically "*misdirection*" means "an error of law made by a Judge in charging the jury" (WHARTON), or "an error of a Judge in charging the jury on a matter of law." (MOZLEY and WHITLEY.) In England where procedure is not the subject of statute, a mere omission in a summing up would not be termed an error of law. But, in India, where a Judge is bound by statute law to sum up the evidence for the prosecution and defence, any omission, however slight, is at least an irregularity and may not unfairly be termed an error of law inasmuch as there has been a failure to conform with the law. Hence, in India, "*misdirection*" is an appropriate term to apply to an omission in a summing up. But to treat every failure to conform to the Procedure Code as a matter of law would lead to absurdity and the test laid down therefore is "whether or not the omission was in the opinion of the Court of such importance as to have led to an erroneous verdict by the jury," **3 S. L. R. 102 = 11 Cr. L. J. 13; 5 B. H. C. R. 85** *followed.* *See* also **17 Cr. L. J. 353 (Patna)** as to the duty of those who allege misdirection.

97. Non-misdirection to direct jury to reconsider their verdict when they were confused.—*See* s. 302 and Note 2 to s. 301. A Judge is not wrong in directing a jury to reconsider their verdict when it appears that they were confused and failed to understand the remarks of the Judge. Also, the act of a Judge in giving a jury who are not intelligent men, in a complicated case, a paper in which the different counts against each prisoner and the witnesses whose testimony bore upon each count are noted, is not objectionable, **Weir II, 515.**

98. Allowing jury to pronounce verdict before calling on accused to enter on his defence is in effect a misdirection.—To allow the jury to pronounce their verdict before the accused is called upon to enter on his defence is in effect a misdirection, though the Judge omits to charge the jury at all. In such a case sub-sec. (2) does not stand in the way of the Appellate Court's interfering with the verdict of the jury, **23 C. 252.** Where a Judge required a jury to give a finding on one of two questions of fact constituting the proof in the case, before he concluded his charge with reference to the other question of fact. *Held*, that the course adopted by the Judge was irregular, if not illegal, and was calculated to embarrass the jury in arriving at a proper verdict as to the character of the offence, if any, proved, **Weir II, 499.** *See* Notes 72 and 73 at p. 706.

99. Misunderstanding of expressions used by Judge in his charge to jury.—Mere misunderstanding on the part of the bystanders in Court or Counsel engaged in a case of expressions used by a Judge in charging a jury (where it appears that the expressions used by the Judge were such as ought to have been understood by [illegible]y reasonable man having regard to what was proved in the case, and what was said to the jury afterwards) [illegible]ll not constitute misdirection, **10 C. 1079.** Where the Judge charged a jury for the acquittal of one of several accused, on the ground that the witnesses had deposed falsely as against him. *Held*, that he ought to have also made it clear to them that if they disbelieved the witnesses, on whose testimony the case hinged, in regard to anyone of the accused, that was a circumstance to be carefully weighed by them in estimating the credibility of the testimony as it affected the other accused, and that his omission to do so and directing the jury in language capable of being understood in a contrary sense, amounted to a misdirection, **Weir II, 501.**

100. 'Verdict is erroneous,' means that verdict is rendered bad by reason of misdirection or misunderstanding of law—Can the High Court go into facts?—In sub-sec. (2) the word 'erroneous' is not to be read as meaning "wrong on the facts." It must be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of misdirection or misunderstanding of the law. The effect of the clause is evidently to prevent the Appellate Court from reversing the verdict of a jury on account of any misdirection by the Judge or any misunderstanding on the part of the jury of the law as laid down by him, unless such misdirection or misunderstanding of the law is on points material to the verdict, so that the verdict can be said to be tainted with error in the process by which it has been arrived at. It throws upon the Appellate Court the duty, no doubt, of ascertaining whether the process or method which the Judge directed the jury to follow, as to the acceptance or discarding of evidence, or as to the view taken of the law, was erroneous on any material point, but not certainly the duty of determining for itself whether the verdict, as

a conclusion of fact, was right or wrong To hold otherwise would be tantamount to holding that an appeal would lie upon the facts from the verdict of a jury in the face of the provisions of s 418 and that the Legislature intended to give the High Court the same powers in respect to an appeal from the verdict of a jury as it has in respect of a judgment by the Sessions Judge in a trial with assessors *Per* BEVERLEY and BANERJEE JJ, **21 C. 955 at p. 977.**

101. Power of High Court in jury trials.—(*i*) *When verdict of jury is set aside for defective summing up, High Court not bound to direct re trial,* but may go into the evidence and decide the matter finally itself *See* Note 75 under s 299, and Notes 14 and 15 to s 307 ' It would defeat and not promote justice, if a verdict were

upon a proper summing up of the whole evidence, a jury might possibly have given a different verdict but whether the legitimate effect of the evidence would require a different verdict If the Court is of opinion that the evidence would not, on any proper view of the case, support a conviction, it would be worse than useless to send back a case for a new trial, in order, that a jury may have the opportunity of convicting on such evidence upon a proper summing up, **5 W. R. 80 at p 90 = B. L. R. Sup. Vol. 459 (F.B.)** *followed* in **29 C. 782; 12 C. W. N. 80.** *See* also **9 W. R. 51; 15 W. R. 17.** When the verdict of a jury is reversed on the ground of its being erroneous owing to misdirection, the power of the Courts is not limited to directing a new trial, but they can deal with the case in any of the ways provided in this section, and therefore the Court may, in an appeal from a conviction under cl (1)(*b*) of this section, either reverse the finding or sentence and acquit or discharge the accused or order him to be re-tried, etc., sub-sec (2) restricts the grounds on which the verdict of the jury can be reversed or altered, but once the verdict is out of the way, there is no restriction on the powers of the Court to deal with the case of which it has complete *seisin* in any of the manner provided in that section Nowhere does the Code lay down that when the verdict of the jury is set aside, the Court must necessarily direct a new trial The principle laid down in *Makin* v *The Attorney General of New South Wales,* **L. R. (1894) A. C. 57** is of considerable importance, but it seems the policy of law in this country is different and that the Legislature has with a distinct purpose, vested the Appellate Court with large powers, **25 C 711** where **21 C 955** *is dissented from* *See* **26 M. 1, 26 M. 38, 30 M. 44; 9 B. H. C. R. 358; 6 B. H. C. R. Cr. Ca. 47; 5 B. H. C. R. Cr. Ca. 85; 2 B. 61, 5 B. 63, 6 B. 34, 19 B. 749; 6 C. 247; 22 C. 276; 14 C. W. N. 493 = 11 Cr. L. J. 96; 1 C. 207, 17 C. W. N. 42, 29 C. 782, 34 C. 698**

Contra—Accused in trial by jury is entitled to verdict of jury on questions of facts—Where a verdict vitiated owing to misdirection by the Judge, the Appeal Court has no option but to set aside the verdict and direct a re-trial Were the Appellate Court to go into the facts in such a case, it would be substituting the decision of the Judge of that Court for the verdict of the jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords whereas the Judges of the Appeal Court can only arrive at a decision on the perusal of the evidence **21 C. 955.** In a case of misdirection, *viz*, that the Judge had wrongly put the *onus* on the accused, the High Court was asked to deal with the case itself and not send it for re-trial when MACLEAN C.J, referring to *Makin* v the *Attorney-General for New South Wales,* **(1894) L R. Ap. Cas. 57** *held* as follows —'I am very doubtful whether we have under s 423 power to re-try the case ourselves but if we have, this is not a case in which we ought to exercise it. I entertain personally a strong opinion that when a case has been tried before a jury and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case re-tried before a jury and that as a matter of procedure and in justice to the accused this course should be adopted," **4 C. W. N. 576.** Where there was a misjoinder of charges and the charge to the jury was defective in so far as the heads of the charge did not set out the facts of the case, what the evidence was, or what the nature of the defence was, a re-trial was ordered, as the High Court was of opinion from the evidence on record that there was a case which ought to be investigated by a jury, **30 C. 822.** The Appellate Court cannot go into

rovisions of sub-sec. (2) and s 537 do

itself whether verdict is actually

re was evidence tending to show that the object of the offender may have been in the first instance revenge, and the charge of the Judge to the jury failed to show that the Judge guided the jury to the necessity of discriminating between the offences committed by the several prisoners, if different offences were committed, or determining whether all acted in pursuance of a common object or that he pointed out as required by s 207, the law applicable to the facts before them, the verdict was set aside and a re-trial ordered, **Weir I, 450; II, 515.**

(*ii*) *When charge bad for misjoinder.*—Where a person is convicted by a jury on an indictment which is in contravention of the provisions of s. 234 and therefore illegal, the conviction must be set aside. It cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury. The effect of the multitude of charges before the jury cannot be averted by dissecting the verdict afterwards and appropriating the findings of guilty, only to such parts of the written accusations as ought to have been submitted to the jury. It would in the first place leave to the Court the functions of the jury and the accused would never have been really tried at all upon the charge afterwards arranged by the Court, **25 M. 61 (P.C.)**.

(*iii*) *Procedure when jury improperly discharged in midst of trial.*—In a Sessions trial, after the evidence of the prosecution witnesses had been given, and the statements of the prisoners read, the Judge thinking that the jury would not be likely to convict upon the evidence that had been given asked the jury if they wished the case to go further and desired to hear the defence of the prisoners. The jury misunderstanding the reason of the question replied that they found certain prisoners '*guilty*' and the others '*not guilty*.' The Judge thereupon dismissed the jury and tried the case again with a fresh jury and convicted some of the accused. *Held*, that the action of the Judge in re-commencing the trial, with the aid of a fresh jury, was not authorised by law and that the whole of the proceedings of the second trial were *ultra vires* and must be set aside, **Weir II, 497.** The High Court directed the Sessions Judge to re-summon the jury originally empanelled and to conclude the trial. "The prisoner should be allowed to re-summon and examine any witnesses hitherto cited by him and the jury should be cautioned that it is their duty to hold their judgment in suspense until they have heard whatever the prisoner has to urge before them in his defence."

(*iv*) In an appeal from an acquittal the High Court is a Court of Appeal on matters of fact, as well as of law, and must decide questions of fact from the whole of the evidence on record, **9 C. L. J. 378 = 10 Cr. L. J. 499.**

102. High Court may direct re-trial by different jury.—It is competent to the High Court in setting aside the verdict of a jury on the ground of misdirection, to order a re-trial before a new jury. Thus, where a Judge in his direction to the jury, informed them that he would after commenting on the evidence ask them whether they considered "that the prisoner had been guilty of any crime or whether he is the unfortunate victim of a most cruel fabrication of false evidence, and that he would then explain the law and take their verdict as to what offence the prisoner had been guilty of." *Held*, that the procedure adopted by the Judge was unwarranted and that there should be but one charge, both on the facts and on the law and that the Judge acted illegally in dividing the charge into two parts, **Weir II, 493.**

103. When inadmissible evidence has been admitted High Court may direct re-trial or deal with case itself.—In case of wrongful admission, the Appellate Court has apart from s. 418 power under s. 167 of *the Evidence Act*, to inquire into the merits of the case. Reading sub-sec. (2) of this section and s. 418 together, it is clear that before the High Court can interfere with a verdict on the ground that some evidence has been wrongly admitted it must be satisfied (i) the verdict was erroneous; (ii) that this erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge and this has in fact occasioned a failure of justice. Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial within the meaning of s. 418 and there is a misdirection in law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence, the judge in his charge points out circumstances which would justify the jury in disbelieving the wrongly admitted evidence, does not make the misdirection, any the less a misdirection, since the presumption is that the jury are well aware that it is for them to appreciate the evidence and they are at liberty to take or not the Judge's view of it. Where evidence which the law says shall not be admitted, is let in with other evidence which is legally admissible and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former, **27 B. 626 at p. 632.** If in a case tried by jury, the Court finds that inadmissible evidence has been received, but that after setting it aside, there is other evidence on record on which the jury may find a verdict of guilty, but which evidence does not seem to the High Court to be conclusive as to the guilt, the High Court may reverse the conviction and sentence and order a new trial, **10 B. H. C. R. 497.** In such a case, it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question. In so far as that evidence was wrongly admitted and treated in the Judge's charge, the verdict of the jury is invalidated and the Appellate Court cannot any longer accept it as conclusive decision on the facts. It is competent to the High

Court in such a case to consider whether after excluding the evidence wrongly admitted the rest of the evidence is sufficient to sustain the verdict and to determine the appeal, **27 B. 626** at p. 636. *See* Note 16 at p 707 to s 299 also **27 B. 644; 31 M. 127; 26 C. 49,** and Notes under Heading V to s 299 at pp 693-694 If the High Court considers that *the improperly admitted* evidence was so trivial that it could not have occasioned a failure of justice, it should not order a re trial but should make the inquiry contemplated by s 167 of *the Indian Evidence Act* **14 C. W. N. 493 = 11 C. L. J. 301 = 11 Cr. L. J. 96; 15 Cr. L. J. 43 (C.)**

discharge the jury and begin the case *de novo* **28 Bom. L. R 281.**

104 Verdict means 'entire verdict'—In cases where an accused person is tried for various offences arising out of a single act or series of acts as contemplated by s 236, the word verdict in sub-sec (2 of this section means the entire verdict, and is not limited to the verdict upon a particular charge upon which an accused person may have been convicted and appealed against, **22 C. 377; 12 P R. 1904** Thus where the appellants were convicted by the jury of grievous hurt and acquitted of murder, it was *held* that on re-trial, they could properly be tried for murder, **16 C. W. N. 909 = 13 Cr. L. J. 716** and Note 77 at p. 707

Judgments of Subordinate Appellate Courts

424. The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

Notes.—1. *See* s 367 and Notes thereunder at pp 802—810

2. Judgment when appeals dismissed must comply with this section and s. 367—In dismissing an appeal under s. 423, a Judge must comply with the provisions of this section and s. 367, **1 Bom. L. R. 225; 1 Rang 301;** but when an appeal is dismissed under s 421 summarily no reasons are necessary *See* Note 15 to s. 421 at page 868 as such an order of dismissal does not amount to a judgment. *Cf* **29 M. 126 (F.B.) 4 C. W. N 26.**

3. Appellant entitled to have explicit opinion of Appellate Court on questions of fact.—Where the law allows an appeal, the appellant is entitled to have from the Court of Appeal that has to deal with them an explicit opinion on the questions of fact involved in the case, **22 C. 241.** In a case of receiving stolen property, on appeal, the Sessions Judge recorded that "if the evidence was of the usual type and it was impossible for the Court to say which side spoke the truth, the first Court which had the evidence before it must be the best Judge and bear the responsibility of conviction' *Held*, that the Appellate Court was the Judge of the facts as completely as the Court which originally tried the case, and that as the Sessions Judge s judgment showed that he was doubtful, the accused must get the benefit of doubt and be acquitted, **5 P. R. 1876; 6 P. R. 1898.** Note 4 to s 423 The Appellate Court ought to take its own view of the evidence which is before it and not merely accept without question, the opinion of the Court of First Instance, **1890 A. W. N 148.** The accused in their grounds of appeal to the Sessions Judge challenged the evidence for the prosecution on various relevant grounds. The judgment of the Sessions Judge was as follows —I have gone through the case, but I see no reason to interfere The witnesses for the defence would not support the accused and after the evidence of two was taken, the rest were withdrawn by the counsel for the accused —*Held*, that the judgment did not comply with the provisions of s 367 and this section **31 P. R. 1884.** *See* also **32 C. 178,** where it was *held* that an Appellate Court should notice briefly but clearly, the objections urged on an appeal and how they were disposed of. Where the judgment of a Criminal Appellate Court is of the nature of a stereotyped one which might answer for any case it is not one in accordance with s 367 and this section, but where the judgment, though not a long and elaborate one affords a clear indication that the Court duly considered the evidence, it is a good judgment and should not be set aside, **1 C. W. N. 169; 1 Rang. 301.**

4 Section 537 does not cure absence of judgment.—Where the order made by the Appellate Court merely stated that the appeal is dismissed under s 423, *held*, that s. 537 (*a*) did not apply as there was an absence of a judgment and not merely an omission or irregularity in a judgment, **17 Bom L. R. 1065 = 16 Cr. L J. 832**

5 What an appellate judgment should contain—*See* Note 30 at p 807 Judgment should contain among other things the point or points for determination, the decision thereon and the reasons of the decision.

33 C. 91. A judgment is not legal unless it contains at least (1) the point or points for determination raised by the Memorandum of Appeal; (2) the decision thereon, and (3) the reasons for the decision, **8 N. L. R. 84 = 13 Cr. L. J. 569; U. B. R. (1913); 2 Qr. 169 = 14 Cr. L. J. 570.** It is difficult to lay down any rule with precision as to what judgment of an Appellate Court complies with and what judgment does not comply with requirements of this Code. The object, no doubt, of the Legislature in formulating rules as to judgments was partly to insure that a Criminal Court should consider the case before in its different bearings and should on such consideration arrive at definite conclusions and also one object may have been that the judgment should show that in fact the Criminal Court had considered the evidence in a case of first instance or in a case of appeal and had found in case of a conviction, that the facts proved to the satisfaction of the Court, brought an offence home to the accused person whom the Court convicted, **19 A. 506.** The judgment should contain a clear finding as to the common object, **22 C. 276; 33 C. 295,**—but if the accused have not been prejudiced the judgment will not be upset, **36 C. 158; 12 C. W. N. 88.**

6. **Judgment when there are several accused, must deal with case of each accused.**—An appellate judgment should show *on the face of it* that the case of each accused has been taken into consideration and reasons should be given, as far as may be necessary, to indicate that the Court has directed judicial attention to the case of each accused. The appellate judgment cannot be read in connection with and as supplementary to the judgment of the Court of First Instance, but must be quite independent, and stand by itself, **35 C. 138,** *applied* in **14 C. W. N. 59 = 11 Cr. L. J. 23** *followed* **Mad. Cr. R. C. 599 of 1909 = 20 M. L. J. (Sh. N.) 18; 17 Cr. L. J. 496 (M.); 22 C. 241; 37 C. 91,** and *see* also **12 Cr. L. J. 43 (C.); 14 A. L. J. 279** and Note 5 under s. 423 at p. 875. Especially in a case of rioting the judgment must deal with the evidence against each accused, **16 Cr. L. J. 735 (M.); 48 M. L. J. 504.**

7. **Judgment must be written by the Court.**—*See* Note 15 under s. 367 at p. 804. The Magistrate should not get it written by a clerk, **Ratanlal 543.** *See* also **6 M. 396; 4 C. L. J. 411.**

8. **Delay in passing judgment improper.**—Delay in delivering judgment in criminal cases is not only unjust to the accused, as it prevents them from appealing at once, but it is opposed to the principles of law, **5 C. P. Cr. 24.** *See* also **14 A. L. J. 327; 20 C. W. N. 1296.** *See* **38 A. 393** as to what a judgment in an appeal from a case under s. 110 should contain.

9. **Judgments not in accordance with law.**—The following judgments were held not to be in acccordance with the provisions of s. 367 and this section:—

"Read proceedings. I see no reason for interfering with the decision or sentence, appeal dismissed, **1888 A. W. N. 280.**

"I see no reason to distrust the finding of the Lower Court. The sentence passed, however, appears harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand," **13 C. 110.**

Where a Sessions Judge pronounced judgment as follows:—"If believed, the prosecution evidence is sufficient to warrant the conviction. I decline to interfere." *Held*, that the judgment would have been proper on appeal to the High Court against a conviction by a jury, but it does not satisfy the requirements of this section and s. 367. The Sessions Judge has to decide not whether the evidence, if believed, is sufficient, but whether, being sufficient, it is also worthy of belief, **Weir II, 536.**

A District Magistrate in disposing of an appeal recorded the following judgment:—"The affray was a faction fight between members of the two parties into which the society of *D* was split up. There is no ground for doubting the justice of the Magistrate's finding that the two appellants took part in the affray and that the party to which they belonged were the aggressors. The appeal is dismissed, and the conviction and sentence are confirmed," *held*, that this was not a judgment in accordance with s. 367 and this section. From the judgment as it stands, the High Court is unable to say that the Magistrate has duly considered the evidence in the case. He does not for instance, refer at all to the material circumstance that the complainant *M*, when first complaining to the Police patel, did not mention the applicant as taking part in the affray, although the applicant seems actually to have been present when the complaint was made, **15 B. 11.**

A Sessions Judge upon hearing in a case of conviction under s. 392, I.P.C., recorded the following judgment:—"Upon reading the record and grounds of appeal, and after hearing Mr. K., pleader for the accused, I see no sufficient grounds for interfering with the conviction or sentence and dismiss this appeal." *Held*, setting aside judgment and directing the re-hearing of appeal, that as the appeal was heard under s. 423 and not under s. 421, the Lower Appellate Court had no power to dismiss the appeal summarily, and that under the

circumstances it had failed to comply with the requirements of this section and s 367 of the Code, **1 Bom. L. R. 225; 23 C. 420.** *See* also **8 A. 514; 20 C. 353; 9 C. W. N. 23, 13 C. W. N. 167 and 192; 37 C. 194; 14 A. L. J. 279.**

A judgment of the Appellate Court in the words ' I find no reason to interfere and no ground of appeal requires particular notice this appeal is dismissed," does not comply with the provisions of this section and s 267, **2 P. R. 1903 = 7 Cr. L. J. 279.**

10. Power to order re-trial, after delivery of judgments.—Notwithstanding the terms of s 369 which prevent an Appellate Court after signing its judgment from altering or reviewing it except to correct a clerical error, it can by a subsequent order remedy an omission to order a new trial when it has merely set aside the proceedings, as held without jurisdiction without making such order, **3 M. 48.** *See* Note 47 at p 881

11. Whether section applies to judgments under s 123?—It may be open to doubt whether the provisions of ss 367 and 424 which apply to judgments in trials and appeals, govern orders under s 123, sub-sec. (3), **37 C 91.** *See* Note 11 at p 160 and Note 2 at p 802

12. Where appellate judgment defective, High Court may direct re-hearing of appeal—It is the duty of the Judge hearing the appeal to state the facts and give the reasons for the conclusion he arrives at. The High Court will not, in revision, make up for the deficiencies in the appellate judgment by having recourse to that of the Court of First Instance Where the appellate judgment is not in accordance with law, the High Court may remand the appeal for re hearing and delivery of a proper judgment, **7 C. W. N 30, 37 C. 194; 13 C. W. N. 167** and **192, 35 C. 136.** Under the wide powers conferred by s 423 (*a*) the High Court has power in an appeal from an order of acquittal by a Lower Appellate Court on an appeal to it to direct the Lower Appellate Court to re-hear the appeal which was before it for determination **13 B. 506** *followed*, **43 P. W. R 1912 = 7 P. L. R. 1913 = 13 Cr. L J. 737.** Where justice has not been properly administered according to law the High Court will direct the re-hearing of an appeal, as such omission is prejudicial to the prisoners, **18 B. 11, Ratanlal 826; 9 C. W. N. 23.**

Order by High Court on appeal to be certified to Lower Court

425. (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith

Note.—Practice.—When a case is decided on appeal or revised by the High Court, the Court or Magistrate to which the High Court certifies its order will proceed under the provisions of this section or s 442 to issue, when necessary, a fresh warrant or order to the jailor—*Bom H C Cr Cir*, p 54

Suspension of sentence pending appeal Release of appellant on bail.

426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced

Notes.—1. Power under this section confined to the Appellate Court.—The Appellate Court may exercise the powers conferred by this section irrespective of the offence for which the accused is confined being bailable or not. In the absence of an appeal, the Sessions Judge has no authority to suspend a sentence,

5 M. H. C. R. Appx. I. Where a Sessions Judge suspended the operation of a sentence passed by a second-class Magistrate, *held* that his action was illegal and that the time during which the sentence was suspended should not be excluded under this section in computing the term of the sentence. Though the result of illegal action of the Sessions Judge was to enable the accused to escape undergoing the greater portion of the sentence, the High Court in setting aside the illegal order of the Sessions Judge, had no power to enhance the punishment, unless it were shown that the original order passed was inadequate, **Weir II, 537.**

2. **Appellate Court cannot direct appellant to be treated as under-trial prisoner.**—Under s. 426 the Appellate Court has no power to pass an order that the prisoner who has been tried, convicted and sentenced in due course of law by a Subordinate Court should be tried as an under-trial prisoner pending the disposal of his appeal, **16 Cr. L. J. 134.**

3. **Order for detention in a Reformatory is not a sentence.**—Sections 8, 10 and 30 of *the Reformatory Schools Act*, 1897, make a distinction between an order for detention and a sentence, s. 53, I.P.C., does not include such orders among punishments. An Appellate Court has, therefore, no power to suspend the carrying out of the order of detention passed in lieu of a sentence of imprisonment, **16 Cr. L. J. 134.**

4. **Sentence of imprisonment cannot be suspended, to take effect at a future period,** but must commence from the time that the sentence is passed. Where a Magistrate postponed the execution of a sentence of imprisonment for a stated period, at the request of the accused to allow the accused to appeal; *held*, that the sentence was bad in law, and could not be carried into execution, **12 W. R. 47 = 3 B. L. R. Ap. Cr. 50.**

Arrest of accused in appeal from acquittal.

427. When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

Note.—*See* Note 12 to s. 417. It is not necessary to give the accused notice before issuing warrant, *cf.* **16 Cr. L. J. 670. (B.).**

Appellate Court may take further evidence or direct it to be taken.

428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court, is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Notes.—1. **Powers conferred upon Criminal Appellate Courts by s. 428 are not analogous to those conferred on Civil Appellate Courts by the Civil Procedure Code.**—A Civil Court has ordinarily no jurisdiction to take evidence of its own motion; it has to decide the action on the evidence adduced by the parties. But a Criminal Court stands on a different footing. Section 540 gives power to the Magistrate at any stage of the inquiry or trial to examine any witness he may find necessary to come to a proper conclusion. Section 428 also in general terms gives power to the appellate tribunal to take additional evidence and before taking such evidence the Court must record its reasons for so doing, **8 M. L. T. 418 = 11 Cr. L. J. 571; 8 M. L. T. 428 = (1910) M. W. N. 829 = 11 Cr. L. J. 734.**

2. **Scope of section—When Appellate Court ought not to take further evidence.**—This section contemplates further inquiry by taking additional evidence, when the conviction by the Lower Court has been based upon some evidence which might legally support it, but which in the opinion of the Appellate Court is not

quite satisfactory. It does not empower an Appellate Court so to act in a case where there is no evidence legally capable of sustaining the charge 9 B. L. R Appx. XXXI = 18 W. R. 31. The section does not appear to be applicable when the prosecution having had ample opportunities to produce evidence, has failed to do so *Per* SUNDARA IYER, J, in 36 M. 457. When, however, the prosecution has preferred to adduce evidence and the Magistrate prevented them by holding that it was unnecessary, the case is one in which a re trial may be ordered or fresh evidence called for under this section, 36 M. 457. The powers conferred by this section are not intended to be exercised in cases in which the prosecution having had ample opportunities to produce evidence, have done so and the entire evidence falls short of sustaining the charge, 5 A. 217 at p 221. *See* also 6 B. H. C. R. Cr. Ca 64. The necessity for taking additional evidence must be apparent from something on the record and cannot be derived from external information 3 L. B. R. 114. (*See* Note 7 to s 417) *See* also 19 M. 375. Appellate Court ought not to allow fresh evidence to be adduced merely because it is alleged to have been discovered after filing of the appeal 31 M. 114 *followed*, 9 M. L. T. 323 = (1911) M. W. N. 136 = 12 Cr. L J. 40.

Under s 428 an Appellate Court cannot act upon any additional evidence which was not taken in the Lower Court unless the provisions of s 428 of the Code are complied with, 21 A. L. J. 869

3. **Section limited to appeals under Chapter XXXI.**—The power to take or call for further evidence, given by this section is expressly limited to appeals under this Chapter XXXI

4. **Appellate Court cannot call for a finding nor act upon it.**—This section empowers an Appellate Court to merely call for evidence and not to call upon the Lower Court for finding When an Appellate Court passes such an order, the proper order for the High Court to make is to set aside his judgment and direct him to restore the appeal and dispose of it according to law, 9 M. L. T. 406 = 12 Cr. L J. 240, 16 Cr. L. J. 767 (M.) The Appellate Court cannot act upon such finding, 1914 M. W. N. 778 = 16 Cr. L. J. 79; but must come to its own conclusion upon the evidence taken by the Magistrate, 16 Cr. L. J. 767 (M.) *See* also 1 Pat. L. J. 99 = 17 Cr. L. J. 332.

5. **Appellate Court cannot direct further inquiry by Police.**—This section does not warrant an Appellate Court sending a case to the Police for investigation, it having been originally started by complaint in Court, 1900 A. W. N. 130.

6. **Reasons for taking additional evidence must be given.**—*See* 8 M. L. T. 418 = 11 Cr. L. J. 671; 8 M L. T. 428 = 11 Cr. L. J. 734; but failure to do so would be merely an irregularity cured by s 531, 9 M. L. T. 406 = 12 Cr. L. J. 240.

7. **Presence of accused may be dispensed with when additional evidence is recorded by High Court itself.**—Chapter XXX refers to the mode of taking and recording evidence in inquiries and trials Under this section and s 375 the High Court could dispense with the presence of the accused, when additional evidence was recorded by itself *Criminal Appeal* 52 *of* 1906 *Allahabad High Court* The same procedure was adopted by the Madras High Court in hearing the appeals connected with the *Runga Reddi Murder Case*

7 A. Section 342, Cr P Code applies only to the case of an original trial, it does not apply to evidence taken under this section by the Appellate Court. There might be cases when the accused can properly be questioned by the Appellate Court in regard to additional evidence taken but if it is not so done there is not omission of anything required by law 52 Bom. 699 = 30 Bom. L. R. 631.

8. **It is only as an Appellate Court, or when additional evidence is called for by Appellate Court, that a Court can record such evidence in absence of jurors or assessors.**—Where a Sessions Court in a trial by assessors for murder, relied on a statement by the deceased, and the evidence necessary to prove that statement was not recorded until after the close of the trial and the discharge of the assessors it was *held* that the evidence was recorded *coram non judice*, 18 A. 136. *See* also 19 M. 375.

9. **Practice—date for re-hearing must be fixed.**—Whenever a criminal appeal is sent back for further inquiry, the appellate Court should invariably fix a date for the re hearing of the case, taking care that the date so fixed is in each instance sufficiently remote to allow of a return being made to the order of remand —*Pun. Cir*, p 290

10. **Accused is not a witness.**—This section does not seem to authorise the examination of the accused as a witness and it does not empower any Appellate Court to take evidence regarding proceedings before a Magistrate, such as to depose to the truth of an allegation that the Magistrate had refused to examine some witness A prosecution regarding the falsity of this statement is therefore bad. A criminal appeal is in reality a continuation of the criminal case, 12 M. 451 at p 453.

11. Court asked to record evidence, not entitled to find.—If the Court that takes the additional evidence is not the Appellate Court itself, it should merely certify the evidence to the Appellate Court and has no power to express any opinion on it or to record any judgment as the case then stood on the record. This is the function of the Appellate Court, **3 B. L. R. Ap. Cr. 62.**

12. Subordinate Court taking fresh evidence can sanction prosecution.—When an Appellate Court directs further evidence to be taken by a Subordinate Court under this section, it is competent for the latter Court before which such evidence is given, if any offence against public justice as is described in s. 195, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of s. 476, **15 W. R. 64 = 6 B. L. R. 698 (F.B.).**

13. Taking additional evidence and finding upon it gives no right of further appeal.—On appeal from the conviction of a Deputy Magistrate, the Sessions Court got additional evidence taken and on considering the same, dismissed the appeal. It was contended that the prisoner had a further right of appeal. *Held*, that no appeal lay, for under the present Code, the Appellate Court is directed to *dispose of the appeal*, and not pass sentence, judgment, etc., as under the Code of 1861. The Appellate Court is not competent to pass a fresh sentence, and it has no power to consider and determine a new case disclosed by the additional evidence, except in so far as to affirm or modify or set aside the sentence under appeal or to act otherwise as provided by s. 423 (1) (*b*) under s. 430 the appeal judgment is final, **27 C. 372** which practically *overrules* **2 W. R. 13** and explains the changes in the law as laid down by the previous codes. Where an Assistant Magistrate decided a case without examining the witnesses for the defence, the Sessions Judge on appeal ordered the evidence of those witnesses to be taken by the Assistant Magistrate, and on the depositions being returned to him, dealt with the case and confirmed the conviction and sentence of the Assistant Magistrate; *held*, that the judgment of the Sessions Judge, though in form confirming the Assistant Magistrate's judgment and sentence, was in substance an original judgment, and that an appeal lay from it to the High Court upon the merits, **2 W. R. 13; 8 W. R. 59.** *See* also **6 B. L. R. 483 = 15 W. R. 33; 8 W. R. 59** and **6 B. H. C. R. Cr. Ca. 64.**

14. When action under this section preferable to re-trial?—Where an Appellate Court found that three material witnesses had not been examined and making that one of the grounds, ordered a re-trial; *held*, that the proper procedure for the Appellate Court to adopt was to proceed under sub-sec. (1) of this section, **31 C. 710.** But where a Sessions Judge remanded a case to a Magistrate on the ground that the provisions of s. 256 of this Code had not been complied with, but the sentence and conviction were allowed to stand, *held* that the case did not fall under this section and that the remand order was illegal, **53 Bom. 578.**

15. Distinction between directing further evidence, further inquiry or re-trial.—*See* ss. 437 and 423. A Sessions Judge or District Magistrate acting under s. 437 (otherwise than as an Appellate Court) can only direct further inquiry and has no power to take evidence or direct the taking of further evidence. The High Court alone as a Court of Revision under s. 439 has all the powers of an Appellate Court, including the power under this section, **6 C. L. J. 251 = 6 Cr. L. J. 357.** Where an Appellate Court directs a re-trial under s. 423, it cannot restrict the evidence to be taken to that mentioned in its order, but should refer the case to be tried, in view of the instructions in its order, when it is open to the accused to adduce such additional evidence as he may desire, **3 C. L. J. 303 = 3 Cr. L. J. 304.**

Procedure where Judges of Court of Appeal are equally divided.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, of the same Court, and such Judge, after such hearing (if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Notes.—1. For similar provisions.—*See* s. 378 and 36 of *the Letters Patent* and **15 B. 452; 27 C. 501** and **892.**

2. Whole case referred to and not merely points of difference.—Where on a difference of opinion between two Judges the case is laid before a third Judge, the whole case is referred to the third Judge and not merely the point or points on which the Judges differed, and it is the duty of the Judge to whom the case is referred, to consider all the points involved before he delivers his opinion, and it will be according to the opinion of such Judge that the judgment will follow, **38 C. 202.**

3. Where Judges agree as to one and disagree as to another accused.—" I am not now concerned with the question of the trial of two prisoners with regard to one of whom the Judges composing the Court of Appeal

may be agreed in their opinion, while as regards the other, the Judges may be equally divided in opinion In such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term 'case,' what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion" *Per* MOOKERJEE, J, **33 C. 202.**

4. Section does not apply to hearing of application under s. 195 (*b*).—The section does not apply to the hearing of application under s 195 (*b*) to revoke a sanction granted by the Lower Court or to give a sanction refused by it. If the Judges are equally divided, the case is governed by s. 36 of *the Letters Patent*, that is, the opinion of the senior Judge prevails, **22 M. L. J. 419 (F.B.) = 13 Cr. L. J. 209.**

Finality of orders on appeal

430. Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII

Notes —1. Section 417 gives a right of appeal to Government against acquittal, Chapter XXXII deals with reference and revision

2. Finality of judgments and orders.—*See* s 369 and Notes thereunder at pp 934—938 Where a Sessions Judge erroneously dismissed an appeal on the ground that it was barred by limitation, but on discovering the error, admitted the appeal and acquitted the accused, the High Court *held* the order of acquittal was *ultra vires*, the first order rejecting the appeal being final and not open to review, **19 B. 732, 24 P. R. 1887.** But where an appeal is wrongly dismissed summarily under s. 421 for non-appearance of appellant, it is open to the Court to re-hear the appeal and deal with it **7 M. H. C. R. Appx. XXIX; 5 N. L. R. 76 = 9 Cr. L. J. 853.** Such an order of disposal without hearing on the merits is not a judgment, **10 C. L. J. 80 = 10 Cr. L. J. 287.** As to finality of judgment in *Sonthal Purgannas, see* **12 C. 536.** An appeal judgment on a sanction application is final, **23 B. 50.** *See* also Note 3 to s 423 and Notes 18 to 20 to s. 421

3. Section applies to High Courts.—An order rejecting an appeal summarily and without calling for records is final It is immaterial whether such order is made before or after the papers are called for, **4 B. 101** *distinguishing* **7 Bom. H. C. R. Cr. Ca. 67.** *See* also **14 C. 42** and Note 8 to s 434 and Notes 12 to 16 to s 369 and Note 7 to s 439

Abatement of appeals

431. Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Notes.—1. Reason for the exception.—We think that an appeal against a sentence of fine should not abate by reason of the death of the accused because it is a matter which affects his estate We have accordingly excepted this case —*Sel Com Rep*

2. Result of the death of one of several appellants.—Two persons were tried and convicted by a Sessions Judge of criminal breach of trust and sentenced each to one year's rigorous imprisonment and a fine of Rs. 1,000 Both appealed to the High Court against the conviction and sentence, and one of them died pending the decision of the appeal The conviction and sentence on the living appellant were reversed but no order was passed as regards the dead one On the application of his nephew for reversal of conviction, *held*, that the appeal of the deceased appellant abated on his death, but that his representatives had their remedy by application to the Governor in Council, **19 B. 714.** Even the High Court cannot call for and examine the record of such a case with a view to revision and rectification **6 P. R. 1893.** See *contra* **2 B. 564** The words newly introduced meet the above Rulings

3. Abatement of revision proceedings—By analogy to s 431, all applications by way of revision abate on the death of the applicant, **6 P. R. 1893,** *contra*, **2 B. 564.**

4. Appeals against compensation directed under s. 250, do not abate.—Where compensation has been awarded under s 250 and an application for revision against this order has been made, pending which the petitioner dies, the application does not abate also, but can be prosecuted by his legal representatives, **24 P. R. 1908 = 9 Cr. L. J. 103.**

CHAPTER XXXII.*

OF REFERENCE AND REVISION.

Reference by Presidency Magistarte to High Court.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

Notes.—1. Reference before hearing of case cannot be made.—A Presidency Magistrate cannot make reference under this section before the hearing of a case, **1 Bom. L. R. 521.**

2. **Reference to High Court must be on a question of law.**—A reference to the High Court under this section must be on a question of law as distinguished from one of fact, **Ratanlal 838,** *e.g.*, whether the words "stand to ply for hire" in s. 22 of Bombay Act VI of 1863 include walking or driving, slowing along the road for a fare, is a question of fact, and as the Act contains no definition of the expression "stand to ply" and in the absence of any definition extending the meaning of the word "stand" it should be understood in its popular sense, **Ratanlal 539.** *See* also **A. I. R. 1929 Cal. 756 (F.B.).**

3. **Practice of High Court on reference.**—Upon a reference under this section, the High Court only deals with the particular points of law stated for its opinion, but not with the facts of the case nor any other objection to the validity of the proceedings referred, **33 C. 193.** The order passed is conclusive both as to the merits of the case and as to the *quantum* of punishment, **1890 A. W. N. 225.**

4. **Right to begin.**—In a reference by a Presidency Magistrate to the High Court as to whether, on the facts stated, any offence has been committed by any accused person, it lies on the prosecution to make out that an offence has been committed, and under the circumstances the prosecution must begin, **19 C. 380.**

5. **Except Presidency Magistrate no other Magistrate can refer for opinion.**—A District Magistrate has no power to make a reference. He can only bring a case before the High Court by way of revision. This section gives power only to a Presidency Magistrate, **1 S. L. R. 4 = 9 Cr. L. J. 248.** A Sessions Judge cannot refer a case to the High Court on a point arising in a pending appeal, **13 A. L. J. 477 = 16 Cr. L. J. 433.** *See* Notes 6 and 7 to s. 438.

Disposal of case according to decision of High Court.

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Direction as to costs.

(2) The High Court may direct by whom the costs of such reference shall be paid.

Notes.—1. High Court sitting in appeal cannot review.—The High Court sitting in appeal cannot review an order passed by it under this section, **Ratanlal 638.** *See* Note 7 under s. 439. But when the Magistrate does not dispose of the case conformably to the order of the High Court, an appeal will lie under s. 411 against the decision of the Magistrate.

2. **Power of High Courts to grant costs under this section.**—The High Court has no jurisdiction to grant costs in criminal cases except in those cases where the Code of Criminal Procedure makes express provision. The maxim "*expressio unius est exclusio alterius*" applied, **45 M. 913.**

Power to reserve questions arising in original jurisdiction of High Court.

434. (1) When any person has, in a trial before a Judge of High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

* An order under s. 4, cl. (1) of Act XXXVII of 1885, sentencing an accused person, is not open to revision, under this Chapter as all sentences passed in criminal cases are final, 12 C. 536.

Procedure when question reserved

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or if the Judge thinks fit, be admitted to bail, and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgement or order as the High Court thinks fit

Notes —1. Analagous provisions.—(*i*) *Chartered High Court —See* cls 25 and 26 of *the Letters Patent* printed in the Appendix.

(*ii*) *Chief Court of Lower Burma —See* ss 11 and 12 of *the Lower Burma Courts Act* VI of 1900

(*iii*) *Punjab —See* Act XVIII of 1884

2. Reference purely discretionary —It is in the discretion of the single Judge constituting the High Court whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges, **10 B. H. C. R. 75** In **22 B. 112** (*Tilak s Case*) the application was refused The statement of the Judge who presides at a trial as to what has taken place at it is conclusive Neither the affidavits of by standers, nor of jurors, nor the notes of counsel, nor of shorthand writers are admissible to controvert the notes or statement of the Judge

3. Point of law must be one arising in course of 'trial.'—When a point of law is raised before the accused is called upon to plead, it cannot be referred under this section to the Full Bench, even if the presiding Judge wished it, **28 C. 211.**

4. Prisoner's counsel has the right to begin.—Where, on the application of such counsel, a question of law has been reserved for the decision of the Court under this section, the counsel for the accused must begin, **8 B. 200.**

5. Power exercised by High Court is a power of review.—The power exercised by a Court sitting as a Court to decide questions of law reserved in criminal cases under this section is the power of review and the Court is a Court of reference and revision, **8 B. 200.** This is the High Court s power of review referred to in s. 369 *See* Note 12 at p 936 and **7 A 672; 8 W. R 61; 10 B 176 (F.B.), 19 B. 732; 23 B. 50.**

6. Power of High Court on point of law reserved, to consider merits of case.—The High Court on a point of law reserved under this section has power to review the whole case, and to determine whether the admission of the rejected evidence would have affected the result of the trial, **1 C. 207 = 25 W. R. 36; 2 B. 61; 9 Bom H. C. R. 358; 10 C. L. J. 13 = 10 Cr. L. J. 193, 32 B 111; 17 C. 642; 25 M. 61, 4 C. W. N. 433.** The question of appreciation of evidence is not one of law, **4 Bom. L. R. 686.**

7. High Court is competent to dispose of case finally.—The accused being upon his trial for murder, two principal witnesses for the prosecution, *G* and *M* were tendered pardon by the committing Magistrate under s 337, and were accepted by them The Judge read to the jury statements (which had not been admitted in evidence) made by *G* and *M*, purporting to have been taken under s 364 *held* that the improper reception of such evidence constituted a decision erroneous in point of law calculated to prejudice the prisoner Under s 167 of *the Indian Evidence Act* and s 537, the High Court went into the merits of the case, quashed the conviction and acquitted the prisoner, **17 C 642.** *See* also **4 C W. N. 433** and **25 M. 61.**

8. Except under this section a Division or Full Bench of High Court cannot revise judgment of single Judge exercising criminal jurisdiction.—The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot be in any way controlled by a Division or Full Bench of the Court. As no appeal lies, no revision lies, **1. P. R. 1909 = 9 Cr L. J. 306; 4 P. R. 1909 = 9 Cr. L. J. 378** In **32 B. 111 (F.B.)** it was held (in a case arising under *the Letters Patent*) that in the absence of any reservation of the point by the trying Judge as provided by cl 25 or of any certificate from the Advocate-General under cl 26 the Court was precluded from re-opening a question which was decided by the Judge presiding at the trial *See* also **35 M. 397.**

Power to call for records of inferior Courts

435. (1) The High Court or any Sessions Judge or District Magistrate, or any Sub-Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or pro-

priety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, "and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record." *

† "*Explanation.*—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437."

(2) If any Sub-Divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

‡ (3) * * * * *

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by either of them.

Note.—The old clause (3) stood as follows:—

(3) Orders made under ss. 143 and 144 and proceedings under Chapter XII and s. 176 are not proceedings within the meaning of this section.

By the omission of this clause orders under ss. 143, 144 and 145 to 148 and 176 are now subject to revision. **48 C. 822** holding that the High Court has jurisdiction to set aside proceedings under s. 145 is in consonance with the law as now amended. **A. I. R. 1929 Mad. 847.** After the amendment by the omission of clause (3) of s. 435, it does not now seem necessary to have recourse to s. 107 of the Government of India Act **(5 and 6 Geo. C. V. 61)** to set aside a proceeding under s. 145.

I.—NATURE AND SCOPE OF REVISIONAL JURISDICTION.

Notes.—1. Scheme of revisional jurisdiction, ss. 435 to 439.—General revisional jurisdiction is conferred by ss. 435, 438 and 439. Under these sections the Sessions Judge and the District Magistrate cannot themselves interfere except to suspend the execution of a sentence or grant bail but can only report to the High Court and the High Court may in its discretion exercise any of the powers referred in s. 439 (1). As regards dismissals of complaints under ss. 203 and 204 (3) and orders of discharge there is no appeal as there is in cases of acquittal and conviction and the Legislature has not thought it sufficient to leave these orders to be dealt with under the general revisional jurisdiction already mentioned and has conferred special powers in regard to these orders on the High Court itself as well as on the Sessions Judge and District Magistrate. Section 436 empowers Sessions Judges and District Magistrates to commit for trial direct in cases exclusively triable at Sessions. In less serious cases not triable at Sessions, it is open to the High Court, Sessions Judge or District Magistrate to make an order for further enquiry, **32 M. 220 at p. 233.** Ss. 435—438 prescribe the method by which the records of any criminal case come to the High Court and the power to deal with the record is prescribed by s. 439. Ss. 435—438 provide the machinery and s. 439 the power to deal with the record, **36 M. 275; 17 O. C. 25 = 15 Cr. L. J. 217.** Ss. 435—439 must be read together, **15 C. 608 at p. 617; 40 C. 477 (F.B.)** and *see* Note 11 to s. 436, Note 4 to s. 437 and Note 3 to s. 439.

2. This Chapter does not affect original jurisdiction of Magistrates.—Revisional powers conferred on superior Courts cannot be regarded as in any way impliedly restricting the jurisdiction conferred on Magistrates to inquire into offences.— *Per* WHITE, C.J., **29 M. 126 (F.B.).** *See* also Note 26 at p. 586, Note 13 to s. 436 and Note 3 to s. 437.

3. Calling for record not a stage of any judicial proceeding.—The call for the records of a case under this section by a District Magistrate, etc., is not a judicial proceeding, so as to give him jurisdiction to make an order under s. 476 in respect of a case disposed of by a Magistrate subordinate to him, **15 M. L. J. 489 = 3 Cr. L. J. 118; 11 N. L. R. 36 = 16 Cr. L. J. 289.** In **25 M. 659,** the Court refused to decide whether an order passed after and as the result of an examination of records under s. 435 was a judicial proceeding. *See* Note 21.

* These words in "———" were inserted by Act XVIII of 1923, s. 116.
† This explanation was added by Act XVIII of 1923, s. 116.
‡ Sub-section (3) was omitted by *ibid.*

II.—COURTS IN WHOM REVISIONAL POWERS ARE VESTED.

4. High Court —*See* s 439 and Notes thereunder as to the revisional powers of the High Court.

5. Sessions Judges.—*All Magistrates including the District Magistrate and a District Magistrate acting under s 30 are inferior to the Sessions Judge for purposes of revision* —The Magistracy are subordinate to the Sessions Court, only for the purpose of reference to the High Court in cases in which revision is required. *See* s 17 (5) and Notes thereto It will be the duty of Sessions Judges carefully to peruse the judgments and orders of the sub-divisional and first class Magistrates submitted to them by District Magistrates and to report to the High Court, without delay, any case which, in their opinion, calls for revision or any doubtful case They will not themselves issue proceedings criticising those of Magistracy except on appeal. District Magistrates should comply with all requisitions for records, returns and information made by Sessions Judges with regard to any case referable by them to the High Court They should also render any explanation which Sessions Judges may require from them or from Subordinate Magistrates in such cases —*Mad H C Rul*, *17th December*, 1884 The duty of criticising the proceedings of the Subordinate Magistracy, is a duty devolving upon the superior Magistracy and not on the Sessions Judge, **7 M. H. C. R. Appx. XXVII.**

(*a*) *Additional Sessions Judge* —Except the power conferred by s 438 (2) an Additional Sessions Judge would ordinarily appear to have no power to act under Chapter XXXII The expression 'Sessions Judge was substituted for 'Court of Session by the 1898 Code. *See* s 438 (2).

(*b*) *Assistant Sessions Judge* —Looking to the terms of ss 17, 193 (2), 409 and 438 (2) an Assistant Sessions Judge is not competent to exercise any of the powers conferred on Sessions Judges by Chapter XXXII *See* **9 B 164** (Joint Sessions Judge), and **37 A. 286** (power of Assistant Sessions Judge to hear appeals).

(*c*) *Joint Sessions Judge* —Under the old Code it was held that a Joint Sessions Judge had no power to act under Chap XXXII, **25 W. R. 21; 9 B. 164; 9 B. 352.** The present Code does away with the office of Joint Sessions Judge

6. District Magistrate.—All Magistrates appointed under ss 12, 13, 14 and 15 are subordinate to the District Magistrate, *see* s 17 (1) and Notes thereto

Additional District Magistrate —An Additional District Magistrate appointed under s 10 (2) is also subordinate to the District Magistrate, *see* Note 4 to s 10 and Note 15 (ii)

7. Sub-Divisional Magistrate specially empowered.—In Madras and the Punjab, all Sub-Divisional Magistrates have been empowered to act under this section —*Fort St. George Gazette*, 1883, p 13, *Punjab Gazette*, 1883, p 52 In Upper Burma (with the exception of the Shan States), all Sub-Divisional Magistrates are by Reg V of 1892 Act V, empowered to call for records under s 435 The power, however, is limited by sub-sec. (*2*), *e g*, they cannot sanction a prosecution, **7 W. 560.** In perusing the calendars under this section, these judicial officers are merely acting within its provisions which are, to satisfy themselves as the correctness of any finding, sentence or order, etc They are not then acting in any stage of a judicial proceeding If a District Magistrate thinks that an order of a Sub-Divisional Magistrate is not legal or proper, he can, acting under this section, report the matter to the High Court, **26 M. 130**

8. Proceeding of Magistrate not empowered, void.—If any Magistrate not being empowered by law in that behalf, calls under this section for proceedings, his proceedings shall be void S 530, cl (*m*)

III.—CONCURRENT JURISDICTION OF SESSIONS JUDGES AND DISTRICT MAGISTRATES UNDER THIS CHAPTER —SUB-SEC. (4).

9. Powers of Sessions Judges—

(*i*) *Sessions Judge incompetent to act either "suo motu" or on application after District Magistrate has been moved under s* 435 —In **17 M. L. J. 143 = 2 M. L. T. 24 = 8 Cr. L. J. 132** it was laid down referring to **28 C. 102,** that after an application had been made to the District Magistrate under this section, any further application to the Sessions Judge is expressly forbidden by this section although the Sessions Judge was not applied to, to revise the order passed by the District Magistrate in revision but only to call for the record and report the District Magistrate s order to the High Court. *See* also **17 C. W. N. 451 = 17 C. L. J. 608 = 14 Cr. L. J. 123.** A Sessions Judge is competent to entertain an application or act *suo motu* to call for the record of a case in which an application has been made to the District Magistrate under s 435 and refer the District Magistrate s order to the High Court, the prohibition in sub-sec (4) being as applicable to such an application the object of which

priety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, "and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record." *

† "*Explanation.*—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437."

(2) If any Sub-Divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

‡ (3) * * * * *

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by either of them.

Note.—The old clause (3) stood as follows :—

(3) Orders made under ss. 143 and 144 and proceedings under Chapter XII and s. 176 are not proceedings within the meaning of this section.

By the omission of this clause orders under ss. 143, 144 and 145 to 148 and 176 are now subject to revision. **48 C. 522** holding that the High Court has jurisdiction to set aside proceedings under s. 145 is in consonance with the law as now amended. **A. I. R. 1929 Mad. 847.** After the amendment by the omission of clause (3) of s. 435, it does not now seem necessary to have recourse to s. 107 of the Government of India Act **(5 and 6 Geo. C. V. 61)** to set aside a proceeding under s. 145.

I.—NATURE AND SCOPE OF REVISIONAL JURISDICTION.

Notes.—1. Scheme of revisional jurisdiction, ss. 435 to 439.—General revisional jurisdiction is conferred by ss. 435, 438 and 439. Under these sections the Sessions Judge and the District Magistrate cannot themselves interfere except to suspend the execution of a sentence or grant bail but can only report to the High Court and the High Court may in its discretion exercise any of the powers referred in s. 439 (1). As regards dismissals of complaints under ss. 203 and 204 (3) and orders of discharge there is no appeal as there is in cases of acquittal and conviction and the Legislature has not thought it sufficient to leave these orders to be dealt with under the general revisional jurisdiction already mentioned and has conferred special powers in regard to these orders on the High Court itself as well as on the Sessions Judge and District Magistrate. Section 436 empowers Sessions Judges and District Magistrates to commit for trial direct in cases exclusively triable at Sessions. In less serious cases not triable at Sessions, it is open to the High Court, Sessions Judge or District Magistrate to make an order for further enquiry, **32 M. 220 at p. 233.** Ss. 435—438 prescribe the method by which the records of any criminal case come to the High Court and the power to deal with the record is prescribed by s. 439. Ss. 435—438 provide the machinery and s. 439 the power to deal with the record, **36 M. 275 ; 17 O. C. 25 = 15 Cr. L. J. 217.** Ss. 435—439 must be read together, **18 C. 608 at p. 617 ; 40 C. 477 (F.B.)** and *see* Note 11 to s. 436, Note 4 to s. 437 and Note 3 to s. 439.

2. This Chapter does not affect original jurisdiction of Magistrates.—Revisional powers conferred on superior Courts cannot be regarded as in any way impliedly restricting the jurisdiction conferred on Magistrates to inquire into offences.— *Per* WHITE, C.J., **29 M. 126 (F.B.).** *See* also Note 26 at p. 586, Note 13 to s. 436 and Note 3 to s. 437.

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* These words in "———" were inserted by Act XVIII of 1923, s. 116.

† This explanation was added by Act XVIII of 1923, s. 116.

‡ Sub-section (3) was omitted by *ibid.*

II.—COURTS IN WHOM REVISIONAL POWERS ARE VESTED.

4. High Court —*See* s 439 and Notes thereunder as to the revisional powers of the High Court

5. Sessions Judges —*All Magistrates including the District Magistrate and a District Magistrate acting under s 30 are inferior to the Sessions Judge for purposes of revision* —The Magistracy are subordinate to the Sessions Court, only for the purpose of reference to the High Court in cases in which revision is required. *See* s 17 (5) and Notes thereto It will be the duty of Sessions Judges carefully to peruse the judgments and orders of the sub-divisional and first class Magistrates submitted to them by District Magistrates and to report to the High Court without delay any case which, in their opinion, calls for revision or any doubtful case They will not themselves issue proceedings criticising those of Magistracy except on appeal. District Magistrates should comply with all requisitions for records returns and information made by Sessions Judges with regard to any case referable by them to the High Court They should also render any explanation which Sessions Judges may require from them or from Subordinate Magistrates in such cases —*Mad H C Rul*, *17th December*, 1884 The duty of criticising the proceedings of the Subordinate Magistracy, is a duty devolving upon the superior Magistracy and not on the Sessions Judge, **7 M. H. C. R. Appx. XXVII.**

(*a*) *Additional Sessions Judge* —Except the power conferred by s 438 (2), an Additional Sessions Judge would ordinarily appear to have no power to act under Chapter XXXII The expression 'Sessions Judge was substituted for 'Court of Session' by the 1898 Code *See* s 438 (2).

(*b*) *Assistant Sessions Judge* —Looking to the terms of ss 17, 193 (2), 409 and 438 (2) an Assistant Sessions Judge is not competent to exercise any of the powers conferred on Sessions Judges by Chapter XXXII *See* **9 B 164** (Joint Sessions Judge), and **37 A. 286** (power of Assistant Sessions Judge to hear appeals).

(*c*) *Joint Sessions Judge* —Under the old Code it was held that a Joint Sessions Judge had no power to act under Chap XXXII, **25 W. R. 21; 9 B. 164, 9 B. 352.** The present Code does away with the office of Joint Sessions Judge

6. District Magistrate.—All Magistrates appointed under ss 12, 13, 14 and 15 are subordinate to the District Magistrate *see* s 17 (1) and Notes thereto

Additional District Magistrate —An Additional District Magistrate appointed under s 10 (2) is also subordinate to the District Magistrate, *see* Note 4 to s 10 and Note 15 (ii).

7. Sub-Divisional Magistrate specially empowered.—In Madras and the Punjab, all Sub-Divisional Magistrates have been empowered to act under this section.—*Fort St George Gazette* 1883, p 13, *Punjab Gazette*, 1883, p 52 In Upper Burma (with the exception of the Shan States), all Sub-Divisional Magistrates are by Reg V of 1892 Act V, empowered to call for records under s 435 The power, however, is limited by sub-sec. (*2*), *e g*, they cannot sanction a prosecution **7 W. 560.** In perusing the calendars under this section, these judicial officers are merely acting within its provisions which are [illegible] finding, sentence or order, etc. They are not then acting in a[illegible] Magistrate thinks that an order of a Sub-Divisional Magistrate [illegible] section, report the matter to the High Court, **26 M. 130.**

8 **Proceeding of Magistrate not empowered, void.**—If any Magistrate, not being empowered by law in that behalf, calls under this section for proceedings his proceedings shall be void S 530, cl. (*m*).

III.—CONCURRENT JURISDICTION OF SESSIONS JUDGES AND DISTRICT MAGISTRATES UNDER THIS CHAPTER —SUB-SEC. (4).

9. Powers of Sessions Judges—

(1) *Sessions Judge incompetent to act either 'suo motu" or on application after District Magistrate has been moved under s* 435 —In **17 M. L. J. 143 = 2 M. L. T. 24 = 5 Cr. L. J. 132** it was laid down referring to **28 C. 102,** that after an application had been made to the District Magistrate under this section, any further application to the Sessions Judge is expressly forbidden by this section although the Sessions Judge was not applied to, to revise the order passed by the District Magistrate in revision, but only to call for the record and report the District Magistrate s order to the High Court *See* also **17 C. W. N. 551 = 17 C. L. J. 608 = 14 Cr. L. J. 123.** A Sessions Judge is competent to entertain an application or act *suo motu* to call for the record of a case in which an application has been made to the District Magistrate under s 435 and refer the District Magistrate s order to the High Court, the prohibition in sub-sec (4) being as applicable to such an application the object of which

was that the Sessions Judge should not revise the order passed by the District Magistrate in revision, **10 R. P. 1912 = 14 Cr. L. J. 134.** A Sessions Judge has concurrent jurisdiction with the District Magistrate under this section; therefore, where an accused, charged with murder is discharged by a first-class Magistrate and his order is upheld by the District Magistrate, a Sessions Judge cannot direct the first-class Magistrate to commit the accused to Court of Sessions, **Ratanlal 837.** *See* Note 2 to s. 436.

(*ii*) *Sessions Judge cannot direct further inquiry after District Magistrate has dealt with case under s.* 435.—*See* **22 C. 673; 17 C. W. N. 451 = 14 Cr. L. J. 123** and Note 6 to s. 437.

(*iii*) *Sessions Judge can refer proceedings of District Magistrate under s.* 438 *to High Court.*—In the matter of reporting a case to the High Court for orders, both the Sessions Judge and the District Magistrate have concurrent jurisdiction, but the Sessions Judge has no jurisdiction to review an order made by the District Magistrate under s. 437 refusing a further inquiry. It is open to the Sessions Judge to refer the matter to the High Court under this section, **22 C. 673; 17 M. L. J. 163 = 5 Cr. L. J. 132.**

(*iv*) *Sessions Judge can refer proceedings of District Magistrate exercising appellate jurisdiction.*—Under the old section it was held that a Sessions Judge has no power to refer to the High Court the judgment of a District Magistrate given in the exercise of his appellate jurisdiction as he is not then an inferior Criminal Court to the Sessions Judge within the meaning of s. 435, **14 C. W. N. 206.** But now under the amendment of sub-sec. (1) by the addition of the explanation that all Magistrates whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of the sub-section, **14 C. W. N. 206** is no longer good law. It may be also noted that **8 Lah. 23** holds the same view as is embodied in the new explanation to sub-sec. (1).

(*v*) *Power of Sessions Judge to revise orders of District Magistrate under s.* 195 (6).—In **30 A. 109,** it was *held* that a Sessions Judge has no jurisdiction to revise an order of a District Magistrate setting aside an order of a third-class Magistrate refusing to sanction a prosecution under s. 211, I.P.C., on the ground that the only Court to which an appeal lies from an order of a third-class Magistrate is the District Magistrate. *See,* however, the recent Full Bench Ruling in **30 M. 382** and Note 215 at p. 541.

(*vi*) *Sessions Judge competent to revise proceedings of a District Magistrate acting in the exercise of his original criminal jurisdiction.*—*See* **12 C. 473 (F.B.); 15 P. R. 1904** and Note 1 to s. 436.

10. Powers of District Magistrate—

(*i*) *District Magistrates cannot either on application or 'suo motu' act after Sessions Judge has dealt with case under this Chapter.*—After the Sessions Judge had refused to interfere with an order of discharge by a second-class Magistrate, the District Magistrate acting *suo motu* directed the committal of the accused. *Held,* the committal was invalid. What the District Magistrate might not do on application, he could not do *suo motu* by dispensing with an application. The fact that the District Magistrate passes the order of commitment without the knowledge of the Sessions Judge's refusal does not make it less illegal. The reason for the prohibition is the avoidance of a conflict between the orders of two district authorities having co-ordinate powers, **26 M. 477; Ratanlal 837** is no longer law, having regard to sub-sec. (4). But *see* **17 Cr. L. J. 497.**

(*ii*) *District Magistrate cannot direct further inquiry under s.* 436, *when Sessions Judge has already passed orders under that section.* *See* Note 5 to s. 436.

(*iii*) *District Magistrate cannot under s.* 438 *refer proceedings of Sessions Judges to High Court.—He must move the High Court through the Public Prosecutor.*—A District Magistrate has no power to call for the record of a Sessions Court under this section, as the District Magistrate is subordinate to the Sessions Judge, and the High Court will not interfere on a report under s. 438, made by a District Magistrate who is dissatisfied with the proceedings of a Sessions Judge, **2 N. L. R. 149 = 4 Cr. L. J. 422** where **23 C. 250** is *followed* and **9 A. 362; 13 W. R. 42** and **8 B. 307** are *referred to.* A District Magistrate has no power to refer the proceedings of a Sessions Judge acquitting an accused person, who had been convicted by a Bench of Magistrates, to the High Court, **6 C. L. R. 245;** also **18 C. 186; 8 C. 876; 14 W. R. 25.** If he considers that there has been a miscarriage of justice in the Court of Sessions, he should communicate with the Public Prosecutor as to the case in which he thinks such miscarriage has occurred, and invite his assistance to move the High Court with regard to it. (**9 A. 362; 10 A. 146; 12 A. 434; 24 A. 346** *followed*), **25 A. 128; 1 S. L. C. 40 = 8 Cr. L. J. 161;** *Mad. H. C. Pro.,* *27th September,* 1885; **12 M. L. T. 170 = 1912 M. W. N. 812 = 23 M. L. J. 732 = 13 Cr. L. J. 714; 28 A. 91; 2 N. L. R. 149 = 4 Cr. L. J. 422; 23 C. 249; Ratanlal 601** and **623;** or to take steps for an appeal

against the order of acquittal by the Sessions Judge, **Ratanlal 212**, followed in **6 Bom. L. R. 1099**, where it was *held* that when a District Magistrate finds that the sentence passed by a first class Magistrate and confirmed in appeal by the Sessions Judge is inadequate, he is not competent to report the matter to the High Court under this section but should bring the fact to the notice of the Local Government to have the High Court moved through the Public Prosecutor In **10 A. 146** and **28 A. 91**, the Allahabad High Court observed that, as a general rule, it would not entertain a reference from a District Magistrate which had for its object the enhancement of a sentence passed by a Sessions Judge as a Court of appeal, *see* also **5 Lah. 11.** So also **6 Bom L R. 1099 = 1 Cr. L. J 1115** In **36 A. 378**, CHAMIER, J, *held* that it was very doubtful whether the District Magistrate is entitled as a matter of law to make a reference for the enhancement of sentence passed in a trial held by the Sessions Court, but assuming that he is so entitled it is extremely inconvenient that the District Magistrate should be allowed to criticise an order of a Court superior to him in this way He should, however, do so only in very special cases, **10 A. 146; 15 M. 36.** A District Magistrate has no power to criticise or refer to the High Court, the proceedings of a Court, like the Sessions Court, superior to his own, **Weir II, 565** and **566**; nor is he competent to report to the High Court under this section an order passed by his predecessor in office But the fact that the reference was improper need not necessarily prevent the High Court from passing the appropriate order under the circumstances of the case as it has ample powers under s 439, **Ratanlal 652; 14 W. R. 25; 41 Bom. 47, 24 A. L. J. 224**

(iv) *District Magistrate cannot withhold order of Sessions Judge even if wrong*—The District Magistrate must forward the orders of the Sessions Judge to the Magistrates to whom they are addressed He has no right to withhold the order because in his opinion it is not a legal order if he desires to obtain a revision of such orders he should move the High Court through the Law Officers of the Government, **9 A. 362** and **18 C. 166** *referred to* **8 M. L. T. 83 = 11 Cr. L. J. 827**

IV.—OVER WHAT COURTS AND PROCEEDINGS REVISIONAL JURISDICTION MAY BE EXERCISED.

11. No revisional jurisdiction under this Chapter over proceedings of Courts other than 'criminal.'—The power to revise proceedings under this Chapter is confined to proceedings of *inferior Criminal Courts* and does not extend to the proceedings of *Civil or Revenue Courts* A Sessions Judge or a High Court has therefore no power to call for the records of Civil Court A Criminal Bench of the High Court cannot therefore, interfere with the proceedings of a Civil or Revenue Court under s 195 or s 476 *See* **26 A. 249 (F.B) 1904 A W. N. 170; 1902 A. W. N. 202; 28 A. 554; 31 A. 38, 8 C. W. N 73; 40 C. 477 (F.B), 26 M. 139, 36 M. 72, Weir II, 541 and 602, 4 L. B. R. 339 = 9 C. L. J. 24, 4 L. B. R. 138 = 7 Cr. L. J. 416; 7 L. B. R. 76 = 6 Bur. L. T. 144 = 14 Cr. L. J. 596, 1915 U. B. R 111, 83 = 17 Cr L. J. 82; 19 C W. N. 447 = 21 C. L. J 198 = 16 Cr. L. J. 286, 17 O. C 25 = 18 Cr. L. J. 217** (where **40 C. 477** *is approved* **6 O C. 216**, *dissented from* and **13 O. C. 198 = 11 Cr. L. J. 514** *distinguished*), nor over a Magistrate exercising civil powers, **9 Bom. L. R. 1347 = 6 Cr. L. J. 425.** In **26 B. 785** the point was raised but not decided.

Contra.—In PUNJAB and CENTRAL PROVINCES it is *held* that it is competent to the High Court under ss 435 and 439 to revise the orders made by Courts other than criminal in any proceeding under this Code, *e g*, under ss 476 and 195, **8 P. R 1908 = 7 P. W. R. 1908 = 7 Cr. L. J. 281 (F.B), 4 N. L. R. 140 = 8 Cr. L. J. 351.**

12 Courts held to be not criminal—

(i) *Income tax Officer is a Revenue Court and not a Criminal Court*—An Income-tax Officer adjudicating upon a petition for reduction of income-tax or hearing an appeal under the *Income tax Act* II of 1886 is a Court and competent to sanction prosecution under s 476, but the High Court has no power to interfere with such order under s 435 as the Income-tax Officer is not a Criminal Court, **36 M. 72; 33 B. 642 (F.B.) 44 P. R. 1905 = 3 Cr. L. J. 128; 3 S. L. R. 66 = 10 Cr. L. J. 395** and **15 Cr. L. J. 2.**

(ii) *District Registrar not a Criminal Court*—District Registrar is not a Criminal Court within the meaning of this section and an order by him granting sanction cannot be revised, **14 Bom L. R. 970 = 1 Bom. Cr. Ca. 214 = 13 Cr. L. J. 845; 35 A. 109** *Cf* **30 M. 326** and Note 44 at p 502

(iii) *Settlement Officer under the Bengal Tenancy Act*—An order made under s 476 by an Assistant Settlement Officer under the Bengal Tenancy Act cannot be revised under s 439, as it is not an inferior Criminal Court, **40 C. 477 (F.B.)**

(*iv*) *Magistrate acting under s.* 86 *of the Bombay District Municipality Act.*—Under s. 86 of *the Bombay District Municipalities Act*, III of 1901, a Magistrate hearing an appeal under that section is merely the appellate authority having jurisdiction to deal with the question of a civil liability. He is not *an inferior Criminal Court* to which alone the revisional jurisdiction under this section is limited, **9 Bom. L. R. 1347; 6 Cr. L. J. 425,** but *see* Note 14 (vii).

13. Cases where revisional jurisdiction is specially prohibited—

(*i*) *Press Act, s.* 22.—*See* Note 40 to s. 439.

(*ii*) *Extradition Act* XV of 1903.—See *Appendix* and Note 41 to s. 439.

(*iii*) *Reformatory Schools Act.*—See *Appendix* and Note 39 to s. 439.

14. Courts and proceedings which have been held to be within the revisional jurisdiction—

(*i*) *Order under Eastern Bengal and Assam Disorderly House Act.*—A Magistrate making an order under Act II of 1907 (E. B. and A. Code) is an inferior Criminal Court and the High Court has jurisdiction to revise such order, as the information which lies at the root of the proceedings thereunder by virtue of s. 2 is to be received by a first-class Magistrate, who is an official whose character is determined by this Code, **37 C. 287.**

(*ii*) *Order under s.* 283 *of the Cantonment Code,* 1899.—An order purporting to have been made under s. 283 of the *Cantonment Code,* 1899, is judicial order and not merely an executive order and therefore subject to the revisonal jurisdiction of the High Court, **9 P. R. 1909 = 30 P. W. R. 1909 = 11 Cr. L. J. 17.** *See* also **1 P. R. 1906; 23 P. R. 1905.**

(*iii*) *Orders under the Calcutta Municipal Act III of* 1899.—The orders of a Magistrate under ss. 449-450 of *the Calcutta Municipal Act* are open to revision by the High Court, **33 C. 287; 34 C. 341; 29 C. 491.** Where the Legislature by express enactment (s. 645) vested a discretion in the General Committee, the High Court will not interfere if the acts done are within the provisions of law, **34 C. 30.**

(*iv*) *Inspector-General of Police—Act V of* 1861.—Under ss. 4 and 5 of Act V of 1861, the Inspector-General of Police is a Magistrate and if he gives sanction his proceedings may be revised, **9 P. W. R. 1908 = 7 Cr. L. J. 291.**

(*v*) *Proceedings under Indian Railways Act.*—A Magistrate's proceedings under s. 113 of *the Indian Railways Act,* IX of 1890, are open to revision by the High Court under this section and s. 439, **18 P. R. 1891.**

(*vi*) *Forest Act VII of* 1878.—The terms of s. 58 of *the Forests Act* do not exclude the revisional powers of the High Court over a subordinate tribunal in the exercise of its criminal jurisdiction where there has been material error in a judicial proceeding, **4 A. 417.**

(*vii*) *Bombay District Municipalities Act III of* 1901.—In a case instituted under s. 151 (2) of the Act, *viz.*, the using of a place in a certain manner after notice has been given under s. 151 (1) the mere fact of a notice being given is not conclusive evidence of the user of the place contrary to the notice. All the necessary ingredients of the offence must be proved as in any other criminal trial, **8 S. L. R. 238 = 16 Cr. L. J. 255.**

(*viii*) *Workmen's Breach of Contract Act XIII of* 1859.—The High Court has power under ss. 435 and 439 of the Cr. Pro. Code to revise an order passed by a Magistrate directing either return of the advance or specific performance of the contract under para. 1 of s. 2 of the Workmen's Breach of Contract Act XIII of 1859, **43 B. 607.**

15. Powers of revision limited to proceedings of "inferior Courts."—Within the territorial jurisdiction of a High Court, all other Courts are inferior to it; in a Sessions Division the Sessions Court is superior to all other local Criminal Courts, and all such other Courts are inferior to it, and in a district all other Magistrates are by s. 17 subordinate to the Magistrate of the District, and consequently inferior to him and inferior as much for the purpose of s. 435 as in any other respect, **12 C. 473 (F.B.).**

"*Inferior, i.e.*, statutably incompetent to hold or exercise equal powers. It carries with it the idea of subordination, which latter means inferior in rank," **9 B. 100.** It is more comprehensive than the word subordinate, **8 M. 18 (F.B).** There may be *inferiority* without subordination as in the relation of a second or third-class Magistrate to the Court of Session, **12 C. 473; 10 C. 268 and 551; 7 A. 134.** A Magistrate is not competent to refer the proceedings of a superior Court to the High Court on the ground that they were

improper, **6 C. L. R. 243** and **8 C. 875.** A Bench Full or Divisional, of a High Court cannot revise orders of a single Judge of the High Court as there is no inferiority, **4 P. R. 1909 = 9 Cr. L. J. 378; 8 P. R. 1909 = 10 Cr. L. J. 314; 14 C 42**

(*i*) *All Magistrates including District Magistrate inferior to Sessions Judge*—*See* **12 C. 473 (F.B.), 1889 A. W. N. 100.** Even a District Magistrate acting under s 30 is inferior to the Sessions Judge, **15 P. R. 1904** *See* Note 1 to s 436 and Note 5

(*ii*) *First-class Magistrate inferior to District Magistrate*—The Court of a Magistrate of the first class is inferior and subordinate to that of the District Magistrate, who is superior in respect of executive as well as judicial functions to all other Magistrates, **9 B. 100; 8 M. 18 (F.B.), 7 A. 853 (F.B.), 12 C. 473 (F.B); 33 P. R. 1883.** The District Magistrate can therefore call for and examine the record of a proceeding before a Sub-Divisional Magistrate of the first class, even if the first-class Magistrate has been appointed an Additional District Magistrate under s 10 (2), **25 P. R. 1908 = 9 Cr. L. J. 104.**

(*iii*) *No revisional jurisdiction to Sessions Judges and Magistrates outside the limits of their Division or District.*—Where sanction was granted and confirmed on appeal by the Magistrate of the District of South Arcot and a complaint laid before a Magistrate in the District of Chingleput, the Sessions Judge of Chingleput is not competent to revise the sanction proceedings or to report such proceedings to the High Court and to stay proceedings before the second-class Magistrate of Chingleput pending the result of the revision, **26 M. 137.** *See* also **30 M. 136** in Note 4 to s. 403, as to the significance of the word '*situate*' in sub-sec (1).

16 Revision limited to proceedings of 'Courts' as such and does not extend to extra-judicial proceedings—

(*i*) *When a Magistrate acts as such his proceedings will be liable to revision whatever he may call them*—When an illegal order is passed and action taken which involves matters coming within the purview of Law and Justice and within the scope of authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer, that he was not acting as a judicial officer but in his executive capacity and the High Court can interfere by way of revision, **4 P. R. 1908 = 1 P. W. R. 1908 = 83 P. L R. 1908 = 7 Cr. L. J. 202** and the validity of such an order may be tested on a prosecution for its disobedience, **11 C. W. N. 266.** An order passed by a District Magistrate cannot be supported as an executive order in the absence of any satutory authority which would justify the making of it, **170 C. 263 = 15 Cr. L. J. 668** *See* Notes 10 and 11 to s. 439 In **7 A. L. J. 983 = 11 Cr. L J. 476** it was *held* that when a Magistrate deals with the case as a Magistrate the Sessions Judge may proceed under this section In this case the Collector who alone was empowered to levy a fine under s. 2 of *Bengal Regulation* VI of 1825 made over the case in his capacity as District Magistrate to the Joint Magistrate who levied a fine Under s. 4 an appeal lay to the Board of Revenue. *Held* the Sessions Judge was competent to deal with the case under s 435 and the High Court set aside the sentence of fine *See* Note 58 at p 235, Note 58 at p 264, Note 11 to s 439 and Notes under s 476

(*ii*) *Judicial and executive order distinguished*—The scope of this section is very wide and the powers under it are not confined to calling for the records of judicial proceedings alone. The distinction however between a judicial and an executive proceeding is very simple—"The essence of a judicial proceeding is a declaration of the law on the particular case which has to be arrived at as the decision of certain legal relations '*est enim judiciam lex ad factum singulare aplata*' (Grotues de pure praedae C I). The essence of an executive proceeding is an act to be done under such and such circumstances and inquired into when necessary with a view to determine whether in the particular case they call for or justify some particular" This distinction being borne in mind, the cases in which the superior may departmentally overrule the orders of his subordinate are easily discriminated from those in which a judicial review is necessary, **Ratanlal 129.** *See* also **29 M. 100; 4 P. R. 1908 = 7 Cr L. J. 202.** The test for deciding whether a particular officer is a Court, does not depend upon whether he is empowered to take evidence but whether he has been given jurisdiction by the constituted authorities to deal [illegible] SADASIVA AIYAR, SUNDARA IYER [illegible] *Woodhouse*, (1906) J, 2 K. B. 501, [illegible] icer,' **36 M. 72** *See* Notes 35—44 u[illegible]

(*iii*) *Extra judicial orders not subject to revision*—The High Court cannot revise an extra judicial order passed by a Magistrate, **1883 A. W. N. 25;** nor can it give such opinion on questions submitted by the Lower Courts. The Lower Courts must instead of applying for instructions in such cases, pass orders and

submit their proceedings for revision, **8 M. 18.** Thus a Magistrate's order directing the observance of Municipal bye-laws which prohibit the slaughter of votive animals in private houses is not revisable under this section, **1885 A. W. N. 258.** So a general circular prohibiting uncertificated pleaders from practising in the Criminal Courts in his District by a District Magistrate is an administrative matter. The particular pleader who has been refused may apply by revision, **19 M. L. J. 566 = 11 Cr. L. J. 69.** In **1902 A. W. N. 175** the High Court declined to interfere with an order passed by a District Magistrate when he revised the list of petition writers who were allowed to practise within the precincts of the Court. A Collector as such is not subject to the revisional jurisdiction of the High Court in criminal matters and where in certain *butwara* proceedings he fines a *Mukhtyar* under s. 182, I.P.C., for making false statements in support of a petition presented by his client, the High Court is not competent to deal with such order, **10 C. L. R. 14.** Similarly, an order passed by a District Magistrate under the rules framed by Government under s. 45 (3) dismissing a village headman in an executive order and not subject to revision by the High Court, **29 A. 563.** In **18 P. R. 1914 = 266 P. L. R. 1914 = 15 Cr. L. J. 601,** it was *held* that neither the Civil nor the Criminal jurisdiction of the High Court can be invoked for the purposes of revising orders under s. 36 of the Legal Practitioners Act and **21 A. 131; 31 A. 59; 11 C. L. J. 513; 12 M. L. T. 411,** and **41 P. R. 1888** were referred to.

(*a*) *Orders under s.* 36 *of the Legal Practitioners Act.*—The High Court cannot interfere under s. 439; **11 P. R. 1909.** *See* also **21 A. 181; 6 A. L. J. 22; 22 P. R. 1904; 1892 A. W. N. 236.** *See* Note 9 (iv) to s. 476.

(*b*) *Orders of Magistrate vested with quasi-judicial functions not open to revision.*—A Presidency Magistrate authorised under Rule 5 of the rules framed by the Local Government in pursuance of the powers given to it by s. 413 of *the Madras City Municipal Act,* III of 1904, to declare the inclusion of a certain person as a candidate for Municipal election by the President of the Corporation was illegal does not act as a Court. He is in the position of a referee between the President and the candidate [**11 M. 26 (P.C.); 21 B. 279; 38 C. 547; 30 M. 326,** and **(1892) 1 Q. B. 431,** *referred to*]. These authorities show that when quasi-judicial functions are delegated to an officer whose decisions are ordinarily subject to the revisional powers of the High Court, he is not with reference to the delegated power necessarily subject to its appellate or revisional authority, **38 M. 581.**

(*c*) *Order under s.* 3 *of Sindh Frontier Regulation* V of 1872.—An order under s. 3 of *the Sindh Frontier Regulation* is an executive order and is not open to revision by the High Court. The Magistrate of the District acts in his executive capacity and not as an inferior Criminal Court, **5 S. L. R. 54 = 12 Cr. L. J. 558.** But orders under ss. 20 and 21 declaring forfeited a bond may be revised, **7 S. L. R. 194 = 15 Cr. L. J. 544,** where **5 S. L. R. 105 = 12 Cr. L. J. 568** was distinguished on the ground that the order made by the Magistrate was not covered by the regulation.

(*d*) *Orders made under s.* 43 *of Bombay Act* IV of 1890 *are executive orders and cannot be revised under this Chapter.*—A Court of Session should not call for the proceedings of a District or Sub-Divisional Magistrate under this section when the order is duly made by such Magistrate under s. 43 of Bombay Act IV of 1890. The proper course for a person feeling aggrieved by Magistrate's order is to petition the Governor in Council under whose control the prerogative of keeping the peace is worked by the Magistracy, **Ratanlal 692** and **540.** An order made or purporting to be made by a District Magistrate under s. 44 of *the Bombay District Police Act* IV of 1890 is not a judicial order made by a Court. It is a mere executive order made by the District Magistrate as Head of the Police with which the High Court cannot interfere under this section, **12 Bom. L. R. 1029 = 11 Cr. L. J. 705.** *See* also **Ratanlal 540** where it was held that the High Court has no jurisdiction to interfere with an order under s. 43 of that Act.

(*e*) *Warrant issued under the Goondas Act* (*Beng. I of* 1923), *s.* 4.—The High Court has no power to interfere under this section with the warrant issued by a Secretary to Government of Bengal under s. 4 of the *Goondas Act* or with the orders of the Deputy Commissioner of Police refusing to release a person arrested on bail. **53 Cal. 962.**

V.—POWERS AND DUTIES OF INFERIOR REVISIONAL COURTS.

17. Points to be borne in mind in revising proceedings of inferior Courts.—Some of the points to which the attention of the Sessions Judges and District Magistrate should be particularly directed in the exercise of their powers of supervision are noted below:—

(1) the rash issue of process;

(2) the dealing with disputed claims of right under colour of a charge of criminal trespass or mischief and convictions *held* of the former offence without a finding as to the criminal *intent*,

(3) the indiscreet imposition of fines beyond the means of offenders,

(4) the light punishment by inferior Courts of offences requiring severe punishments in cases which ought to have gone up to a superior Court for enhanced punishment,

(5) the imposition of heavy fines in addition to imprisonment with a view, in default of payment, to extend the term of imprisonment beyond the ordinary powers of the Magistrate to inflict,

(6) the exaction of excessive bail or excessive security for keeping the peace or for good behaviour,

(7) unnecessary delay in the trial of cases —*Mad. H. C Rul*, *17th December*, 1884 para 17

18. Powers limited by ss. 436, 437 and 438 —The powers conferred by this section are limited to reporting under s 438 and to the specific powers conferred by ss 436 and 437 The Sessions Judge cannot himself issue proceedings criticising those of the Magistrates except on appeal, **7 M. H. C. R. Appx. XXVII.**

19 Referring authority not entitled to record fresh evidence.—A Sessions Judge making a reference, after calling for records under this section cannot take fresh evidence, **1882 A. W. N. 146**, and neither can a District Magistrate **3 Bom. L. R. 677; 12 A. L. J. 461 = 15 Cr. L. J. 575.**

20. Records may be called for at any stage of proceedings.—*See* **22 C. 131** and **24 W. R. 4.** Records may be called for even after the prisoner has served out his sentence, **7 A. 135** and where the accused is dead, **2 B 564.** But there is no provision in the Code which enables a Judge to stop a trial already commenced and to refer to the High Court any question or questions of law arising on the merits in that case, **Ratanlal 214** In exceptional cases, where a bare statement of the facts without any elaborate argument is sufficient to convince the Court that the case is a fit one for interference at an intermediate stage the High Court will exercise its discretion in interfering, **2 S. L. R. 25 = 10 Cr. L. J. 237.** *Cf* Note 42 to s 439

21 No power to accord sanction on perusing calendar.—A Sub-Divisional Magistrate acting under this section, has no authority to sanction prosecution on perusing the calendar, **7 M. 560** and **189**, **15 M L. J. 489 = 3 Cr. L. J. 118,** as calling for an examination of proceedings under s 435 does not constitute a judicial proceeding **11 N L. R. 86 = 16 Cr. L. J. 289.** In **1908 A. W. N. 74 = 5 A. L. J. 562 = 7 Cr. L. J. 304,** the first class Magistrate who discharged an accused, refused sanction to prosecute the complainant for an offence under s 193 I P C An application was then made to the District Magistrate who accorded sanction for prosecution under s. 211, I P C *Held* the District Magistrate had no jurisdiction to pass such an order either under this section or s. 195 (6). The revisional powers of a District Magistrate do not include the powers conferred on a Court of appeal under sub-sec (6) of s 195 All that he could have done was to make a report to the High Court under s. 438, submitting the result of his examination of the record

22. District Magistrate cannot take cognisance of case by way of revision against prisoner who has not appealed —*I* and *M* were tried together and convicted of the same offences by a second class Magistrate *I* alone appealed and in hearing his appeal, the District Magistrate took cognisance of the case against *M* and set aside the convictions and sentences against both the accused and ordered their re trial *Held* that the District Magistrate had no jurisdiction to reverse the conviction and sentence against *M* or to

.. the High Court, **Ratanlal 358, 3 Bom. L. R.**

. Also if the applicant for revision has the right

exercise of the right before the proper Court

1886 A. W. N. 295 *See* Note 47 to s 439

23 District Magistrate cannot direct trial of persons not before him —When once the District Magistrate makes a case over for disposal to a Subordinate Magistrate it is out of his hands and he is not competent to pass any order relating to it, other than an order which might be made under this Chapter Therefore where in a case transferred by a District Magistrate, the Deputy Magistrate refused to order the trial of certain persons complained against, the District Magistrate was *held* not competent to order the trial of the said persons, **30 C 449.** *See* also **27 C. 798** and **979,** and Notes 4 and 5 at pp 580-581

24 Decision of jury under s. 138, not liable to revision.—The decision of a jury under s 138 is not a proceeding in a Criminal Court which the District Magistrate could call for and examine and refer to the High Court under this section, **Ratanlal 336**, *see* Note 22 at p 246 A District Magistrate may refer a case under s 133 to the High Court under s 438, **14 C. W. N. 55.**

25. Power of Sessions Judge or District Magistrate to call for record of proceedings under s. 145.—When a Court has acted without jurisdiction in proceedings under Chapter XII, the Sessions Judge or District Magistrate can call for the record and report to the High Court under s. 438, because the powers under this section of the High Court, Sessions Judge and District Magistrate are the same, **5 C. W. N. 71.** PRINSEP, J., in **5 C. W. N. 71** remarked that in such cases, it was the duty of the Sessions Judge and District Magistrate to refer the case to the High Court, because it would save the parties the expense of coming up to the High Court and the *ratio* of this decision cannot be too highly recommended, *see* also **4 C. W. N. 779; 3 C. W. N. 49** and **2 C. W. N. 593.** If, however, the Magistrate was duly empowered to institute proceedings under s. 135, the District Magistrate cannot call for the record, **28 C. 416; 14 C. W. N. 247.** But *see* Preliminary Note to s. 435. The old sub-sec. (3) to this section has now been omitted, and therefore orders under s. 145 can be revised now.

26. Power to stay proceedings.—Whether a Sessions Judge or District Magistrate can stay proceedings or not, the call for records under this section, would virtually act as a stay of proceedings because while the record is with the superior Court the case before the Magistrate cannot proceed, not for want of jurisdiction, but because the necessary papers are with the superior tribunal, **9 C. W. N. 829.** *See* Note 20.

27. District Magistrate cannot quash proceedings.—A Subordinate Magistrate being of opinion that no sanction under s. 197 was necessary, proceeded to try a case. On an application under s. 435 the District Magistrate, holding that sanction was necessary quashed the proceedings of the Sub-Magistrate. *Held*, that the order quashing proceedings was clearly made without jurisdiction, as there is no provision of law which gives a District Magistrate power to interfere in this way, and that the proper course for him was to report the case for the orders of the High Court, if interference was considered necessary, **23 M. 540.** *See* also **A. I. R. 1928 Rang. 292.**

28. Power to order further inquiry upon mere consideration of evidence on record.—It is open to a Sessions Judge or District Judge under s. 437 to order further inquiry on the mere consideration of the evidence, **32 M. 220 (F.B.)** *overruling* **31 M. 133.** *See* Note 33 (v) to s. 437.

VI.—PRACTICE.

29. Parting with judicial records.—No Court is at liberty to part with its judicial records, except when called for by an Appellate Court or on the demand of a superior Court under this section. They must be retained in order to meet the contingency of such legal requisitions being made. For the purpose of any reference or report to the executive Goverment, copies of proceedings are sufficient; but for purposes of appeal or revision by superior Courts, the originals are indispensable, **Ratanlal 128; 28 A. 268; 1904 A. W. N. 238; 30 A. 116.**

30. Reference to be accompanied with explanation of inferior Court.—A Sessions Judge calling for the records of an inferior Court is, before referring the case to the High Court for orders, bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation together with the rest of the record to the High Court, **8 C. 644.** But the Sessions Judge or District Magistrate has no power to record any fresh evidence before making a reference. Such evidence must be disregarded, **3 Bom. L. R. 677; 1908 A. W. N. 74** and *see* Note 19. The only case in which a District Magistrate can take further evidence is set out in s. 437.

31. Copy of order in appeal to be forwarded with proceedings to High Court.—When proceedings are called by the High Court from any Magistrate, the copy of any order made by the Appellate Court and transmitted to the Lower Court shall be forwarded to the High Court with the record and proceedings of the Magistrate.—*Bom. H. C. Cr. Cir.*, p. 47.

32. Practice—Cases simultaneously called for by Appellate and High Courts.—When the High Court calls on a Magistrate for the record of a case, which record has already been sent to the Sessions Court in appeal, the Magistrate shall make a return according to the writ. When a case is called for at the same time, both on appeal and by the High Court in revision, the Magistrate shall comply with the order of the Court of Appeal and make a return accordingly to the writ of the High Court.

33. That Judge previously declined to interfere 'suo motu' is not a sufficient reason to refuse to which en case when complainant applies for revision. *See* Note 37 to s. 437.

of their **34. Affidavit of accused is useless.**—Where a Magistrate has recorded that an accused person has ' guilty, an affidavit to the contrary sworn to by the accused, is not admissible in evidence, on revision

by the High Court If there is any mistake about the matter, it is the *vakil* and not the client who ought to make an affidavit, **19 M. 209.** *See* also **12 M. 451; 19 A. 200; 1906 A. W. N. 42 = 3 A. L. J. 98.**

35. Order passed in revision in criminal proceedings.—An order passed by a single Judge of the High Court in the exercise of its criminal jurisdiction is one passed in a criminal trial, if the proceedings which give rise to the revision are a criminal trial, **27 M. 510; 2 L. W. 363 = 16 Cr. L. J. 464.**

Power to order inquiry

***436.** On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any person (accused of an offence) † who has been discharged

‡ " Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made "

Notes.—1. Terms explained—

(*i*) *Inquiry —See* definition, s 4 (*k*) and Notes at pp 12 13 An enquiry under this Code is different from a trial. It means an enquiry of the same nature as under section 202 of this Code, **29 Cr. L. J. 372 = 108 I. C. 323.**

(*ii*) *Complaint—See* definition s. 4 (*h*) and Notes at pp 6—10 and *see* also Notes under Heading II to s. 190 at pp 472—476

(*iii*) *Discharge* has two meanings, one, non technical as in s 119 where it is merely equivalent to 'permitted to depart' and the other as in ss 209, 253 and 259 '*Discharged* in s 437 ought to be read as equivalent to "*discharged within the meaning of ss* 209, 253 *and* 259 and a *discharge* under s 199 is not within the scope of the section" **33 M. 85.** In **36 A. 147,** it was again *held* that a wide interpretation may be put upon the word 'discharged' so as to include an order under s 119 and *see* Notes 21 and 22 below *See* ss 119, 209, 213 (2), 253, 259, 305 (3) and (4), 308 333, 423, 484, 494 (*a*), 495 (2) for orders of discharge

(*iv*) " *Accused* ' means 'a person accused of an offence' and not a person against whom proceedings are taken under s 110, **27 C 662; 33 C. 8; 33 M. 85.** *Contra* **24 A. 148, 36 C. 163.**

2. Section does not control powers of Magistrates to entertain fresh complaints after previous dismissal or discharge.—This section is only an enabling section and an order under it is not necessary for fresh proceedings being taken up on the same facts by the same Magistrate discharging an accused whether under s 253 or s 259 or the complaint is dismissed under s 203 or s 204, or by a Magistrate of co ordinate jurisdiction, **29 C 726, 28 C. 652, 29 M. 126 (F.B.)** *overruling* **28 M. 253; 16 Cr. L. J. 73 (A.)** *See* also **31 M. 543, 28 C. 102 and 211; 1 B. 64; 1 C. W. N. 57; 4 C. W. N. 26 and 46; 28 M. 310, 26 P. W. R. 1903 = 8 Cr. L J. 249; 1 N L R 18; 9 A. 85; 1906 A. W. N. 245 = 4 Cr. L. J. 59, 1895 A W. N. 86; 16 Cr. L. J. 73 (A.), 36 A. 53; 8 S. L R 196 = 16 Cr. L. J. 174** or a successor of the Magistrate, **36 A. 129** *distinguishing* **22 A. 106.** A Magistrate may revise a dismissed complaint even when the District Magistrate has refused to make a further inquiry, **36 C. 415; 10 P. R. 1911 = 24 P. W. R. 1911 = 205 P. L. R. 1911 (F.B)** which *overrules* **33 P. R. 1894** Though such further inquiry is not actually illegal it should be only undertaken in exceptional cases and for good reason shown In **11 P. W. R. 1910 = 11 Cr. L. J. 347,** however, it was *held* that when a complaint has been dismissed by a Magistrate and the dismissal has been upheld by the Sessions Judge the successor of the Magistrate has no right to entertain a fresh complaint The complainant s remedy is by application to the Chief Court and not by presenting a fresh complaint Though the Magistrate may have jurisdiction to entertain a renewed complaint, the appropriate remedy for complaints wrongly dismissed is under s 437, **4 S L. R. 53 = 11 Cr L. J. 582.** *See* Notes 27 to 30 to s 203 and Notes 14, 16 to 18 at pp 1058 and 1059

I —WHAT COURTS MAY DIRECT FURTHER ENQUIRY.

3. Power of High Court under this section.—" It was the intention of the Legislature that the High Court should have a freer hand in interfering under s 437 than under s 439 and the powers of the High

* This section originally numbered 437 but was renumbered 436 by *ibid*
† These words were substituted for the words accused person by Act XVIII of 1923
‡ Proviso was added by *ibid*

Court and the Sessions Judge and the District Magistrate are co-extensive under this section," **32 M. 220 (F.B.)** at **p. 238.** Though the High Court has under this section, concurrent jurisdiction with the District Magistrate and the Sessions Judge yet where a District Magistrate dismissed a complaint under s. 203, the High Court declined to entertain an application by the complainant under this section when no application had been made to the Sessions Judge, **28 A. 268** where **1904 A. W. N. 232** is *followed.* The reason or the mention of the High Court in this section is obvious. Though s. 439 gives to the High Court all the powers of an Appellate Court under s. 423, the power mentioned in this section is not included in it (**9 A. 52** at **p. 55**). *See* Note 43 to s. 439. **23 A. L. J. 20.**

4. Power of High Court to direct farther inquiry in case of discharge by Presidency Magistrate.—The High Court has power, under s. 439 read with s. 423 of this Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case (**15 C. 608; 26 C. 746; 28 C. 652; 27 B. 84** *followed*; **7. C. W. N. 521** *referred to*; **27 C. 126; 6 C. L. J. 705 = 6 Cr. L. J. 490** and **33 C. 1282** *discussed* and *dissented from* (**36 C. 994**). The High Court acting under s. 439 may order the commitment of a person whom a Presidency Magistrate had discharged. Sub-sec. (4) of s. 439 points to the conclusion that all other powers under s. 439 not expressly excluded by that sub-section may be exercised by the High Court as a Court of Revision, **27 B. 84; 15 M. L. T. 200 = 14 Cr. L. J. 529 and Weir II, 265,** where it was laid down that the fact the Superior Court might be disposed to take the view that the Magistrate discredited the prosecution evidence for insufficient reasons and discharged the accused without committing him for trial, is no ground for interference by it. *See* also **20 C. W. N. 1128.**

5. Sessions Judge and District Magistrate should not review each other's orders.—*See* Notes 9 and 10 to s. 435. Both the District Magistrate and the Sessions Judge are competent to order further inquiry, but when further inquiry is refused by one of these officers, it would be an unseemly proceeding, to say the least, that it should be ordered by the other. If either the District Magistrate or the Sessions Judge thinks that the Sessions Judge or the District Magistrate is wrong he should refer the matter to the High Court under s. 438. He has no jurisdiction himself to review an order made by a Court having concurrent jurisdiction with himself, **22 C. 573.** *See* now sub-sec. (4) to s. 435 and also Note 2 to s. 436, and the recent amendment of sub-sec. (1) of s. 435 and the new explanation added thereon making all Magistrates in their original as well as appellate jurisdiction subordinate to the Sessions Judge for purposes of sub-sec. (1) of ss. 435 and 437.

(*i*) *District Magistrate not competent to act when Sessions Judge has passed orders under this section*.—Where a Sessions Judge has passed orders under this section, the District Magistrate acting under the same section should not pass orders of a contrary kind, but if he thinks that the Judge's orders are wrong, he should submit them to the High Court through the medium of the Public Prosecutor, **12 A. 434; 9 A. 362; 10 A. 146; 18 C. 186.**

(*ii*) *Sessions Judge not competent to direct further inquiry when District Magistrate has dealt with the case under s.* 435.—A complaint was made to a Deputy Magistrate who after considering a Police report on the matter ordered—'Enter mistake of law.' The complainant put in another complaint before the District Magistrate who sent the complaint to the Deputy Magistrate for judicial inquiry and report and after considering his report, decided that the case should be entered as false. The complainant then applied to the Sessions Judge who ordered a further inquiry under s. 437. *Held following* **6 C. W. N. 638** and **8 C. W. N. 456 = 1 Cr. L. J. 356** that the Deputy Magistrate's order must be regarded as an order dismissing the complaint and therfore the District Magistrate in directing further inquiry acted under s. 435 and the Sessions Judge was not competent to direct a further inquiry in view of sub-sec. (4) of s. 435, **17 C. W. N. 451 = 14 Cr. L. J. 123.**

(*iii*) *Court of Session cannot refer applicant to District Magistrate.*—When an application is presented to a Court of Session under this Chapter, it has no power to refer the applicant to the District Magistrate whose Court is one not of interior, but of concurrent jurisdiction, with the Court of Session for the purposes of this Chapter, **Ratanlal 525.**

6. Additional Sessions Judge may act under this section.—*See* s. 438 (2).

7. Deputy Magistrate cannot direct further inquiry.—A Deputy Magistrate in charge of the current duties of a District Magistrate is not thereby invested with jurisdiction under this section, **11 C. 236.**

8. District Magistrate may direct further inquiry when case discharged by himself.—Where a District Magistrate has passed an order of discharge, he is competent to revise his own order upon a fresh complaint and direct a further inquiry, **9 P. R. 1902.** This section is not confined to cases in which the original

inquiry was held by a Magistrate subordinate to the District Magistrate A case originally discharged by himself, the District Magistrate may under this section, make over to any Magistrate subordinate to himself, for further inquiry, **28 C. 102.** A District Magistrate, who on application under this section, refused to interfere with an order of discharge, may subsequently *suo motu* direct a further inquiry, on looking into the Police diary **11 C. W. N. 11.** *See* Note 37

9. District Magistrate may order further inquiry when discharge made by specially empowered Magistrate—Where a Subordinate Magistrate of the first class specially empowered under s. 30 makes an order of discharge in a case which is triable exclusively by a Sessions Court, such order is open to revision by the District Magistrate under ss. 436 and 437, **13 N. L. R. 94 = 17 Cr. L. J. 255.**

10. Court which sanctioned prosecution not competent to order further inquiry.—The words 'try any case' in s 556 are wide enough to include any stage of the judicial proceeding in which the question of the guilt or innocence of the accused is finally adjudicated on. Where, therefore, a District Magistrate as President of a Municipality presided at the meeting of the Board which directed the prosecution of a Municipal servant, *held* the District Magistrate was disqualified to direct further inquiry under s 437, **5 S. L. R. 137 = 13 Cr. L. J. 30** where **27 A. 25** is *distinguished*

II.—WHO MAY BE DIRECTED TO MAKE FURTHER INQUIRY.

11. District Magistrate.—The language of this section shows that a District Magistrate, though exercising the enhanced powers under s 30, may be ordered by the Sessions Judge to make the further inquiry directed under this section, **15 P. R. 1904.** The Legislature appears to have contemplated that the Magistrate of the district should exercise a discretion as to the selection of any Magistrate subordinate to him and this discretion seems to have been vested in the District Magistrate and not in the Sessions Judge—*Per* FIELD, J., in **10 C. 207.** But in **8 M. 336,** the High Court expressed the opinion that the further inquiry should ordinarily be made by the same Magistrate as made the first inquiry The power conferred by this section is, however, purely a discretionary one, **15 C. 608; 4 A. 148** and where this discretion is not properly exercised the High Court may set aside the order for further inquiry, **11 C. 81.**

12. Subordinate of first-class Magistrate to District Magistrate.—A Magistrate of the first class is subordinate to the District Magistrate for purposes of this section, **7 A. 853 (F.B.), 10 B. 131; 8 M. 18 (F B), 12 C. 473 (F.B.), 38 P. R. 1883.**

13. Case specifically made over by District Magistrate cannot be withdrawn by Sub-Divisional Magistrate.—A Sub Divisional Magistrate cannot properly withdraw a case specifically referred to by his superior, the District Magistrate, to a Subordinate Magistrate for further inquiry under this section, **Ratnalal 315.** But a Sub-Divisional Magistrate who is directed by the District Magistrate acting under this section to hold a further inquiry, is competent under s 192 to transfer the case to a second-class Magistrate subordinate to himself, **Weir II, 563.**

14. When further inquiry should be entrusted to discharging Magistrate?—When a further inquiry involves the taking and weighing of additional evidence the function will generally be best performed by the same Magistrate who made the previous inquiry, though peculiar or prejudiced views, or even the possibility of them, may make it more desirable to bring a fresh mind to bear on the facts, **Ratanlal 328; 4 L B. R 233 = 7 Cr. L. J. 493.**

15. When further inquiry should be entrusted to a different Magistrate?—This section contemplates that further inquiry may be made by another Magistrate and the unsatisfactory way in which a Subordinate Magistrate has dealt with the case would be a good ground for ordering further inquiry by another Magistrate and such Magistrate may, if necessary, retake the evidence taken before the first Magistrate, **32 M. 220 (F.B.)** SANKARAN NAIR, J., *dissenting* When the further inquiry is into the effect of the evidence already on the record, or the testimony of the witness already examined, it will usually be desirable that the fresh consideration of the complaint should be entrusted to a different Magistrate from the one who has already formed an opinion on the case, **Ratanlal 328.** *Contra, see* **8 M. 296** at **pp 299** and **336.** Where a Magistrate discharged the accused without hearing all the evidence expressing an opinion that 'to affix the guilt to the accused is an impossibility' and that "there is a certain mystery about the whole proceeding which it appears impossible to clear up," the High Court in revision directed further inquiry to be made by another Magistrate who had nothing to do with the case, **Ratanlal 926.** But ordinarily the further inquiry should not be by a different Magistrate, **8 M. 296.**

15-A. Further inquiry should not be entrusted to Magistrate of rank lower than first Magistrate.—When a District Magistrate orders further inquiry into a case tried by a first-class Magistrate specially empowered he should not order further inquiry by another Magistrate not so empowered, **17 Cr. L. J. 245 = 12 N. L. R. 94.**

III.—IN WHAT CASES FURTHER ENQUIRY MAY BE MADE.

16. Further inquiry may be made only when complaint dismissed or accused discharged.—This section does not apply to a case in which the complaint has not been dismissed under s. 203 or under sub-sec. (3) of sec. 204, or in which no accused has been discharged, **27 C. 658.** *See* Note 8 to s. 436. Where after the issue of warrant against certain persons the Magistrate does not think it proper to proceed further, the termination of proceedings against them is in effect an order of discharge, and it is therefore subject to revision under this section, **4 C. W. N. 242.** An order directing further inquiry without regard to what is really the material consideration in such cases, the prospect of any public advantage from the case being re-opened, is one passed without jurisdiction and is liable to be set aside by the High Court in revision, **43 M. L. J. 555.**

(i) *Complaint which has not been dismissed cannot be revised.*—Where one of the accused is tried for one offence only and is convicted of that offence, the complaint cannot be said to have been dismissed in regard to other offences for which the accused was not tried at all, **27 C. 838.**

(ii) *Order directing a case to be struck off cannot be revised.*—A Magistrate's order directing a case reported to him by the Police to be struck off is not a judicial order dismissing a complaint or discharging an accused person which can be reviewed by the Sessions Judge, **Ratanlal 521.** Where a Subordinate Magistrate made an order, as regards one of several accused that he should not be proceeded against and that the warrant and other processes against him should be withdrawn. *Held,* that though the order of the Magistrate was bad in law, the District Magistrate had no jurisdiction under this section to set aside the order and direct a re-trial, **12 C. W. N. 68.** '*Discharged*' must be read as equivalent to discharged under ss. 209, 253 and 259, **23 M. 85.**

17. No further inquiry in cases of acquittal.—A Sessions Judge has no power to order further inquiry where the accused is acquitted by a Magistrate, **20 C. 633,** nor a District Magistrate when the accused is acquitted by a Subordinate Magistrate under s. 245, **19 P. R. 1900.** Such power can only be exercised by the High Court in revision under s. 439. *See* **8 M. 236** and **24 M. 136** which latter case *dissents* from **20 C. 633** and *overrules* **28 M. 225.** The section does not authorise the High Court to set aside an order of acquittal even when it is illegally and improperly passed, **21 W. R. 21.** Nor is a Sessions Judge competent to set aside an order of acquittal, although such order might have been passed without any charge having been framed or evidence for defence taken, **1 A. L. J. 415.** In **7 C. W. N. 493,** a number of persons were charged under ss. 143, 342 and 323, I P C, but the Police did not send up several persons as the case against them was weak and the others were tried and acquitted by the Magistrate on the ground that the case was false. The District Magistrate sent for the records and directed that the acquitted persons and the others should be placed on trial, as he did not consider the case of sufficient importance to move the Local Government and the High Court. *Held,* that the District Magistrate did not rightly exercise his discretion in directing the re-trial of the acquitted persons and if he thought it necessary, it was his duty to have moved the Local Government to have the acquittal set aside, and that he erred in directing the re-trial of persons not sent up, as the facts of the case had been before a Court and that Court held the case to be false and that judgment had not been set aside. But *see* **14 C. W. N. 157** and Note 12 to s 403. When the acquittal is by a Court having no jurisdiction it need not be set aside, **31 A. 317.** *See* also **7 C. W. N. 711; 1 C. W. N. 650; 2 C. W. N. 290; 4 C. W. N. 346; 23 C. 983; 24 C. 286; 15 P. W. R. 1893.** But see *contra* **24 C. 528; 28 C. 211; 28 C. 652; 29 C. 726.**

So also when instead of acquittal, wrong order of discharge is passed.—If a Magistrate trying a summons-case, whatever procedure he adopts, finds no case made out against the accused and lets him go unconditionally, he acquits him though he may style his order of acquittal an order of discharge and tack on to it the number of some section of the Code which deals with discharge. The acquittal is none the less an acquittal and no order may be passed under this section for further inquiry, **8 M. L. T. 78 = 11 Cr. L. J. 350.** When, after framing of charge, the trial is recommended under s. 350, the second Magistrate cannot pass an order of discharge, but must acquit under s. 258 and if by mistake he passes an order of discharge, there can be no order for further inquiry, **38 M. 585; 17 Cr. L. J. 95 (M.).**

18. No further inquiry when persons have never been before the Court.—In regard to persons accused who have never been before the Court at all, it cannot be said that they have been discharged

and that it is in the discretion of the Magistrate to proceed against them or not, but it is not such a case in which an order under this section can be made by the Sessions Judge directing the Magistrate to proceed with the case as regards those persons. Therefore, where a Sessions Judge passed an order directing further inquiry into the complaint against the accused against whom the Magistrate did not choose to proceed, *held* that his order was without jurisdiction **27 C. 658.** *See* also **4 C. L. R. 452; 11 C. W. N. 218; 12 C. W. N. 68.** But *see* **29 C. 457; 32 C. 783.** A Court has no authority to direct further inquiry in respect of a person when no complaint has been made against him and no other regular process has been issued against him **39 C. 238.** This section has no application to the case of persons accused of any offence who had never been before any Court. Therefore where a Subordinate Magistrate, though competent to act upon a Police report against persons who were alleged in that report to have committed an offence, did not so act, *held* that it was not proper for the District Magistrate to pass an order directing proceedings to be taken against such persons unless he had withdrawn the whole matter from the Court of the Sub-Magistrate, **4 C. W. N. 212; 24 M. 136; 29 M. 126; 29 C. 457; 4 C. W. N. 346** But this section does not apply to a case in which a Magistrate has refused to proceed against some of the persons accused of an offence before the Police, as they never had been before him and had not therefore been discharged The proper course for the District Magistrate to take would be to withdraw the case under s. 528, and deal with it on the evidence, as in the exercise of his discretion he thought fit and not to order a further inquiry under this section **5 C. W. N. 435; 27 C. 979.** Nor can the District Magistrate direct proceedings to be taken against certain persons in a case when he has transferred the case to the file of a Deputy Magistrate, **30 C. 449.** *See* Note 28 to s. 203 and *see* also Note 7 to s. 190 at p 471

But it should be noted that in **30 C. W. N. 312** it is held that where on receipt of a complaint a Magistrate holds an enquiry under s. 202 of the Code and dismisses the complaint under s. 203 The Sessions Judge under s 436 can only direct a full and proper enquiry of the same nature as the Magistrate has already held and cannot direct a further enquiry after summoning the accused The practice of allowing the accused to be represented in an enquiry under s. 202 has been condemned

19. No further inquiry in cases of conviction.—A Sessions Judge, who on examining the monthly criminal return of a first-class Magistrate, sends for the record and proceedings in a case in which an accused person has been convicted cannot legally order any further inquiry to be made If he thinks that any further inquiry is necessary he must report the matter to the High Court, which alone has power to order such inquiry to be made in such a case, **Ratanlal 407.**

20. Power of District Magistrate to direct further inquiry into offences, some of which form component part of offence of which accused is acquitted.—The accused was tried for being a member of an unlawful assembly with the common object of assaulting the complainant and after a trial under s 147 I P C, was acquitted The District Magistrate on motion ordered further inquiry into the offences under ss 323 and 342, I P C *Held*, that the offence under s. 323 being one of the offences which formed the subject of former trial this matter cannot be re-opened, until the order of acquittal has been set aside Further that no order within the scope of this section having been passed regarding the offence under s 342, the Magistrate had no jurisdiction to order further inquiry with regard to that offence, **5 C. W. N. 72.** Similarly, in **27 C. 658,** the accused was tried and convicted of mischief, the only offence with which he was charged The Sessions Judge being of opinion that the accused had been lightly dealt with, ordered further inquiry against the accused and others for an offence under s. 144 I P C *Held*, such order was without jurisdiction as none of the accused had ever been discharged of that offence nor was any complaint of any such offence made against them dismissed under s. 203 or s 204 (3). *See* Note 2 to s 403

21. Further inquiry in cases under Chapter VIII —*See* Note 131 to section 123

(*a*) *Security for keeping the peace*—An application to take security under s 107 does not amount to an accusation of an offence, **42 P. R. 1905 = 2 Cr. L. J. 697,** and the Magistrate in such cases does not pass any order of acquittal or discharge, **6 P. R. 1911 (F B) = 153 P. L. R. 1911 = 30 P. W. R. 1911 = 12 Cr. L. J. 232; (1919) U. B. R. I. 3 = 15 Cr. L J. 531; 6 P. R. 1911, 33 M. 85.** *See* also **36 C 163, 27 C. 656; 16 B 661.**

(*b*) *Security for good behaviour*—A person against whom proceedings are taken under s 110 is an '*accused person*" within the meaning of this section And if a person against whom proceedings are taken under Chapter VIII is discharged by a Subordinate Magistrate, the District Magistrate is competent to order further inquiry, **21 A. 107, 1899 A. W. N. 203, 24 A. 148** (*dissenting* from **1900 A. W. N. 206**) and in **35 A. 147** the High Court refused to disturb the practice as laid down in the cases and *held* that the words of s 437 do not prevent interpreting the word 'discharge' in a large sense, **16 B. 661; 13 Bom. L. R. 505 = 12 Cr. "**

in **27 C. 662** and **33 C. 8**, it was held that proceedings under s. 110 cannot be regarded as on a complaint nor can they be regarded as a case in which an accused person has been discharged, for the terms "*discharged person*" and "*discharge*" in this section clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of Chapter XIX, **27 C. 662** was *followed* in **42 P. R. 1905.** *See* also **13 C. W. N. 261.** However, in **36 C. 163**, it was held that a person against whom proceedings were taken under Chapter VIII was an accused person, to whom the provisions of s. 443 applied and the cases in **21 A. 107; 16 B. 661** and **23 C. 493** were *followed.* In **33 M. 85** it was held that s. 437 should not be applied to cases under Chapter VIII; at any rate, where before making an order under s. 119 the Magistrate has called on the person into whose conduct the inquiry is made to establish his defence. It may be by analogy applied to a discharge made under s. 119 in circumstances resembling those in which a discharg is made under s. 253. The word "*discharged*" in s. 119 means only "*permitted to depart.*" *See* also **36 M. 315.** In view of the amendment of the new s. 436 by the insertion of the words "**accused of an offence**" after the word "person" it is submitted, that the Legislature has made it clear that to attract the application of s. 436 the person discharged must have been accused of an offence, and as in proceedings under s. 110 the person proceeded against, *is not accused of an offence*, therefore, this section cannot apply to such person. This amendment follows the rulings in **27 C. 662; 30 C. 163;** and so the cases in **36 C. 163; 21 A. 107** holding to the contrary have become obsolete. *See* also **2 R. 30** which supports the above interpretation. *See* also **46 A. 235.**

22. **Further inquiry in cases under s. 133.**—The section has no application to a proceeding under s. 133 which does not deal with any case of an offence. Therefore a Sessions Judge has no authority to direct a first-class Magistrate to make a further inquiry where the Magistrate has dropped proceedings under s. 133, **24 C. 395; 25 C. 425; 14 C. W. N. 55** and *see* Notes 60 and 61 to s. 133.

23. **Further inquiry in any case under s. 145.**—This section does not authorise the District Magistrate to order further inquiry in a case under s. 145 which is not directed to any offence at all, **20 C. 729;** nor can the High Court, **30 C. 112.** Thus, though a District Magistrate has no jurisdiction to revise the order of a Subordinate Magistrate striking off a possession case, yet when such Magistrate declined to take proceedings, the District Magistrate is perfectly competent to initiate proceedings acting on the same Police report, **6 C. W. N. 290.** *See* also Notes 154 to 162 to s. 145.

24. **Further inquiry in case dismissed under s. 247.**—When a case against the accused who was absent at the trial of his co-accused is dismissed under s. 247 no order could properly be passed under this section against such absent accused, **4 C. W. N. 346.** *See* Notes to s. 247.

25. **Further inquiry when proceedings stopped under s. 249.**—A District Magistrate cannot under this section set aside an order made by a Subordinate Magistrate under s. 249, **9 P. R. 1913 = 163 P. L. R. 1913 = 13 Cr. L. J. 860.**

26. **Order of discharge by High Court under s. 332 cannot be set aside.**—When an order of discharge was passed upon the Advocate-General entering a *nolle prosequi* under s. 332 in a Sessions case before the Calcutta High Court, *held* it could not be aside by any tribunal, but it did not require to be set aside for initiation of fresh proceedings on the same charges, **16 C. W. N. 983 = 3 Cr. L. J. 488.**

26-A. **No further inquiry in maintenance cases, s. 488.**—No further inquiry can be directed in respect of an order under s. 488 as an application for maintenance is not a complaint, **5 C. 536** as the defendant in such a case is not an accused, **17 C. P. L. R. 127 = 1 Cr. L. J. 864.**

IV.—NOTICE TO ACCUSED.

27. **Notice necessary before making order for further inquiry.**—In a case of further inquiry notice should be given, **20 A. 339**, *approved* in **25 A. 375; 4 C. W. N. 100; 1 Bom. L. R. 782.** Omission to do so is fatal to the validity of the order, **4 C. W. N. 100; 12 C. W. N. 822 = 8 Cr. L. J. 51; 44 P. W. R. 1911 = 12 Cr. J. 615.** No order should be passed against an accused person without his getting an opportunity of being heard. Thus, where a rule was issued only on the District Magistrate to show cause why further inquiry should not be directed under this section, it was *held* the accused was entitled to be heard, **11 C. W. N. 316 = 5 Cr. L. J. 112**; though the general rule is that the District Magistrate is the proper person entitled to be heard and not the private party interested in the result. *See* **26 C. 798; 31 C. 811.** As to the question whether any notice to the accused to show cause is by law necessary if further inquiry is ordered under this section, it is now settled that no such notice is necessary in point of law, **15 C. 608; 10 B. 131** *followed* in **20 A. 339; 2 Bom. L. R. 586; 3 Bom. L. R. 703; 11 P. W. R. 1908 = 7 Cr. L. J. 347; 11 O. C. 261; 13 O. C. 289 = 11 Cr. L. J. 629.** But no Court would

be exercising a proper discretion in such a matter if, before proceeding under this section, it were to order a further inquiry in a case in which the accused person may have been discharged, without giving him an opportunity, by service of a notice to show cause against such an order being made, **15 C 608; 2 C. W. N. 196; 32 C. 1090; 12 C. W. N. 822; 5 Bom. L. R. 877; 6 Bom. L. R. 479; 3 C. W. N. 249; 2 Bom. L. R. 586; 3 Bom. L. R. 703; 9 C. W. N. 219; 12 Cr. L. J. 110 (Sindh), 8 Bur. L. T. 133 = 16 Cr. L. J. 696; (1914) U. B. R. I. 3 = 15 Cr. L. J. 531; 10 P. R. 1911 = 24 P. W. R. 1911 = 205 P. L. R. 1911 = 12 Cr. L. J. 364; 4 P. W. R. 1915 = 16 Cr. L. J. 214** The High Court of Allahabad felt itself [in **6 A. 367** and **9 A. 52 at p. 58 (F.B.)**] bound to impress on Sessions Judges and Magistrates that in exercising the powers conferred by this section, they should, in the first place, always allow the person who has been discharged an opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and next that they should use them sparingly and with great caution and circumspection especially in cases where the questions involved are mere matters of fact This last recommendation is approved of by the Bombay High Court in **Ratanlal 328.** *See* also **36 A. 147;** and **4 C. W. N. 100; 8 P. R. 1900; 2 P. R. 1901; 10 C. 207** and **268** at **p. 273** and **1 B. 64.** The High Court of Madras recently held that the omission to give notice, in itself does not render an order under this section bad, but where there was nothing to show that there was any difficulty in connection with giving notice or that there is any reason why the general rule set forth above should not be followed the order will be set aside, **26 M. 41 (F.B), 16 M. L. T. 285 = 15 Cr. L J. 619.** In the earlier case it is said " Though the power conferred is wide, yet it must be remembered that it is a discretionary power confided only to the two principal tribunals in each district, and that the discretion is a judicial discretion to be exercised subject to the supervision and control of the High Courts,' **14 M. 334 at p. 338 (F.B.).** A question may be very clear to the superior Court acting under this section but still it ought to give an accused already discharged an opportunity to be heard, **11 C. W. N. 173 = 5 Cr. L. J. 16.** *See* also **3 C. L. J. 43; 14 P. R. 1891; 32 C. 1090; 17 P. R. 1895; 14 C. W. N. 284.** Notice to show cause why commitment should not be directed under s. 436, is however sufficient notice for making an order for further inquiry under this section, **18 C. 75.** Where there was however no manner of notice at all, the High Court might set aside the order for further inquiry as bad, **11 C. W. N. 35; 12 C. W. N. 822 = 8 C. L. J. 73 = 8 Cr. L. J. 51.** S 440 does not empower a Court to dispense with notice under s 437, **39 C. 238; 15 Cr. L. J. 1 (C.), 5 Bur. L. T. 37 = 13 Cr. L. J. 301.** And though the Code does not expressly require notice, it is but proper such notice should be given especially where the further inquiry directed is for the purpose of reconsidering evidence already given, **5 Bom. L. R. 877; 19 Bom. L. R. 908.** When a man has been through two inquiries and discharged, a third inquiry should not be ordered without notice, **12 A. L. J. 167 = 15 Cr. L. J. 39.** The District Magistrate would exercise a sound discretion if he gives such notice and hears the accused, **Weir II, 245; 11 C. W. N. 316 = 5 Cr. L. J. 112; 2 Bom. L. R 586; 6 Bom. L. R. 479; 3 S. L. R. 7 = 9 Cr. L. J. 446.** In **8 Bom. L. R. 694 = 4 Cr. L. J. 329,** ASTON, J, remarked that whether notice should be given or not would depend on the circumstances of each case *See* also **5 A. L. J. 74 = 7 Cr. L. J. 157, 15 A. L. J. 627; 16 A. L. J. 298.**

28. Notice may be dispensed with, when complaint dismissed summarily.—When a complaint is dismissed under s 203 or s 204 (3) in the absence of any of the accused notice to show cause might be dispensed with **29 C. 457; 15 C. 608 at p. 624; 32 C. 1090; 20 A. 339; 2 Bom. L. R. 586; 11 P. W. R. 1908 = 7 Cr. L. J. 347, 11 O. C. 261 = 8 Cr. L. J. 342; 1908 P. W. R. 25; 30 A. 52, (1908) A. W. N. 45 = 5 A. L. J. 74 = 7 Cr. L J. 157, 12 Cr. L. J. 46 (A.), 35 A. 78** Where a Magistrate proceeded against a few only, of a number of persons complained against and refused the complainant s application for process against the others it was considered the refusal amounted to a dismissal of the complaint under s 203 and so notice for acting under this section might be dispensed with, **29 Bom L R. 713** and also **108 I C. 106 = 28 Cr. L J. 650.** But *see* **11 C. W. N. 316 = 5 Cr. L J. 112** and **11 C. W. N. 35, 40 A. 138; 47 A. 722 = 23 A. L J. 451. A. I. R. 1929 Cal. 508.**

29. Procedure when accused cannot be found.—It is competent to any Court which had issued orders to issue notice to the accused to cancel that order, **15 P R. 1893.** In **12 C. W. N. 22,** a person whose complaint had been dismissed applied to the High Court for an order for further inquiry and obtained a rule *nisi* Service of notice was however, found difficult as the whereabouts of the accused were not known The High Court, instead of making the rule absolute as it could have done, if it had followed **26 M. 41,** discharged the rule giving the petitioner leave to move again when notice could be served on the accused

30. Accused not bound to appear on notice—A notice of this kind is for the benefit of the accused and it is by no means an objectionable practice to give to an accused person an opportunity of upholding the [illegible]

cused may not be

obligation to avail

[illegible] When action is proposed to be taken

under this section, it is not summons in terms of s. 68 that should be served on the accused, but a notice to show cause why an order for further inquiry should not be made, so that he is free to appear and show cause or stay away, 6 A. 307; 22 C. 573.

V.—WHEN FURTHER INQUIRY MAY BE DIRECTED AND WHEN NOT.

31. **Further inquiry may be ordered only where discharge is illegal or perverse or evidence is obviously incomplete.**—It is not open to a District Magistrate to order further proceedings in any case under s. 437. This section is limited by the words 'on examining the record under s. 435,' and s. 435 lays down that a Court may call for and examine any record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. It cannot therefore be said that if a Magistrate finds no illegality, or impropriety or irregularity and nothing incorrect in the proceeding, that he is empowered to set aside an order of discharge upon other grounds or no grounds at all, **16 C. W. N. 1078 = 13 Cr. L. J. 764.** '*Correctness, legality or propriety of any finding*' is an express enactment (*see* s. 435). Every finding, sentence or order is liable to review, not only on the ground of illegality, or irregularity, but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits, **15 C. 608.** But the omission of the word *improperly* before *discharged* at the end of the section, would indicate that the powers conferred by this section are very wide and would embrace a case where the discharge is proper, but further inquiry is necessary, **9 A. 52 (F.B.)** at **pp. 57** and **58.** It is, however, improper to interfere under this section with an order of discharge unless it is perverse or illegal, **394 P. L. R. 1902.** This Court has often pointed out that where a man is discharged under circumstances which make the order of discharge equivalent to one of acquittal no further proceeding should be taken against him under s. 437 (**8 P. R. 1900; 2 P. R. 1901 = 32 P. L. R. 1901; 8 P. R. 1909 = 10 Cr. L. J. 314** *referred to*). No invariable rule can be laid down but speaking generally, further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete, **10 P. R. 1911 = 24 P. W. R. 1911 = 205 P. L. R. 1911 = 12 Cr. L. J. 364 (F.B.); 4 P. W. R. 1915 = 15 Cr. L. J. 214.** So also when the order of discharge was passed because the complainant declined to produce any evidence, **19 P. W. R. 1915 = 16 Cr. L. J. 662.** Thus when the trying Magistrate has arrived at the conclusion that no *prima facie* case had been made out against an accused person; the High Court cannot command him to arrive at a different conclusion on the facts. If the complainant had a good case according to law against the accused, he may make a complaint to another Magistrate who will not be prevented from inquiring and adjudging by the mere discharge of the accused in a warrant case, **Ratanlal 209.** *See* also **2 C. P. L. R. 82** and **17 Cr. L. J. 245 = 12 N. L. R. 94; 20 P. W. R. 1916 = 17 Cr. L. J. 161; 9 P. R. 1913 = 8 P. W. R. 1913 = 13 Cr. L. J. 860.**

32. **Power of ordering further inquiry should be used sparingly and with great circumspection.**—When an accused person has been three times subject to the harassment of a magisterial inquiry on charges dwindling in importance, the series, save in extraordinary circumstances, or the discovery of new and important evidence giving quite a different complexion to the affair, ought to close, because it savours of oppression to send a man a fourth time before a Magistrate for inquiry into a serious charge on the evidence which has already been thrice pronounced insufficient or untrustworthy. As held by the Allahabad High Court in **9 A. 52 (F.B.)** the power of ordering further inquiry should be used sparingly and with great circumspection, **Ratanlal 328.** *See* **4 A. 148; 11 C. W. N. 173 = 5 Cr. L. J. 16.** Where a Magistrate, after taking the whole evidence and completing the inquiry, discharges the accused in a warrant-case, there is only a technical difference between the *discharge* and an acquittal, and so it could never have been intended that a discharged accused should be placed in worse position than one acquitted, merely because the Magistrate considered the evidence so untrustworthy as not to furnish ground for a formal charge. *Held*, that, where the Magistrate after taking all the evidence, discharges an accused person, this section does not empower the Sessions Judge to order a fresh trial in order that another Magistrate may consider the same evidence and pass an order, **2 C. P. Cr. 82.** This case was *approved* in **31 P. L. R. 1900** and **100 P. L. R. 1901.** *See* also **11 C. W. N. 173 = 5 Cr. L. J. 16**; and the dissenting judgment of SUBRAMANIA AYYAR, J, in **29 M. 126 (F.B.).** All Magistrates, and especially the one who formerly discharged the accused, are bound to exercise due discretion, to take that discharge into account, and to avoid any such oppressive proceedings as may either expose them to punishment under s. 219 or s 220, I.P.C, or to a civil action on the part of the accused, **Ratanlal 350.**

33. **When further inquiry may be ordered**—

(*i*) *Real test for interference by the High Court.*—The test for the interference of the High Court in revision with an order of discharge and for directing further inquiry under this section is, whether it would

under similar circumstances have accepted an appeal from acquittal, if one had been preferred Where the evidence for the prosecution was contradictory and insufficient for a conviction, and there was no suggestion that additional or further evidence was forthcoming the Punjab Chief Court in **1905 P. L R. at p. 49** refused to interfere

(*ii*) *When Magistrate omitted to consider accused s admission in another case* —When a Magistrate had wrongly omitted to take into consideration the admissions made by the accused in another case, the High Court in the exercise of its revisional powers ordered further inquiry, as it held that those admissions had an important bearing on the case, **13 B. 376.**

(*iii*) *When on punishment of some accused Magistrate refused to try others who had absconded* — A complaint was made against several persons under ss 147 and 323, I P C Some of them were tried and convicted, while others were reported to be absconding. One of these latter was arrested, but afterwards the warrants against all the absconding accused were withdrawn and the arrested accused released The complainant then applied to the District Magistrate to revive proceedings, but he refused to interfere *Held* that if a body of men committed an offence, the Magistrate cannot say that he considers the punishment of some of them to be sufficient in regard to others who may be equally guilty, though probably in a different degree The order of the District Magistrate is therefore wrong, and there should be further inquiry in such matter, **4 C. W. N. 560.**

(*iv*) *Discharging summons case without recording plea* —When process was issued against the accused for an offence under s 506 I P C., and he was tried under that section, but the Magistrate without recording his plea to that charge discharged him of an offence under s 500, I P C., *held* the proceedings were irregular as the plea of the accused ought to have been taken, s 242 and a further inquiry was ordered **13 Cr. L. J. 483 (C.)**

(*v*) *Further inquiry can in case of discharge be directed upon same materials when no fresh evidence is forthcoming* —The question, whether, after an inquiry by a first class Magistrate and discharge of the accused, a Sessions Judge or District Magistrate has jurisdiction under this section to order " further inquiry or a rehearing upon the same materials which were before the first class Magistrate, *i e*, when no further evidence is forthcoming, has been a subject of much difference of opinion among the several High Courts *See* **10 C 207** and **1027, 12 C. 522, 6 A. 367, 21 A. 122; 1883 A. W. N. 150, 8 M. 296** and **336, 10 B. 131,** but now the High Courts of Calcutta (*see* **15 C 608** by a majority of 6 to 2), Allahabad, **9 A. 52 (F B)** and Madras, **14 M 334 (F B)** have come to agree with the decision of the Bombay High Court, **10 B. 131,** that a Sessions Judge or a District Magistrate has jurisdiction under this section to order further inquiry in cases of discharge under s 253 or s 259 The intention seems to be to give revisional jurisdiction to the Sessions Court and District Magistrate in cases of improper discharge concurrently with that of the High Court, and to include an incorrect finding among the matters liable to revision, and thereby to obviate the expense and inconvenience which the necessity to resort to the High Court might in such case entail "—*Per* MUTTUSAMI AYYAR, J, in **14 M. 334** at **p 338** *See* also **13 B. 376, 17 P. R. 1898** The Chief Court of the Punjab expressed its agreement with the cases reported in **12 C. 522** and **8 M. 336** (now partially *overruled*), but it did not decide what was the actual meaning of the words ' further inquiry,' **63 P. R. 1897.** *See* **14 P. R. 1891.** In **2 P. R. 1901** it was held on the authority of **15 C. 608** that there may be cases in which an order for further inquiry, may be a re-hearing and re-consideration of the evidence already taken, *e g*, where the order of discharge is manifestly perverse or foolish, **23 Cr. L J. 233 (1)** and **860 (1)**, and not in all cases a taking of fresh evidence, but *following* **8 P. R. 1900** they also held that when a Magistrate has gone into the evidence and dealt with the case carefully, an interference with his order of discharge would virtually be the conversion of the finding of an acquittal into one of conviction *See* also **8 P. R. 1909 = 17 P. W. R. 1909 = 10 Cr. L. J. 314, 18 P. W. R. 1909 = 11 Cr. L. J. 110; 10 P. R. 1911 = 12 Cr. L. J. 364; 24 P. R. 1903** A Full Bench of the Chief Court of Burma has also held in **3 L. B. R. 97,** *overruling* **1 L. B R 100** and *following* **2 L. B. R. 27** that where further inquiry entails only re-hearing on the same materials, it is still competent to the District Magistrate to order further inquiry, as the authority given by this section is unfettered by any other provision of the law In **32 M. 214** a divisional bench refused to follow **31 M. 133** and *held* that a Sessions Judge may direct further inquiry when the discharge is due to misappreciation of evidence. There is nothing in this section to suggest that misappreciation of evidence in the Lower Court is not a ground of interference The Sessions Judge or District Magistrate is not bound to refer the case to the High Court in case of difference of opinion with the Lower Court on the mere appreciation of evidence, but would be justified in ordering a reconsideration of the same evidence, **32 M. 220 (F.B.)** *overruling* **31 M. 133; 15 C 608** *dissented from* so far as it held that a reference to the High Court was necessary.

(*vi*) *Fettering discretion of Subordinate Magistrate in further inquiry.*—A District Magistrate who refers a case to a Subordinate Magistrate for further inquiry has no authority to fetter him in the exercise of his judicial discretion as to the question whether the case should or should not be committed to the Court of Sessions, **15 M. 39.** Where the accused were discharged of offences under ss. 342 and 357, I.P.C., the Judge cannot direct an inquiry into an offence under s. 467, I.P.C., **10 Cr. L. J. 554 (A.).** In making an order for further inquiry it is improper for the superior Magistrate to write a judgment which is practically a mandate to a Subordinate Magistrate, **12 N. L. R. 94 = 17 Cr. L. J. 245,** refering to **32 C. 1090.**

(*vii*) *No power to direct the Police to re-consider.*—Where a District Magistrate in setting aside the order of discharge concluded his order by observing: 'The case, therefore is re-opened and the Police are now at liberty to re-consider the whole position.' *Held*, such an order is not contemplated by s. 437 and the proper order should have been to order the Sub-Magistrate to make further inquiry, **37 P. W. R. 1913 = 14 Cr. L. J. 596.**

39. When directing further inquiry, complainant may be required to furnish security for costs of accused.—In **8 S. L. R. 196 = 16 Cr. L. J. 174,** the High Court refused to order further inquiry unless the applicant (1) paid into Court the expenses incurred by the Government under s. 544 in respect of a previous complaint and (2) executed a bond with one surety undertaking to pay the reasonable costs of the accused in the event of his being acquitted or discharged and such acquittal or discharge not being reversed in appeal or revision. S. 526 (5) was cited as a precedent for the latter condition.

40. In making further inquiry, complainant may be taken 'de novo.'—Further inquiry does not mean proceeding on the evidence already taken. It means that evidence or other evidence, if there be any, should be taken *de novo* by that Magistrate who holds the further inquiry, **9 A. L. J. 310 = 13 Cr. L. J. 255.** When for valid reasons, further inquiry is ordered to be conducted by another Magistrate, the inquiry should commence *de novo*, **6 A. 367; 22 C. 573; 4 L. B. R. 233 = 7 Cr. L. J. 493.**

Can a complaint be dismissed again after order for further inquiry?—An order for *further inquiry* directed to a Subordinate Court means that the case should be taken up again and that the question of dismissing the complaint, or charging the accused, as the case may be, should again be considered and an appropriate order made as the result of such fresh consideration. *Per* WALLIS, J., **32 M. 220 (F.B.)** at **p. 234.** *See* also **15 C. 608; A. I. R. 1929 Pat. 644.** When further inquiry is ordered into a complaint dismissed under s. 203, the Magistrate cannot again act under s. 203, but must proceed to enquire into or try the case under s. 204, **11 C. W. N. 316.**

41. In further inquiry, accused might be tried for any offence established by evidence.—A prosecution lawfully revived must be dealt with in accordance with law in the same way in which a prosecution originally instituted is dealt with. Therefore, when a Magistrate is to make a further inquiry, it was *held* that he was competent to try the accused for such offence as might be established by the evidence, **7 M. 454.** He is not bound to try him for the very offence for which he was originally discharged. *See* **1 C. L. R. 83; 2 P. R. 1901.**

42. No difference between fresh and further inquiry.—There is no substantial distinction intended to be denoted by the words 'fresh inquiry' in s. 436 and 'further inquiry' in s. 437, **15 C. 608.** *See* also **14 M. 334; 8 M. 336.**

Power to order commitment.

437. * When on examining the record of any case under section 435 or otherwise, the *Sessions Judge* or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the *Sessions Judge* or District Magistrate, may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the *Sessions Judge* or District Magistrate, improperly discharged.

Provided as follows:—

(*a*) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made;

(*b*) that if such *Judge* or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such *Judge* or Magistrate may direct the inferior Court to inquire into such offence.

* This section which was originally numbered 436 was renumbered 437 by Act XVIII of 1923.

Notes.—As to the scope of this section, *see* **32 M. 220.**

1. Sessions Judge competent to direct commitment in cases of discharge by District Magistrate—If the case be exclusively triable by the Court of Session the Sessions Judge may direct commitment, even where the District Magistrate himself discharges the accused, **7 A. 853; 12 C. 473; 8 M. 18; 9 B. 100. In 17 Cr. L. J. 223 (Oudh)** the case in **9 B. 100** was followed.

2. Sessions Judge cannot act where District Magistrate has confirmed order of discharge.—*See* Note 9 (*i*) to s 435

3. District Magistrate with special powers under s. 30 can direct further inquiry.—The expression *District Magistrate* used in this section, includes a District Magistrate possessing the extraordinary jurisdiction conferred by s. 30, **1904 P. L. R. 234.**

4. Court of Session and District Magistrate can direct commitment without intervention of Magistrate.—There is nothing in this section to show that when the Court of Session or the District Magistrate directs a discharged person to be committed for trial, the commitment thereupon must necessarily be made by the discharging Magistrate, whilst the first *proviso* to it shows that it may be made by the Sessions Court or District Magistrate as the power happens to be exercised by the one or the other, **10 B. 319; 28 C. 397.** Under this section it is competent to a District Magistrate to make a committal himself or to direct a Subordinate Magistrate to make a committal The words "*order him to be committed*" in this section do not mean more than *pass an order for his committal*, **31 M. 40; 10 B. 319** and **28 C. 397**; (but *see* **4 W. R. 4**). Where however, the Magistrate is directed to commit he cannot be asked to record the defence evidence also, **4 N.-W. P. H. C. R. 80.** *See* also **12 N. L. R. 94 = 17 Cr. L. J. 245.**

5. Section limited to offences triable exclusively by Court of Session.—To give the District Magistrate or Sessions Judge jurisdiction to act under this section, the accused must have been charged with an offence triable *exclusively by the Court of Session*, *i e*, an offence shown to be so triable in the 8th column of Schedule II, **1904 P. L. R. 234; 1 A. 413 (F.B.)** *See* also **3 P. R. 1897.** Thus a Sessions Judge cannot direct commitment in respect of an offence under s 411 I P C, **Ratanlal 42; 15 M. L. J. 373.** In cases not covered by this section, if the District Magistrate thinks the Subordinate Magistrate has improperly discharged the accused he may either act under s. 437 or report the matter to the High Court under s 438, **8 M. 336.** The High Court can commit, in any case without any restriction

Charges of offences not exclusively triable by Sessions Court may be added—Where a District Magistrate committed the accused on charges of ss 408 and 477 A, I P C., in respect of which the accused had been previously discharged, it was contended (1) that the District Magistrate was not competent to make the order under s 436 as the case against the accused was primarily one under s. 408, I P.C, an offence not exclusively triable by a Sessions Court, and (2) that the District Magistrate was not competent to add a charge under s 408 to the one under 477 A, *held*, that the District Magistrate had jurisdiction to make the order as the falsification of accounts was a substantial part of the affair, and it was open to the District Magistrate to consider that the case was triable exclusively by the Court of Session and next that once a proper order of commitment is made, it opened up the whole case and the District Magistrate is competent to add other charges intimately connected with the charge under s 477 A and forming part of the same transaction **16 Bom. L. R. 80 = 2 Bom. Cr. Ca. 179 = 15 Cr. L. J. 292, 53 Cal. 645**

6. Section not applicable where accused acquitted.—Where the accused had been acquitted by a Magistrate, neither the District Magistrate nor the Sessions Judge has jurisdiction to proceed under the section or s. 437, **20 C. 633.** But the acquittal must be one in substance and not merely in form Thus where a Magistrate used the words "acquitted and released" when he intended only to discharge, the Court of Session was *held* competent to direct a commitment under this section, **8 W. R. 41; 24 M. 136.** *See* Note 17 to s 437

7. Conviction for minor offence no bar to order of commitment for major offence.—Where an accused appears to have committed culpable homicide, his conviction by a Magistrate for a minor offence does not prevent his trial for murder, etc. The Sessions Judge if he thinks there is a *prima facie* case, may call on the accused to show cause why a commitment should not be ordered, and may thereafter order his commitment if satisfied that there is sufficient cause for it **Ratanlal 337.**

8. What amounts to 'discharge.'—The fact that no formal order of discharge for the graver offence has been passed is immaterial, for if the Magistrate convicts only for the minor offence, its effect is a discharge for the graver offence, by his declining to take action in respect of such graver offence, **15 C. 608.** *See* **24 M. 136**

which *overrules* **223 M. 225** and *dissents from* **20. C. 633.** The refusal of a Magistrate to proceed against certain persons mentioned in the report of the investigating Police-officer, was *held* to be in effect an order discharging them, **4 C. W. N. 242.** But until the Magistrate has so refused to act, a District Magistrate is not competent to proceed under this section or s. 437, **32 C. 783; 35 M. L. J. 667.** *See* Note 46 to s. 403.

9. Points to be considered in directing commitment.—An order by a Sessions Judge directing a Magistrate to commit an accused person who has been discharged by him, simply because the offence is triable exclusively by the Court of Session is bad in law, **Weir II, 260.** The fact that a superior Court might be disposed to take the view that the Magistrate discredited the prosecution evidence for insufficient reasons and discharged the accused without committing him for trial, is no ground for interference by it. **Weir II, 255; 31 M. 133.** Nor does a case come within the purview of this section merely because in the opinion of the District Magistrate the offence alleged to have been committed could not be adequately punished by a Magistrate, **1908 A. W. N. 189 = 8 Cr. L. J. 47.** It is the duty of the superior Court, in considering whether an accused person has been improperly discharged, within the terms of this section, so as to require him to be committed to the Sessions Court, to consider all the grounds upon which such an order of discharge has been passed, including a consideration of evidence which has not been believed or *held* to be sufficient to establish a *prima facie* case. Without doing so it would be impossible for the superior Court to find that the order of discharge was improper. Where the Magistrate had discharged the accused and the Sessions Judge refrained from considering the evidence of the witnesses whom the Magistrate considered to be unreliable because he thought he could hardly deal with all those questions "without prejudging the case and without making it difficult for him to hear it with a jury" but directed, a committal, *held* that the order must be set aside, as it had not been made on full consideration of the merits of the case as disclosed by the evidence taken before the Magistrate, **7 C. W. N. 77; 13 B. 376.** *See* also **1 Pat. L. J. = 17 Cr. L. J. 330.**

10. When commitment should be made and when fresh inquiry.—

(*i*) *When on the evidence already taken, there is a clear case, commitment should be made.*—In a case triable exclusively by the Court of Session, if the Sessions Judge or District Magistrate is satisfied that on the evidence taken, there is a clear case for committal and there is no reason for desiring a further consideration by the Magistrate, it would ordinarily be his duty to commit under this section, without ordering a further inquiry, **15 C. 608.**

(*ii*) *Where trial Magistrate omitted to take evidence, District Magistrate may himself take that evidence and commit.*—A Subordinate Magistrate having dismissed a case under s. 380, I.P.C., without taking certain evidence which, in his opinion, would have been of little value, the Magistrate of the district, on the application of the complainant, took such evidence and committed the accused for trial before the Court of Session. *Held*, on reference to the High Court, that as further evidence, in addition to that taken by the Subordinate Magistrate, was forthcoming, the District Magistrate's action was sustainable on the principle laid down in **2 C. 405; 4 C. 16.**

(*iii*) *Where fresh evidence has since come to light, fresh inquiry must be held.*—Where a District Magistrate directed a Subordinate Magistrate to commit the accused for trial, on the ground that since the order of discharge was made, fresh evidence had come to light which, if it had been available before discharge would have been sufficient to warrant the committal of the accused; *held*, that the order of the District Magistrate could not be sustained, as the accused had not an opportunity of cross-examining on the fresh evidence and that the proper order under the circumstances would be, to have directed a fresh inquiry under this section leaving the discretion of the Magistrate unfettered to commit or not, **Weir II, 550; 15 M. 39.**

(*iv*) *After issuing notice for commitment may direct further inquiry.*—A District Magistrate who had issued a notice to an improperly discharged accused as to why he should not be committed to the Court of Session is also competent on cause being shown to direct further inquiry, **18 C. 75.** *See* also **14 M. 334** at p. **337.**

(*v*) *Commitment cannot be made for offences which the accused was not charged.*—An order by a Judge directing a Magistrate to commit an accused person who has been discharged at a preliminary inquiry to take his trial in a Court of Session must specify the particular acts constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate, for otherwise a man might be committed for trial in respect of an offence of which he had never been accused or never even heard a word until apprehended under the commitment, **10 B. L. R. 285 = 19 W. R. 30; 21 W. R. 41.** *See* also **10 Cr. L. J. 554 (A.).** An order of commitment may, however, be made without a charge both under this section and s. 526, **27 M. 54.**

11. **Scope of the words 'under s. 435 or otherwise.'**—The words "or otherwise" do not mean, in any other way whatsoever, but in any other way provided by the Code, **10 C. 268.** On the other hand, if we put a wide and general construction, the whole of the limitation necessarily implied in s 435 would become unnecessary and such a result would suppose in the Legislature an absence of all intention, which ought not to be imputed or presumed *See* Note 3 to s. 439 and Note to s 438. The reasons for exercising the power conferred by this section are reasons which should arise upon the materials to be found on the record and not upon extraneous matter, **1890 A. W. N. 147.**

12. **Notice to accused absolutely necessary before acting under this section.**—The opportunity to show cause referred to in *proviso* (*a*) does not mean any opportunity, but the accused must have a special opportunity, **Ratanlal 588.** *Proviso* (*a*) being an exception to s 440, notice to the accused is absolutely necessary, **1 C. L. R. 93; 24 W. R. 70; 1 B 64.** The order is liable to be reversed when no notice is given, on the ground that the order of committal and the commitment made thereunder are illegal **6 M. 372; 22 W R. 67.** But where the Magistrate is asked to make further inquiry under *proviso* (*b*), then there is no express provision for notice Also where the trial has been held without any objection on the ground of want of notice, and the omission has not occasioned a failure of justice, the High Court will not in revision interfere, **7 C. 662 = 10 C. L. R. 8.** Where a District Magistrate being of opinion that an accused person is improperly discharged makes an order to commit him to the Court of Session, without giving any notice to the accused, but the committing Magistrate before so doing issues the notice, the irregularity in the proceedings of the District Magistrate comes within the terms of and is cured by s 537, **Ratanlal 899** where **7 C. 662** is *followed* In **15 M. L. J. 373** the District Magistrate directed a Sub Divisional Magistrate to commit an accused person in regard to an offence not exclusively triable by the Court of Session, without giving the accused an opportunity to show cause before the District Magistrate himself *Held* that not only the order was without jurisdiction, the opportunity to show cause, given before the Sub Divisional Magistrate could not be regarded as a compliance with the law, though the Sub-Divisional Magistrate forwarded a statement of the accused to the District Magistrate The order of the District Magistrate was therefore set aside This case was *followed* in **23 P. W R. 1913 = 312 P. L R. 1913 = 14 Cr. L. J. 605.**

13. **Section does not preclude revival of proceedings by same or another Magistrate.**—Fresh proceedings may be taken by the Magistrate who passed the order of discharge or by another Magistrate without any order from a superior Court, provided he is competent to take cognisance of the offence **29 C. 726; 29 M. 126 (F.B.)** which *overrules* **28 M. 255** and *follows* **29 C. 726; 1 B. 64.** Even if the order of the District Magistrate or Sessions Judge directing a further inquiry be set aside as wrong, proceedings held by a Subordinate Magistrate as a result of such order, need not necessarily be void if the Subordinate Magistrate had jurisdiction, even without the order for further inquiry, **18 W. R. 39,** and even if the District Magistrate had refused to order further enquiry the Subordinate Magistrate may take fresh proceedings, **36 C. 415.** The Police and the Magistracy are not precluded by a Magistrate's orders of discharge from reviving a charge against a person who was discharged if in their judgment there is sufficient reason for holding that the discharge was made on a wrong view of the facts, **Ratanlal 350; 36 C. 415.** *See* Note 3 to s 437 Notes 16—18 to s 253 and Note 11 to s 209

14. **Section does not apply to Presidency Magistrates.**—The provisions of this section and s 437 do not apply to Presidency Magistrates who can revive a complaint even after discharge **1 C. W. N. 49** *followed* in **8 C. W. N. 169, 28 C. 211; 28 C. 652; 33 C. 1282 and 29 C. 726.** But the High Court can interfere with the orders of Presidency Magistrates under s 439 read with s 423, **36 C. 994; 14 M. L. T. 200 = 14 Cr. L. J. 529.** (*See* Note 43 to s 439, and under s 15 of *the Charter Act* and s 20 of *the Letters Patent,* **26 C. 746** and **27 C. 126.**

15. **Revision of order of commitment by High Court—Difference between sections 215 and 439.**—An order of commitment made under this section can be quashed by the High Court acting under ss 435 and 439, on points of law as well as of facts though not under s 215 **27 M. 54; 12 C W. N 117 = 6 C. L. J. 760 = 6 Cr. L. J. 406; 13 Cr. L. J. 373 (M.), 1908 A. W. N. 189.** S 215 refers only to a commitment actually made, **7 C. W. N. 327; 14 M.** [illegible]
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it where it is manifest that the order under this section is improper, *e.g.*, where there is no evidence to prove the offence charged or where it is clear that the Court would not act on the evidence, **30 M. 224** It is evident from the words used in s 436 that the fullest and widest discretion has been given to District Magistrates or Sessions Judges and when an order for commitment has been made, the High Court should be most unwilling

to interfere and should require strong grounds before setting aside such an order, **26 A. 564; 13 A. L. J. 111 = 16 Cr. L. J. 139.** *See* Note 45 to s. 439. But an order of committal, made by the High Court itself under s. 525 cannot be so revised, **27 M. 54.**

16. High Court not to be moved ordinarily, where District authorities have power to grant relief.—Ordinarily the High Court will not be ready to exercise its revisional powers, where the District Magistrate or Sessions Judge have concurrent jurisdiction in the matter, **1887 A. W. N. 105,** especially so as the order of the District Magistrate or Sessions Judge under this section or s. 437 is liable to be revised in its turn by the High Court, **15 C. 608** and **p. 621,** *see* Note 23 to s. 439.

17. On fresh evidence Sessions Judge may grant relief once refused by High Court.—The District Magistrate having dismissed a complaint under s. 203, complainant's prosecution was ordered for an offence under s. 211, I.P.C. The High Court refused to interfere with the order under s. 203 and the order directing prosecution. The Sessions Judge tried the complainant under s. 211, I.P.C., and on acquitting him, directed a further inquiry into his original complaint. *Held,* the order directing further inquiry was valid notwithstanding the previous refusal of the High Court, as the order now made by the Sessions Judge was upon materials totally different from those which were before the High Court when further inquiry was refused, **7 C. W. N. 80.** Where, however, a Sessions Judge acting under s. 476, sent an accused to be tried for an offence under s. 193, I.P.C. the Magistrate discharged the accused. Then the Sessions Judge acting under this section, issued a notice to the accused calling upon him to show cause why he should not be committed for trial for an offence under s. 195, I.P.C. *Held,* that his latter order should be set aside as it was open to the Sessions Judge if he thought proper, to have directed the accused to be committed for trial on the same evidence which was before him when he acted under s. 476, and that the accused having been discharged in the trial for the offence under s 193, I.P.C., it was not proper to order a prosecution for an offence under s 195, I.P.C., on the same facts unless on exceptional grounds, **Weir II, 549.** *See* also **10 Cr. L. J. 654 (A.)**

17-A. Continued Jurisdiction.—Where the Magistrate passed an order under s 209 discharging the accused and the Sessions Judge refused to set aside that order but at a later stage after perusing the entire evidence he directed that the accused may be committed to the Sessions, *held* that the latter order was valid in law. Jurisdiction to make such an order is a continuing jurisdiction and is not barred because a previous application was refused. The case is analogus to the case of an order of dismissal or discharge, **33 C. W. N. 974.**

18. Witness should not be suddenly committed on information elicited in examination.—Immediately after the petitioner's evidence had been recorded in the trial of certain persons, for giving false evidence, then being held in the Sessions Court, he was asked certain questions by the Sessions Judge as to his liability to be committed to the Court of Session on a charge of murder, and he was eventually so committed. *Held,* quashing the committal, that the consequences to public justice would be very serious if a witness, during the course of his deposition, and before being absolved from his oath as a witness, were liable to be suddenly called upon to show cause why he should not be committed for some other distinct and serious crime of which a Magistrate had discharged him, **Ratanlal 588.** *See* s. 351.

438. (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered may order that the execution of such sentence be suspended, and if the accused is in confinement that he be released on bail or on his own bond.

Report to High Court

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this chapter in respect of any case which may be transferred to him by * * or under any general or special order of the Sessions Judge."

Notes.– 1. Courts empowered to report.—In addition to the two principal officers [illegible] the Sessions Judge and District Magistrate,—this section confers a similar power on an Additional Sessions Judge, but restricts it to cases transferred to him by the Sessions Judge, **1903 A. W. N. 25;** [illegible] the power of District Magistrate can never be exercised by the Joint Magistrate of the district, **14 W. R. 23.** [illegible]

* The words [illegible] inserted [illegible] were [illegible] the words "by the Sessions Judge" by Act [illegible]

Joint Magistrate is nowhere employed in the present Code A Deputy or Sub-Divisional Magistrate though in charge cannot act under this section *See* Note 7 to s. 435

2. Scope of the words "or otherwise."—'We think that these words being words of general importance following the particular words, 'under section 435,' must be construed according to the usual rule and that they mean not 'in any other way whatsoever' but 'in any other way provided by the Code,' **10 C. 268.** The Court declined to accept the contention that the words 'or otherwise,' gave the District Magistrate a power quite independent of the power conferred upon him in cases in which he has proceeded under s 435 That these words cannot, of course, have reference to any power outside the Code is clear from the fact that the Code created the judicial officers whose powers are dealt with therein and their powers must necessarily be found within the four corners of the Code, **36 M. 275** The words 'or otherwise' were not intended to confer upon the District Magistrate the power to question the propriety of an order of a Sessions Court and refer the matter to the High Court, **28 A. 91; 23 C. 249; 2 N. L. R. 149 = 4 Cr. L. J. 422.** *See* Note 11 to s 436 and Note 3 to s 439

2-A. Where the Sessions Judge refused to make a reference once but subsequently did so on the ground that certain new facts had come to his knowledge, ***held*** that this section contemplates such a reference. The wide words "or otherwise" are put in to meet exceptional cases, **29 Bom. L. R. 480.**

3. Limitations to powers of reference.—

(*i*) *Limited to proceedings of inferior Criminal Courts—s* 435 (1).—The power conferred by this section read with s. 435 upon a District Magistrate to make a reference to the High Court refers clearly to "proceeding before any inferior Criminal Court" By the words "or otherwise" in this section the Legislature never intended to give to a Magistrate the power to question the propriety of a judgment or sentence passed by a superior criminal authority such as a Sessions Judge, **23 C. 249** and **250; 18 Bom. L. R. 796.** It would be contrary to every principle to allow a District Magistrate to report against an order of the Sessions Court to which he is subordinate, **28 A. 91; 2 N. L. R. 149 = 4 Cr. L. J. 422; 23 M. L. J. 732 = 13 Cr. L. J. 714; 36 A. 378.** An order of the Sessions Judge in the exercise of his powers under section 437 cannot form the subject matter of a reference to the High Court at the instance of the Magistrate whose order has been interfered with, **49 All. 443.** This section does not empower a District Magistrate to refer to the High Court the proceedings of a Superintendent of Police, the latter not being a "Court subordinate to" Magistrate, **Ratanlal 133.** *See* Note 15 to s. 435 **46 A. 851.**

opinion that it is open to him to revise the proceedings of a Subordinate Court on grounds extraneous to the record as, *e g*, where an order has been obtained by the trick or fraud of a party He should also call for the explanation of the Subordinate Magistrate and embody such explanation in his report, **8 C. 644.** *See* Note 30 to s 435

4. Cases of acquittal not to be reported under this section.—If dissatisfied with an order of acquittal the proper procedure for a District Magistrate to adopt would be to move the Local Government to exercise its powers under s 417 and not directly make a reference under this section, **24 A. 346; 1902 A. W. N. 89; 15 M. 86.** Any reference under this section the object of which is to induce the High Court to set aside an acquittal, cannot be entertained on the revisional side, **25 A. 128.** *See* also **19 W. R. 55; 13 P. W. R. 1907 = 8 Cr. L. J. 438** (where **13 P. R 1905** is *overruled* and **12 P. R. 1906** *referred to*), **5 N. L. R. 4 = 9 Cr. L. J. 211; 8 M. L. T. 380 = 1910 M. W. N. 517 = 11 Cr. L. J. 622; 12 A. L. J. 253 = 15 Cr. L. J. 304** "It seems to me that to entertain proceedings by way of revision on a District Magistrate s report in a case where an appeal would lie from an acquittal is contrary to the spirit if not to the letter of sub sec (5) of s 439" *Per* MILLER, J, in **38 M. 1028; 44 C. 703; 5 L. 16.**

5. Power of reporting discretionary and when it may be exercised.—The words "*if he thinks fit*" in this section indicate that the District Magistrate or Sessions Judge *is not bound* to refer every case in which he may detect an error, **20 W. R. 40.**

(*i*) *Reference must be made when order contrary to law or sentence too severe.*—When a Sessions Judge considers that a judgment or order is contrary to law or that the punishment is too severe, he may properly report the proceedings to the High Court, **20 W. R. 50.** The District Magistrate should report to the High Court

all cases in which he considers the orders of a Subordinate Magistrate to be illegal, leaving it to the High Court to determine whether or not the illegality requires correction, **Weir II, 564.** But the taking by the Sessions Judge, of a different view of the evidence from that taken by the Magistrate is no ground for a report or reference, **18 W. R. 7** and **39.**

(*ii*) *Reference should be made only when there is a failure of justice.*—If a punishable offence has been committed and a proper punishment has been inflicted, he should abstain from further proceedings, unless from any irregularity, a failure of justice has been caused. Thus, where the recommendation would be merely to alter the conviction of an offence to another cognate offence no report should be made, **9 C. 847 = 12 C. L. R. 451.**

6. **When reference should not be made?—**

(*i*) *When reporting officer might dispose of the matter himself.*—Where an accused, charged with theft was discharged by a first-class Magistrate and District Magistrate referred the case to the High Court; *held*, that the High Court need not interfere in a mere case of discharge, the District Magistrate being competent to take steps himself, should he deem it necessary, **Ratanlal 290 (F.B.).** Similarly, if a Subordinate Judge refuses to grant sanction for prosecution, the Sessions Judge to whom he is subordinate might himself grant it, without referring to the High Court, **Ratanlal 937; 9 W. R. 6; 11 W. R. 24.** An Appellate Court is incompetent to refer to the High Court in a case in which an appeal lies to it, **7 P. W. R. 1910 = 62 P. L. R. 1910 = 15 Cr. L. J. 485.**

(*ii*) *Cannot refer when appeal or application pending.*—The Sessions Judge is not competent to refer a case for enhancement of sentence, unless he has heard the appeal filed against the conviction. He can only refer the case under the provisions of s. 438, when he is satisfied as to the propriety of the conviction, **6 A. L. J. 421.** Where a Sessions Judge hearing an appeal is of opinion that a person should be acquitted, he ought not to refer the case to the High Court, but he should himself dispose of the appeal, **13 A. L. J. 477 = 16 Cr. L. J. 433.** S. 438 was not intended to enable the District Magistrate to get the opinion of the High Court on a question of law arising in a case pending before him or to transfer the decision of a difficult case pending before him to the High Court. The Magistrate can refer only in a case where the proceedings are not themselves the subject of a revision case in an appeal case pending before him as it is his duty to pass a judicial order himself in that case, **15 Cr. L. J. 472 (M.).** Neither s. 438 nor any other provision of the Code authorises a District Magistrate to refer a point of law arising in an appeal pending before him. It is the business of the District Magistrate to dispose of the appeal before him and if he should so improperly refer, his order can be revised at the instance of the party aggrieved, **7 P. W. R. 1914 = 62 P. L. R. 1914 = 15 Cr. L. J. 485; 7 L. B. R. 251 = 15 Cr. L. J. 667.**

(*iii*) *Where trial void for want of jurisdiction.*—When an offence is tried by a Court without jurisdiction, the proceedings are void under s. 530, and it is not necessary in case of an acquittal for the High Court to upset the acquittal before re-trial can be had, **8 B. 307; 31 A. 317,** and *see* Notes 18 and 19 to s 403.

(*iv*) *Magistrate should not make reference on mere representation of complainant.*—A District Magistrate reported the proceedings of the second-class Magistrate of *A* on the representation of the District Superintendent of Police who had himself been the complainant in the case before that Magistrate; *held*, that the District Magistrate acted irregularly in forwarding with his own incomplete report the communication addressed to him by the complainant protesting against the second-class Magistrate's decision. The circumstance, that the complainant holds office as District Superintendent of Police, can give him no right to make any representation to the District Magistrate in the form of an official letter or memorandum in a case in which he is personally interested, nor can the High Court take such letter or memorandum into consideration when dealing with the case, **Ratanlal 340.**

(*v*) *When an order has already been made under s.* 435.—*See* **26 M. 477; 17 M. L. J. 153 = 5 Cr. L. J. 132; 10 P. R. 1912 = 14 Cr. L. J. 134** and *see* Note 9 under s. 435.

7. **Provincial Magistrates not empowered to refer questions for opinion of High Court.**—There is no provision in the Code which enables a Judge to stop a trial already commenced and refer to the High Court any question or questions of law arising on the merits in that case, **Ratanlal 214.** In **2 A. 771,** a Sessions Judge after having asked the assessors their opinion in a case which was being tried by him, suspended the trial of the case and made a reference to the High Court under this section on a question of jurisdiction which had arisen in the trial of the case. *Held*, that it was not intended that the section should be so used and that the Sessions Judge should have disposed of the question himself. The Code of 1861 like s. 617 of the *Civil Procedure Code of* 1882 empowered the Sessions Court to send questions for the opinion of the High Court, but

the present Code contains no such provision (except in the case of a Presidency Magistrate, *see* s 432), **27 A. 25; Oudh H. C. 64** and **71; 5 O. C. 316 (1902)** *See* Note 5 to s 432 Also the difference in the language employed by the old Code, *viz*, "*shall refer* and '*may report*' of the present Code is noteworthy

8. Conditions for suspension of sentence and admission of accused to bail.—Where the District Magistrate was not competent to refer a case under this section to the High Court, he had no authority to admit the accused to bail, **18 C. 186**; nor has he such power under this section if the report does not contain a recommendation that the sentence be altered or reversed **23 W. R. 40; 3 C. L. R. 404.** Also, the District Magistrate cannot exercise the power of suspending the sentence and admitting the accused to bail on a mere application for consideration of a case He can do so only after consideration and on making the report

9. Power of Sessions Judge to stay proceedings pending revision by High Court.—Criminal proceedings supported by a sanction were instituted against the accused The accused put in a revision petition under s 435 to the Sessions Judge against the order according sanction The Sessions Judge ordered proceeding to be stayed, pending the disposal of the reference by the High Court *Held*, that the order was *ultra vires* and that the Sessions Judge had no power to stay a prosecution instituted in pursuance of the sanction in a Court which is not subordinate to the Sessions Judge This section provides in what way he may take action in favour of an accused pending the disposal of his reference and recommendation to the High Court *Quære* Whether he could stay proceedings, even where the Magistrate is subordinate to him? **26 M. 137. In 9 P. W. R. 1916** it was laid down that a Sessions Judge has no power at all to stay criminal proceedings pending before a Magistrate subordinate to him *See*, however, **12 P. W. R. 1916.**

10. Form and contents of reference.—All references submitted to the High Court under this section are to be accompanied by the record of the case, and by a statement of the case in English, giving—(1) a brief abstract of the case, (2) the sentence or order of the Lower Court, and the name of, and the powers exercised by the Magistrate passing it, (3) the particular portion of the finding, sentence, or order, which is considered incorrect, illegal or improper, or the particular portion of the proceedings which is considered irregular (4) the grounds upon which it is proposed that the High Court should exercise the powers conferred by s 439, (5) a statement (where appropriate) showing how much of the sentence the accused has undergone, and if he has been sentenced to fine or whipping whether the fine has been realised or the whipping has been inflicted.—*Pun Cir*, p 290, *Bom H C Cr Cir*, p 47 More than one case should not be submitted with one letter Each case should be accompanied by a letter and statement referred to above The fact of the reference and a copy of its terms should be communicated by the Court making it to the Lower Court.—*Bom H C Cr Cir*, p 47 C P Cr Cir. requires the following information in addition to the above —Subordinate Courts should, whenever it may seem desirable to do so be called on to submit an explanation with regard to the point on which it is proposed to make the reference and the explanation should be sent with the statement of the case In cases in which an [illegible]

out in the case of an appeal being preferred, do not apply to a reference under this section, so that when a recommendation is made, that a sentence of whipping be reversed, the execution of such sentence should always be suspended by express order under the provisions of the latter section.—*C P Cr Cir*, No 46

11. What the report should contain.—The recommendation should contain a definite recommendation that the sentence be altered or reversed, **27 A. 25.** The Magistrate ought to give a brief abstract of the case and the grounds upon which he recommends the order or sentence he considers to be incorrect should be set aside by the High Court, **9 Cr. L. J. 502 (M.)**, *see* also **51 A. 663.** The order of reference should set forth the point on which orders are required when a case is referred to under this section, **Oudh S. C. No. 64.**

12. Referring Judge has no power to take evidence.—S 438 does not empower the District Magistrate to take evidence and if he had power to take evidence it was only for the purpose of a recommendation to the High Court and the High Court cannot refer to such evidence to pass a final order in the case, **12 A. L. J. 461 = 15 Cr. L. J. 575.** Neither s 435, nor s 438 nor any other section empowers a District Magistrate to take further evidence with a view to reporting the case, **3 Bom. L. R. 677.** *See* Note 19 to s. 435

High Court's powers of revision

439. (1) In the case of any proceedings the record of which has been called for by itself or which has been reported for orders, or which otherwise come to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections* 423, 426, 427 and 428 or on a

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all cases in which he considers the orders of a Subordinate Magistrate to be illegal, leaving it to the High Court to determine whether or not the illegality requires correction, **Weir II, 564.** But the taking by the Sessions Judge, of a different view of the evidence from that taken by the Magistrate is no ground for a report or reference, **18 W. R. 7** and **39.**

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High Court's powers of revision

439. (1) In the case of any proceedings the record of which has been called for by itself or which has been reported for orders, or which otherwise come to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections* 423, 426, 427 and 428 or on a

* The figures 195 were omitted by Act XVIII of 1923

Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or Magistrate of the first class.

(4) Nothing in this section applies to any entry made under section 273, or, shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

*"(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-sec. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

Notes.—1. Sections of the Code indicating revisional jurisdiction.—*See* s. 106 (3).—Power to require security for keeping the peace on conviction. S. 423.—Powers of Appellate Court in disposing of appeal. S. 426.—Power of suspending sentence and releasing appellant on bail pending appeal. S 427.—Power to order the arrest of the accused in appeal from acquittal. S. 428.—Power of Appellate Court to take further evidence or direct it to be taken. S. 338.—Power to direct tender of pardon. Under s. 350, prov. (*b*) the High Court may set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court be of opinion that the accused was materially prejudiced. *See* also ss. 232, 437 and 520, which confer special powers of a revisional nature on the High Court.

The changes effected in this section by the new amendment are few.

Section 195 is omitted from sub-sec. (1) because sub-sec. (6) of s. 195 giving power to revoke or grant sanction to the higher authority is omitted from s. 195 under the present Code.

Sub-sec. (6) is newly added to this section. Under it an opportunity is given to an accused person of showing cause against his conviction when the High Court calls upon him to show cause why his sentence should not be enhanced. *See* **27 Bom. L. R. 1348** *for a judicial interpretation of the sub-section (6).*

ANALYSIS OF NOTES.

I.—SCOPE OF REVISIONAL JURISDICTION OF HIGH COURT.

2. Revisional jurisdiction under the old and present Codes.—The powers conferred by this section in the present Code, are larger than any exercised by the High Court under the Code of 1872, **Weir II, 538; 36 C. 44.** Under the 1872 Code, revisional jurisdiction was limited "to material error committed in *judicial*

* This sub-section was added by Act XVIII of 1923.

proceedings" i.e if such error had occasioned a failure of justice 19 W. R. 28 The Code of 1872 limited the High Court's power of revision to cases of *material errors* committed in *judicial proceedings* while the present Code gives it a wider latitude by allowing it to act in its discretion Interference with findings of facts will be regulated in the same manner as interference with the verdict of a jury, 14 B. 331; Ratanlal 177; also 21 C. 931. As to meaning of the term '*material error*, *see* 19 W. R. 28; 20 W.R. 40; 21 W.R. 83; 24 W.R. 60; 2 M. 38; 2 C. 110, 2 A. 336; 3 A. 543. But it should be noted that s. 439 must be read along with and subject to s. 435 Under the present amendment by the omission of sub-sec. (3) orders made under ss 143 and 144 and proceedings under Chap XII and s 176 have now become proceedings liable to be revised So under the present Code as amended these proceedings are proceedings within the meaning of s. 435, and to this extent the power of the High Court is extended

3. S. 439 must be read along with and subject to s 435.—'It is clear that ss 435 439 must be read together as pointed out by WATSON J, in 15 C. 608 at p. 617. S 439 must, therefore, be read along with and subject to the provisions of s. 435' It follows that an order made by a Civil or Revenue Court cannot be revised under s. 439, 40 C. 477 (F.B.) *See* also 26 A. 249 One of the referring Judges, in 40 C. 477, IMAM, J, was, however of opinion that s. 439 is much more general and much more extensive in its comprehension than s. 435 and does not limit the powers of the High Court to proceedings of inferior Criminal Courts. 'S 439 is not independent of s. 435 The summoning of the record must be a necessary preliminary to any action which a High Court may take under s. 437 or s. 439 'Ss 435—438 prescribed the method by which the records of any criminal case come to the High Court and the power of the High Court to deal with the record is in s. 439, ss 435—438 provide the machinery and s 439 gives the power to dispose of the record' It seems clear, therefore, that the language in s 439, 'the record of which has been called for by itself is not used in contradistinction to 'which othewise comes to its knowledge' but as contrasted with 'which has been reported for orders' and that it has reference to the recognised channels by which the High Court becomes seized of the case, that is to say either by calling for the record itself or by having the case reported to it under s 438 by a Sessions Judge or District Magistrate who has himself called for the records under s. 435 and whether it has called for the record itself or is dealing with it where the records has been called for by a Sessions Judge or District Magistrate and reported to it, in either case the Court is acting both of its own motion and on petition. There is, therefore no room for the reading of those words "otherwise comes to its knowledge as having reference to petition. It cannot be suggested that without those words or the word 'otherwise in s 437, the High Court, a Sessions Judge or a District Magistrate could not act on petition. When once this is clearly understood, the difficulty raised by the omission of the Legistature to insert the words 's 439' in the exception clause disappears S 435 is the initial power whether exercised by the High Court or the Sessions Judge or the District Magistrate, and whether of their own motion or on petition. When the Legislature took away this power, it cut off the jurisdiction of the High Court at its fountain head. The machinery, by which the High Court became seized of the case under the Code being gone, it was unnecessary to forbid the exercise of powers which depended on such seizin. 36 M. 275

The words '*otherwise come to its knowledge*' cannot have reference to the power of the High Court under *the Charter Act* in the exercise of its superintendence to call for records and then proceed to exercise the powers under s 439 A wider meaning should not be given to these words in s 439 than what is attached to the same words in ss 437 438 If the words in these sections are limited to the powers to be found in the Code (*see* 10 C. 268—92) as they must be, the words in s 439 should be similarly limited They are not words which confer a power, but they are words which save any power which exist, 36 M. 275.

4 Revisional powers conferred by ss. 436 and 439 compared—Under s 436 the Legislature has conferred a special jurisdiction on the High Court as well as on the Sessions Judge and District Magistrate in cases of dismissal and orders of discharge as to which there is no right of appeal It was therefore, the intention of the Legislature that the High Court should have a free hand in interfering under s 436 than under s 439 When the Legislature is not satisfied that the general revisional jurisdiction established by it is sufficient to deal with a particular class of cases and creates a special revisional jurisdiction in such cases, the special juris diction should be exhausted before the general jurisdiction is resorted to 32 M. 220 (F B.). *See* Note 4 to s 437

5 Extraordinary jurisdiction of High Court under s. 15 of Charter Act and s 28 of Letters Patent.—In 26 C. 188 it was held that the powers of the High Court under *the Charter Act* are not affected by s 435 In 26 A. 144 it was laid down that s 15 of *the Charter Act* does not override sub-sec (3) of section 435 so as to enable the High Court to interfere with an order duly passed by a Magistrate under Chapter XII, etc In 36 M. 275 it was laid down that the power of supervision under *the Charter Act* was limited to question of jurisdiction,

but the imposing of any such limitation was not approved of in **26 M. L. J. 208.** *See* also **25 A. 537 ; 24 A. 315** and **443 ; 25 C. 852 ; 27 C. 892** and **918 ; 26 C. 625 ; 28 C. 416** and **709; 24 B. 527** and **36 C. 994.** *See* also Notes at pp. ii and vi of Appendix. But now sub-sec. (3) of s. 435 is omitted.

It is now laid down that clause 28 of the Letters Patent does not give the High Court jurisdiction to revise the order of a Secretary to Government of Bengal issuing a warrant under the *Goondas Act* (Beng. I of 1923) as such Secretary was not an officer or Court possessing criminal jurisdiction in 1865 nor was the case subject to reference to, or revision by, the High Court at the time. Such Secretaty is not "an inferior Criminal Court" within section 435 of the Code and the High Court cannot interfere under section 439 in the case of a warrant issued under the Act. **51 C. 460 ; 53 Cal. 962.**

6. Right of Chartered High Court to issue writ of certiorari sending for proceedings of inferior Courts.—In **36 M. 72** it was contended that a Superior Court like the High Court of Madras had inherent jurisdiction to issue a writ of *certiorari* to quash all proceedings of a judicial nature wheresoever and by whomsoever held within the ambit of its jurisdiction and such a power is not confined to the limits of its original jurisdiction, SUNDARA IYER, J., *held* that the right of superintendence is confined to Court subject to its appellate jurisdiction and does not extend to all judicial proceedings *held* by Courts not subject to its appellate jurisdiction and that the High Court of Madras had no jurisdiction to quash, on return to a writ of *certiorari*, the proceedings of a Divisional Officer in the mofussil deciding an appeal under the *Income Tax Act*; while SADASIVIER, J., was of opinion that the power to issue the writ of *certiorari* to quash Judicial Proceedings passed by persons in the mofussil does belong to the Madras High Court though, of course, the power should not be invoked excepting very extraordinary cases, *see* also **29 C. W. N. 898.**

7. High Court cannot revise its own judgments.—The first four lines of s. 439 show beyond all possibility of doubt that the record which is referred to in that section is the record of some Court other than the High Court, **14 C. 42 (F.B.).** *See* Notes 15-16 to s. 369, and Note 3 to s. 450. The High Court has no power to review an order of one of its Judges, **7 A. 672.**

(*i*) *Passed on appeal.*—When the High Court has dealt with a case as a Court of Appeal, it will not afterwards deal with the same case as a Court of Revision, except possibly to cure a very manifest injustice. The Code nowhere allows a *review* of an order of the High Court in a criminal proceeding, **Weir II, 573** whether appellate or revisional, **10 B. 176 (F.B.) ; 19 B. 732 ; 23 B. 50 ; 8 C. 63 ; 1905 U. B. R. (Cr. P. C.) 35 = 2 Cr. L. J. 465 ; 8 P. R. 1909 = 10 Cr. L. J. 314 ; 5 W. R. 61 ; 17 W. R. 2 ; 4 B. 101 ; 10 B. 176.** Even the discovery of fresh evidence would not give the power of review, **Ratanlal 458.**

(*ii*) *Passed by single Judge exercising original criminal jurisdiction.*—There is neither appeal nor revision against the judgment of a single Judge exercising original criminal jurisdiction to a Division or Full Bench, **1 P. R. 1909 = 6 P. W. R. 1909 = 9 Cr. L. J. 306 ; 4 P. R. 1909 = 10 P. W. R. 1909 = 41 P. L. R. 1909 = 9 Cr. L. J. 378.** *See* also **8 C. 63 ; 10 B. 176 ; 27 A. 92 ; 14 C. 42.**

(*iii*) *Passed by Bench exercising revisional jurisdiction.—See* **1 P. R. 1909 = 9 Cr. L. J. 306; 4 P. R. 1909 = 10 P. W. R. 1909 = 41 P. L. R. 1909 = 9 Cr. L. J. 378 ; 8 P. R. 1909 = 10 Cr. L. J. 314; 19 B. 732 ; 8 C. 63 ; 14 C. 42 ; 7 A. 672 ; 3 A. 545; 15 A. 61 ; 14 A. L. J. 61.**

7-A. Exceptions—

(*i*) *Appeal under s.* 15 *of the Letters Patent.—See* s. 15 of the Letters Patent at p. iv of the Appendix. As revision under s. 439 is a matter of discretion, it would require a very strong case for a Letters Patent appeal to succeed against the decision of a single Judge of the High Court passed in revision, **26 M. L. J. 233 = 15 M. L. T. 230 = 15 Cr. L. J. 362.**

(*ii*) *Order made summarily without notice.*—High Court can set aside an order dismissing an appeal or application summarily for default of appearance, **10 C. L. J. 80 = 10 Cr. L. J. 287 ;** but in **23 M. L. J. 371 = 12 M. L. T. 360 = 13 Cr. L. J. 710** it was held that the High Court has no power to review an order made by it in the exercise of its revisional jurisdiction even where the application had been dismissed for default and **7 M. H. C. R. 29** was *distinguished.* The power to re-hear a petition once dismissed is not inherent in a Court. *See* Note 1 to s. 430, and also **27 A. 92.** In **18 W. R. 33 = 9 B. L. R. 342,** the High Court cancelled its order passed without notice to the Magistrate or to the Government. *See* also **7 Bom. H. C. Rep. 67** and Notes 33 and 33-A.

Where the High Court under s. 439 enhanced sentence without giving the accused sufficient opportunity to be heard, the High Court acts without jurisdiction and its order is void *abinitio.* It is therefore open to the High Court, in spite of the previous order, to decide the case on the merits after giving proper notice to the

accused But where an order is passed in a criminal matter within jurisdiction, it becomes final as soon as it is signed and thereafter there is no power in the Court to review or alter the decision **47 M. 428 = 46 M L. J. 496.**

(iii) *Order made without jurisdiction*—Under a misconception the High Court granted leave to appeal to the Privy Council against an order granting sanction in a proceeding under s 10 of the Letters Patent, the High Court reviewed its own order and set aside the order granting leave to appeal **47 C. 734** *See also* an unreported case referred in **8 C 63** at **p 67.**

(iv) *To other orders*—*See* **27 M. 54** order passed under s 526 (1) (iv) **14 C. 42** (order on a reference under s 307) **8 C. 63** (application for transfer).

(v) *May revise orders before they are sealed and issued*—When the order rejecting the petition is signed but not sealed, the Judge may review his order, **21 A. 177; 27 A. 92; 14 A. L. J. 61.** *See* Note to s. 369, *see*, however, **1915 M. W. N 786 = 16 Cr. L. J. 697.**

8. Limits to the local jurisdiction of the Bombay and Calcutta High Courts—

(i) In **24 B. 471** it was *held* that the High Court of Bombay has no criminal revisional [illegible] over the proceedings of Her Majesty s Council within the dominions of *the Sultan of Muscat*.

(ii) Similarly, the Calcutta High Court has no power either by way of appeal or revision to [illegible] with a sentence passed by the Superintendent of *the Tributary Mahals*, when exercising [illegible] offences committed in *Mourbhanj*, a place not situated within the limits of British India, **7 C. 523; 8 C. [illegible], 9 C. 288** or over the Political Resident at Manipur **12 C. W. N. 602, 7 C. L J. 171 = 7 Cr. L. J. 198** As [illegible] the High Court has still powers of revision under *the Charter Act* and the *Letters Patent* over the [illegible] *Cachar Hills* *see* **26 C. 874** *See* Notes to s 1 at p 3

in order to prevent gross and palpable failure of justice, but it should not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code, **36 A. 403.** The High Court must not allow what would virtually be an appeal from the order of the Court below. It is necessary to see whether there has been any error of law, any irregularity, any abuse of, a failure to exercise judicial discretion, such as would justify interference in revision, **10 N. L. R. 177 = 16 Cr. L. J. 161**; *see* also **7 Pat. 579.** Where it was *held* that sections 438 and 439 are intended to cover all cases of irregularity and injustice including acquittal coming to the notice of the High Court and it covers cases of erroneous acquittals in which the High Court will interfere under s. 439 at the instance of a private party as well as on reference by a Sessions Judge.

(*i*) *Distinction between criminal, revisional and civil appellate jurisdiction.*—' Application for revision in criminal cases stands on a fundamentally different footing from appeals against appellate decree in civil cases. In cases of the latter description the High Court is bound by the rigid provisions of s. 100 of the Civil Procedure Code, to act on findings of fact embodied in the judgment of the Lower Court. In criminal cases on the other hand, there is no such statutory restriction to the exercise of our jurisdiction,' **16 C. L. J. 453 = 13 Cr. L. J. 897,** *per* MOOKERJI, J., matters which are not urged before the first Court of Revision may be urged in moving the High Court, **40 C. 41.**

(*ii*) *High Court will not necessarily revise every order which may be illegal or irregular.*—Though according to the Privy Council Ruling in **25 M. 61,** it must be held that a trial which is not warranted by the provisions of the Code is altogether illegal and void, and not merely irregular and within the purview of s. 537, yet it would be entirely inconsistent with the letter and spirit of this section to hold that in every case of illegal trial, the High Court is necessarily obliged to interfere without due regard to the circumstances of the particular case. The illegality of a trial is no doubt *prima facie* good and strong ground for the exercise or revisional jurisdiction, but it is not imperative on the Court to take such action in every case, however small and scant, may be the necessity or reason for adopting such a course, so as to interfere with the conviction in every such case, especially where no prejudice is shown to have been caused by such illegality, **5 P. R. 1906 = 4 Cr. L. J. 75; 4 L. B. R. 315 (F.B.) = 9 Cr. L. J. 15,** where the fact that the accused did not apply for revision was stated as a ground for not interfering. *See* also **29 P. W. R. 1913 = 14 Cr. L. J. 599** where following **19 P. W. R. 1910 = 11 Cr. L. J. 389,** it was *held* that the High Court is not always bound to interfere under s. 439 even if the Court below is wrong in law where the accused has not been prejudiced. To justify interference it must be shown that there exists an error in law, and that the accused has been prejudiced by that error, **4 Bom. L. R. 686.**

The power of revision should not be so exercised as to make one portion of the Code conflict with another, as would be the case were the High Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code, **36 A. 403.**

10. There is no species of injustice which the High Court is powerless to correct.—"I would be strongly inclined to hold that no hard-and-fast limitation should be placed on the exercise of our powers of superintendence over the proceedings of inferior Courts. I would hold with WOODROFFE, J., in **12 C. W. N. 678 = 7 Cr. L. J. 499,** that there is no species of injustice which this Court would be powerless to correct under the Charter where its interference is called for, **27 C. 126; 27 M. 223; 31 M. 510; 28 M. 28; 21 M. L. J. 484 = 9 M. L. T. 273 = (1911) 2 M. W. N. 369** support the view that the High Court has plenary powers of interference under the Charter, where it is needed to incorrect injustice. *See* also **33 C. 68; 13 C. L. R. 275; 28 C. 709,** although a narrower construction was adopted in **27 C. 892** and **6 C. L. J. 705 = 6 Cr. L. J. 490."** *Per* SUNDARA IYER, J., in **14 M. L. T. 200 = 14 Cr. L. J. 529.** Ss. 435 and 439 give the High Court power to control the propriety as well as the legality of a finding, sentence or order of any inferior Criminal Court, and that necessarily imports power to regulate or revise the proceedings leading up to such finding, sentence or order. If, therefore, a sentence has been passed or confirmed by a Court which could not legally try, or should not have properly tried the case, the High Court has a discretion to interfere, **9 N. L. R. 81 = 15 Cr. L. J. 385.** It was contended that the Legislature did under s. 435 empower the High Court only to send for a record of a criminal case with a view to satisfy itself of the correctness, legality or propriety of any order passed therein and not to interfere with such order even though the High Court found it illegal, incorrect or improper and further that the High Court has no power to interfere with orders in respect of which no appeal would lie under this Code and that it has only such powers as are conferred on an Appellate Court under s. 423. *Held,* that under s. 439 very wide powers of revision were intended to be conferred on the High Court. The meaning of that section is that in any case to which s. 435 or 438 is applicable, the High Court can with reference to any particular order (whether appealable or not)

exercise all or any of the powers which under s 423 an Appellate Court could exercise if that order happened to be one open to appeal, and it was not intended by the Legislature that the High Court's powers of revision were to be limited merely to orders from which an appeal would lie Obviously the main idea is that the High Court should be in a position to rectify cases of injustice or illegality when the person affected is unable to appeal, **27 C. 126** *dissented from* **45 P. R. 1885** *distinguished* **42 P. R. 1885 (25 C. 238, 22 C. 131, 2 A. 398, 20 B. 843, 8 P. R. 1904 = 1 Cr. L. J. 514** *followed*), **33 P. R. 1910 = 12 Cr. L. J. 50.** In view of the wide provisions of s 439 it is difficult to say that the High Court is debarred from enquiring into the validity of the reasons for discharging the jury, **56 C. 1032.**

11. If proceedings are not bona fide or are manifestly illegal, High Court will interfere in spite of statutory prohibition.—If it is established to the satisfaction of the High Court that the proceedings are not *bona fide* and that in substance their continuance would mean an abuse of the statutory provisions on the subject, it is not only competent to the High Court, but it is its obvious duty to interfere with the proceedings of a Magistrate even at the initial stage when the Magistrate has before him a Police report sufficient to justify the commencement of proceedings under s 110, **17 C. W. N. 238 = 18 C. L. J. 467 = 14 Cr. L. J. 5.** When an illegal order is passed and action taken which involves matters coming within the purview of law, justice and within the scope of authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was acting not as a judicial officer, but in his executive capacity The High Court will interfere, **4 P. R. 1908 = 7 Cr. L. J. 202; 17 O. C. 263 = 15 Cr. L J. 663** Proceedings which merely purport to be under some provision of law which is not open to revision, but are not really so and do not conform to the statutory requirement will be dealt with in revision *see* **26 A. 144; 24 B. 527; 26 C 188** and other cases noted under Heading V below The High Court will revise an order of a Magistrate made without jurisdiction in spite of a provision that a conviction under the particular Act shall not be open to appeal or revision **2 S. L. R. 20 = 10 Cr. L. J. 233.** 'It is true that s 15 of the Extradition Act XV of 1903 ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III, but when the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law but is, in fact, without jurisdiction, not being sanctioned by it we cannot but assume that the Magistrate has acted in his general jurisdiction and as such his order is revisable by the Court and is liable to be set aside at the instance of the party whose liberty is affected by it,' **14 Cr. L. J. 673 (C)** where **7 Bom. L. R. 463=2 Cr. L. J. 439** and **21 P. R. 1886** are *referred to* *See* Note 16 to s 435

12. There can be no waiver as to defect of jurisdiction.—A plea of want of jurisdiction may be taken at any time, even in the High Court on revision though not taken in the Courts below, and the fact the accused may have consented to the jurisdiction will not cure the defect, **16 W. R. 69 (79) 23 W. R 59; 26 B 50 at p. 53.** Neither ignorance of parties nor silence on their part can vest a Magistrate with powers which the law does not give him *See* **10 C L. J. 432 = 11 Cr. L. J. 1.** No waiver on the part of the petitioners could confer on the Magistrate authority to act in a manner not prescribed by the Legislature *See* also **18 M L. J. 330 = 3 M. L T. 407 = 8 Cr. L. J. 152; 9 N. L. R. 81 = 14 Cr. L. J. 385, 1 S. L R. 98 = 8 Cr. L. J. 356, 9 Bom. L. R. 356 = 5 Cr. L. J 332; 12 C. W. N. 140 = 6 Cr. L. J. 434; 9 A. L. J. 51 = 13 Cr. L. J. 169** and Note 21 to s 233 But *see* **4 L. B. R. 315 (F.B.) = 9 Cr. L J. 15,** where it was *held*, that though the trial was vitiated by misjoinder of charges not curable by s 537, the conviction should not be set aside as the accused had not personally applied for revision as he pleaded guilty, and as no injustice seemed to have resulted

13 Consent of prisoner does not cure defective proceedings—Procedure prescribed by law must be followed.—Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner When the irregularities are all unfavourable to the prisoner, it is impossible for any Court to consider a waiver or consent as binding on him It is the duty of Magistrate and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure, and then attempting to protect themselves against the consequences of such departure by getting the accused person to say he consents to it *In the mofussil, most prisoners, not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest* There would be an end to all procedure if such an assent were held to warrant material and important irregularities.—*Per* MACPHERSON, J, in **2 C. 23** at **p. 30; 25 W. R. 57;** *see* also **6 C. 83** and **96** and **12 W. R. 3 = 3 B. L. R. Ap. Cr 20,** which citing **36 L. J. 51 (P.C.)** lays down that a prisoner on his trial can consent to nothing **4 Lah. 376,** *see* also **46 M. 117.**

14. Powers of revision are not limited by death of accused or expiry or sentence—The High Court is competent in revision, under this section to interfere with a conviction, even after the expiry of the sentence, **7 A.**

135 or the abatement of appeal where justice to the deceased convict's family requires that the sentence should be altered.—DR. STOKES, *Anglo-Indian Codes*, Vol. II, p. 26. In many cases a man's *status* is altered by conviction, and his future prospects in life may depend on the existence or annulment of the conviction. *See* 2 B. 564 and Note 34. In 16 Cr. L. J. 272 (M.) the Court, however, refused to revise an order under s. 144 which had ceased to be in force by efflux of time.

15. As a rule of practice powers of revision are limited by errors appearing on the record.—It has always been regarded as a sound rule of practice not to interfere when there is no error in law or on the face of the record, **4 B. L. R. 686; 22 C. 998; 6 S. L. R. 121 = 13 Cr. L. J. 771** and not to interfere in cases of acquittal in which Government might have appealed under s. 417 but has not done so, **38 M. 1028; 10 Cr. L. J. 160 (M.)**. But if an order was obtained by the fraud or trick of the party asking for it and which would not have been made, but for that fraud or trick there is nothing in s. 435 which would prevent the High Court from revising such an order even if it was one of acquittal. In **18 C. W. N. 646 = 15 Cr. L. J. 473**, the High Court in revising the sentence by a Sessions Court on appeal took into consideration a decision of a Settlement Court made after the appeal judgment of the Sessions Court as to the possession of the parties to the case and reduced the sentence through the finding of the Settlement Court was contrary to the finding of the Sessions Court. *See* Notes 20 and 73 below.

16. High Court though competent to deal with evidence in revision will not as a rule do so, except to prevent miscarriage of justice.—The High Court has jurisdiction to revise findings of facts in the case of findings of Courts of Appeal as well as of original Courts, and the law imposes no limit to this jurisdiction except the decision of the Judges who have regulated the discretion by rules which in practice limit its jurisdiction. *Per* JARDINE, J., **14 B. 331; 10 C. 1047; 10 B. 131.** It is unusual in revision to interfere with a finding of fact, unless it is one so manifestly erroneous, that a miscarriage of justice would result from its being uncorrected, **6 Bom. L. R. 1096.** "It is not correct to say that the law as laid down in the Criminal Procedure Code gives us no power to go into evidence in revision. The High Court has this power, but this Court has, as a matter of practice, *held* that it will not go into evidence as a rule, but will interfere only under special circumstances or where there is an error of law."—*Per* CHANDAVARKAR, J., **28 B. 533 at p. 545.** The rule of practice is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it.—*Per* ASTON, J., *ibid.* In **12 Bom. L. R. 21 = 11 Cr. L. J. 180,** it is stated by CHANDAVARKAR, J., that it has been the settled practice of the Bombay High Court to refuse to interfere in the exercise of its revisional jurisdiction in regard to findings of fact, except on very exceptionable grounds such as a mis-statement of evidence by the Lower Court, or the misconstruction of documents or placing by that Court of the *onus* of proof on the accused contrary to the law of evidence and, **8 B. 197, Ratanlal 244, 14 B. 331** are *referred to.* That in exceptional circumstances, the High Court may and should interfere on questions of fact is obvious, such as where there has been a conviction of a clearly innocent man, and but for the powers given to the High Court to interfere as a Court of Revision, the only remedy would be by petition to the Governmeut to exercise its powers of prerogative.—*Per* ASTON, J., in **8 Bom. L. R. 851 = 4 Cr. L. J. 446, 20 A. L. J. 276.**

'In revision it is open to the High Court to consider whether there has been any misappreciation of evidence, and if the Court has power to do so and if a convicted person claims to be heard to show that the Lower Courts have misappreciated the evidence in the case and that he has been unjustly convicted, it is not in my opinion, open to a Judge to say that it is within his discretion to permit or refuse him to do so or not, no doubt the sections only say that the High Court '*may*' interfere in revision, but I think the word '*may*' is the only word that could be used in the sections.' *Per* SANKARAN NAIR, J., in **15 Cr. L. J. 285 (M.)**, but the other Judges did not concur with this view.

(*i*) *Revisional jurisdictions not confined to errors of law.*—No doubt the High Court does ordinarily, when acting in revision, take the facts as found by the Magistrate but, there is nothing in the Code to limit the Courts' power of interference to cases where the Magistrate has ignored or contravened an express provision of law. The High Court has power to revise an order whenever it is manifestly wrong, **14 M. L. T. 200 = 14 Cr. L. J. 529.** The words of this section are very general and empower the High Court to send for the record of the case, not only when it wishes to satisfy itself about the correctness of any finding, sentence or order, but as to the regularity of any proceedings in Subordinate Courts, **20 B. 543 at p. 545; 9 N. L. R. 81 = 14 Cr. L. J. 385.** Under this section every finding, sentence or order is liable to review not only on the ground of illegality or irregularity, but also on the ground of incorrectness, *i.e.*, on the ground that it was wrong on merits. An order of discharge is no exception to this rule, **15 C. 608; 31 M. 133.** The High Court will interfere when the Lower Courts have erred in their inferences from facts as found and have found applicants guilty of offences which are not constituted by such facts, **8 S. L. R. 199 = 16 Cr. L. J. 230.**

(*ii*) *Will not interfere when accused has pleaded guilty*.—In a summary trial for an offence under the Cantonment Code, the Magistrate recorded in his order " Finally the accused admits his error in not having complied with the notice and throws himself on the mercy of this Court." *Held*, that this was equivalent to a plea of guilty and that the accused could not be heard in revision, except as to the extent or legality of the sentence, **1907 A. W. N. 204 = 6 Cr. L. J. 153; 4 L. B. R. 315 (F.B.) = 9 Cr. L. J. 15;** but *see* **12 C. W. N. 140 = 6 Cr. L. J. 434.**

(*iii*) *High Court may go into evidence even in non-appealable cases*.—In cases in which the law allows no appeal, the High Court, as a Court of Revision, does not, except on the ground of an error of law or where the question is one of evidence except on exceptional grounds, exercise the powers of an Appellate Court. But where such exceptional grounds exist, the Court will exercise its discretion under this section and reverse the conviction and sentence.—*Per* CHANDAVARKAR, J., in **9 Bom. L. R. 708 = 6 Cr. L. J. 70.** There is nothing in the statute law, which precludes the High Court from interfering in the exercise of its revisional powers with convictions and sentences whether the ground of that interference be what is commonly called a question of fact or whether it to be a question of law. The *cursus curiæ* drawing a distinction between grounds of the former and grounds of the latter sort rests rather upon a principle of convenience than of law. The true rule is that the High Court will not interfere in revision unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice.—*Per* ASTON, J., *ibid.*, *see* also **8 P. R. 1909 = 17 P. W. R. 1909 = 10 Cr. L. J. 314; 13 C. W. N. 833 = 12 Cr. L. J. 382.**

17. When High Courts will not disturb findings of fact.—

(*i*) *Careful and deliberate weighing of evidence will not be set aside*.—Where a Sessions Judge, after a careful and deliberate weighing of the evidence on the record, comes to a conclusion unfavourable to the accused, the High Court will not interfere, however much it might hold a contrary opinion as to the value of the evidence, **20 W. R. 61 = 12 B. L. R. 249.** Where a Magistrate trying an accused person has dealt at considerable length with the evidence on the record and discharged the accused, recording what appear to be sound reason for the conclusion arrived at by him, the High Court will not interfere with such order in revision on the ground that the guilt of the accused is established by the evidence already recorded, **8 P. R. 1900; 2 P. R. 1901; 8 P. R. 1909 = 10 Cr. L. J. 314; 11 P. R. 1911 = 12 Cr. L. J. 217.** Unless new and cogent evidence can be produced the High Court should not set aside the order of dismissal and direct further inquiry though there may be some irregularities, **18 P. W. R. 1909 = 11 Cr. L. J. 110; 6 A. 434; 8 C. 695; 24 A. 346.** The High Court acting in revision under this section is bound to accept the finding of the Lower Court unless there is any error of law or procedure vitiating that finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact, the Lower Court has misapprehended the evidence, **12 Bom. L. R. 21; 20 P. W. R. 1914 = 123 P. L. R. 1914 = 15 Cr. L. J. 324.**

(*ii*) *That High Court would or might come to different conclusion on the facts is no ground.*—The High Court, as a Court of Revision, does possess the power of upsetting a finding of fact by the Lower Court on the ground of misappreciation of evidence. Such power, however, will not be exercised except for some very extraordinary reason. The circumstance that the Court itself might or would have come to a different conclusion is not such a reason, **Ratanlal 177; 30 P. W. R. 1905.**

(*iii*) *The mere fact that Appellate Court takes a different view of the facts is no ground*.—*A* and *B* were convicted by a first-class Magistrate who awarded them appealable sentences. *B* appealed to the Sessions Judge, who, holding that the evidence was not sufficient to establish his guilt, reversed the conviction and sentence. *A* did not appeal, but after *B's* release asked the Sessions Judge to refer his case to the High Court on the ground that the reasons for releasing *B* applied to his case also. *Held*, that the mere fact that the Sessions Judge had taken a different view of the evidence from that which the Magistrate took, did not justify the High Court to interfere in revision, **Ratanlal 977; 2 Bom. L. R. 334.** When there is difference between the trying Magistrate and the Sessions Judge as to the credibility of certain witnesses, the High Court will not interfere, as there is no point of law involved, **18 W. R. 7;** also **18 W. R. 39; 2 Bom. L. R. 334.**

18. Cases where High Courts have gone into facts.—(*i*) *Whereby wrongly placing onus, injustice has resulted*.—The High Court will interfere in revision where a Court has taken a wrong view of the facts through an error in law, *e.g.*, where it places the burden of proof on the accused contrary to the principles illustrated in s. 101 of *the Indian Evidence Act*, **Ratanlal 794.** *See* **66 P. L. R. 1916.**

(*ii*) *Where Courts have not properly applied the proper principles in dealing with accomplice evidence*.—Where the Lower Courts have not considered the evidence from the point of view that the witnesses were

accomplices, and hearsay evidence was improperly admitted on important points, the High Court will go into the facts and reverse the conviction based on them, **2 C. W. N. 672.** The High Court will not interfere on the mere ground that the rule of practice that an accomplice is unworthy of credit unless he is corroborated in material particulars, has not been adhered to by the convicting Court, unless there are exceptional circumstances calling for the exercise of their jurisdiction in the interests of justice, **11 Bom. L. R. 858 = 10 Cr. L. J. 433.** In **3 P. W. R. 1911 = 12 Cr. L. J. 35,** concurrent findings of fact were set aside by the High Court in revision as the Lower Courts had failed to scrutinise carefully the proof of corroboration of accomplice evidence.

(*iii*) *Where judgment is manifestly defective and insufficient to maintain order made.*—Where a judgment is manifestly defective, and the findings contained therein are insufficient to sustain a conviction, the High Court on revision will examine the evidence in order to see whether the conviction may not be supported, **2 C. L. J. 516** (*see* Note below). If the Appellate Court gives a judgment which makes it appear probable that he has not fully heard and considered the appeal, his disposal of the appeal ought not to be allowed to stand, **7 M. L. T. 182 = 11 Cr. L. J. 331.** The High Court will not exercise its revisional powers where the judgment of the Appellate Court, though informal, has appreciated the points which the prosecution had to establish, and expressed opinion thereon, **20 C. 353**; but if it has failed to do so the High Court will interfere, **13 C. W. N. 192** and **167**; **14 C. W. N. 23.**

(*iv*) *Where evidence is very doubtful or discrepant or the Courts have omitted to consider material evidence.*—In **20 P. R. 1097 = 6 Cr. L. J. 263** and **13 P. W. R. 1909 = 11 Cr. L. J. 97** it was *held* that where the evidence against an accused person is weak, suspicious and inconclusive the Chief Court on revision side can examine and discuss the evidence on record, upset the concurrent findings of fact by both the Lower Courts and set aside the conviction. *See* also **13 C. W. N. 267** where the High Court interfered to prevent a miscarriage of justice arising from the alteration of date in the charge. A conviction based on evidence having a serious discrepancy therein, of which no notice had been taken by both the Lower Courts was set aside, **8 P. W. R. 1912 = 113 P. L. R. 1912 = 13 Cr. L. J. 463.** In **23 P. W. R. 1912 = 13 Cr. L. J. 712,** a conviction was set aside as the case seemed *ab initio* improbable and on account of enmity between the parties there was a strong element of doubt and *see* also **22 P. W. R. 1912 = 13 Cr. L. J. 555; 224 P. L. R. 1912=38 P. W. R. 1912 = 13 Cr. L. J. 774; 28 P. W. R. 1914 = 168 P. L. R. 1914 = 15 Cr. L. J. 591; 18 P. W. R. 1914 = 113 P. L. R. 1914 = 15 Cr. L. J. 521; 21 P. L. R. 1914=12 P. W. R. 1914; 7 P. W. R. 1915=16 Cr. L. J. 202; 28 P. W. R. 1915.** In **12 P. W. R. 1913=66 P. L. R. 1913 = 14 Cr. L. J. 148,** a concurrent finding of facts was set aside as the evidence was insufficient. *See* also **5 P. W. R. 1913 = 152 P. L. R. 1913 = 14 Cr. L. J. 320; 17 C. W. N. 294=14 Cr. L. J. 120; 43 P. W. R. 1913.** An omission by an Appellate Court to consider certain earlier depositions of the prosecution witnesses containing statements different from or contradictory of statements made subsequently in depositions recorded at the trial, was held to amount to an error in law sufficient to warrant the setting aside of an Appellate Court's judgment, **Weir II, 573.** But the mere application of a party to examine the evidence in any case would not be sufficient ground for going into facts in revision. There must appear on the face of the judgment or order complained of or of the record, some ground to induce the High Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. But no hard-and-fast rule can be laid down; each case will have to be dealt with according to its own circumstances. Where the judgment showed that the Magistrate was influenced by the evidence in a cross-case, the High Court in revision went into the evidence and acquitted the accused. The interference of the High Court in revision is not limited to matters of law, but it is fully competent to the High Court to enter into matters of fact, if it thinks fit. On the other hand, it is not bound to go into evidence, if it does not think fit, **22 C. 998** *quoted with approval* by ASTON, J., in **28 B. 533 at p. 549.** In **25 P. W. R. 1910 = 11 Cr. L. J. 425,** the Chief Court discussed the evidence and reversed the concurrent findings of fact and acquitted the accused as the evidence was merely circumstantial and not conclusive. In **15 Cr. L. J. 721 (Oudh)** an order under s. 125 was set aside, as the matter had been before only one Court below.

(*v*) *Wrong construction of document.*—The Chief Court of Punjab in **12 P. R. 1905** laid down that in revision, it would not ordinarily go behind the findings of the Lower Courts; but where the findings upon the facts are inadequate, and the construction of a document on which the question of guilt or innocence largely depends, erroneous, it has power to go fully into the facts. The Ruling in **12 W. R. 47** proceeds on a rather narrow view of the extent of the powers in revision. *See* also **1907 P. W. R. 20 = 6 Cr. L. J. 263; 13 P. W. R. 1909 = 11 Cr. L. J. 97.** The High Court can also interfere in revision, where there appear mis-reading of the documentary evidence and fundamental errors in principle, which vitiate the conduct and disposal of the case, **28 B. 479.**

(*vi*) *Where Courts have been misled by irrelevant matter.*—The power to go into the evidence is not limited, however, to a consideration of whether there was evidence to justify the finding of the Lower Court. If

unless presented within sixty days and the rule indicates that the High Court will not interfere in the case of a belated application **5 S L. R. 265 = 13 Cr. L J. 531.** In Bombay a Criminal Revision petition must be filed within sixty days, exclusive of the time taken for obtaining copies of judgment. In **8 S. L. R. 21 = 15 Cr. L. J. 662** refused to interfere with an order under s. 195 as no appeal had been preferred and the application was made at a late stage of the proceedings *See* Bom. H C Rules, Appellate side, Ch. IV, R 17 (2) (3) It is the practice of the Patna High Court not to entertain save under exceptional circumstances an aplication in revision after the expiry of sixty days from the date of the order or decision impugned It is certain that the period of sixty days will not be extended by the period occupied in proceedings in the Sessions Court unless the delay is due to the Sessions Court issuing notices, etc. It is not allowable to delay in approaching the Sessions Judge who ought to be moved within the period of appeal, *i.e* 30 days and in all cases the petitioner must come to the High Court within a reasonable time **8 Pat 468.**

25 **Application by Government for revision—Delay**—It is not an inflexible rule that where either the Government on the one side or an accused on the other has a right of appeal but now (see *contra* sub-sec 5) and does not exercise it the powers of the High Court under this section cannot be exercised but in such cases these powers should be sparingly used and, save in very exceptional circumstances, not at all in reference to questions of fact. Where an application was made by the Local Government for revision of an order of acquittal nearly ten months after a Sessions' trial and upwards of twelve months after the commission of the alleged crime and where there was upon the face of the Judge s judgment, no error in law, and no appeal had been preferred upon a question of fact *held* that under such circumstances the Court did not feel called upon to enter into the case at large, upon the merits, under a petition of revision, **6 A 584.** *See* the remarks of STRAIGHT, J

IV.—HOW POWERS OF HIGH COURT INVOKED—PRACTICE AND PROCEDURE.

26. **Manner in which exercise of revisional powers is invoked immaterial.**—The Court should act whenever it is desirable without regard to the way in which the information reached it, **4 S L R. 86 = 11 Cr. L J. 593.**

High Court may exercise its powers of revision upon information in whatever way received e g—Though the section gives the High Court power to call for cases, not only judicial information but also to deal with a case '*which otherwise comes to its knowledge,*' yet in most circumstances it is a right practice that Judges should be moved in open Court, **Ratanlal 577; 2 B. 564; 16 B 530 at p. 582.** *See* also Note 4 to s 438 and Note 81 *See* Resolution in the *Fuller Case Government of India Gazette*, 1887, p 311

(i) *Petition of complainant*—Upon the petition of a private person occupying the position of a complainant **2 M. 33; 1 A. 139, 24 W. R. 60; 2 A. 443, 24 A. 346; 2 S L. R. 25 = 10 Cr. L. J. 237.**

(ii) *High Court may act suo motu*—The High Court has power *suo motu* to quash a conviction under s 562 even though the convicts have not moved the High Court **7 P. W. R. 1912 = 67 P. L. R. 1912 = 13 Cr. L. J. 476** The High Court may and frequently does exercise its power of revision *ex mero motu*, **2 B. 564.**

(iii) *Revisional powers may be put in force on credible information*—The powers conferred by this section are *at all times* to be exercised and they may be put in force not merely on matters coming before the Judge in Court but also on matters coming to his knowledge on reliable information, **Weir II, 538.** The information upon which any of the authorities specified in this section might act, may be of any character But the proper course for the Government or a private party is to proceed by petition in open Court. Publicity is thus secured and a fuller hearing of the reason which move the Government in the interests of public order, or a private party in his own **16 B. 518 at p. 582, 2 M. 38.**

(iv) *High Court may act on an official communication from Government to the Registrar*—*See* **1887 A W. N 144, 2 A 522**

(v) *High Court s revisional powers not affected by want of jurisdiction of the referring authority*—When a Sessions Judge on appeal makes an order, and subsequently on discovering that the order was erroneous reports the matter to the High Court, the reference is properly before the High Court, no matter whether the Sessions Judge had power to hear the appeal or not **9 C. W. N. 549 = 2 Cr. L J. 259** The fact that the reference is improper need not necessarily prevent the High Court from exercising its powers of revision under s 439 **Ratanlal 652, 14 W. R. 25** In **14 A. L. J. 156** the High Court set aside an order alleged to be under s 145 on a reference by the Sessions Judge though they were of opinion that the Sessions Judge should not have called for the records under s 435

(vi) *In case of inadequate sentence District Magistrate may inform the High Court direct*—*See* Note 81 In **1 S. L R. 40 = 8 Cr. L J. 161,** the High Court refused to entertain a reference from the District

Magistrate under s. 438 or a revision application by the Public Prosecutor under instructions from the District Magistrate which had for its object the enhancement of a sentence reduced by the Sessions Judge.

(*vii*) *Third party.*—When an order of discharge of an accused person has the effect of operating to the detriment of a third person he has the right to apply in revision against the order, **50 Cal. 1023.**

27. **Does the issue of a rule open up the whole case?**—Ordinarily the High Court will not hear the applicant on a point outside the rule; **6 C. W. N. 593; 33 C. 1282; 35 C. 183**; nor the opposite party. In **31 C. 710**, a rule had been granted at the instance of the accused to show cause why an order for a re-trial should not be set aside. Then the Crown for the first time came forward with the objection that there had been a misjoinder of charges at the first trial and therefore the conviction should be set aside and a re-trial ordered. *Held*, the objection for the Crown could not prevail. But the Court is not necessarily confined to the four corners of the rule either as to the points which it will consider or the form of its final order, **23 C. 347; 2 C. W. N. 81.** If one good point of law is made out, records may be called for and the petitioner is entitled to argue at the hearing such other points of law and procedure as may be raised by the petition, **7 B. 126.** A party may raise at the hearing a new point of law, though not mentioned in the rule, if the Judges granting the rule have directed that it will be considered at the hearing, **11 C. W. N. 567 = 5 Cr. L. J. 278.**

28. **The form in which rule is issued does not fetter discretion of Bench hearing it.**—Although rules to show cause are frequently granted on particular grounds, the form of any rule granted would ordinarily be such as to leave the action which the Court should take, in case the conviction is set aside, to the discretion of the Court which hears the rule. Where a rule was granted "to show cause why the conviction should not be set aside and the case sent back for re-trial," and it came on for hearing before a Bench other than that which had granted it, *held* that the terms of the rule did not prevent the Bench hearing it, from discharging the accused, **23 C. 347; 2 C. W. N. 81; 27 C. 820.**

29. **Proper functionary entitled to show cause.**—If a rule is granted against the order of a Sessions Judge, he is the proper person to show cause, **7 C. W. N. 80.** Where a Magistrate wishes to show cause, he should instruct the Public Prosecutor, but should not address the Registrar of the High Court by letter, **4 C. 20 = 3 C. L. R. 93.** In showing cause it is not open to the trying Magistrate to submit observations with a view to supplement or add to his judgment. He may, however, submit his remarks in answer to the grounds urged by the petitioner for revision, **7 C. W. N. 859.** Where a rule is issued upon the Magistrate to show cause and the order sought to be set aside is one, for instance under s. 107, that is only intended to secure the peace of the district by binding down the petitioner, the Magistrate is the only person entitled to be heard. Any other party interested in the result of the order cannot appear, **25 C. 798.** The same principle was observed where an application was made to revoke sanction granted, **31 C. 811.** A Munsiff must show cause by counsel and not like a District Magistrate, **6 C. L. J. 713.**

30. **Notice must go to accused.**—*See* sub-sec. (2) and Note 83. A High Court may by virtue of s. 427 order the arrest of the accused without previous notice to him under sub-sec. (2) as a warrant of arrest is not an order to the prejudice of the accused within the meaning of that sub-section, **16 Cr. L. J. 670.**

31. **It is optional with Court to hear parties or pleaders.**—*See* s. 440 and Notes thereto.

32. **Can order made on default of appearance be restored?**—A rule which had been discharged for the non-appearance of the vakil for the petitioner, can be restored at any time before the order for the discharge had been drawn up, signed and sealed, **7 C. W. N. 7.** An order dismissing an application for default of appearance is not a judgment and such an order may be set aside and the application may be heard and disposed of on the merits, **10 C. L. J. 80 = 10 Cr. L. J. 287.** *See* also Note 2 to s. 430 and Note 11 to s. 369, but *see* Notes 7 and 7-A.

32-A. **After dismissal of petition, another petition on same matter cannot be entertained.**—The decision in **23 M. L. J. 371 = 12 M. L. T. 350 = 13 Cr. L. J. 710** shows that the High Court has no power to restore a petition once dismissed for default. It is argued that that decision does not preclude the filing of a fresh petition for the same relief. Although the principle of *res judicata* is not applicable to criminal cases yet on grounds of justice and equity, Courts should discourage the agitation of the same matter once again before another Judge. If the dismissed petition cannot be restored, there is stronger ground for holding that a new petition will not lie. **1915 M. W. N. 786 = 16 Cr. L. J. 697 = 44 M. L. J. 27.**

33. **Abatement of revision application.**—An application for revision must, by analogy to s. 431, abate on the death of the applicant, **6 P. R. 1893.** But as s. 431 has been subsequently amended by the insertion

of the words "except an appeal from a sentence of fine" a revision application against a sentence of fine does not abate and the principle applies to a case in which a compensation has been awarded under s 250, **24 P. R. 1908 = 9 Cr. L. J. 103; 2 B. 564.** *See* **16 Cr. L. J. 713 (M.)** where it was *held*, that there can be no abatement of a criminal case on the death of the complainant.

V.—POWERS OF HIGH COURT TO DEAL WITH PROCEEDINGS NOT EXPRESSLY CRIMINAL.

(34) (35), (36), (37), (38) —It should be noted that by the omission of sub-sec. (3) from s 435 orders under ss 143, 144 and proceedings under Chapter XII and s 176 have now become proceedings liable to be revised under s. 439 and therefore the High Court can call for record of such proceedings under powers conferred by s. 439

It should also be noted that orders under s. 176, *i e*, inquest proceedings are now liable to be revised It is needless to refer to the various cases that have become now obsolete in view of the omission of sub-sec (3) of s 435

39. Orders under the Reformatory Schools Act, 1897.—*See* Notes 1—6 to s 16 of the Act in Appendix IV

40. Orders for security or forfeiture under the Press Act, 1910.—An order under s 8 of *the Press Act* I of 1910 for the deposit of security by the publisher of a newspaper is not revisable by the High Court, **17 C. W. N. 1245.** Nor can the High Court question the legality of a forfeiture under s 22 of that Act, **18 C. W. N. 1 = 14 Cr. L. J. 497.**

41. Orders under the Extradition Act.—The High Court has no power to interfere in respect of a warrant issued by a Political Agent of a Native State under s 7 of Act XV of 1903 in respect of an offence included in the *first schedule*, **38 P. W. R. 1908 = 3 P. R. 1909 = 9 Cr. L. J. 3; 42 C. 793.** If an order purporting to be passed under this Act by a Magistrate is illegal, the High Court will interfere, **14 Cr. L. J. 673 (C.)**

41-A. Orders under s. 161 (2), Bombay District Municipal Act.—High Court has power to revise such an order, **21 Bom. L. R. 755.**

41-B. Power to interfere with order passed under para. 1, s. 2 of the Workmen's Breach of Contract Act XIII of 1859.—The High Court has power, under ss 435 and 439 of the Code to revise an order passed by a Magistrate directing either return of the advance or specific performance of the contract under para 1 of s 2 of the Workmen's Breach of Contract Act, **43 B. 607.**

41-C. Demolition order passed by a Municipal Magistrate appointed under s. 531 of the Calcutta Municipal Act is subject to revision.—Wherein it is further *held*, that the Municipal Magistrate appointed under section 531 of the Calcutta Municipal Act of 1923 is a Court of inferior criminal jurisdiction within section 6 of the Code and orders of demolition passed by such Magistrate are subject to the revision by the High Court under sections 435 and 439 of the Code, **29 C. W. N. 898.**

41-D. Order by a District Magistrate to remove obstruction from a Municipal road under Bengal Municipal Act, ss. 176, 178 and 202.—A proceeding under s 202 of the Bengal Municipal Act is a judicial proceeding, and the High Court has power to revise an order made thereunder, **52 C. 670.**

VI.—GENERAL POWERS OF HIGH COURT IN REVISION.

42. High Court competent to interfere at any stage of case even without the record.—The High Court has jurisdiction to take cognisance of and revise the proceedings of a Magistrate while they are in an interlocutory state of pending investigation, and may suspend such proceedings without having the record before it, it may also in such a case order bail to be taken from the person accused If the Court were altogether unable to take such a step without having the record before it, the non existence or non production of a record could really effect a nullification of the High Court s powers of revision in some cases which by their nature would be cases in which it was most necessary that this power should be exercised, but the High Court ought not, except in extreme cases, interfere with a Magistrate until it has the record before it, **20 W. R. 23 = 11 B. L. R. Ap. 8.** A Court of Revision should be most reluctant to interfere in a pending case, but such interference is justified and necessary in order to prevent a clear abuse of the right of resort to a Criminal Court. Whereupon the admitted facts there is no justification for the charge against the accused, he should not be left

for a moment longer than is necessary in the position of a person accused of an offence and forced to defend himself against a charge for which there is no legal evidence to establish, **8 S. L. R. 143 = 16 Cr. L. J. 141** *following* **26 C. 786.** *See* also **28 M. L. J. 505 = 16 Cr. L. J. 477.** *See* **28 C. W. N. 23** where the Calcutta High Court interfered with Magisterial proceedings in the preliminary stage under section 107 or 110.

(*i*) *May direct that complaint should be dismissed and further proceedings stayed.*—The High Court is competent to direct that a complaint should be at once dismissed as disclosing no criminal offence, **10 P. W. R. 1913 = 33 P. L. R. 1913 = 14 Cr. L. J. 128.** When a man has been once tried and acquitted, and subsequent proceedings are taken against him, though as a matter of law the accused might not be entitled to the benefit of s. 403, yet where the circumstances are such that it is inexpedient that further proceeding should be taken, the High Court, acting under this section, may stop such further proceedings, **1905 A. W. N. 238 = 2 A. L. J. 673.** Similarly, where a Magistrate overruled an objection that the prosecution was barred by limitation specially applicable to the case, his order was set aside on revision, **20 B. 543.** *See* also **22 C. 131; 1. P. W. R. 1909 = 36 P. L. R. 1909 = 9 Cr. L. J. 151; 3 P. W. R. 1909 = 9 Cr. L. J. 154; 28 M. L. J. 505 = 16 Cr. L. J. 477,** where the High Court interfered and stayed an illegal prosecution. But *see* **I. L. R. 2 Pat. 257,** which holds that s. 439 of the Code does not authorise the High Court to direct a Subordinate Court to refrain from trying an accused person against whom such Court has issued process, **2 Pat. 257.**

(*ii*) *May interfere with interlocutory proceedings.*—Very wide powers of revision were intended to be conferred on the High Court under s. 429 and it is with particular reference to non-appealable orders that the High Courts were empowered to act as Court of Revision. The High Court is competent at any stage of a case to interfere in order to exercise its powers of revision, **38 C. 68.** Where, therefore, proceedings were instituted against a person under s. 110 for the third time, though on both the previous occasions he was acquitted and there was no fresh evidence and the original order was also defective, the Chief Court on the application of the accused quashed the proceedings at once, **33 P. R. 1910; 17 P. W. R. 1910 = 11 Cr. L. J. 387** (where **45 P. R. 1885** was *distinguished* **27 C. 126** was *dissented* from and **25 C. 233, 26 C. 786, 22 C. 131, 1899 A. W. N. 212, 28 B. 533** and **8 P. R. 1904** *followed*). There can be little doubt that though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers, that in the interests of justice it should do so, no hard-and-fast rule can be laid down as regards the class of cases in which the High Court will interfere, **28 M. L. J. 505 = 17 M. L. T. 398 = 16 Cr. L. J. 477.** Where the notice and interlocutory order passed under s. 112 were defective and could not form the basis of a proceeding under s. 110, the Chief Court set aside the proceedings so far taken by the Magistrate, he being at liberty to take fresh action under Chapter VIII, **18 P. W. R. 1910 = 11 Cr. L. J. 388.** The High Court has jurisdiction to take cognisance and revise the proceedings of a Magistrate while they are in an interlocutory stage pending investigation, and may suspend such proceedings without having the record before it, **20 W. R. 23; 22 C. 131.** It may also order bail to be taken from the person accused, **20 B. 543.** But it will not interfere with interlocutory proceedings unless the case is of an exceptional nature. Sections 423 and 435 read with this section invest the High Court with power to be exercised whenever the Court thinks fit to correct errors in procedure, committed by Subordinate Criminal Courts, before the final order of acquittal or conviction is passed by such Subordinate Court, **257 P. L. R. 1904; 10 A. L. J. 144 = 13 Cr. L. J. 443.** In **28 M. L. J. 505 = 16 Cr. L. J. 477,** the High Court set aside a charge on the ground that injury was likely to be caused by a vexatious and protracted trial. The words "*any proceeding*" at the commencement of the section make this clear. The Court can, therefore, pending trial, interfere with the interlocutory order of a Magistrate, refusing to summon certain witnesses for the defence, **130 P. L. R. 1901; 2 S. L. R. 25 = 10 Cr. L. J. 237.** See *contra* **45 P. R. 1885.** When a Subordinate Court improperly declines to record any evidence tendered, the High Court will interfere in any stage, **257 P. L. R. 1904;** or if the Magistrate improperly declines to allow the cross-examination of prosecution witnesses, *see* Note 11 at p. 598. **10 A. L. J. 144 = 13 Cr. L. J. 443.** In **1 P. W. R. 1909 = 9 Cr. L. J. 151,** the Chief Court interfere in a pending criminal case and directed that the name of one of the accused should be struck out of the complaint and that no further proceedings be taken against him. Where proceedings are initiated upon the complaint of an unauthorised person they are *ultra vires* and liable to be set aside at any time during the pendency of the case. An order refusing to examine a pardanashin woman on commission was set aside, **11 P. W. R. 1913 = 14 Cr. L. J. 3.** The High Court has power to set aside an order of a Magistrate refusing to order the production of property alleged to be the proceeds of an offence under inquiry, **19 C. 52.** The High Court has power to interfere with the order of a Magistrate charging the accused with an offence although no appeal lies in respect of the order. When once a Civil Court has adjudicated upon questions of right, save in exceptional cases, a Criminal Court ought not to go behind the finding of the Civil Court, **33 P.**

R. 1910 = 12 Cr. L. J. 50. When the High Court has stayed proceedings the Magistrate is bound to stop the inquiry or trial, when credible information, such as a letter or telegram from Counsel retained in the case, is shown to him, **2 C. W. N. 498; 5 C. W. N 110; 19 M. 375.** *See* **8 S. L. R. 238 = 16 Cr. L. J. 255,** where the High Court set aside interlocutory order of a Magistrate refusing to let in evidence *See* also **40 C. 54.** In **14 A. L. J. 851,** the High Court set aside an order calling upon a witness in a pending case to show cause why he should not be prosecuted for perjury But *see* **20 M. L. T. 252; 16 A. L. J. 458** and **735; 23 A. L. J. 21; 47, M. L. J. 373.**

(*iii*) *It is only in exceptional instances that the High Court will interfere in a pending case*—It is only in very exceptional instances that the High Court will interfere in revison with the action of a Subordinate Court in respect of any pending case, and especially when such case has reached the stage when a charge has been drawn up and only the defence of the accused remains to be heard No hard and fast rule can be laid down on the subject, but the interference of the High Court will be regulated by the particular circumstance of each case. But generally speaking, it seems inadvisable to interfere in a pending case, unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress Where, therefore, neither the complaint nor the evidence for the prosecution made out any case against a person the High Court quashed the proceedings against him, holding that it was most unfair to him that he should be called upon to rebut a charge which, upon the evidence was baseless in so far as it affected him, **26 C. 786** *concurred* in **1899 A. W. N. 212.** *See* also **52 Bom. 151 = 30 Bom. L. R. 70.** No hard and fast rule can be laid down on this subject since it is impossible as well as undesirable to do so But one *safe practicable test* would be this, *viz*, that a *bare statement of the facts of the case without any elaborate argument* should be sufficient to convince the High Court that it is a fit one for its interference at an intermediate stage, **25 C. 233** *followed* in **2 S. L. R. 25 = 10 Cr. L. J. 237.** The High Cout will interfere with interlocutory orders only under exceptional circumstances, **25 C. 233; 1 S. L. R. 30 = 9 Cr. L. J. 270.** *Contra, see* **45 P. R. 1885,** where it was *held* that the revisional powers conferred by this section do not include the power of setting aside while the trial of the accused is still pending, interlocutory orders by which no penalty is imposed on the accused, but this case must be read subject to the ruling in **33 P. R. 1910.** *See* also **8 P. W. R. 1909 = 9 Cr. L J. 154, 8 P. R. 1904; 14 C. W. N. 167; 45 P. W. R. 1910; 23 A. L. J. 21; 47 M. L. J. 373; 47 M. 722.**

43. Competent for High Court to direct further inquiry in cases of dismissal or discharge—(*i*) *By Mofussil Magistrates in the exercise of the original jurisdiction*—*See* Note 4 to s 436 The High Court has power under this section if it considers that an accused person has been improperly discharged, to order him to be committed for trial, **19 W. R. 56; 24 W. R. 23; 6 A. 40.** *See* also **9 A. 52; 15 A. 205** which *dissents* from **8 A. 14; 27 C. 172; 16 B. 580** *followed* in **23 C. 350.** The power is so clear from the terms of this section that s 437 cannot be taken to limit it to Mofussil cases only The High Court is empowered to exercise any of the powers conferred on a Court of Appeal by certain preceding sections including s 423 It may set aside an order of discharge passed by a Presidency Magistrate and direct that the accused be arrested and forthwith committed for trial This is one of the powers conferred by s 423 and it is not necessary to exercise this power, that the Court should actually be hearing an appeal from acquittal The section lays down that the High Court may exercise the same powers in revision, in any proceeding whatever, as it could have exercised in hearing an appeal from acquittal It was the intention of the Legislature in framing this section to make its terms sufficiently wide and comprehensive to cover all cases not included in s 436, **27 B. 84** which *approves* and *follows* **6 A. 40; 15 C. 608; 26 C. 746.** The High Court has under ss 435 and 439 all the powers of an Appellate Court, which include a power to direct a re trial or commitment, *a fortiori* it has power to set aside the order of a discharge, **36 C. 994** *dissenting* from **27 C. 126; 6 C. L. J. 705** and **33 C. 1282,** where it was laid down that when a Presidency Magistrate dismisses a complaint the remedy is not either under s 437 or this section, but under s 15 of *the Charter Act*, though the question of the propriety or impropriety of the order does not strictly come within the authority vested by s 15 of *the Charter Act* *See* Note 5 to s 436 High Court will not scrutinise orders of discharge if upon their face they bear token of careful consideration The very language of this section shows that the object of the Legislature was to secure the setting right of a patent error or defect and not to give the High Court a roving commission either in the direction of stamping with approval the proceedings of a Lower Court, or in the direction of questioning about and looking to see if possibly under a fair record, there lies some trace of possible error In the absence of some well founded suspicion, it is inexpedient to scrutinise orders of discharge or other orders which upon the face of them bear token of careful consideration and appear good and lawful.—*Per* KNOX, J, **1899 A. W. N. 135; 8 P. R. 1909 = 10 Cr. L. J. 314.**

(*ii*) *Presidency Magistrate.—See* **36 C. 994; 27 B. 84; 14 M. L. T. 200 = 14 Cr. L. J. 529.** The High Court has under ss. 439 and 423 all the powers of an Appellate Court which include a power to direct a re-trial or commitment, *a fortiori* it has the power to set aside the order of discharge and it is not necessary to have recourse to s. 15 of *the Charter Act* for the power of the High Court to revise the proceedings of Presidency Magistrate. *See* Note 5 to s. 436.

44. High Court can in revision exercise all powers of Court of Appeal.—The nature of the powers that the High Court has *in revision is the same as that which a Court of Appeal has in the case of an appeal* from any order against which an appeal is provided by the Codes, as in cases coming within ss. 405, 406, **14 M. L. T. 200 = 14 Cr. L. J. 529; A. I. R. 1928 Mad. 1267 = 55 M. L. J. 674.** Of all the Courts of Revision, the High Court alone has all the powers of an Appellate Court specified in s. 423, **20 C. 638; 23 M. 225,** including the power to direct evidence to be taken which is not given to the Sessions Judge or the District Magistrate under s. 437, **11 C. W. N. 275 = 6 C. L. J. 251 = 6 Cr. L. J. 357;** and in addition, it has the power of enhancing sentence, which no Appellate Court has. The only limitation is that specified in sub-sec. (4) of this section. *See* also **36 C. 994.** In cases in which the law allows no appeal, the High Court will not, in revision, except on very exceptional grounds, exercise the powers of an Appellate Court; but where such exceptional grounds exist, as where the conviction is not in any degree supported by the evidence, **8 B. 197; 14 B. 115,** at **p. 118; Ratanlal 244; 2 C. W. N. 81; 14 B. 331,** or it is in the interests of justice, **10 C. 1047; 18 W. R. 7,** or where the inquiry in the Lower Court is faulty, **12 B. 377,** or when the conviction rests on the testimony of accomplices, **14 B. 331;** the High Court will, in the exercise of its revisional powers, deal with the evidence itself, **Ratanlal 908.** *See* **19 W. R. 30 = 10 B. L. R. 285; 14 C. 169; 15 C. 608 at p. 618.** The High Court can set aside an acquittal and order a re-trial or commitment, **7 C. W. N. 521.**

45. May quash commitments whether made under s. 436.—It can quash a commitment made under s. 436 by a Sessions Judge or District Magistrate, on points of law as well as of facts, **12 C. W. N. 117 = 6 C. L. J. 760; 30 M. 224.** S. 215 is not a bar to such interference, **7 C. W. N. 327;** but the High Court cannot revise an order made by itself directing a commitment under s. 526 (1) (*iv*), **27 M. 54.** *See* Note 15 to s. 436 and Note 2 to s. 215. Though the High Court has power under this section to consider whether or not a Sessions Judge has exercised a proper judicial discretion under s. 436, in setting aside a Magistrate's order of discharge, and for this purpose, the High Court may consider the facts as well as the questions of law involved, yet it will only exercise this power where it is manifest that the Sessions Judge's order is improper, *e.g.*, where there is no evidence to prove the offence charged, or where it is clear that the Court would not act on the evidence, **30 M. 224,** where **7 C. W. N. 227; 14 M. 334** and **15 C. 621** are *referred to.*

But in **1 Rang. 526** it is *held*, that the High Court has no concern with the question of the credibility of the evidence, when there is in fact some evidence on the committal record which would justify the Sessions Judge in leaving the question of guilt or innocence to the jury. Credibility of the evidence is no question of law.

46. May consider the propriety of and revise any sentence.—The infliction of an inadequate punishment is undoubtedly an impropriety which the jurisdiction in revision is intended to remedy.—*Per* JARDINE, J., **16 B. 580; 15 W. R. 83,** decided under the 1861 Code, is no longer law. Where, therefore, in the absence of clear evidence of the damage done, the Magistrate passed the maximum sentence, the High Court reduced the same, **2 Bom. L. R. 335.** The High Court can interfere wherever it finds the Court below, in passing sentence, has failed to exercise a sound judicial discretion, **2 C. 110.**

Whipping.—See *the Whipping Act,* Appx. and ss. 391—395.—Where a sentence of whipping has been carried out, no other punishment can be awarded even if sentence is inadequate, **15 Cr. L. J. 538 (Bur.).**

47. Competent to deal with order against accused not before the Court while dealing with case of his co-accused—

(*i*) *While dealing with appeal of co-accused may deal with conviction of accused not appealing.*—When out of two accused convicted and sentenced by a Sessions Judge, one only appealed and his conviction was set aside by the High Court on the ground that the prosecution case was false; *held*, that the High Court has power under this section to deal with the conviction of the other accused who had not appealed and that sub-sec. (5) of this section did not in any way affect the jurisdiction vested in the High Court, **5 C. W. N. 330; 19 W. R. 57; 14 P. W. R. 1909 = 11 Cr. L. J. 99; 12 Cr. L. J. 250 (Bur.); 7 P. W. R. 1916;** *see* also **29 Cr. L. J. 259.** But *see contra* **29 Cr. L. J. 325 (2) = 108 I. C. 81.**

(ii) *May deal with conviction of accused not applying, while dealing with application for revision of another accused tried along with him*—In **9 P. R. 1909 = 30 P. W. R. 1909 = 11 Cr. L. J. 17**, the Chief Court while setting aside the conviction on a revision petition *held*, that it was open to the High Court under s 439 to deal with the convictions of all the offenders who were tried together and found guilty on exactly similar facts, though only one had applied for revision. In **(1911) 2 M. W. N. 170 = 12 Cr. L. J. 495**, the conviction of an accused who had not applied was set aside in dealing with the application of a co-accused

(iii) *When Appeal Court acquits some accused, High Court may in revision acquit the others who could not appeal*—Where a Magistrate tries several accused and passes appealable sentences on only some of them whom on appeal the Sessions Court acquits, the High Court may under this section revise the sentences on the others or these may be referred to the Local Government, **2 C. 110; 7 C. 447; 1893 A. W. N. 51.** If the High Court in revision, disagrees with the Sessions Judge, the order of acquittal might be set aside and the Sessions Judge ordered to re-hear the appeal, **27 C. 320.**

48. **Is High Court competent to allow compounding of an offence in revision?**—The High Court as a Court of Revision may give effect to the compounding of offences which the accused persons had agreed to, after the conviction was confirmed in appeal As the Court may, in revision, remit the whole of the punishment not undergone, it may also give effect to the composition **252 P. L. R. 1904, 32 A. 153.** *See* **17 O. C. 92 = 15 Cr. L. J. 567**, and *see* Note 9 to s 345 The power conferred on the Court exercising powers of revision are wide enough to give leave to the parties to compound, an offence under s 345, **32 A. 153** and when the parties have lawfully compounded the offence the High Court may set aside the conviction, **18 O. C 161 = 11 Cr. L. J. 496.** In **11 A. L. J. 13 = 14 Cr. L. J. 46**, TUDBALL, J, doubted the corrections of **32 A. 153**, as the power to sanction a compromise was given to an Appellate Court not by s. 423 (*d*) but by s. 345 *Contra* **18 C. W. N. 1212 = 15 Cr. L. J. 728; 29 M. L. J. 521 = 16 Cr. L. J. 750.** In **17 Cr. L J. 339** *held* that High Court was not competent to sanction a compromise entered into after conviction But now under s 345 sub-sec. (5 A) it is expressly provided that a High Court can under s 439 allow any person to compound any offence which he is competent to compound under s 345, and therefore cases holding a contrary view are no longer good law *See* also **A. I. R. 1929 Pat. 512**

49 **Power to alter finding and confirm conviction.**—In the exercise of its powers of revision, it is open to the High Court to alter any finding and confirm a conviction, and that if the evidence on the record in a case be sufficient to warrant a conviction, the Court would not be justified in setting such conviction aside, merely because the view taken of the evidence by the Lower Court is not sustainable, or some fact which ought to have been found by that Court is not found or found incorrectly, **22 C. 391.** *See* **21 C. 827.** In **18 C. W. N. 309 = 15 Cr. L. J. 4**, the Calcutta High Court set aside the conviction under ss 46 and 52 of *the Bengal Excise Act* and holding that it was a case to which ss 236 and 237 were applicable, convicted him of an offence under s 61 read with s. 46, cl. (*a*) and s. 2, cl. (12) though he was not charged with it and confirmed the sentence But if there is no doubt as to the offence when the facts are established ss 236 and 237 have no application, **15 Cr L. J. 41.** But it is doubtful whether the High Court has power in revision, having regard to the last clause of this section, to change a conviction under s 379 to one under s 295, I P C., where the Lower Court has acquitted an accused of the latter offence and convicted him of the former offence, **Weir II, 577; I, 430.** Where separate sentences for offences under ss 147 and 353, I P C., as for distinct offences are considered illegal the High Court may in their stead substitute one aggregate or consolidated sentence sufficient to meet the offence of which the accused were convicted, **4 C. W. N. 245.** On appeal or revision the accused person cannot be convicted of an offence of which he could not have been convicted by the Court which tried him, though it is open to the Court of Revision to alter a finding provided the accused is not convicted of a more serious offence, **3 L. B R. 232**, where **25 A. 34** is *distinguished*, **27 C. 860** *followed* and **3 C. W. N. 367** and **653** *referred to* When a prisoner is convicted by a subordinate tribunal of an offence within its jurisdiction and the evidence discloses an offence of a graver character beyond the jurisdiction of that tribunal, the High Court may quash the conviction and sentence for the minor offence and direct a trial before a tribunal having jurisdiction over the [illegible] Whether it will do so or not is a question not of law, but of expediency on the facts of the particular [illegible] **H. C. R. Appx. Y; Weir II, 569**

50 **Power to order restoration of property.**—Reading s. 423 (1) (*d*) and s. [illegible] Court acting under this section may order restoration of property, **27 A. 415**, where **25 C.** [illegible] **36 C. 44** The High Court may in the exercise of its revisional powers pass an order [illegible] the money received by false pretences, **15 Cr. L. J. 655 (Bur.)** Also the High Court [illegible]

orders passed by Magistrates under s. 514 or by the Disirict Magistrate under s. 515, **15 P. R. 1905.** Orders under s. 523, are also subject to similar revison, **4 Bom. L. R. 12.** In **35 B. 253,** the High Court held that it had no jurisdiction to interfere with an order as to disposal of property where the party aggrieved had a right of appeal.

50-A. Limitation.—In exceptional circumstances the rule that application for revision must be made within sixty days may be departed from, **43 C. 1029.**

51. Power to take fresh evidence or direct it to be taken.—The High Court may at its discretion direct fresh evidence to be taken, while acting under this section, **3 Bom. L. R. 677.** A High Court may while acting in revision by virtue of s. 428 call for additional evidence upon which it can itself come to a conclusion, but the High Court has no power to call for a finding or act upon it, **16 Cr. L. J. 767 (M.).** But a District Magistrate or Sessions Judge acting under s. 437, has no such power to take additional evidence or direct it to be taken, **6 C. L. J. 251 = 6 Cr. L. J. 357** and *see* Note 15 to s. 428.

52. Stay of proceedings in Criminal Court pending result of civil litigation.—In **Weir II, 249** the High Court refused to issue a Mandamus where a Magistrate had in the exercise of his discretion refused to proceed with a criminal charge pending a civil action in respect of the same matter. *See* also **Weir II, 249.** If a Magistrate on a consideration of all the circumstances exercises his discretion and either stays proceedings in the criminal case pending the disposal of the civil suit or declining to do so, the High Court, as a Court of Revision will not as a general rule interfere with the exercise of such discretion, **Weir II, 418.** The High Court will not ordinarily stay proceedings in a Subordinate Criminal Court, merely because the same facts are being litigated in a civil suit, **31 C. 858.** *See* also **23 C. 610; 5 C. W. N. 44; 6 C. W. N. 469; 8 C. W. N. 31; 9 C. W. N. 262; 30 M. 226; 10 C. W. N. 154** and **121; 14 C. W. N. 131; 31 M. 510; 34 C. 848;** but will not do so when the Lower Court thinks it expedient in the interests of justice that the trial should go on, **35 C. 909; 26 B. 785; 8 S. L. R. 20 = 15 Cr. L. J. 661.** In **23 C. 610** it was however laid down that ordinarily it is not desirable, if the parties to the two proceedings are substantially the same and the prosecution is but a private prosecution and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time. The Magistrate might stay proceedings in his Court or the High Court might direct him to do so, if sufficient cause in that behalf, is made out. It is ordinarily a matter within the discretion of the Magistrate himself, and it is doubtful whether the High Court has jurisdiction under the Code to quash pending proceedings. In all such cases the test is whether the accused would be prejudiced if the criminal proceedings are not stayed until the disposal of the suit, and in this respect there is no difference between proceedings instituted in pursuance of a sanction and those instituted by a party when no such sanction is necessary, **16 Cr. L. J. 637 (M.).** *See* also **15 Cr. L. J. 568 (M.); 8 S. L. R. 20 = 15 Cr. L. J. 661; 7 Bur. L. T. 73 = 15 Cr. L. J. 438.** *See* also **18 B. 581** and **16 B. 729,** where **B. L. R. (F. B. Vol.) 526,** *Igen* v. *Ingham,* **14 Q. B. D. 396,** and *Rex.* v. *Summon,* **8 C.** and **P. 50** are *referred to.* *See* Notes under Heading XXIX at p. 546 and Notes under Heading IX to s. 476. *See* also **4, 8 and 9 P. W. R. 1916.**

VII.—WHAT PROCEEDINGS UNDER THE CODE HIGH COURT MAY REVISE.

53. Power of the High Court extends to "any proceedings."—*See* Notes 1 and 42.

54. Power to revise order granting bail.—The proceedings in which it has to be determined whether an accused person should be admitted to bail by a Magistrate is a judicial proceeding, and as such is cognisable by the High Court as a Court of Revision, **6 M. 63.** If a Sessions Judge finding that there is no reasonable ground to believe that the accused is guilty, released him on bail under s. 497, the High Court will not interfere under this section or any other provision of law, **10 M. L. J. 411.** Where DAVIES, J, seemed to be of opinion that the High Court had power to interfere under this section, if the Sessions Judge had passed all illegal order, but WHITE, C.J., doubted whether the High Court had any power at all, whether under the Code or *the Charter Act,* to interfere. *See* Note 7 to s. 497.

55. Power to revise order refusing to grant copies.—Where a Magistrate refused to grant the accused copies of papers which were necessary for defence, the High Court, in the exercise of the powers conferred by this section, set aside the conviction. The Court remarked that the Magistrate acted contrary to law when he determined whether the documents, of which copies were required by the accused for his defence, were necessary or not, **14 W. R. 77.** In **15 C. W. N. 770,** on a Presidency Magistrate refusing to furnish copies of the notes of evidence to a party, the High Court under s. 45 of the Specific Relief Act ordered the records of the case to be brought up to the High Court and left with the Registrar, and allowed liberty to the party to take copies.

56. Interference with sanction orders under s. 195.—It should be noted that under the new Code as amended the necessity of a sanction under s 195 is done away with. Instead of a sanction, under the recent amendments offences mentioned in s 195 can only be taken cognisance of, upon a complaint instituted under s 476 S 476 B provides expressly for an appeal in cases where an application for such a complaint is either granted or refused Therefore the question as to the revision of sanction orders under s 195 cannot now arise

57. Order under s. 478.—*See* **15 M. 224.**

58. Power to revoke sanction granted under s. 197.—Having reference to this section, the powers of the High Court, appellate and revisional, are co-extensive, and s 195 does not confer on an Appellate Court any authority in respect of an order made by a Subordinate Court under s 197, **26 C. 852.** *See* also **1908 A. W. N. 273 = 5 A. L. J. 749 = 9 Cr. L. J. 39; 4 L. B. R. 133 = 7 Cr. L. J. 416.** High Courts power of interference in such cases is under s 15 of *the Charter Act*

59. Orders under s. 88.—*See* Notes 19 to 21 to s 88 and **9 P. R. 1908 = 29 P. W. R. 1908 = 8 Cr. L. J. 260.** In **28 P. L. R. 1915 = 16 Cr. L. J. 166,** it was however *held* following **22 C. 935** and **20 M. 88** that no revision lies against order of attachment. High Court cannot set aside sale duly made, **8 P. R. 1911 = 104 P. L. R 1911 = 12 Cr. L. J. 142.**

59-A. Issue of Warrant under s. 90 without recording of reasons.—Where accused has been let out on his own bond, a warrant under s 90 without recording any reason as required by the section is illegal **38 M. 1088.** *See* s. 406 and Notes thereon.

60. Power to revise security proceedings under Chap. VIII.—*See* s 406 and notes thereon.

Although the High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections, *e.g.*, ss 207 and 110 of the Code still when the materials on which such orders are based are clearly insufficient to support those orders, the High Court should interfere and quash the orders and proceedings under its revisional jurisdiction, **28 C. W. N. 23.**

61. Power to revise order passed under Chap. XI.—*See* Notes under Heading XI, Chap XI *See* preliminary note to section 435 Under the amended Code these orders can be revised by the High Court

61-A. Power to revise orders under Chapter XII.—Owing to the amendment of s. 435 by the omission of clause (3) orders under Chapter XII of the Code are now proceedings within the meaning of s 435 and therefore are revisable by the High Court. *See* preliminary note to s 435 But it is held in **49 M. L. J. 593** that the High Court has no jurisdiction to entertain a petition for the appointment of a Receiver, pending the disposal of a criminal revision petition preferred against an order of the Lower Court passed under s 145 of the Code

61-B. Orders under s. 250.—*See* Note 35 at p 711

61-C. Orders under s. 332.—The High Court is competent to revise an order under s 332 fining an absent assessor or juror *See* Note to s 332 at p 846

62. Orders under s. 334.—The High Court may on revision set aside an order directing an accused person to pay costs of an adjournment on an application by the accused for transfer, **8 P. W. R. 1911 = 12 Cr. L. J. 274.**

62-A. Orders under s. 386.—No revision lies against order of attachment under s 386 **28 P. L. R. 1915 = 16 Cr. L J. 166; 22 C. 935; 20 M. 88.**

62-B. Orders under s. 437.—*See* Note 14 to s 437

62-C. Orders under s. 471.—The passing of an order under s 471 after an acquittal has been recorded cannot be said to alter a finding of acquittal into one of conviction Therefore where the Court below acquitted an accused upon the ground, that he was in same but omitted to pass orders under s 471 Cr P C, *held*, that the High Court had power in revision to pass an order under that section, **43 M. L. J. 72**

63. Appellate orders under s 486.—*See* **23 P. W. R. 1912 = 13 Cr. L. J. 567.**

64. Orders in maintenance cases under s. 488—The High Court has power under this section to set aside or modify a Magistrates order, awarding maintenance under s 488 or to direct further inquiry on the ground that the rate fixed by the order appears to be beyond the means of the person ordered to pay the allowance, **Weir II, 575.** *See* also **16 M. 234; 5 B. H. C. R. Cr. Ca. 81,** and Note 86 to s 488

65. **Orders under ss. 514 and 515—Forfeiture of Bonds.**—Under ss. 435 and 439 the High Court has power to revise orders passed by Magistrate under s. 514 or by the District Magistrate under s. 515. This general power is not taken away by the power given to the District Magistrate, **15 P. R. 1905 = 2 Cr. L. J. 131; 5 S. L. R. 179 = 13 Cr. L. J. 31; 159 P. L. R. 1917 (Cr.)** *Mad. Cr. Rev. Case* 77 *of* 1907. The cases in **3 C. 757 = 2 C. L. R. 408; 8 C. L. R. 72; 19 W. R. 1 and 2 P. R. 1883** were all decided under the Codes prior to 1882 and are obsolete. *See* Notes to s. 514 and Note 2 to s. 515.

66. **Order for disposal of property under s. 517.**—The powers conferred by ss. 435 and 439 on the High Court are larger than any previously exercised by it. The words ' *any proceedings* " extend to an order made by a Magistrate under s. 517, **Weir II, 538; 36 C. 44; 17 Bom. L. R. 922.**

66-A. **Orders under s. 520.**—*See* **27 A. 630.**

67. **Order for restoration of immovable property, 522.**—The High Court has full power to interfere in revision with orders passed by Magistrates under s. 522, **36 C. 44; 27 A. 415** *followed. See* Note 50 above. *See* sub-sec. (3) of s. 522 which provides that an order under s. 522 may be made by any Court of Appeal, confirmation, reference or revision.

67-A. **Order refusing to transfer a case under s. 528 whether revisable.**—In **1 Rang. 632** it is *held* that High Court has no power to interfere in revision with an order to transfer a case under s. 528.

67-B. **Orders under s. 545.**—*See* **29 P. R. 1903.**

67-C. **Orders under s. 548.**—*See* **8 C. 166,** where an order refusing to grant copies was revised under s. 1 of the High Court's Act.

67-D. **High Court interfering with revision in expunging remarks prejudicial to the character of a person neither a party nor a witness.**—Where a Magistrate in a criminal case made observations against the character of a person who was neither a witness in nor a party to the proceedings and who had no opportunity of being heard, and upon material which was not legal evidence in the case, *held* that it would be a denial of justice to allow such reflections to stand and they should be expunged from the judgment of the Magistrate, **6 Lah. 166.** In a Bombay case it was *held* that it would be an extraordinary exercise of the powers of a High Court to order that remarks made against a complainant by a Magistrate while convicting the accused should be deleted. **19 Bom. L. R. 912.** But *see* s. 561-A which was inserted newly by Act XVIII of 1923 and the note thereon.

VIII.—INTERFERENCE IN REVISION WITH ORDERS OF ACQUITTAL.

68. **Revision against acquittal not usually encouraged.**—Though the High Court has the power of revising an order of acquittal, yet ordinarily it will not interfere with such an order in the exercise of its revisional jurisdiction, because an appeal can always be made by Local Government under s. 417, **16 Cr. L. J. 352 (O.) 13 P. W. R. 1907 = 72 P. L. R. 1908 = 5 Cr. L. J. 438; 15 B. 349; 6 A. 484; 1883 P. R. 18; 6 C. P. L. R. 15; 5 N. L. R. 4 = 9 Cr. L. J. 211; 8 M. L. T. 380 = (1910) M. W. N. 517 = 11 Cr. L. J. 622.** In **38 M. 1028,** the High Court declined to set aside in revision an order of acquittal though they were prepared to set aside the order of acquittal if the matter had come before it by way of appeal by the Local Government. Though the High Court has jurisdiction to interfere on revision with an acquittal, it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice, **42 C. 612** (TEUNON, J., was however of opinion that the discretion of the High Court ought not to be fettered by any rule of practice). ' I am of opinion that applications by private parties ought to be discouraged, and that the Court should only interfere when it considers that interference is urgently demanded in the interests of public justice. It seems to me that the Court should not interfere with an order of acquittal when the question is as to the appreciation of evidence or where there is no patent error or defect in the order of acquittal passed by the Lower Court which has resulted in grave injustice. The mere fact that the High Court if it was sitting as a Court of Appeal would have come to a different conclusion on facts, is no ground for exercising revisional jurisdiction in petitions against orders of acquittal,' KUMARASAWMI SASTRI, J., **16 Cr. L. J. 600 (M.); 17 M. L. T. 457 = 16 Cr. L. J. 558 (M.); 17 Cr. L. J. 1.** In **14 M. 363,** the Madras High Court remarked it would not ordinarily interfere by way of revision *in cases of acquittal.* In **1 A. 139 (F.B.)** the High Court refused to interfere, even where the acquittal proceeded on an error of law. *See* also **27 A. 359; 24 A. 346; 25 A. 128; 1902 A. W. N. 200; 8 C. 895; 2 A. 276; 1 C. L. R. 352; 4 Cr. L. J. 37; 12 P. R. 1906; 14 P. R. 1905** which is now *overruled* by **13 P. W. R. 1907; 5 M. L. T. 258 = 11 Cr. L. J. 195; 10 Cr. L. J. 160 (B.); 1914 M. W. N. 124 = 15 Cr. L. J. 225.** In **9 Bur. L. T. 47 = 17 Cr. L. J. 91,** the High Court refused

to consider an application for revision against acquittal. In 20 C. W. N. 882 an acquittal under s. 247 was set aside as the absence was due to the death of the complainant and the case was one of considerable importance, 44 A. 332; 5 Lah. 18; 5 Patna 25.

69. High Court cannot interfere with acquittal where Public Prosecutor has withdrawn charge.—*See* s. 494. If the Public Prosecutor withdraws a charge and the Court approves of it, the accused shall be acquitted, and neither the Public Prosecutor nor the Judge is called on to give any reasons for his action. The High Court has no power to interfere with such an order of acquittal. 8 M. L. T. 218 = 11 Cr. L. J. 193.

70. Entry under s. 273 cannot be revised even if Court entering it is a High Court for limited purpose only.—A Court subordinate to the High Court may be declared to be a High Court under s. 266 for the limited purpose of Chap. XXIII. The High Court has defined in s. 4 although possessing revisional power over the said Subordinate Court in all other respects, will not have the power of reversing or interfering with any order passed by that Court under s. 273. The said Subordinate Court when making an order under s. 273 in Chapter XXIII acts as a High Court within the meaning of s. 266.—*Per* MITTER, J., 14 C. 42 at p. 48.

71. In exceptional cases alone High Court will interfere.—As a rule, where no appeal has been preferred by the Local Government from an original or appellate order of acquittal the High Court will not interfere in revision, 13 P. W. R. 1907 = 5 Cr. L. J. 433; which *overrules* 14 P. R. 1905; 42 C. 612. *See* also 12 P. R. 1906; Weir II, 870 and 871; 7 Rang. 533. But where a Magistrate acquitted the accused disregarding the [illegible] [illegible] [illegible] Court does not ordinarily interfere with orders of acquittal in revision, yet it cannot be expected that it would hesitate to do so, where the acquittal is based not upon an appreciation of doubtful evidence, but upon a manifest error apparent on the face of the judgment, 9 Bom. L. R. 156 = 5 Cr. L. J. 171; 3 Bom. L. R. 554. The High Court set aside an acquittal when the accused were acquitted upon the result of local inspection and without taking the evidence of witnesses present, 39 C. 931. It will interfere where the acquittal is based solely on a mistaken view of the law, 6 A. L. J. 733 = 10 Cr. L. J. 417. So also where a trial was wrongly held to be barred under s. 403, 12 Bom. L. R. 226. Where a Magistrate in a summary trial acquitted the accused without examining all the witnesses for the prosecution, his order was set aside on revision, 24 W. R. 62; 2 C. L. R. 339. A Magistrate cannot refuse to allow an accused person when put on his defence to recall the witnesses for the prosecution to be cross-examined by him, 19 W. R. 53. Where a Magistrate acquitted the accused in a summary trial the High Court set aside the acquittal on the ground that the summary procedure was ill adopted to the complicated nature of the case, 6 S. L. R. 101 = 13 Cr. L. J. 780; 6 S. L. R. 121 = 13 Cr. L. J. 771. *See* also 5 M. L. T. 255. Upon a proper interpretation of s. 439 sub-sec. (4), a High Court acting as a Court of Revision, is not competent to question an order of acquittal upon the merits thereof nor can it direct a re-trial upon the ground that it takes a different view of the facts or of the law applicable thereto from that upon which the order of acquittal is based. It is only where an acquittal is illegal for some such reason as is given in s. 530 (*p*), or where an incurable irregularity has occasioned a failure of justice the High Court can interfere, 5 N. L. R. 4 = 9 Cr. L. J. 211. Where it is plain that the Lower Court for reasons outside the merits of the dispute has really declined to decide the controversy and has dealt with matters which really do not decide the complaint before him, the High Court will interfere in revision from an order of acquittal, for example, where in a case of defamation as by stating a person to be of the "Chamar" caste the Judge has decided that the case ought to be dismissed because he regards it as trivial and contemptible but has not decided the issues requiring determination for a finding as to whether or not an offence of defamation has been committed, 13 A. L. J. 846.

The High Court declined on an application by the complainant to interfere under s. 435 of the Code with an order of acquittal passed by a Sessions Judge agreeing with assessors 25 Bom. L. R. 485 (9 Bom. L. R. 156, *distinguished*).

72. Revision against acquittal not restricted to errors apparent on face of record.—That the accused obtained his acquittal under s. 247 by preventing the complainant from appearing by wrongfully arresting and detaining him on a false charge of nuisance is not a ground for setting aside the order of acquittal in revision whether directly at the instance of the complainant or on a report of the District Magistrate. There is no reason to hold that the ground for interference should be apparent on the record, 35 M. 1023. *See* also 1891 A. W. N. 120 and Notes 15 and 20 above.

73. **After setting aside acquittal, may direct re-trial or re-hearing of appeal.**—The High Court has power under this section to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction, **5 W. R. 2** and **32**; **11 B. H. C. R. 117**; **21 W. R. 21 = 12 B. L. R. Appx. XXII**; **1 A. 1**; **3 B. 150**; **7 C. L. R. 142**; **1904 P. L. R. 1**; **6 S. L. R. 101 = 13 Cr. L. J. 780.** In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under this section, reverse such order and direct a re-trial of the appeal, the proper tribunal to conduct which is the Sessions Court, or such other Court of equal jurisdiction as the High Court may entrust, under s. 426, with the trial of the appeal, **9 A. 134**; **27 C. 320**; **19 A. L. J. 589.** *See* also **23 A. L. J. 433**; **24 A. L. J. 414.**

74. **High Court will not interfere with acquittal on reference under s. 438.**—Usually the High Court will not interfere with an acquittal, when it is made the subject of reference under s. 438, **24 A. 346**; **12 A. L. J. 255 = 15 Cr. L. J. 304**; **25 A. 128**; **1 S. L. R. 40 = 8 Cr. L. J. 161.** For an exceptional case, *see* **7 S. L. R. 200 = 15 Cr. L. J. 553,** where the Magistrate allowed a compromise at the instance of the relatives of the person deceased and the acquittal was not after trial on the merits. The High Court has jurisdiction to interfere with acquittal in revision under s. 439, but it will not exercise that jurisdiction on a reference by a Sessions Judge except where serious injustice has been caused by error of law, **42 M. 109.**

75. **High Court has jurisdiction to revise order of acquittal at the instance of complainant.**—Provisions of sub-sec. (5) do not debar the High Court from revising an order of acquittal at the instance of the private complainant who could not appeal. " We entertain no doubt that we can deal with an order of acquittal in accordance with the practice of this Court in a series of cases," **38 C. 786.** Though as a Court of Appeal the High Court can consider an order of acquittal only on the appeal of the Local Government yet as a Court of Revision, if can deal with either an original or appellate order of acquittal, either when reported under s- 438, or whenever it may otherwise come to its knowledge. It can so act even on the application of a private prosecutor, **37 C. 320**; **11 C. L. J. 113 = 11 Cr. L. J. 213**; **18 P. R. 1883**; **18 C. W. N. 1244 = 15 Cr. L. J. 722**; **18 P. W. R. 1916 = 16 Cr. L. J. 657**; **2 A. 448**; **25 A. 128**; **6 S. L. R. 121 = 13 Cr. L. J. 771**; **39 C. 931.** In **42 C. 612,** JENKINS, C.J , *distinguished* **11 C. L. J. 113,** on the ground that the error was one of pure law apparent on the face of the record, while the offence was one under s. 504, I.P.C. ' I have always understood that offences of an essentially personal character, such as defamation or insult were viewed differently for the purpose of revision.' *See* also **14 M. 363**; **6 C. L. R. 245**; **7 C. L. R. 142**; **7 C. 447**; **1883 A. W. N. 222.** But the High Court should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice, **42 C. 612**; **16 Cr. L. J. 558**; **1915 M. W. N. 540 = 16 Cr. L. J. 600**; **19 Bom. L. R. 354**; **18 Cr. L. J. 519**; **U. B. R. (1917) 2nd Qr., 19**; **18 Cr. L. J. 849**; **18 A. L. J. 846**; **41 B. 560.**

76. **Sub-sec. (4) does not limit the powers of Court of Appeal.**—Sub-sec. (4) cannot be held to limit the powers of a Court of Appeal. It only limits the powers of the High Court when acting as a Court of Revision from converting a finding of acquittal into one of conviction. But s. 423 (*b*) has no such restriction, **37 M. 119.** In **23 C. 975,** it was contended upon sub-sec. (4) of this section, that the power under s. 423, sub-sec. 1 (*b*) to alter the finding must be held to be subject to the restriction, that the High Court cannot find the appellant guilty of any offence of which he had been acquitted by the Court below, but the High Court was of opinion that the clause did not limit the powers of the Court as a Court of Appeal; that it was only intended to limit in certain respects the revisional powers of the Court which would otherwise have been competent in revision to convert a finding of acquittal into one of conviction, **44 A. 332.**

76-A. ***Order of acquittal interference in revision.***—*The High* Court cannot on an application in revision convert an order of acquittal into one of conviction by setting aside the order of the Sessions Judge and restoring that of the Magistrate. *Quære.* Whether the High Court has power to interfere with such an order in revision, **53 Bom. 564.**

77. **Sub-sec. (4) limits power of High Court only where there is complete acquittal.**—In **12 P. R. 1904 = 599 P. L. R. 1904,** it was held the Chief Court had power in revision, where the accused had been convicted of one offence and acquitted of another, to convert the acquittal into a conviction. What was meant by acquittal in sub-sec (4) of this section was a complete acquittal and discharge on all the allegations and facts charged and not an acquittal on one charge and conviction on another. Reading this section and s. 423 together, the Court considered that the High Court as a Court of revision had power at one and the same time to alter the finding and to enhance the sentence as might be lawful or desirable in accordance with the new finding. The juxtaposition of the words " *maintaining the sentence* " in s. 423, and " *may enhance the sentence* " in this section is not accidental, but significant. *See* also **37 M. 119** where it was held that sub-sec. (4) refers to

Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before overruling or setting aside the said decision or order.

Note.—A statement submitted by a Presidency Magistrate under this section must be regarded as a completion of the record and possesses a conclusive character as against affidavits, **12 B. 377.** This section apparently applies to cases in which the sentence or order is not appealable. *See* s. 411. Mere omissions by a Magistrate to record his reasons before referring a case under s. 202 for enquiry by the Police, and for dismissing a complaint under s. 203, is an irregularity. But a statement filed under s. 441 supplies the omission. So, after the filing of such a statement, such an omission does not call for the interference of the High Court with an order made under those sections, **5 M. L. T. 79.** The Calcutta High Court has *held* that no rule exists which can be binding on any Bench exercising criminal revisional jurisdiction as to whether a party may be heard through Counsel or Vakil instructed or retained or merely instructed by the Legal Remembrancer or Local Government.

High Court's order to be certified to Lower Court or Magistrate.

442. When a case is revised under this Chapter by the High Court, it shall, *in manner hereinbefore provided by s.* 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

Notes.—1. Scope of section.—This section applies to all revisions by a High Court whether under s. 435 or s. 439 and the provisions that it must certify its decision or order to the Court by which the sentence, etc., was passed are incompatible with the notion that a High Court can *revise* its own finding, for it cannot certify to itself, **5 P. R. 1909 = 41 P. L. R. 1909 = 10 P. W. R. 1909 = 9 Cr. L. J. 378.**

2. The result of every application for revision of a sentenee under which the applicant is in confinement shall be notified direct to the officer in charge of the jail in which the applicant is confined, by the Court from whose order the application for revision was preferred.—*C. P. Cr. Cir.*, Part II, No. 47. For Bombay Rule, *see* Book Cir. C., pp. 50—54, vide *Government Gazette* for 1896, Part I, pp. 427 and 428.

PART VIII.

SPECIAL PROCEEDINGS.

CHAPTER XXXIII.*

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.

Note.—Chapter XXXIII is thoroughly recast by the Criminal Law (Amendment) Act XII of 1923. The object of this thorough revision of Chapter XXXIII is to reduce the differences in the cases of trials of European British subjects and Indians under the Code. The report of the Committee that was submitted to the Legislative Assembly, represents a compromise that could be effected between the interests concerned under the existing circumstances and the various racial considerations between Europeans and Indians that must be recognised as existir ˎcts in spite of theoretical considerations based on pure justice. It would be best to give in the words re sente. of th t itself the effect of the compromise arrived at.

9 S. J Cr. th

Bill is enacted the only privileges as regards the criminal procedure applicable to them which for European subjects of His Majesty as compared with Indian subjects of His Majesty will follows:—

privilege of not being tried by Magistrates of the second or third class, save for offences nishable with fine only not exceeding Rs. 50;

will be therefore

* III (ss. 443 to 449) has been substituted in the place of the old Chapter XXXIII (ss. 443—463) by the Criminal Law XII of 1923).

(b) the privilege of being under different High Courts in the case of a few areas in which the general Judicial Administration is not very highly developed,

(c) the privilege of being able to obtain writs in the nature of *habeas corpus* from High Courts of Judicature established by Letters Patent when outside the limits of British India, and

(d) the exemption from the jurisdiction of Magistrate and Sessions Judges as regards sentences of whipping and from the jurisdiction of special power Magistrates as regards the infliction of sentences of imprisonment exceeding two years.

The Committee accepted retention of each of these few privileges for one reason or another Incidentally the number of persons who will be entitled to the privileges will be reduced by reason of the fact that they will only be claimable by persons of European descent in the male line

The only existing distinction between the procedure in criminal trials applicable to Indian subjects of His Majesty and Europeans (other than European British subjects) and Americans is that referred to in paragraph 4 of this statement. The existing privileges are retained for these persons but they are also accorded by the Bill to Indian subjects of His Majesty

In the Bill the procedure for the trial of cases in which racial considerations are involved is included in a Chapter which takes the place of the existing Chapter XXXII of Code. The remaining provisions of that Chapter which it is necessary to retain are distributed in appropriate places throughout the Code, as is indicated in the notes on clauses which are appended to this statement.

As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency town. The first step to be taken to secure that such a case shall be tried under the provisions of the Chapter is a claim to be made by the accused person before the Magistrate. Unless such a claim is made at one of the stages indicated for the trial of a summons-case, or of a warrant case, or for the inquiry preliminary to commitment, the provisions of the Chapter will not apply The Magistrate then makes such inquiry as he thinks necessary As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the Chapter or not, it is provided that if the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects he shall find that the case should be tried under the provisions of the Chapter For other cases with which both European British subjects and Indian British subjects are connected the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried This it is observed is the same criterion as that now contained in clause (e) of sub-sec. (1) of s. 526 of the Code of Criminal Procedure relating to the powers of a High Court to transfer criminal cases If the Magistrate rejects the claim the person has a right of appeal to the Sessions Judge whose decision is final, and if the claim is rejected by the Magistrate the Magistrate is required to stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented until it has been decided The period allowed for the presentation of an appeal is fixed by the amendment of the Indian Limitation Act 1908, made by clause 39 of the Bill at seven days. The persons who will be included within the term 'complainant" for the purpose of these provisions are then defined by the proposed s 444 Incidentally public servants and officers and servants of companies, associations or bodies to which the Local Government by general or special order may declare the provisions of the section to apply will not be included within the definition merely because they have made a complaint or given information in their official or *quasi*-official capacity The procedure in summons-cases punishable with imprisonment which has been referred to in paragraph 6 of this statement is then laid down. For warrant cases which would normally be triable under the provisions of Chapter XXI of the Code, if it is found that the case ought to be tried under the provisions of the Chapter, a Magistrate is required, if he does not discharge the accused, to commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court. Normally in the Court of Session the case will then be tried by a jury of mixed nationality, the majority of the jurors being either Indians or Europeans and Americans according as the accused person is an Indian or an European subject of His Majesty *Statement of Objects and Reasons—Racial Distinctions Committee Report*, 1923.

Preliminary note. Trial of Europeans by jury, whether substantive right or mere matter of procedure.—Where an European had claimed to be tried by jury and was committed on 11th June, 1923, to the Sessions Court, but that right to be tried by jury was taken away by Act XII of 1923 which came into force on

the 1st of September, 1923; and the accused appeared before the Sessions Judge in October, 1923, and asked for trial by a mixed jury, *held* that the right of trial by jury was a substantive right and not a mere matter of procedure and that the accused who had this right under Chapter XXXIII of the old Code when he was committed for trial, could not be deprived of it by the Amendment of that Code by Act XII of 1923, **6 Lah. 262.**

Determination regarding applicability of this Chapter.

443. (1) Where, in the course of the trial outside a presideney town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall if he is satisfied—

(*a*) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or

(*b*) that, in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter, record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or if he is not so satisfied, record a finding that it is not such a case.

(2) Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.

(3) Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.

Note.—" Presidency town shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay as the case may be," s. 3 (4), General Clauses Act X of 1897.

Definition of "complainant."

444. For the purposes of section 443, "*complainant*" *means* any person making a complaint or, in relation to any case of which cognisance is taken under clause (*b*) of section 190, sub-section (1) any person who has given information relating to the commission of the offence within the meaning of section 154:

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in section 3 of the Indian Railways Act, 1890 or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the *Local Official Gazette*, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a Police-officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

Procedure in summons-cases.

445. (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons-case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two

Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case

(2) Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case, together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law

(3) Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-sec (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code

(4) In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-sec (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may, by general or special order, direct

(5) Notwithstanding anything contained in this section, the Local Government may, by notification in the *Local Official Gazette*, direct that all summons cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant cases

Procedure in warrant-cases

446. (1) Where a Magistrate or a Sessions Judge decides under s 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court

(2) Where an accused is committed to the Court of Session under sub-section (1), the Court shall *proceed to try the case as if the accused had required to be tried in accordance with the* provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of s 284 A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians

Note.—*See* for the meaning and scope of this section and the sections 443 and 275 and for the meaning of the phrase 'Ordinary course' in the proviso to s 446, **5 Lah. 515** The provisions of this section are mandatory and the Magistrate after deciding that he had no jurisdiction cannot assume jurisdiction against the *Indian accused by discharging the European British subject*, **51 A. 493.**

Court to inform accused persons of their rights in certain cases.

447. If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter.

to appeal shows that the case would, if it had been tried outside a presidency town would have been triable under Chapter XXXIII On general principle it is desirable that such applications should be made to a Divisional Bench rather than to a single Judge

5. Limitation.—If the appeal is barred, the application for leave is necessarily out of time An appeal under this section from the conviction and sentence by a Judge at the original Sessions of the High Court is governed by Art. 155 of the Limitation Act (IX of 1908) **53 Cal. 746.**

450 to 463.—(*Repealed*)

Note.—Sections 453 454, 455 and 459 have taken the shape of an additional Chapter XLIV which was inserted by the Criminal Law (Amendment) Act XII of 1923 These sections have now become supplementary provisions relating to European and Indian British subjects and others and are now enacted as s 528-A, 528-B 528-C and 528. Ss 456, 457 and 458 have become parts of ss. 491 and 491 A S 460 is to be found in s 284-A S 462 has become a part of s. 326

CHAPTER XXXIV.

LUNATICS

Procedure in case of accused being lunatic

464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing

* (1-A) Pending such examination and inquiry the Magistrate may deal with the accused in accordance with the provisions of section 466

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall † "record a finding to that effect and' shall postpone further proceedings in the case

Note.—The amendment in sub-sec. (2) requires the Magistrate to record a finding, if he is of opinion that the accused is of unsound mind and incapable of making a defence —*Statement of Objects and Reasons* (1914).

Notes.—For procedure where accused though not insane does not understand proceedings, *see* s 341 *See* Act XXXVI of 1888 as to wandering and dangerous lunatics Ss 464—468 and 472—475 deal with the procedure in the case of an accused who is of an unsound mind at the time of the trial and *see* ss 469—472, 468, 474 and 475 as to the case of an accused who is of an unsound mind at the time of the trial but the question is whether he was of sound mind at the time of the offence

1. Section does not deal with question whether accused was or was not insane when offence committed —This section has nothing to do with the question whether the accused person was or was not of unsound mind at the time when he is alleged to have committed the offence of which he is accused, **1900 A. W. N. 37.** The inquiry under this section will only affect the prisoner's trial and not the result after trial The test of insanity at the time of the commission of the offence is whether the prisoner knew at the time that he was doing wrong, **24 W. R. 5, 12 M. 459, 10 B 512.** The law presumes every person of the age of discretion to be sane, unless the contrary is proved and when a lunatic has lucid intervals the law presumes the offence of such to have been committed in a lucid interval unless it appears to have been committed during derangement, **Ratanlal 172** The fact that the conduct of the accused at the time of trial was unusual and that his father was insane, do not justify the conclusion that the accused was at the time of committing the offence, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing

* This sub-section was inserted by Act XVIII of 1923
† The words in inverted commas were inserted by *ibid*

what was wrong and contrary to law, **Ratanlal 10.** The test of insanity under this section is that a person accused before a Magistrate is of unsound mind and incapable of making his defence. Under such circumstances the Magistrate should not acquit him, but must proceed under s. 466, **Weir II, 581**; *see* **10 W. R. 37; 1 W. R. 11; 11 M. L. T. 24 = 13 Cr. L. J. 24** and Notes to s. 341.

2. **Provisions of this Chapter do not override general rules of procedure.**—The provisions of this Chapter are subsidiary provisions for dealing with an exceptional class of persons charged with offences, and are not to be construed to override the general rules of procedure, except in so far as the special provision is clearly incompatible with the general provisions, **11 P. R. 1894.** When a charge of an offence to which Chapter XVIII applies is made before a Magistrate, he ought, in the first place, to make an inquiry into the truth of the charge; it is only when he is satisfied, after such inquiry that there is a *prima facie* case against the accused that he can make the inquiry prescribed by this section into the question of the unsoundness of mind of the accused person, etc.—*Ibid.*

3. **Magistrate must inquire into fact of unsoundness.**—The language of this section is that "when a Magistrate holding" not "about to commence an inquiry......and *consequently incapable of making his defence,* the Magistrate shall inquire, etc." The provision of this section certainly contains as sound sense as it appears to be sound law, for the Legislature can never have intended that a person should be liable to be treated as a lunatic by the executive Government on the report of Criminal Court after a summary inquiry into his state of mind alone, merely because somebody has chosen to make a charge against him, possibly a groundless charge, before a Magistrate.—*Per* PLOWDEN, J., **11 P. R. 1894.** A Magistrate cannot consign a lunatic to an asylum or jail on his own mere unprofessional opinion. He must have before him the deliberate statements of a medical officer, reduced to writing and subjected to the test of cross-examination, **1 Bur. L. R. 87.** A mere certificate of a medical man is not enough, **9 W. R. 23.** Where, upon the report of a Civil Surgeon that the accused person was of weak intellect, a Magistrate discharged the accused and made him over to his brother for safe custody, it was *held* that the proceedings were illegal, because if the order was made under s. 466, the Civil Surgeon should have been examined; and if under s. 470, the accused should have been detained in custody and the case reported to Government, **Weir II, 580.** In the city of Bombay *the Police Surgeon* is the medical officer to be examined (*Gazette*, 1877, p 339), while in Madras, it is the officer in medical charge of the Penitentiary (*Gazette*, 20th August, 1878, Pt. I, p. 474), and in the districts, all medical officers in independent charge are competent to give evidence under this section. (G. O. No. 2224, Judicial, dated 23rd August, 1883) In addition to expert testimony the Magistrate may also take evidence as to the ordinary habits and behaviour of the accused and his demeanour both before and after the commission of the offence charged, **5 C. 826; 42 A. 137.**

4. **Magistrate should not try accused when he finds him incapable of making defence.**—If, after inquiring into the fact of the unsoundness of mind of the accused, and examining the Civil Surgeon, the accused appears to be insane and unable to understand questions and to return intelligent replies, the Magistrate should follow this section and not s. 341, and should act on his opinion under s. 466, **Ratanlal 832.** When a Magistrate finds that the accused is quite incapable of making his defence, he ought not to try him and acquit on the ground of insanity. If the accused be afterwards found to be capable of making his defence, the procedure prescribed in ss. 467, 468 and 473 should be followed, **Weir II, 581.** The postponement contemplated by this section is to be *sine die*, and as the postponement is caused by circumstances over which the Court has no control, cases postponed under this section, may be excluded in preparing the annual statement of the average duration of cases in the Criminal Court, **J. C. Oudh No. 70 of 1866.**

Procedure in case of person committed before Court of Session or High Court being lunatic

465. (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, *"and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the jury, if any, shall be discharged."

* The words in inverted commas were substituted for the words "and, if satisfied, shall pass judgment accordingly, and thereupon the trial shall be postponed" by Act XVIII of 1923

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

Note.—" This amendment provides for the discharge of the jury in the event of the Court being satisfied that the accused is of unsound mind and incapable of making his defence '—*Statement of Objects and Reasons* (1914).

Notes.—1. Sections 464 and 465 to be applied only when accused's sanity at the time of trial is questioned.—These two sections refer to the procedure to be adopted by a Magistrate or other Court on coming to the conclusion that a person put on trial before the Magistrate or Court is of unsound mind, and incapable of defending himself, that is to say, actually of unsound mind *when placed before the Magistrate or other Court* These two sections have nothing whatever to do with the question whether the accused person was or was not of unsound mind at the time when he is alleged to have committed the offence of which he is accused, **1900 A. W. N. 47.** *See* Note 1 to s 464

2. Fact of unsoundness of mind at time of trial should first be put before jury before calling on prisoner to stand his trial.—The power given to the jury to try the fact of unsoundness of mind is in accordance with the decision in **10 B. L. R. Ap. 10 = 19 W. R. 15.** The second paragraph is based on the same decision Where a person committed to a Court of Session appears to the Court to be of unsound mind and consequently unable to make his defence, it is obligatory on the Court to try first the fact of such insanity and incapacity before calling on the prisoner to stand his trial and not to continue to try the fact, throughout the trial of the prisoner, **1905 A. W. N. 2.** A Sessions Judge in his charge to the jury told them that in his judgment, the accused was, at the time of his trial, exhibiting symptoms of unsoundness of mind, and he directed them to find whether the accused was insane at the time be committed the offence , *held*, that the issue as to whether the accused was of unsound mind *at the time of the trial*, and incapable of properly making his defence, was a preliminary issue to that put by the Sessions Judge, and should have been first submitted to the jury, **19 W. R. 45; 1882 A. W. N. 106; 10 W. R. 37.** The trial was set aside as bad and re-trial ordered Again, where the accused confessed to having killed his wife and pleaded *guilty* at his trial for murder, and the Sessions Judge recorded briefly the evidence of two prosecution witnesses to determine whether the offence committed was or was not culpable homicide amounting to murder, and he found that the offence was murder and sentenced the accused to transportation for life on the ground " that the accused without being actually insane, so as not to be aware of what he was doing, appears to be decidedly a man of weak intellect." On appeal it was urged that the accused was insane or at any rate incapable of understanding the charge against him The Chief Court set aside the conviction and ordered an inquiry under this section before re trial on the charge, **54 P. R. 1905 = 169 P. L. R. 1905 = 3 Cr. L. J. 80.**

3. Where accused's sanity is doubted, the fact should be tried.— Where a Sessions Judge entertains doubts as to the sanity of the accused, he should not merely put questions to him, but should try the fact of such unsoundness of mind by examining the Civil Surgeon, or some other medical officer, and by taking such evidence as might have been procurable from the village at which the accused resides with the view of ascertaining whether the accused had at any time prior to the commission of the crime, exhibited symptoms of insanity, **1 B. H. C. R. 33.** *See* the procedure adopted in **2 W. R. 33.** Where an accused person is found to be insane before the completion of his trial, the Judge should postpone the trial and report the case to the Local Government, instead of trying the accused when he is incapable of making his defence and acquitting him on the ground that he committed the offence charged when he was incapable of knowing that he was doing wrong, **1 W. R. 11.** Where in the course of his examination under s 364 the accused said that he was not in his senses when he tried to rob *held*, that the Court of Session should have acted under s 465 and tried the fact whether on the date the accused was called on to plead the accused was or was not of unsound mind and capable or incapable of making his defence, **15 A. L. J. 239.**

4. Stay of proceedings by Sessions Court.—A Sessions Judge has no power to stay proceedings and to direct inquiry as to the state of the accused s mind, because it appeared to him problematic whether he was capable of making his defence The proper procedure to be followed is provided by this section, **Weir II, 137; 3 W. R. 57.**

5. Procedure when case is postponed.—When a Magistrate finds that an accused person was of unsound mind and incapable of making his defence when put before him for trial he should postpone further proceedings and take action under this section, **1900 A. W. N. 47**; after a case has been reported to Government under s. 466, it should not be struck off, but should be kept on the register of pending cases, **6 W. R. 3.** When a

trial is postponed under this section on the ground of the insanity of the prisoner and the consequent incapacity to make his defence it should not be resumed at the point at which it was previously stopped, but should be commenced *de novo*, when the Court finds him capable of making his defence, **Weir II, 582.** *See* Note 4 to s. 464.

6. **Prosecution must prove sanity of accused.**—When a jury is impanelled, the *onus* is on the prosecution to prove the sanity of the defendant, *R.* v. *Davies*, (1853) **3 Car. and Kir. 328.** The jury may form their own judgment of the defendant's sanity or insanity by his demeanour without any evidence being given; if he shows strong symptoms of insanity, it is unnecessary to ask him if he wishes to cross-examine any witnesses who are called or to make any remarks or offer evidence, *R.* v. *Goode*, (1837) **7 Ad. and El. 536.** *Halsbury Laws of England*, Vol. IX, p. 354. *See* also **51 C. 584; 51 C. 827.**

Release of lunatic pending investigation or trial.

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, *"whether the case is one in which bail may be taken or not," may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

Custody of lunatic.

†"(2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit and shall report the action taken to the Local Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912."

Note.—This section is amended so as to allow bail to be granted at the discretion of the Court in any case in which the accused is a lunatic and the amendment also permits the accused to be kept in custody. The object in view is to delegate the power of the Local Government and to do away with the existing distinction in procedure between bailable and non-bailable cases.—*Statement of Objects and Reasons* (1914).

Note.—Jurisdiction of Criminal Courts over lunatics.—The authority of the Criminal Court over an accused, declared to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and it does not revive until he (the accused) is sent back to the Magistrate under s. 473, on a certificate that he is capable of making his defence, **2 C. 356.** *See* **3 W. R. 70** as to custody in non-bailable cases, pending orders of Government.

Resumption of inquiry or trial.

467. (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466 and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence

Note.—While under s. 464, the examination of the medical witness is necessary the certificate of such officer is sufficient for a renewal of proceedings under sub-sec. (2) of this section.

Procedure on accused appearing before Magistrate or Court.

468. (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

* The words in inverted commas were substituted for the words "if the case is one in which bail may be taken" by Act XVIII of 1923.
† Sub-sec. (2) was substituted for the original sub-sec (2) by Act XVIII of 1923, s. 122.

(2) If the Magistrate or Court considers the accused * to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be † 'and if he the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.'

Note.—Inquiry or trial should commence "de novo."—When a trial is postponed on the ground of insanity of the prisoner, it should not be resumed at the point at which it was previously stopped, but should be commenced *de novo*, when the Court finds him capable of making his defence, **Weir II, 582.**

When accused appears to have been insane

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be

Notes.—1. Committing Magistrate to inform jail authorities to place accused under careful surveillance.—Whenever a Magistrate, acting under this section shall send for trial before the Court of Session an accused person regarding whose sanity at the time of committing the offence he entertains any doubt, he shall at the same time inform the jail authorities of the supposed state of the accused in order that he may be placed under careful surveillance prior to his trial before the Court of Session.—*Bom. H C. Cr Cir*, p 18

2. A Magistrate rightly commits for trial at the Sessions, a prisoner charged with murder, whom he finds to be sane at the time of the preliminary investigation, although he was insane, when he committed the act, **9 W. R. 23.**

3. It is not incumbent upon a committing Magistrate to order a medical inquiry upon a defence of insanity If he is of opinion that the accused is sane at the time of the trial he has to proceed in accordance to this section and commit the accused for trial, **9 Lah. 371 = 29 Cr. L. J. 204.**

Judgment of acquittal on ground of lunacy

‡ **470.** Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law the finding shall state specifically whether he committed the act or not

Notes.—1. Acquittal on ground of lunacy.—" Nothing is an offence which is done by a person who, at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law" S 84, I P C

2. Fact of unsoundness must be distinctly proved—The fact of unsoundness of mind is one which must be clearly and distinctly proved, before any jury is justified in returning a verdict under s 84 I.P C Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved, **20 W. R. 70 = 13 B. L. R. Appx. XX; Ratanlal 172; 1 W R. 19, 1901 A. W. N 132, 39 M. 550.** *See* also *R* v *Oxford*, **4 St Tr. (N S) 497;** *R* v *Stokes*, **3 C. and K. 185** Finding of acquittal within the terms of this section must be after a trial by a regularly constituted Court. So where the Sessions Judge without choosing assessors proceeded himself to try this point, took evidence and delivered judgment the proceedings were quashed and a re trial ordered with assessors, **5 N.-W. P. H Cr. 110** *See* Note 1 to s 464

3 Procedure—discharge of accused.—When a Magistrate is of opinion that the accused is of sound mind at the time of the trial but was insane when he committed the act, he should not be discharged under s 253 Such a procedure is illegal and the Magistrate should have acted under this section and s. 471 **Weir II, 582**

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* The word ' person ' was omitted by *ibid*

† The words in inverted commas were added by Act XVIII of 1923

‡ Cf *the Criminal Lunatics Act* 1800, 39 and 40, Geo III, C 94

4. Confession of guilt—Opinion (evidence) as to state of accused's mind.—The accused killed his brother-in-law, there being apparently no enmity or quarrel between them. His explanation was that he killed the deceased in order that he might die by the order of the public authorities and so go to heaven. No medical evidence had been taken as to whether the accused was or had been of unsound mind. *Held*, that the explanation, if accepted as indicating the thoughts of the accused at the time of doing the act, did not fall within the definition of unsoundness of mind sufficient to excuse crime, inasmuch as it indicated a consciousness that the act was contrary to law. *Held*, also, that it was expedient to have the opinion (evidence) of a medical witness as to state of accused's mind (past and present), **Weir II; 583.** *See* also **9 S. L. R. 171 = 17 Cr. L. J. 79.**

5. McNaughten's case.—The following answers were given by the English Judges to certain questions propounded to them by the House of Lords in the case of *Reg.* v. *McNaughten*, **10 Cl. and Fin. 200 = 8 Eng. Rep. 718**; *Archbold*, 13 -15. The questions were as follows:—

"*1st.*—What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"*2nd.*—What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for example), and insanity is set up as a defence?

"*3rd.*—In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

"*4th.*—If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?

"*5th.*—Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to the law, or whether he was labouring under any and what delusion at the time?"

To these questions the Judges (with the exception of MAULE, J., who gave on his own account a more qualified answer) answered as follows:—

To the 1st question:—"Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean, the law of the land."

To the 2nd and 3rd questions:—That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was

conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, and this course, we think, is correct, accompanied with such observations and explanations as the circumstance of each particular case may require '

To the 4th question —" The answer to this question must, of course, depend on the nature of the delusion, but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example if, under the influence of his delusion he supposes another man to be in the act of attempting to take away his life and he kills that man as he supposes in self-defence he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

And to the last question —" We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible But where the facts are admitted and not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form though the same cannot be insisted on as a matter of right.' For decided cases in India on the subject, *see* **1 W. R 1; 7 W. R. 64, 7 W. R 42; 8 W. R. Cr. (Let) 19; 23 C. 604; 10 B. 512, 12 M 459; 22 C 817; 14 B. 564, 10 C. W. N. 725; 34 C 686; 8 P. R. 1889; 42 B R. 1887; 16 P. W. R. 1909 = 94 P. L. R. 1909**, the opinion of lay persons on the question of sanity is not of much value, **15 O. C 321 = 14 Cr. L J. 81.**

6. Recommendation to Local Government to commute sentence.—Where the accused was not so insane as to gain the benefit of s 84, I P C, but the Judge was of opinion that the accused was at the time of the commission of the crime suffering from mental derangement, the record was forwarded to the Local Government with a recommendation that the case may be dealt with under s 401, **23 C. 604; 10 B. 512, 16 P. W. R. 1909 = 11 Cr. L. J. 105** In **1914 U. B. R. III 28 = 16 Cr. L J 95** a mental derangement which fell short of unsoundness of mind described in s. 84, I P C, was held to be a good ground for passing the lesser sentence As to the Court's power to order detention of lunatic until orders from Government were received after acquittal in the trial, *see* **20 Bom. L. R. 629.**

Person acquitted on such ground to be kept in safe custody

471. (1) Whenever * " the finding " states that the accused person committed the act alleged the Magistrate or Court before whom or which the trial has been held shall, if such act would, but for the incapacity found have constituted an offence, order such person to be detained † in safe custody in such place and manner as the Magistrate or Court thinks fit ‡ " and shall report the action taken to the Local Government " §

‖ Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

¶ * * * *

Power of Local Government to relieve Inspector General of certain functions

**(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under †† section 473 or section 474

* The words in inverted commas were substituted for the words ' such judgment by Act XVIII of 1923

† The word " detained was substituted for the word ' kept by *ibid*

‡ The words in inverted commas were inserted by *ibid*

§ The words 'and shall report the case for the orders of the Local Government' were repealed by Act X of 1914

‖ This proviso was inserted by *ibid*

¶ Original sub sections (2) and (3) were repealed by Act IV of 1912

** Original sub sec (4) was renumbered (2) by *ibid*

†† The word and figures section 472 were repealed by Act X of 1914.

Note.—Original sub-secs. (2) and (3) of s. 471 were repealed by *the Indian Lunacy Act*, IV of 1912.

Notes.—1. Scope of the section.—Under the old section it was held that s. 471 of the Code does not compel the Court to send the accused to a lunatic asylum. All that is necessary is to see that such safeguards are taken as would keep the accused from mischief, **42 M. L. J. 72.** *See* also **43 B. 134.**

In **43 B. 134** it was *held* that the Court can order under s. 471 that the accused be detained in custody in jail until the further orders of Government and that the case be reported for further orders of Government. In **25 Bom. L. R. 286, 43 B. 134** was dissented from and it was held that under s. 471 the Court, in a case where it finds that an offence has been committed by a lunatic, must confine itself to making an order that he should be kept in safe custody. It is then for the Government to decide under their own powers the future fate of the person concerned and it was no duty of the Court to report the case for further orders of the Local Government as the last 12 words "and shall report the case for the orders of the Local Government" were repealed by Act X of 1914. Under the new amendment the words "and shall report *the action* taken to the Local Government" are newly added. Previously the words, "and shall report *the case* for orders of the Local Government" which occurred at the end of sub-sec. (1) were held not to authorise the Court to send the accused to a lunatic asylum or jail, but the Court had to submit a report of the case to the Local Government. Now under the new amendment a Court is competent to direct the detention of the accused in an asylum or jail. After making such order, under the new amendment, the Court is required to submit a report to the Local Government of the action taken under s. 471, so under the new amendment the Court can take action under s. 471 without reporting the case for the orders of the Local Government. But *see* also **29 Cr. L. J. 847 (2) = 111 I. C. 399 (2).**

2. High Court will not interfere with verdict of jury.—Where the question for decision is one on which all unprofessional opinion is likely to be equally good, the High Court expressed its unwillingness to interfere with the unanimous finding of a jury of educated men, come to on evidence before them, without the very clearest proof that they were mistaken. It is the duty of the Judge and not of the High Court to report the case for the orders of Government, **19 W. R. 45.**

3. Section should be applied to accused persons who labour under defects which make their trial impossible.—In **37 P. R. 1889** it was held that in accordance with English practice when the accused persons are not insane but labour under defects which render their trial impossible, they should be treated as insane persons and confined during the King's pleasure. This was followed in **13 P. R. 1911 = 12 Cr. L. J. 613.** *See* also **27 C. 368.** In *R.* v. *Pritchard*, **7 C.** and **P. 303,** where a prisoner arraigned on an indictment for felony, appeared to be deaf, dumb and also of non-sane mind, ALDERSON, B., put three distinct issues to the jury, directing the jury to be sworn separately on each: (1) Whether the prisoner was mute of malice or by the visitation of God; (2) Whether he was able to plead; (3) Whether he was sane or not; and on the last issue they were directed to inquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror to whom he might object, and to understand the details of the evidence and he directed the jury that if there was no certain mode of communicating to the prisoner the details of the evidence so that he could clearly understand them and be able properly to make his defence to the charge against him, the jury ought to find that he was not of sane mind. *See* also *R.* v. *Dyson*, **7 C.** and **P. 305;** *R.* v. *Whitfield*, **3 C.** and **K. 121.** The directions in *R.* v. *Pritchard* were approved of in *R.* v. *Berry*, **1 Q. B. D. 447** and *Ex-parte Emery*, **(1909) 2 K. B. 81.** In the last case the accused was totally deaf and unable to read or write. On being called on to plead he stood mute. The jury found that he was mute by visitation of God and being again sworn found that he was not capable of conducting his defence. It was held that this finding amounted to a finding that the accused was insane within the meaning of s. 2 of *the Criminal Lunatics Act*, 1800. *Archbold*, pp. 191—194.

472. * * * *

Note—Section 472 was repealed by *the Indian Lunacy Act* IV of 1912, s. 101 and Sch. II. Provision is now made for inspection of lunatics by ss. 28—30 of the said Act.

Procedure where lunatic prisoner is reported capable of making his defence.

473. If such person is* "detained" under the provisions of section 466, and † "in the case of a person detained in a jail, the Inspector-General of Prisons or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them" shall certify that in his or their opinion, such person is capable of making his defence, he shall be taken before the Magis-

* "—" This word substituted for the word "confined" by Act XVIII of 1923.
† "—" These words were substituted for the words "such Inspector-General or visitors" by *ibid.*

trate or Court, as the case case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 468, and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence

Procedure where lunatic confined under s 466 or s. 471 is declared fit to be discharged

474. (1) Is such person* is "detained" under the provisions of section 466 or section 471 and such Inspector General or visitors shall certify that, in his or their judgment, he may be † "released" without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be † "released" or to be detained in custody or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum, and, in case it orders him to be transferred to an asylum may appoint a commission, consisting of a judicial and two medical officers

(2) Such commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his ‡ "release" or detention as it thinks fit

Delivery of lunatic to care of relative or friend.

§ "**475.** (1) Whenever any relative or friend of any person detained under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall—

(*a*) be properly taken care of and prevented from doing injury to himself or to any other person, and

(*b*) be produced for the inspection of such officer, and at such times and places, as the Local Government may direct, and

(*c*) in the case of a person detained under section 466, be produced when required before such Magistrate or Court, order such person to be delivered to such relative or friend

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence and the inspecting officer referred to in sub-section (1), clause (*b*), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court, and, upon such production the Magistrate or Court shall proceed in accordance with the provisions of section 468 and the certificate of the inspecting officer shall be receivable as evidence'

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

Procedure in cases mentioned in s 195

‖ "**476.** (1) When any Civil, Revenue or Criminal Court is, whether on app[illegible] made to it in this behalf or otherwise, of opinion that it is expe[illegible] interests of justice that an inquiry should be made into any [illegible] to in section 195, sub-section (1), clause (*b*) or clause (*c*) [illegible] to have been committed in or in relation to a proceeding [illegible]

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* '— This word was substituted for the word "confined by Act XVIII of 1923

† ' — ' This word was substituted for the word 'discharged by *ibid*

‡ '— This word was substituted for the word discharge' by *ibid*

§ Section 475 was substituted by Act XVIII of 1923

‖ Sections 476, 476 (A) and 476 (B) were substituted for section 476 by Act XVIII of 1923.

Court may, after such preliminary inquiry, if any, as it thinks necessary record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate and may bind over any person to appear and give evidence before such Magistrate."

For the purposes of this sub-section a Chief Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200.

(3) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in a judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

Note.—Referring to the amendment of this section, the Select Committee say—

"The changes that we have made in the proposed s. 476 are not of great importance." We have provided that a Court can act on application made to it or *suo motu* and after such preliminary inquiry, if any, as it thinks necessary. For the words "committed before it or brought under its notice in the course of a judicial proceeding" we have substituted the phraseology used in the proposed new s. 195. We have substituted "may make a complaint" for "shall make a complaint," and in view of the criticism of the words "nearest first-class Magistrate" we have provided that a complaint should be sent to a first-class Magistrate having jurisdiction. For the words "if he thinks expedient in the interests of justice," which we think might hamper a Magistrate in the exercise of his powers of adjournment, we have substituted 'if he thinks fit.' In order to give effect to the decision arrived at in our consideration of cl. 114 that proceedings under s. 476, etc., should be subject to revision, we have introduced words which will make it necessary for the Court to record an order.

The whole section has been redrafted by the recent amendment. And the changes made by the amendment are given in the Select Committee Report quoted above.

Under the new amendment, under s. 476 the Court can act on application made to it or *suo motu* may make a complaint to a first-class Magistrate having jurisdiction. Under the old law it was not necessary to make a formal complaint and the Court could send the case for inquiry or trial to the nearest first-class Magistrate. But under the new amendment it is necessary that such first-class Magistrate should have jurisdiction to try the case.

Instead of "and committed before it or brought under its notice in the course of a judicial proceeding" the amending Act has substituted the words "which appears to have been committed in or in relation to a proceeding in that Court." The probable effect of this amendment is to widen in some respects and in other respects to restrict the scope of the section.

Sub-sec. (3) added by the amending Act gives power to a Magistrate to adjourn the hearing of a case until the decision of an appeal preferred over the proceeding out of which the matter arose.

ANALYSIS OF NOTES.

I.—SCOPE OF SECTION.

Notes.—1. The changes introduced by the amendment.—The changes effected by the amendment are noted above, s 476 had to be re cast in view of the changes introduced in s 195 under the amending Act (XVIII of 1923). Under s 195 as amended the necessity of a sanction for the cognisance of certain offences mentioned in that section is dispensed with Now s 195 lays down the conditions necessary for the cognisance of certain offences by a Court Under the old s 195, a sanction or a complaint could be preferred by a Court of law But now under that section as amended no sanction can be given. In short, s 195 now deals with the limitations that exist to the cognisance of offences by a Court.

Analysing s 195, therefore, it will be seen that under cl (*a*) of sub-sec (1) a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate, is now necessary for the cognisance of offences under ss 172 to 188, I P C. The complaint referred to in cl. (*a*) is an ordinary complaint against an accused person, filed by the public officer concerned The only difference being that there is no necessity of examining a public servant as complainant as provided in s 200, sub-cl (*aa*).

Clause (*b*) of s. 195 provides that offences under ss, 193 to 196, 199, 200, 205 to 211 and 228, I P C, can only be taken cognisance of on the complaint in writing of a Court concerned, under circumstances mentioned in cl. (*b*)

Clause (*c*) of s. 195 provides that in the case of ss 463, 471, 475 476, I P C, cognisance can only be taken on the complaint in writing of the Court concerned under circumstances mentioned in cl (*c*).

As far as the complaints by public servants under cl (*a*) are concerned, there is no section in the Code requiring any special procedure with regard to such complaints The public servants concerned in the prose cution of offences mentioned in cl. (*a*) are reasonably expected to file a direct complaint against an accused person (*See* Report of the Select Committee quoted at p 440 under s 195)

But with regard to offences mentioned in cls (*b*) and (*c*) a special procedure is laid down under s 476 Under that section a Court can only proceed by making a complaint with regard to an offence which appears to have been committed in or in relation to a proceeding in that Court It should be remarked that s 476 is the only section that authorises a Court to proceed against delinquents under cls (*b*) and (*c*) of s 195 It is already stated that now there can neither be a complaint nor a sanction under s 195 *See* **26 Bom. L. R. 289.**

A sanction to prosecute granted after September 1st, 1923, when the Criminal Procedure Code of 1898 was amended by Act XVIII of 1923, is illegal, (**31 C. 652** *followed*) **26 Bom. L. R. 1235.**

2. Under the old Code there was a conflict of decision as to the working of ss 195 and 476 In some cases (*e g*, **32 B 184; 40 M. 100, 42 M. 540 (F.B)** it was held that ss 195 and 476 must be read together and were supplementary and not independent of each other These cases held that s 476 must be read along with s. 195 and the qualifications mentioned in s 195 are to be treated as incorporated in the provisions of s 476 and it was further held that [illegible]
does not come within the [illegible]
such a person (**40 M. 100**). [illegible]
the power of the Court to direct a prosecution under s 476 is not restricted by the circumstances mentioned in s. 195 Therefore it was held that under s 476 a Court can direct the prosecution of a person for an offence under s 467, I P C., though he was not a party to the proceeding in that Court (**32 M. 49; 40 A. 24; 18 B 581; 14 Bom. L. R. 968; 34 C. 551**), **40 A. 24**

Now under the present amendment of both the sections, it seems that the Legislature intends that both ss 195 and 476 must be read together and that cls (*b*) and (*c*) of s. 195 must be treated as incorporated in s 476 and therefore s 476 can only apply to those offences mentioned in s 195 if they are committed by the person or in the circumstances mentioned therein, and therefore the Court is not competent to pass an order under s 476 directing the prosecution of a person who is not a party to the proceeding for an offence under s 467, I P C. Under the present amendment s 195 lays down the necessity of a complaint by specified persons for the cognisance of offences and s 476 lays down the procedure that is to be followed in

cases of offences mentioned in cls. (*b*) and (*c*) of s. 195. Therefore it is clear that s. 476 deals with the procedure required to be followed under s. 195. The cases holding contrary views on the interpretation of ss. 195 and 476 are however noted below.

3. Relation between ss. 195 and 476—

(i) *Is s. 476 supplementary to s. 195?*—Under cls. (*b*) and (*c*) of s. 195 it is open not only to the Court trying the case, but also to the Court to which such Court is subordinate either to grant a sanction or *to prefer a complaint* for the prosecution of the offender, although the superior Court may have had nothing to do with the trial of the case itself. How *that complaint* may be preferred is not stated in that section, but stated in s. 476 (1), because cl. (2) of this section says that the proceedings adopted by a Court under cl. (*i*) shall be treated as being in the nature of a *complaint*, **32 B. 184.** "The confusion that so often arises on this subject would disappear if Magistrates would regard the first three sub-sections of s. 195, the last four sub-sections of s. 195 and the two sub-sections of s. 476 as the three sub-divisions of one section, the first laying down the two main subjects to be dealt with, sanctions and complaints, the second dealing with sanctions and the third with complaints," **9 N. L. R. 184 = 15 Cr. L. J. 33.** But the Madras High Court has dissented from this view, **32 M. 49 (F.B.)**, where WHITE, C.J., expresses the opinion (at **p. 54**), that s. 476 is a self-contained section. Sub-sec. (1) gives the Court power to put the law in motion and sub-sec. (2) provides for the procedure to be followed when the law has been put in motion. SANKARAN NAIR, J., (at **pp. 55-56**) is also of opinion that an order under s. 476 is not a complaint under s. 195, but it is also open to a Court instead of following the procedure prescribed by s. 476 to present a complaint like any other ordinary person before a Magistrate. But MILLER, J., approves of **32 B. 184** and dissents from the view of the majority. *See* also **7 A. 871; 21 M. 124; 9 Bom. L. R. 1160 = 6 Cr. L. J. 326** and *see* **Weir II, 596,** where it was *held* that a Court is not precluded by this section from sanctioning the institution of a complaint by an officer of the Court or otherwise, instead of itself sending down the accused to a Magistrate of the first class.

(ii) "*Offence referred to in s. 195.—The sections must be read together.*—These words do not mean merely the offences covered by the sections of the I.P.C. mentioned in s. 195, but they mean the offences covered by those sections and committed under the qualifying circumstances mentioned in s. 195; a number of decisions is in favour of the view that the qualification mentioned in s. 195 (*b*) is to be treated as incorporated in the latter provision; (*see* **7 C. L. J. 373 = 12 C. W. N. 575 = 7 Cr. L. J. 340; 5 C. W. N. 106**), but upon the question of the effect of cl. (*c*) of s. 195 upon s. 476; judicial opinion is divided (*see* **18 B. 581; 22 C. 1004; 14 Bom. L. R. 968 = 13 Cr. L. J. 848;** *contra* **15 M. 224**), **37 C. 250.** In **18 M. L. T. 488 = 16 Cr. L. J. 797,** it was *held* following **15 M. 224,** that s. 476 applies only to those offences mentioned in s. 195 if they are committed by the person or in the circumstances mentioned therein and therefore a Court is not competent to pass an order under s. 476 directing the prosecution of a person not a party to the proceeding for an offence under s. 467, I.P.C. *See* **36 M. L. J. 448 (F.B.).** The wider view *held* in **22 C. 1004; 18 B. 581; 14 Bom. L. R. 968 = 13 Cr. L. J. 848** and the dictum of SANKARAN NAIR, J., in **32 M. 49—57,** that s. 476 must be construed as being entirely self-contained and that the offences mentioned in s. 195 must be referred to without any of the restrictions of qualifications that are to be found there as to the circumstances in which the offence is committed, was not adopted. *See* also **12 P. R. 1905.** *See* **21 Cr. L. J. 56.**

4. Difference between complaint under s. 195 and order under s. 476.—Where offences against public justice are committed, it will be well, if Courts availed themselves more fully of the provisions of this section, instead of leaving the prosecution to private parties who often use the sanction granted to them for the gratification of private ends, **26 B. 785. In Weir II, 589,** the proceedings of a Sessions Court according sanction under s. 195, of its own motion, without notice to the parties concerned, and the forwarding of these proceedings to a District Magistrate, instead of to the nearest Magistrate of the first class were not viewed as taken under this section and were set aside as illegal.

(i) S. 195 is not confined to judicial proceedings while s. 476 is so restricted.

(ii) A complaint may be made under s. 195 when the matter requires investigation, but an order under s. 476 can be passed only when a *prima facie* case is made out.

(iii) The complaint under s. 195 must be made before a Magistrate having jurisdiction under the ordinary provisions of the Code while s. 476 confers an exclusive jurisdiction on the 'nearest' first-class Magistrate who may not have any power to try if a complaint were laid before him under s. 195. *See* Notes 52 and 53.

(iv) The Magistrate to whom a case is sent under s 476 has to dispose of the case after 'inquiry' or 'trial' as the case may be, but not upon the result of any investigation by a Police-officer, etc, as a Magistrate taking cognisance of a complaint under s 195 is entitled to do under s 203

(v) A first class Magistrate cannot order an investigation into a case sent to him under s 476 as there is no examination of the complainant

(vi) The High Court has power to revise the orders passed under s 476 at least by Civil or Criminal Courts, but it has no power to reject or to direct the Magistrate to reject a complaint preferred under s 195 —*Per* SANKARAN NAIR J, in **32 M. 49 at pp. 57 58.**

(vii) An order granting sanction is subject to an appeal under s 195 while there is no appeal against an order under s 476 **34 C. 551 (F.B.).**

(viii) A sanction or a complaint under s 195 may be given or made at any time, but an order under s 476 must be made promptly, **34 C. 551; 32 M. 49.**

5. Under the old section a Presidency Magistrate could not fall within the definition of a Magistrate of the first class as used in this section —But now under the present amendment by the addition of the last paragraph to sub-sec (1). The Chief Presidency Magistrate is regarded as a Magistrate of the first class for purposes of this section. So rulings in **9 Bom. L R. 1160 = 6 Cr. L. J. 325** and **32 M. 49 at p. 57,** have become obsolete

5-A.—As to the relation between this section and s 195, *see* **17 Cr. L. J. 470, 475; 1 Pat. L. J. 298 = 16 Cr. L. J. 797.**

6. Whether ss. 476 and 476-A apply to a forged document produced in Court, the person forging the document neither being a party to the proceeding nor producing the document in Court —A person who possibly forged the document which was produced in Court cannot be proceeded against under s. 476-A of the Code if there be no grounds for supposing that he did so for the purpose of using it in Court and there is nothing to show that it was he who used the document in Court, **28 C. W. N. 880.**

II —COURTS EMPOWERED TO ACT UNDER THIS SECTION.

7. What is a Court?—Notes 11 to 16 to s 435 The word 'Court' in this section evidently means a Judge or body of Judges to whom the public administration of justice as regards any particular subject or subjects has been delegated by the Government The test for deciding whether a particular officer is a Court does not depend upon whether he is empowered to take evidence, *e g*, *an arbitrator* or commissioner appointed to take evidence does not constitute a Court. There may be Courts like Appellate Courts who are not empowered to take evidence but decide upon evidence taken by others. There *need not* be two parties arrayed as opponents The test is whether there was *alias* before the officer See *R* v *Woodhouse*, **(1906) 2 K B 501.** He must have been given jurisdiction by the constituted authorities to deal out justice in any particular defined class of cases, **36 M. 72** *approving* **24 M. 121** where it was *held* that a Tahsildar acting under *Income-tax Act* III of 1869 was a Court as he was a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable *him to arrive* at a determination *See* also **37 B. 365** where **17 C 872** is *followed* and *Royal Aquarium* v. *Parkinson*, **(1892) 1 Q. B. 431.**

A Court to which an application purporting to be under s. 83, Transfer of Property Act, is made is entitled under s 476 of the Code to make a complaint with respect to documents filed with the application, **4 P. 24.**

8. The Court which tried a case and not the Court in which the complaint was merely filed, is empowered under s. 476 to complain.—*Where on a* complaint having been transferred to another Court and dismissed under s. 203, the Magistrate before whom the complaint was filed took action under s 476 for s. 211, I P C, and transferred the same for action to another Magistrate *Held*, that the Court before which the complaint was filed had no jurisdiction to proceed *under s. 476.* If a complaint under s 476 is to be made, it should be made by the Court which tried the case and not by the Court before which the complaint was merely filed **30 C. W. N. 504**

9. Section not applicable to Village Magistrates in Madras.—Village Magistrates in the Madras Presidency are not bound in the circumstances mentioned in [illegible]
herein. A complaint of any offence referred to in s 195, when ma [illegible]
to give jurisdiction to the Magistrate complained to, to inquire i[illegible]

Bombay.—So also the Bombay High Court in **32 B. 195** is of opinion that ss. 476 and 496 must be read together and having regard to the plain language of s. 195 (*b*) and (*c*) a successor of the trial Judge in the same Court may exercise the powers under this section for an offence committed before his predecessor and **34 C. 551** is *dissented from*. **27 Bom. L. R. 616 = 49 B. 710.** But *see* **28 Bom. L. R. 1296.**

Madras.—The power to direct a prosecution under s. 476 is conferred on the Court and not on the individual Magistrate who tried the case, **29 M. 331.** This must, however, be held subject to the conditions laid down in **31 M. 140** and **32 M. 49 (F.B.).**

Burma.—A Magistrate who pronounces judgment in a case partly heard by himself and partly by his predecessor is competent to proceed under s. 476 against a witness who deposed before his predecessor, **4 Bur. L. T. 246 = 12 Cr. L. J. 521; 3 Rang. 48.**

Contra—**Punjab.**—It is only the individual Judge or Magistrate before whom the offence was committed in Court who can take action under this section (**34 C. 551** and **35 C. 114** *followed*, **29 M. 331** not *followed*). **6 P. R. 1909 = 12 P. W. R. 1909 = 10 Cr. L. J. 158 = 17 Cr. L. J. 40.** It was *held* in **10 P. L. R. 1911 = 4 P. W. R. 1911 = 12 Cr. L. J. 68** (*following* **35 C. 114** and **6 P. R. 1909**) that even where the preliminary inquiry has been commenced by the proper officer who issued that notice, his successor cannot be competent to complete the inquiry and pass an order under s. 476, but *see* **4 Lah. 58.**

The word "Court" in s. 476 of the Code includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding, and therefore it was held that the successor of the Sessions Judge could direct a prosecution under s. 476 though the alleged false evidence was given before his predecessor, **4 Lah. 58.** *See* **7 Lah. 108.**

13. Powers of Appellate Court to institute proceedings under this section.—Under the old section it was held that where a Subordinate Judge refuses to grant sanction, a District Judge has on appeal, jurisdiction to take action under this section; but in so doing, he should himself proceed according to sub-sec. (*b*) of s. 195 read with this section, **32 B. 184** where **34 C. 551 (F.B.)** is *dissented from*. It is not competent to the District Judge to direct the Subordinate Judge to prosecute the offender. On disposal of an appeal, it is competent to the Court of First Instance as also to the Court of Appeal to take action under this section, **16 C. L. J. 569 = 14 Cr. L. J. 32.** But it is an unusual and not a proper procedure for an Appellate Court, which did not hear the evidence, to order the prosecution for perjury of a witness for making false statements in his deposition in the Lower Court on materials in support of the prosecution, which were not before the Lower Court and which the witness had no opportunity for explaining while in the box, **10 C. W. N. 1091 = 4 Cr. L. J. 219.** But *see* now s. 476-A which expressly authorises the Appellate Court to take action under s. 476.

14. Powers of High Court in revision to take steps under this section.—In **11 A. L. J. 113 = 14 Cr. L. J. 127,** the High Court in revision set aside an order under s. 195 and directed proceedings under s. 476. In **37 C. 13** it was *held* on the authority of **34 C. 551** that a District Judge was not competent while dealing with an application under s. 195 (6) to set aside the sanction and himself take steps under this section and the Full Bench ruling prevented the High Court as much as a District Judge from taking action under s. 476. In view, however, of **37 C. 642 (F.B.)** this case cannot be regarded as good authority. Calling up records under s. 435 is not a [illegible] proceeding, **7 M. 560** (*see* Note 21 to s. 435) and therefore a District Magistrate has no power to make an order under this section merely on calling up the records. In this case the application was made after the lapse of one year from the termination of the case in which the offence was committed in the Sub-Magistrate's Court. *See* **1908 A. W. N. 74 = 5 A. L. J. 562 = 7 Cr. L. J. 304.** *See* also the Select Committee Report in the preliminary note, *supra*.

Since the amendment of the Code by Act XVIII of 1923 the power of private prosecution is taken away in connection with offences relating to proceedings in Court and the amended Code has given a definite right of appeal against complaints drawn up by Courts, as a general rule, it is inadvisable for the High Court to interfere in revision with an appellate order refusing to withdraw complaints. **7 Lah. 108; 26 Bom. L. R. 289.**

III.—LIMIT OF TIME FOR TAKING ACTION.

15. Appropriate time for making an order under this section.—There is nothing in this section either impliedly or expressly limiting the time within which action under s. 476 should be taken. All that can be said is that the offences in respect of which action has to be taken being offences against the administration of justice, prompt action is desirable. At the same time, the Court will have to take into consideration

the advisability of taking action before the proceedings in which the offence is committed are concluded or before the appeal in any such proceedings is over or before the connected civil litigation is disposed of except in Madras and in some cases in Calcutta the other High Courts are of opinion, that no time limit ought to be imposed for the Courts to act under this section.

Madras.—The power conferred by this section can be exercised by the Court only in the course of the judicial proceeding or at its conclusion, or so shortly after as to make it really the continuation of the same proceeding in the course of which the offence was committed or brought to its notice **32 M. 43 (F.B.), 31 M. 140 (F.B)** MILLER, J, however, who *dissented* from the majority view was of opinion that though the section contemplates immediate action, it does not expressly or impliedly exclude what may be called action subsequent. The words '*when the Court is of opinion*' are wide enough to embrace any point of time at which the opinion is formed whether during or after the close of the proceedings and there is nothing in the rest of the section to indicate that the opinion must in all cases be formed as soon as the offence is committed, **31 M. 140** at **p. 150** and **32 M. 49** at **p 53.** *See* also **15 M. L. J. 439 = 3 Cr. L. J. 118; (1911) 2 M. W. N. 93 = 12 Cr. L. J. 337.** In **36 M. 72,** SUNDARA IYER, J, with whom SADASIVA IYER, J, concurred, was of opinion that delay in directing the prosecution cannot be regarded as one of entire absence of jurisdiction in the Court in passing the order "The Court has inherent jurisdiction to make the order Taking it that it is bound to do so at a particular time it is not easy to say that the passing of the order after the lapse of time would be a ground for holding it to be made without jurisdiction At any rate I do not think that the High Court would be bound to quash the proceedings on account of a defect of jurisdiction of this character" A delay of five days is not material, if proceedings are taken within reasonable promptitude, that is, so shortly after the conclusion of the proceedings as to make it practically the continuation of the same proceeding, it will suffice, **(1912) M. W. N. 1206 = 13 Cr. L. J. 625.** In **17 Cr. L. J. 515** it was held that action under this section could be taken while the proceedings are not finished, **44 M. 422 (F.B).**

Illustrations—(*a*) A witness was examined on the 17th September and judgment was delivered on the 8th October On the 29th October the Judge issused notice to the witness why he should not be prosecuted. The witness s explanation was received on the 15th November and the order for prosecution was made on the 16th November, *held* by the Full Bench that the order made after an interval of three weeks was made without jurisdiction, **32 M. 49** (MILLER, J, *dissenting*), **31 M. 140 (F.B.)** *followed* and **32 B. 184** *not followed* (*b*) On information given to the Police by the petitioner an investigation was made and a preliminary inquiry held at the conclusion of which on the 11th July, the accused was discharged. On the 28th August, the District Magistrate refused to set aside the order of discharge On 25th September, a notice to show cause was issued and on the 3rd November an order was made for the prosecution of the complainant under s 211, I P C, *held* by the Full Bench (MILLER, J, *dissenting*) that the order was without jurisdiction, **31 M. 142** *following* **Weir II, 597; 15 M. L. J. 439 = Weir II, 601-A** and **34 C. 551; 29 M. 331** *considered* *See* **25 M. L. T. 18** where the last case was followed. (*c*) In the absence of anything to show that the Magistrate's order under s 476 is part of the proceedings in the trial in which the alleged offence was committed, it is made without jurisdiction **6 M. L. T. 92 = 10 Cr. L J. 8, 8 M. L. T. 81 = 11 Cr. L J. 479.** (*d*) During the pendency of an execution case which was dismissed on 27th July, 1911, it was brought to the notice of the Judge that an offence under s 186, I P C, had been committed. On an application for sanction, order was made on the 25th November under this section, *held* order bad, **25 M. L. J. 593 = 14 M. L. T. 512 = 1913 M. W. N. 1002 = 14 Cr. L. J. 624.** (*e*) Where in execution proceedings a District Munsiff passed an order under s 476 not of his own motion, but on the suggestion of the District Judge 19 days after the termination of the execution proceedings, *held* the delay was fatal to the validity of the order, **10 M. L. T. 333 = 12 Cr. L. J. 496.** *See* also **15 Cr. L. J. 283,** where proceedings were instituted five months after close of trial

Calcutta.—Action under this section should as far as possible, be prompt and expeditious, **37 C. 642.** The power conferred by s 476 is exercisable only at or immediately after the conclusion of the trial in which the offence was committed. "The terms of s 476 indicate that the desirability of prosecuting the offender must be present to the mind of the Court during the proceedings in the course of which the offence was committed or brought to its notice It was never intended that when the proceedings had terminated, the attention of the Court should be subsequently drawn by some private person to the fact that in those proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment The commission of the offence and the desirability of a prosecution should be

so patent as to move the Court at the time to take action without the stimulus of an application by some interested person."—GEIDT, J., in **34 C. 551 (F.B.)** quoted with approval by WHITE, C.J., in **31 M. 140.** *See* also **30 C. 444.**

Illustrations.—(*a*) An order made four months after a criminal trial had concluded, by the successor in office of the Magistrate who had tried the case directing the prosecution under s. 476 is bad, **34 C. 551.** (*b*) The petitioner laid an information before the Police which the Police reported to be false. On this report the Deputy Commissioner directed a judicial inquiry into the matter by a Deputy Magistrate who, after inquiry came to the conclusion that the information was false and submitted his report on the 4th February, 1908, to the Deputy Commissioner for orders, who ordered the prosecution of the petitioner under s. 211, I.P.C. The order was set aside by the High Cout following **33 C. 30** as one made without jurisdiction and the record was returned to the Deputy Magistrate. The Magistrate again inquired into the matter and on the 14th August, 1908, ordered the prosecution of the petitioner; *held*, the order was legal, **13 C. W. N. 398 = 11 Cr. L. J. 4.**

Allahabad.—There is nothing in s. 476 which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter, **37 A. 344,** where the Madras decisions were referred to and not followed. Except under very special circumstances, proceedings under s. 476 should be taken at an early date after the decision of the original case, **11 Cr. L. J. 20 (A.).** Though it is desirable that any action taken under s. 476 should be as prompt as possible, yet, s. 476 lays down more than one starting point from which such action should be taken, **6 A. L. J. 392 = 9 Cr. L. J. 219.** *See* also **10 A. L. J. 247 = 13 Cr. L. J. 707; 34 A. 393; 1901 A. W. N. 177.**

Illustrations.—(*a*) An *ex-parte* decree of 1907 was transferred from Court *A* to Court *H* for execution against judgment-debtor *N*. In execution, *N's* objections were overruled and he was imprisoned and released in April, 1908. Another decree against *N* was transferred from Court *B* to *H*; in proceedings in execution of that decree in August, 1908, the Court at *H* found on inquiry that both the suits against *N* were false suits brought at the instigation of *G* and committed him for trial under ss. 210/109, 467/109, 471/109 and 466/109; *held*, that the committal was good. The words "brought under its notice" were wide enough to cover an offence which may have been committed in another *forum* and on some previous occasion provided it is brought under the notice of the Court inquiring and making an order under s. 476. The judgment of GEIDT, J., in **34 C. 551 (F.B.)** *approved*; **31 M. 140** and **9 C. W. N. 859** discussed and not followed, **6 A. L. J. 392 = 9 Cr. L. J. 219.** (*b*) A District Magistrate's order giving sanction refused by a Sub-Magistrate was set aside by the High Court for want of notice to accused. Thereafter the District Magistrate instituted proceedings under s. 476. *Held*, order bad, **11 Cr. L. J. 20 (A.).** (*c*) *See* also **1 A. L. J. 316** and **388.** In the former a Magistrate after ceasing to preside over the Court and while engaged on some other duty in the same district made an order under this section in respect of a case tried by him. In the latter, a complainant was prosecuted under s. 211 and acquitted. After the acquittal the same Magistrate who accorded sanction for the prosecution, now acting in the capacity of a District Magistrate ordered the prosecution of the complainant for perjury. In both cases the order was set aside as calculated to bring the administration of justice into contempt. (*d*) The High Court in revision against an order granting sanction under s. 195 set aside the order and directed proceedings under s. 476, **11 A. L. J. 113 = 14 Cr. L. J. 127.**

Bombay.—There is nothing in the language of the section which makes it incumbent upon a Court acting under it to exercise the power within any period or at any particular time. Such a construction necessitates the importing into the section of words which are not there; and for which there is no necessary implication from the languge used by the Legislature, **32 B. 184 at p. 190.** *See* also **13 B. 384** and **34 B. 88. 20 Bom. L. R. 998; 43 B. 300.**

Sindh.—It will be found on careful perusal extremely difficult to extract from the words of the section any provision either impliedly or expressly limiting the time within which action should be taken. No limitation has been imposed to prevent a prosecution bing filed in the ordinary way under s. 195 and it is difficult to see why it should have been thought necessary to limit the more convenient procedure under s. 476, **7 S. L. R. 187 = 15 Cr. L. J. 541** where the Bombay view was followed. *See* **17 Cr. L. J. 77.**

Punjab.—*See* **88 P. L. R. 1916; 29 P. R. 1916 (Cr.).**

IV.—IN RESPECT OF WHAT OFFENCES ACTION MAY BE TAKEN?

16. The offence must be one 'referred to in s. 195'—Scope of 'any offence referred to in s. 195.'—*See* Notes 2 and 3, *supra.* There is a conflict of authority as to whether these words mean only the offences

covered by the sections of the I P.C. mentioned in s. 195 or do they mean the offence mentioned in those sections and committed under the qualifying circumstances described in s 195 So far as the effect of cl. (*b*) of s. 195 upon s. 476 is concerned, the authorities are in favour of the view that the qualification mentioned in the former section is to be treated as incorporated in the latter *See* **7 C. L. J. 373 = 12 C. W. N. 575 = 7 Cr. L J. 340** and **5 C. W. N. 106.** Therefore no order for prosecution can be made under s 476 when the alleged offence under s 211, I P C, has been committed in the course of a Police investigation and not in reference to any proceeding in a Court, **14 C. W. N. 330 = 10 C. L J. 564 = 11 Cr. L. J. 37,** *distinguishing* **7 C. L. J. 371 = 7 Cr. L. J. 338** and **33 C. 30.** As to the qustion of effect of cl (*c*) of s 195, **18 B. 581** and **22 C. 1004** hold the view that the qualifying circumstances mentioned in s 195 are not to be incorporated in ss 476 and 478 so that the Court has jurisdiction to proceed under s 478 whether the offence of forgery was committed by a party to the proceeding or by a witness or whether it has been committed in respect of a document merely produced, but not given in evidence *See* also **12 P. R. 1897 ; 30 Cr. L. J. 656 = 116 I. C. 632.** But the Madras High Court in **15 M. 224** has held that the qualification mentioned in s 195, cl. (*c*), makes s 476 inapplicable if the offence under s. 471, I P C, has been committed in respect of a document not given in evidence *See* Notes 24, 159 and 160 to s 195 *See* also Note 7 to 195

17. Is it necessary that the person whose prosecution is ordered must be a party or witness in the proceedings ?—*See* Notes 2 and 3 *supra* It should be noted that under the present amendment it appears to be intended by the Legislature that ss 195 and 476 must be read together Section 476 is supplementary to s 195 and all the qualifications mentioned in s 195, cls (*b*) and (*c*) of sub-section (1) must be treated as incorporated in s 476. Therefore, s 476 can apply to those offences mentioned in s 195 if they are committed by the persons or in the circumstances mentioned therein and therefore a Court may not be competent to pass an order under s 476 directing the prosecution of a person who is not a party to the proceeding in the case of an offence mentioned in cl (*c*) of sub-sec (1) s 195 So it is submitted that the decision in **43 B. 300** holding that under s. 476 a Court can direct the prosecution of a person who is not a party can no longer be supported All that is required is that such an offence as is referred to in this section should be either committed in or in relation to a proceeding in that Court, provided the terms of section 195, sub-section (1), cls (*b*) and (*c*) are satisfied

In **24 A. L. J. 122** the effect of the amendments of ss 476 and 195 was discussed at length and the view of the learned Judges is that now after the Amending Act of 1923, sections 476 and 195 must be read together and all those conditions mentioned in clauses (*b*) and (*c*) of sub-section (1) of s 195 must be held to have been incorporated in s 476 so as to render the scope of s. 476 co-extensive with cls (*b*) and (*c*) of s. 195 Also *held*, that under s 476 the Court cannot prosecute by a complaint a person who is not a party to the proceeding before it as that condition is laid down by clause (*c*) of s. 195 So a witness not being a party to the proceeding cannot be proceeded against by a complaint under s 476 But at the same time, it will be remembered that s. 195 being a restrictive section, there is nothing in that section and s 476 to prevent the Munsiff, without recourse to s 476, from making a complaint under the ordinary law in respect of the offence under s 471, I P C, when it was committed before him by a witness who was not a party to the proceeding

In **2 Rang. 374** it is now decided that it is not open to a Court to make a complaint under s. 476 of the Code in respect of any person other than persons who are parties to the proceedings before it **3 Rang. 48.**

In **3 Rang 303, 2 Rang. 374** was distinguished and it was held that in respect of offences enumerated in s. 195 (1) (*b*) of the Code the powers of the Court to complain are not confined only to the parties before it *See* also **110 I. C. 108 = 29 Cr. L. J. 652** where in **3 Rang. 374 ; 3 Rang. 48** are dissented from and also **9 Lah. 678.**

It is competent to a Court to sanction the prosecution under s 476, I P C., of a minor s guardian who applies for the probate of a forged will, **14 Bom. L. R. 968 = 1 Bom. Cr. Ca. 212 = 13 Cr. L. J. 843.** *Contra* — **18 M L. T. 438 = 16 Cr. L. J. 797.** But a person not a party who is accidentally in Court cannot be suddenly called on to produce certain documents of title alleged to be in his possession and it is not justifiable to draw proceedings under ss. 175, 187 and 204, I P C, without determining if the documents were such that he could be compelled to produce, **14 C. L. J. 120 = 12 Cr. L. J. 450.** *See* **21 C. W. N. 950.**

18. Whether complaint necessary under s. 476 for the prosecution of a party to a proceeding where the document produced is not given in evidence by the party himself.—It is now held by the Bombay High Court in **27 Bom. L. R. 607 = 49 B. 608** that s 195 (*c*) of the Criminal Procedure Code covers any document

produced or given in evidence in the course of a proceeding whether produced by the party who is alleged to have committed the offence or by anyone else (**5 Pat. L. J. 135** *distinguished*).

19. Offence under s. 467, I.P.C. is within the intendment of s. 195.—Though s. 467, I.P.C, is not mentioned in s. 195, yet sanction is necessary as s. 463, I.P.C., which is one of the sections mentioned therein covers s. 467, I.P.C., **14 C. W. N. 479 = 11 Cr. L. J. 280.**

Offence under s. 474, *I.P.C.*—No sanction is necessary for a prosecution under s. 474, I.P.C., **19 C. W. N. 125 = 16 Cr. L. J. 309.**

20. "Offences committed in or in relation to a proceeding in that Court."—Under the old section action could be taken with regard to offences committed before a Court or brought under its notice in the course of a judicial proceeding. Under the new amendment the words "and committed before it or brought under its notice in the course of a judicial proceeding" are dropped and in their stead the words "which appears to have been committed in or in relation to a proceeding in that Court" are substituted. The probable effect of this, it is submitted, would be to restrict the scope of the section and perhaps cases like **6 A. L. J. 392** and **40 A. 116** in which the offence was committed neither before the Court nor in relation to a proceeding in that Court, but in another jurisdiction, will not be covered by the wording of the present section.

The following cases under the old section are retained for their academic interest:

Under the old section offence must be committed before the Court or brought to its notice in a judicial proceeding.—The powers conferred by this section can only be exercised if the offence in respect of which a prosecution is ordered has come to the cognisance of the Court in a *judicial proceeding*, **40 C. 444.** This section applies only to judicial proceedings, **4 C. W. N. 366; 7 M. 560; 6 A. 103; 2 C. L. J. 612 = 3 Cr. L. J. 81; 13 P. R. 1915 = 184 P. L. R. 1915 = 16 Cr. L. J. 251.** 'All the High Courts are agreed that the offence for which a prosecution can be ordered under s. 476 must have been either committed before the Court making the order or brought to its notice in the course of a judicial proceeding before it. There is and can be no difference of opinion on this point, because the language of the section is perfectly plain.' The illegality of passing an order in respect of an offence not complying with such conditions cannot be cured by s. 537, **11 N. L. R. 36 = 16 Cr. L. J. 289.**

(*i*) *Offence committed before it.*—Where a District Magistrate without examining the complainant refers his case to a Subordinate Magistrate for inquiry and report, and on the strength of that report, initiates prosecution against the complainant under s. 211, I.P.C., his order is bad, as the offence is not committed before him, **27 C. 921.** Neither the High Court nor the District Magistrate can take action under this section for an offence committed before a Subordinate Court, **37 C. 13.** *See* also **4 C. W. N. 305; 14 C. W. N. 63, 78** and **306; 1904 A. W. N. 170 = 1 A. L. J. 481.**

(*ii*) *Court cannot take action under s.* 476 *for the purpose of obtaining notice of an offence.*—In respect of an offence not committed before him nor brought to his notice in a judicial proceeding but brought to his notice in a Police report, a Magistrate cannot afterwards set up a judicial proceeding for the purpose of again informing himself of what he already knew, so as to artificially create for himself jurisdiction under s. 476 That, would be a reducing of the law to absurdity. In respect of an offence already notified to him extra-judicially he could not have jurisdiction to proceed under s. 476, **11 N. L. R. 36 = 16 Cr. L. J. 289.**

(*iii*) *The judicial proceeding in which the offence is committed need not be the same judicial proceeding in which the offence is brought to notice of Court.*—*See* **32 B. 184; 6 A. L. J. 392 = 9 Cr. L. J. 219** and Note 13 *contra*, Madras, *see* Note 13.

(*iv*) *Brought to its notice in a judicial proceeding.*—Where a District Magistrate had sanctioned the prosecution of one *S*, who was alleged to have given false evidence before a second-class Magistrate in a Forest Case, and directed that it should take place before a Head Assistant Magistrate; *held*, that he had no jurisdiction to act under this section, since the alleged offence was not brought to his notice in the course of a judicial proceeding, **18 M. 487.** *See* also **12 W. R. 69 = 4 B. L. R. Ap. Cr. 9** and **34 P. R. 1886** as to the precise meaning of the words "brought under its notice in the course of a judicial proceeding." The words "brought under its notice" are wide enough to cover an offence which may have been committed in another *forum* and on some previous occasions, **6 A. L. J. 392 = 9 Cr. L. J. 219.** These words are wide enough to include the proceedings before an arbitrator to whom the proceedings in a suit had been referred and a decree passed on the award,

33 A. 396. Where complaint was made of an illegal seizure of cattle to a Subordinate Magistrate and that officer reported the matter to a Joint Magistrate for action on the Revenue Side, and the Joint Magistrate forwarded the complaint to a Cantonment Magistrate for trial *Held* that the Joint Magistrate had no power to make the order as the alleged offence was not brought to his notice in the course of a judicial proceeding, **Weir II, 598** Where the petitioner made a deposition before a Subordinate Magistrate and after the making of the deposition the Sub-Divisional Magistrate transferred the case to his own file and the deposition of the witness was not put in evidence nor was he examined at the trial before the Head Assistant Magistrate, on account of his non appearance in obedience to a summons until after the disposal of the case *Held* that the order of the Head Assistant Magistrate made under this section in respect of the alleged false statements contained in the deposition before the Subordinate Magistrate was made without jurisdiction, because the petitioner's offence was not brought to the notice of the Head Assistant Magistrate in the course of a judicial proceeding, **Weir II, 598** But *see* **21 C. W. N. 755.** Similarly, where a person had been examined as a witness in support of the prosecution by a Subordinate Magistrate in a case of theft and subsequently on the transfer of the case to the file of the Head Assistant Magistrate, he did not appear before that officer in obedience to a summons nor was the deposition made before the Subordinate Magistrate put in evidence, but nevertheless the Head Assistant Magistrate in discharging the accused, found that the evidence given by the witness before the Subordinate Magistrate was false After the trial was over the witness appeared before the Head Assistant Magistrate and deposed that what he had stated before the Subordinate Magistrate was false and thereupon the Head Assistant Magistrate directed his prosecution under this section *Held*, that the order of the Head Assistant Magistrate was *ultra vires* and made without jurisdiction as the evidence of this particular witness was not brought to his notice in the course of a judicial proceeding **Weir II, 598.** Where the Police reported a complaint made to them to be false and the District Magistrate thereupon directed the Deputy Magistrate to make an inquiry and on receipt of the Deputy Magistrate's report the District Magistrate passed final orders on the Police report directing, under this section the prosecution of the complainant for an offence under s 211, I P C *Held*, that the order was without jurisdiction as it was passed with regard to a matter which did not come before a District Magistrate in the course of a judicial proceeding **33 C. 30.** The proper course in such a case should have been to direct the Police to lodge a complaint **7 C. L. J. 371 = 7 Cr. L J. 338.** In **9 C. W. N. 1030** an application was made before the District Magistrate on behalf of a mother for the recovery of the custody of a female child from her grandfather The District Magistrate ordered the Deputy Magistrate to hold an inquiry, in the course of which the grandfather stated that the child had already been married, and on receipt of a report to that effect from the Deputy Magistrate the District Magistrate dismissed the application The District Magistrate on a subsequent application came to the conclusion that the statements made before the Deputy Magistrate by the grandfather and the alleged husband, were false and directed their prosecution under this section *Held* that the alleged offence of perjury had not been brought to the notice of the District Magistrate in the course of a judicial proceeding within the meaning of this section and therefore the proceedings of the District Magistrate were *ultra vires* *See* also **14 C. W. N. 63** and **78** One *B* a stranger presented a complaint to the District Magistrate alleging that *A* had given false evidence in a criminal trial in the Court of a Subordinate Magistrate and praying that *A* might be punished, whereupon the District Magistrate directed the prosecution of *A* *held*, that the order was bad as the false statement was not made before the District Magistrate nor brought to his notice in a judicial proceeding **13 P. W. R. 1913 = 68 P. L. R 1913 = 14 Cr. L. J. 107.** A Magistrate being of opinion that a Police witness had not spoken the truth stated in his judgment that he left the witness to the mercy of the Superintendent of Police Thereupon the Superintendent of Police to whom the judgment was sent forwarded the same to the District Magistrate, who remarked that it was a case in which proceedings should be taken under s 476 The Superintendent forwarded the papers to the successor of the trial Magistrate the trial Magistrate having been transferred The succeeding Magistrate initiated proceedings under s 476, *held*, he had no jurisdiction inasmuch as the offence had neither been committed before him nor was it brought to his notice in the course of any judicial proceeding, **17 Cr. L. J. 40 (Oudh)**. *See* also **(1911) 2 M. W. N. Jour. 107.**

21. No prosecution will lie in respect of statement in affidavits by accused persons.—No oath can be administered to a person accused of an offence in connection with the criminal matter in which he is accused and therefore no prosecution will lie in respect of false statements contained in a document purporting to be an affidavit sworn to by an accused person, **3 A. L. J. 98** which *follows* **19 A. 200.** *See* **12 M. 451; Weir II, 635; I, 176.**

V.—POINTS TO BE CONSIDERED BEFORE TAKING PROCEEDINGS.

22. **Notice desirable but not indispensable.**—Opportunity should be given to the accused to show cause before passing an order under this section, **Weir II, 587; 7 M. 189.** It is always fairest and a course that should be followed that a notice should be given to the party concerned, but the section nowhere says that notice shall be given and at the best the want of notice is a mere irregularity in procedure, **10 A. L. J. 248 = 13 Cr. L. J. 707,** where **11 Cr. L. J. 20** *distinguished. See* also **3 Bur. L. T. 101 = 12 Cr. L. J. 85; 1915 U. B. R. III, 83 = 17 Cr. L. J. 82.** In strict law a notice is not an indispensable preliminary to an order under this section. **15 C. W. N. 691 = 14 C. L. J. 123 = 12 Cr. L. J. 209,** where **20 C. 349** and **474; 7 Bom. L. R. 84 = 2 Cr. L. J. 54** are *followed*; *see* also **33 C. W. N. 664.** When the materials before the Court are insufficient, notice must go, **6 A. 101; 17 O. C. 25 = 15 Cr. L. J. 217.**

23. **Preliminary inquiry must be held when necessary.**—*See* Notes under Heading VII.

24. **Must order under s. 476 be based on strictly legal evidence?**—In **21 M. L. J. 795 = (1911) 2 M. W. N. 9 = 10 M. L. T. 47 = 12 Cr. L. J. 323,** SUNDARA IYER, J., was of opinion that an order under s. 476 based on statements which do not constitute legal evidence is illegal. The same principles which apply in granting sanction should be followed in passing orders under this section. The words "when any civil ......Court is of opinion that there is ground for inquiring into any offence" must be construed as meaning "when there is legal ground for inquiring and therefore an order based partly at least on what appeared at the preliminary investigation under s. 202 was illegal" while AYLING, J., was of opinion that the wording of sub-sec. (1) is wide enough to cover the consideration of other than strictly legal evidence on the record and therefore an order under sub-sec. (1) ought not to be set aside because it proceeds (wholly or partly) on a consideration of the result of a preliminary inquiry under s. 202. During a civil suit in the Court of the District Judge, a patwari gave evidence. After the decision of the case the District Magistrate held a departmental inquiry, forwarded the proceedings to the District Judge and applied for sanction to prosecute the witness for forgery. The District Judge refused sanction but on perusing the records of the departmental inquiry issued notices to the witness and directed his prosecution. *Held,* that the Judge ought not to have looked at the records of the departmental inquiry which was not evidence in the case and that he acted with material irregularity in ordering a prosecution without having before him at least *some material in the shape of evidence which went to show* that there is *reason to* believe that the offences have been committed and without making an inquiry himself, **13 Cr. L. J. 43 (A.).** *See* also **26 M. L. J. 486** where it was held that a sanction under s. 195 need not be based on legal evidence.

25. **Power given by this section must be used with great care and deliberation.**—In delivering judgment in **1 C. 450,** MACPHERSON, J., remarked "The power given by this section should be used with care and due consideration. And it is by no means in every instance in which a party fails to prove his case that the Judge who has decided against such party is justified in exercising the powers given him by this section. So long as it is a case as to which there is any possible doubt, or in which *it is not perfectly certain that the Judge's* decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly if the moment he has given his judgment in the civil suit, he exercises the power given him by this section. At the same time if, in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at *once,* of course it may be right to do so. Judges should, *however, bear in mind that criminal prosecutions are* frequently suggested by successful litigants merely to prevent an appeal in the civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also *recollect* that when they proceed under s. 476, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and merely sanctioned by the Court under s. 195, cl. (*b*)." *See* also **8 C. 435.** The order should disclose a reasonably well founded and deliberate judicial opinion that there was ground for inquiry and the power given by this section should be used with care and consideration, **1901 A. W. N. 177.** *See* also **37 C. 13.**

26. **There must be reasonable probability of conviction—but question of guilt or innocence not to be decided.**—"There must be a reasonable probability of conviction, because without that there could be no ground for another Magistrate to waste his time in holding the inquiry. But the section does not say that before a Magistrate orders a prosecution he must try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction," ***9 N. L. R. 184 = 15 Cr. L. J. 33.*** "No sanction should be granted unless

there is a reasonable probability of conviction It would be an abuse of the powers vested in a Court of Justice, if sanction were granted or upheld on the principle that though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be thrashed out, so that it may be decided whether or not an offence has been committed No doubt the authority which is called upon to grant a sanction under s 195 or to take action under s 476 need not and should not decide the question of guilt or innocence of the party against whom proceedings are to be instituted but great care and caution are required before the criminal law is set in motion, and there must be a reasonable foundation for a charge in respect of which prosecution is sanctioned or directed, **37 C. 250**, where **7 A. 871, 12 C. W. N. 3 = 6 Cr. L. J. 356** and **1 C. 450** are *referred to*. There is yet another reason why no Court should take action under s 476 without inquiring thoroughly into the matter and being satisfied that there is what may be called fairly good case against the accused It is that persons complained against by a Court under s 476 are deprived of the protection given to them by s 203 against frivolous and unnecessary prosecution by other complainants, **10 N. L. R. 177 = 16 Cr. L. 161.** *See* also **6 C. W. N. 927; 1900 A. W. N. 149; 23 C. 532; 20 C. 349; 21 M. 124** In **13 A. L. J. 1111 = 16 Cr. L. J. 817**, KNOX, J, *dissented* from the views held in **37 C. 13** and **37 C. 250** that sanction ought not to be granted when the evidence before the Court granting the sanction is such that the probable result will be acquittal and held that all that a Court granting sanction has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether or not any of the offences punishable as set out in s. 195 has or has not been made out. KNOX, J., seems to make a difference between sanctioning a prosecution under s 195 and taking action under s. 476, and that in the former case an application for sanction must be carefully considered before the sanction is given, **17 Cr. L. J. 93 (A.)** When there is a dispute between the two parties over a property it is inadvisable to grant sanction under s. 195 but the Court ought to proceed under s 476 **11 A. L. J. 113 = 14 Cr. L. J. 127** and *see* Notes to s 195 at pp 510 to 515 It is not in every case which a Magistrate considers to be false, that he should direct a prosecution under s 211, I P C, **34 C. 42.** *See* the remarks of SANKARAN NAIR, J, in **32 M. 49** at p 57 as to the difference between institution of a complaint under s 195 and the passing of an order under s 476

27. In cases of false charge, opportunity must be given to accused to prove his case.—It is unfair to [illegible]

s 211, I P C, committed before the Police, yet when the Police report the complaint to be false and the petitioner insists upon a judicial investigation, the petition must be taken to have been preferred to the Magistrate, who is therefore competent to proceed under s. 476, **37 C. 250** *referring to* **14 C. 707; 10 M. 232** and **33 C. 1.** In **19 C W. N 127 = 16 Cr. L. J. 320**, the order directing prosecution under s 182 was set aside though there was an inquiry into the complaint, as the complainants themselves had not been examined and the Magistrate had acted upon the report which he ought not to have called for A man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him, and such opportunity should be afforded him if he desires to take advantage of it, not before the Police but before the Magistrate, **6 C. 496.** In such a case proceedings should not be taken by the Magistrate *suo motu*, until a reasonable interval has shown that the complainant accepts the result of the Police investigation and takes no further steps, **7 C. L R. 382.** *See* also **6 C. 582** and **584; 7 C. 87** and **208; 2 C. L R. 315; 4 C. L. R. 134; 16 W. R. 44** and **77; 5 C. 281; 8 C. L. R. 289; 8 C. 435; 7 M. 189.** See *contra* **4 A. 132.** There it was *held* that if a Magistrate dismisses a complaint under s 203 as a false one, and decides to proceed against the complainant under this section for making a false charge, he is not bound before so proceeding, to give the complainant an opportunity of substantiating the truth of the complaint, by being allowed to produce evidence before him It is enough that the false charge is made and that no prosecution is instituted thereon, **1 A. 497**, or that the false charge is not still pending **1 M. H. C. R. 30.** But the more proper course, however, would be to let the informant bring his witnesses into Court hear them out and then if the case was considered to be a false case to pass an order that the informant should be tried under s. 211, I P C, **30 A. 52** *See* also **23 P. R. 1886.**

28 There must be clear "prima facie" case against accused—Before a Court is justified in making an order under this section directing the prosecution of any person it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge either in the course of the preliminary inquiry referred to in that section or in the earlier proceedings out of which the inquiry arises It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence, but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted,

16 C. 730; 5 A. 62. To justify a Court in sanctioning a prosecution for any offence referred to in s. 195, it is not necessary to go minutely into the evidence or to see whether there is sufficient evidence to support a conviction. It is sufficient if the evidence discloses a reasonable foundation for a criminal charge, **Weir II, 587; 7 W. R. (Civil) 482; Marshall 270.** When an order under this section is made apparently on very insufficient grounds, and no further action was taken in respect thereof by the Court making it for more than a year the order was set aside in revision, **1901 A. W. N. 177.** *See* also **23 A. 249; 18 M. L. T. 591 = 17 Cr. L. J. 42.** But if the Original Court has formed a judicial opinion that there is good *prima facie* ground for inquiry into an offence referred to in s. 195 the High Court will not interfere merely because it disagrees with such opinion, **23 A. 249.**

29. **Improper to take steps before termination of proceedings in which offence was committed.**—Order should not be made before the witnesses for the prosecution have been cross-examined and before the defence had any opportunity to show that the alleged statement was not false, **11 M. L. T. 191 = (1912) M. W. N. 400 = 13 Cr. L. J. 144.** While the examination of a witness was proceeding before a Magistrate, the Magistrate ordered his arrest and sent him up for trial for an offence under s. 191, I.P.C. *Held*, that the order directing the prosecution of the witness, while proceedings before the Magistrate were still pending was improper and should be set aside, **4 Bom. L. R. 778.** Proceedings under this section should not be taken until the very close of the case in which false evidence was given or forged document used as genuine, etc., **3 C. L. J. 302 = 3 Cr. L. J. 303.** Criminal proceedings for an offence of forgery or giving false evidence arising out of a civil litigation, should not, as a rule, go on during the pendency of such litigation, **16 B. 729; 19 C. W. N. 125 = 16 Cr. L. J. 309.** *Quære.* Can the trying Magistrate proceed against any person other than the one against whom proceedings under this section had been taken, if he sees reason to suspect any other? *See* s. 195 (4), **18 M. L. T. 591.** If, however, criminal proceedings consequent upon the order under s. 476 have terminated and a sentence has been passed, the High Court will not interfere if there has been no prejudice, **43 C. 173.** It is no doubt true that a Magistrate ought not to take proceedings under s. 476 until the close of the trial, the reason being as pointed in **8 Bom. H. C. R. 126** that such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial, but that is a consideration which affects the accused under trial and not the witness whose prosecution is ordered, **17 Cr. L. J. 77 (Sindh),** *see* also **16 Cr. L. J. 114 (C.).** But *see* **20 M. L. T. 252.**

29-A. **Compromise of case.**—The mere fact that the parties agreed to compromise the case in the Appellate Court cannot take away the jurisdiction vested in the trial Court to make a complaint under this section, **49 All. 792 = 28 Cr. L. J. 549.**

30. **Propriety of criminal prosecution when appeal is pending against the original proceedings.**—If in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear grounds for believing that either the parties to the proceeding or their witnesses have committed perjury or any other offence against public justice, he is justified in directing criminal proceedings against such person under this section without any further inquiry than that which he has already held in his own Court. As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement to await the hearing of the appeal, where an appeal is pending in the case in which he is charged with such perjury, **6 C. 308** *following* **B. L. R. (Sup. Vol.) 426 = 5 W. R. (Civ. Mis.) 24.** *See* also **13 B. 109; 7 B. H. C. R. 29; 23 C. 532 and 610; 16 C. 730; 20 C. 349; 13 M. 144; 16 A. 80; 21 M. 124; 16 B. 729; 18 B. 581.** The High Court cannot, as a Court of Civil Appeal, interfere, **8 C. L. R. 148.** The High Court ought not to stay the criminal proceedings where the Court below has refused to do so and has thought it fit in the interest of justice to take immediate action, **35 C. 909.** *See* Note 67.

31. **According of sanction under s. 195 no bar to acting under this section.**—The fact that the Court may have given sanction under s. 195, to a person to complain of an offence specified therein, does not affect its power to act under this section should it deem it necessary, **13 R. 384; 34 B. 88; 29 M. 331.** But in Madras this power must be read subject to **31 M. 140** and **32 M. 49.** When a Magistrate sanctions the prosecution in the absence of any application before him, his order must be taken to be one made under this section, **7 M. 189**; and conversely sanction may be given after a proceeding under s. 476 has been set aside on a technical ground, **11 Cr. L. J. 327 (C.).**

32. **Court must form its own opinion.**—Where a Munsiff in making an order under this section for the prosecution of a person for an offence committed before him purported to act not of his own accord, but on the responsibility of the District Judge who himself had no jurisdiction to pass such an order, *held* the order of the Munsiff was bad inasmuch as it was only nominally his, but the opinion was the opinion of the District Judge, **6 A. L. J. 924 = 10 Cr. L. 525.** *See* Note 44 and **17 Cr. L. J. 40 (O.).**

VI.—NECESSITY FOR PRELIMINARY INQUIRY.

33. Holding of preliminary inquiry is discretionary and its absence will not render order bad.—Ordinarily it is not necessary that there should be a preliminary inquiry before an order under this section is made, **6 C. 308.** Preliminary inquiry is discretionary to be had or not as the Court thinks fit, **20 C. 474; 6 C. W. N. 295; 1 C. L. J. 630 = 2 Cr. L. J. 656; 28 M. L. J. 436 = 15 Cr. L J. 271.** In strict law for proceeding under this section, neither notice to show cause why the party should not be sent before a Magistrate for a trial nor a preliminary inquiry indispensable, **7 Bom. L. R. 84 = 2 Cr. L. J. 54; 14 Bom. L. R. 587 = 1 Bom. Cr. Ca. 154 = 13 Cr. L. J. 689.** The adoption of a rigid rule to that effect would simply introduce a new stage as a matter of imperative necessity, **15 A. 392; 34 A. 267; 20 C. 474.** An order under this section sending a case for inquiry to a Magistrate, is not necessarily bad, because the Court did not make a preliminary inquiry before making such order. The law requires only such preliminary inquiry as may be necessary, **5 A. 62,** nor is omission on the part of a Sessions Judge to hold such inquiry a sufficient ground for reversing the conviction when the omission does not appear to have affected the merits of the case—*M H. C Pro 5th January,* 1882 For other cases, *see* **5 C. 184 at p. 187; 2 C. L. R. 315; 9. W. R. 3; 28 P. R. 1886.** *See* Notes 97—101 at pp. 516—518 **4 Pat. 434.**

It is absolutely essential to the validity of an order under s 476 of the Code that the Court which passes the order should apply its mind to the matter upon its merits Before a complaint is made under this section it is necessary that a Court which thinks that an offence mentioned in section 195, sub-section (1), cl (*b*) or (*c*) has been committed, should record a finding to that effect and then make a complaint. The provision is mandatory because an appeal is against an order of a Court, **29 Cr. L. J. 792 = A. I. R. 1928 Mad. 783** and **A. I. R. 1928 Cal. 862.**

In an appeal the High Court directed the Sessions Judge to take action under s 476 The Sessions Judge without applying his mind to the merits ordered their prosecution. *Held,* that the order of the Sessions Judge was erroneous and that the Sessions Judge should have looked into the matter himself and ordered prosecution on his own initiative **21 A. L. J. 930,** but *see* **24 A. L. J. 122.**

34. When preliminary inquiry desirable—

(i) *Generally when materials already before Court are not sufficient to establish a 'prima facie' case*—Where the parties to a civil suit filed a compromise after part of the evidence was recorded and the suit was dismissed and five days later the Judge *suo motu* took cognisance of the case afresh and without calling upon the defendant to show cause directed his prosecution for fabricating false evidence in respect of provisions not relied on by the defendant. *Held,* that the order was bad as he had not recorded any finding on the question of the genuineness or otherwise when deciding the suit and he ought to have given the persons concerned an opportunity of showing cause, **17 O. C. 25 = 15 Cr. L. J. 217; 7 S. L. R. 187 = 15 Cr. L. J. 541.** *See* also **6 C. 440 = 7 C. L. R. 330.** Where the materials already before the Court are insufficient in themselves to establish a *prima facie* case it is better to make preliminary inquiry, **19 C. 345.** When a suit did not come on for trial, but was settled out of Court, the Civil Court was competent to hold a preliminary inquiry to determine whether *prima facie* one of the specified offences had been committed before it by the false personation of the person who had confessed judgment, **19 C. 345; 12 P. R. 1897.** *See* also **6 A. 114** and **98, 8 C. L. R. 148; 2 P. R. 1888; 19 A. L. J. 56.**

(ii) *When offence has not been committed before the Court*—Where a suit for the recovery of money due on a bond was referred to arbitration, and the arbitrator decided that the bond was a forgery and the Magistrate directed a prosecution, *held,* that the Magistrate should not have granted a sanction without making an inquiry to satisfy himself whether there were materials to justify a prosecution, **6 A. 101.** A Subordinate Judge, on the report of his bailiff that he was obstructed by *A* and *B* in executing a warrant of attachment of the movable property of a judgment debtor, gave sanction for the prosecution of *A* and *B* under s 186, I P C, without making a preliminary inquiry into the truth or otherwise of the report, and sent the case to a first class Magistrate for trial under this section *Held* that the Subordinate Judge would have better complied with the requirements of this section if, before acting on the mere report of the bailiff, he had made an inquiry of his own, **Ratanlal 701.** Where a complaint is made to the Police and a report is made that the complaint is false, the Magistrate will not exercise a proper discretion if he forthwith, on the receipt of the Police report, orders the prosecution of the complainant under s 211, I P C The Magistrate should give the complainant full opportunity to have a proper judicial inquiry into the truth of the complaint. But, if advantage is not taken of the opportunity, the Magistrate may either accord sanction under s 195 to some person desirous of

prosecuting, or himself make the complaint under s. 195. If a judicial inquiry is made, the Magistrate may proceed under this section, 5 C. W. N. 106. *See* also 7 M. 189; 14 C. 707; 27 C. 921 and 13 Cr. L. J. 48 (A.); 15 C. W. N. 691 = 14 C. L. J. 123 = 12 Cr. L. J. 209.

(iii) *When the identity of the offender, or offence is uncertain.*—A preliminary inquiry ought to be held when it is uncertain as to who the accused person is, 23 C. 532; 16 C. 730; 20 C. 349 and 474 or where the offence is uncertain, 1 C. 450.

35. **Successor in office may pass order without preliminary inquiry.**—The authority of 9 C. W. N. 859; 34 C. 551; 35 C. 114 that it is not competent to the successor in office to pass an order under this section without an independent investigation is very much shaken by 37 C. 642. All that was intended to be laid down was that if an offence has been committed not in Court but outside the Court, an investigation may be necessary to enable the Court to ascertain the facts justifying an order under s. 476, 14 C. L. J. 123 = 15 C. W. N. 691 = 12 Cr. L. J. 209.

36. **Practice and procedure in preliminary inquiry—**

(i) *Oath may be administered and evidence taken.*—Inquiry must be on evidence, one mode of making an inquiry is certainly to take evidence (17 C. 872) and if the Court can take evidence it is a judicial proceeding, s. 4 (*m*), 37 C. 52 and *see* 8 Bom. L. R. 589 = 4 Cr. L. J. 183. But *see* 6 W. R. 41.

(ii) *Person implicated not to be subjected to examination.*—A person against whom proceedings are to be taken under this section ought not to be subjected to any examination in the preliminary inquiry, Weir II, 598. *See* 17 Cr. L. J. 316 (Bur.), where it was held that such a person is in the position of an accused and cannot be examined as a witness.

(iii) *Person implicated need not be present.*—It is not necessary that the preliminary inquiry, contemplated by this section, should be conducted in the presence of the accused. All that the Court making inquiry has to do is to satisfy itself that there are *prima facie* grounds for sending the case for investigation to a Magistrate, 9 W. R. 3; 7 M. 224; 6 C. W. N. 295.

(iv) *Manner of recording evidence.*—'Though the Magistrate made a preliminary inquiry under s. 476, and presumably examined witnesses in the course of that inquiry he made no record of their statements. We do not find in the Code any provision with regard to the manner in which the evidence in such inquiry should be recorded. But we are of opinion that for further reference a summary of the statements should have been made,' 42 C. 240.

(v) *Not necessary to give accused opportunity to cross-examine.*—A Magistrate refusing to give the accused opportunity to cross-examine the witnesses does not act illegally, or with material irregularity, 34 A. 267. The person implicated has no right to cross-examine the then accused, 18 Bom. L. R. 284. But *see* 19 A. L. J. 56 where refusal to give opportunity to cross-examine witnesses by the Lower Court was set aside in revision by the High Court and a preliminary inquiry ordered, 6 Pat. L. J. 146; 44 M. L. J. 74. But *see* 51 M. L. J. 331 where 44 M. L. J. 74 is doubted.

(vi) *Inquiry must be conducted by the Court.*—*See* 1 C. 450.

37. **Dieting of witnesses in inquiries held by Civil Courts under this section.**—With the sanction of the Local Government it is directed that when witnesses are summoned by a Civil Court to attend a preliminary inquiry held under this section into any offence referred to in s. 195, diet-money on the scale allowed for Criminal Courts, be paid to such witnesses by the nearest Magistrate, on the requisition of the Civil Court.—*Oudh Cr. Dig.*, at p. 21.

VII.—PRACTICE AND PROCEDURE OF COURT SENDING CASE.

38. **Procedure when offence not covered by s. 195.**—A District Judge cannot direct the arrest and prosecution of a person under s. 411, I.P.C., as such an order is not warranted by the provisions of this section. If, in the course of the hearing of a case before him, he thinks that someone should be proceeded against under s. 411, he can proceed under Chapter XVI of the Code by instituting a complaint in the ordinary way also, Ratanlal 515. *See* 9 Bom. L. R. 1160; Weir II, 596.

39. **Procedure when two contradictory statements are made in two different Courts.**—Where the evidence given before the committing Magistrate was contradicted by the same witness before the Sessions

Judge, it is not competent for the Sessions Court to order the trial of the accused for perjury without specifying which of the depositions made by the accused was false, especially when there is nothing on the record to show that the Judge was satisfied that the evidence given before himself was false, **3 L. B. R. 204 = 4 Cr. L. J. 469.** When prosecution is ordered in respect of two contradictory statements made in two different Courts, an order under this section of one of the Courts alone is insufficient. Both Courts must make an order under this section in respect of the alternative charge, **16 M. L. J. (Sh. N.) 40**; or at all events, the Court which desires to take action should obtain the sanction of the Court before which, the other statement was made unless it is itself a Court to which the other is subordinate, **6 C. 496 = 7 C. L. R. 467.** In *Tilak's case*, **4 Bom. L. R. 750** an offence under s 211, I P C., alleged to have been committed in the Court of Poona City Magistrate was brought to the notice of the District Court of Poona in the course of a civil judicial proceeding The District Judge acted under this section and sent the case down to the first-class Magistrate, Poona *Held*, that the offence was not cognisable by the first class Magistrate, as there was neither the previous sanction nor the complaint of the Poona City Magistrate or of the Sessions Court to which he is subordinate The fact that the District Court and the Sessions Court are represented by one and the same individual will not in any way cure the illegality But *see* **6 A. L. J. 392 = 9 Cr. L. J. 219.**

40. Court cannot review order declining to send case.—A Magistrate when acquitting the accused declined to order the prosecution of the complainant under s 476 but subsequently on the application of the accused he took steps under this section, *held* the second order was a review of the first order and the Magistrate's second order was therefore incompetent and must be quashed, **10 M. L. T. 389 = (1911) 2 M. W. N. 431 = 12 Cr. L. J. 556.** *See* also Note 3 to s. 369

41. Court may direct prosecution when moved by stranger.—In **13 Cr. L. J. 1 (C.)** it was suggested that as the Court does not ordinarily grant sanction under s 195 to a person in no way connected with the proceeding, the Court should similarly refuse to direct a prosecution under s. 476 when the fact of the commission of an offence has been brought to its notice by a stranger, but the Court refused to accept the limitation suggested *See*, however, **13 P. W. R 1913 = 14 Cr. L. J. 107** and Note 23. In **34 C. 551,** GEIDT, J, was of opinion that it was not intended that when the proceedings had terminated and passed beyond the reach of the Court, the attention of the Court should be subsequently re-drawn by some private person to the fact that in those proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment and in **31 M. 140,** WHITE, C J, approved of these remarks So also in **6 A L. J. 924,** (Note 35) an order by a Munsiff at the suggestion of the District Judge was set aside

42. Offences must be specified and the order sending case must not be vague.—Although s 643 of Act X of 1877 gives Civil Courts powers similar to those conferred on Civil, Criminal or Revenue Courts alike, by this section, the whole law as to the procedure in cases within that section is now embodied in this section Where a Judge, having disbelieved the evidence of a witness, directed the record of the case to be sent to a Magistrate with a view to his inquiring whether or not he had voluntarily given false evidence, *held* on a motion to quash the order, that the Judge had no power to send a case to a Magistrate except when, after having made such preliminary inquiry as may be necessary, he is of opinion that there is sufficient ground, (*i e*, ground of a nature higher than mere surmise or suspicion) for directing judicial inquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge, into which the Magistrate ought to inquire, and that the order was bad, because the Judge had made no preliminary inquiry and because it was too vague and general, **1 C. 450** *followed in* **1900 A. W. N. 149, 8 S. L. R. 179 = 16 Cr. L. J. 104, 1 P. R. 1910 = 11 Cr. L J. 90.** *See* also **14 A. L. J. 814; 52 C. 478.** A separate order containing the requisite finding setting out in detail specific matters extracted from the proceedings and directing a complaint to be made in respect thereof, followed by a complaint conforming to the previous order is greatly to be preferred Such a course avoids the possibility of any mistake as to what is intended, **56 Cal. 932.**

43. Order must specify the accused person.—A Court ought not to send a case when it is uncertain as to who the accused person is *See* **23 C. 352, 16 C 730; 20 C. 349** and **474** Where a District Judge, being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, sent both of them to the nearest first-class Magistrate so that the guilty party might be proceeded against, *held*, that the order was illegal and must be set aside in revision under s. 439, **163 P. L. R. 1905 = 3 Cr. L. J. 73, 23 A. 249** *followed*, **2 Lah. 68.**

44. **Order must show that it was part of the proceedings in the trial.**—In the absence of anything to show that a Magistrate's order under s. 476 is part of the proceedings in the trial in which the alleged offence was committed, the order is made without jurisdiction (**31 M. 140** and **32 M. 49** *followed*); **6 M. L. T. 92 = 10 Cr. L. J. 8.**

45. **Case cannot be sent to third-class Magistrate for inquiry or to Sessions Judge without commitment.**—When a Criminal Court sends a case under this section to a third-class Magistrate to hold a preliminary inquiry, the offence being exclusively triable by the Court of Session, the third-class Magistrate has no jurisdiction to hold an inquiry or to commit, **7 M. 189.** *See* **16 M. 131.** Nor can the Magistrate send the accused to the Sessions Court, without holding a preliminary inquiry under Chapter XVIII, and making a valid order of commitment, **Weir II, 585.** But a Civil Court may send a case to a Criminal Court for investigation without specifying the particular officer by whom it is to be investigated, **13 W. R. 45**; *contra* **4 N.-W. P. H. C. R. 86.**

46. **Simultaneous order under this section and s. 250 legal.**—A Magistrate may simultaneously send down the complainant under this section for an offence under s. 211, I.P.C., and order him to pay compensation under s. 250, **21 M. 237**; **27 M. 59** and **30 C. 123 (F.B.)**, where **22 C. 586** and **26 C. 181** are explained.

47. **Taking security from accused before drawing up proceedings under this section illegal.**—A Sessions Judge is not competent to direct a witness alleged to have given false evidence in a judicial proceeding before him to give security to appear before him, when called upon to answer charges yet to be framed under s. 193, I.P.C., it is open to him to take immediate action under this section, if he considers it expedient, **5 C. W. N. 630.**

48. **Irregular order.**—(*i*) *Optional order is bad.*—Where a Magistrate on an application by a private party for sanction under s. 196 against *XY*, made an order to the effect "I charge *XY* with perjury, and I make the case over to.........(another competent Magistrate) or in the alternative, I accord sanction to the applicant to prosecute *XY*, for an offence under s. 182, I.P.C., etc." *Held*, that such an option of this kind was no order at all and was altogether invalid, **25 A. 234.** A Court may either grant a sanction or proceed under this section, but if it grants the sanction and merely sends the accused to a Magistrate, it does not comply with the requirements of this section, **13 B. 109 at p. 112.**

(*ii*) *Order with a view to commit to Sessions is bad.*—Again, where a Judge proceeding to act under this section, made an order arresting the accused "with a view to commit him to the Court of Sessions," *held*, that the order, so far as it was made with a view to commit the accused to the Sessions Court, was wrong, but the Magistrate should have sent the case to the nearest first-class Magistrate, **3 Bom. L. R. 185.**

(*iii*) *Order sending the case to a District Magistrate.*—An Assistant Collector trying a Rent Suit, made an order to the effect "as the plaintiff knowingly and voluntarily told a lie, it will be fair that he be proceeded against under s. 193, I.P.C., it is therefore ordered that the record of the case be herewith submitted to the Collector for starting a case under s. 193." On receipt of this order, the Collector, who was also District Magistrate, directed "that a case under s. 193, I.P.C., be instituted against *Sundar Sarup* and made over for decision to *M*, Magistrate of the first class." *Held, per* KNOX, J., that the Assistant Collector intended to act under this section, when he made the order, and in any event, his order was a complaint either under s. 476 or s. 195 made to the District Magistrate, though that officer was addressed as Collector, and the District Magistrate on receipt of such complaint had jurisdiction under s. 192 to make the order he made, **26 A. 514.** But in **30 P. R. 1905 = 105 P. L. R. 1905** a Revenue Court being satisfied from perusal of certain documents tendered in evidence, that they were forgeries, sent the case to the District Magistrate for action; *held*, that such a proceeding was a complaint within the meaning of s. 195, but did not constitute a proceeding under this section. *See* also **23 P. R. 1901**; **13 B. 109** and **1915 U. B. R. III, 91 = 17 Cr. L. J. 59.**

(*iv*) *Order merely directing prosecution without sending case to Magistrate.*—An order under s. 476 which merely directs the prosecution of the accused, but omits to direct the accused to be taken before the nearest first-class Magistrate is utmost an irregularity cured by s. 537, **37 M. 317.** *Cf.* **12 A. L. J. 881 = 15 Cr. L. J. 700.**

(*v*) The fact that a Magistrate directed a prosecution for an offence under s. 211, I.P.C., while the offence really falls under s. 182, I.P.C., does not render the order bad, **8 S. L. R. 179 = 16 Cr. L. J. 104.**

(*vi*) As an order under s. 476 of the Code directing a prosecution of offences under ss. 193 and 196, I.P.C., amounts to a complaint under s. 200 of the Code, the Court before making an order must hold an inquiry and must specify by its order (1) the witnesses to prove the complaint; (2) the false evidence complained

against, (3) whether a person complained against knew that the evidence which he was using as genuine was false An order not specifying these matters but leaving them to be fished out by the trying Magistrate is liable to be set aside as illegal. **48 M. 295.**

(*vii*) Where the Chief Presidency Magistrate made a complaint to himself under s 476 (1) of the Code and then transferred the same to the third Presidency Magistrate for disposal, the latter after having enquired into the case committed the accused to the High Court Sessions for trial, *held* that the procedure followed was substantially correct The Chief Presidency Magistrate in taking the cognisance of a complaint made by him self and sending it to the third Presidency Magistrate made a mistake but a technical one only, not going to the root of the case There was nothing in the Code to prevent the Chief Presidency Magistrate from taking cognisance of his own complaint. Taking cognisance of a complaint is not a judicial act **30 C. W. N. 276.**

(*viii*) A proceeding drawn up by a Magistrate sanctioning the prosecution of an accused under s 211, I P C, with a request that the case may be disposed of according to law does not amount to a formal complaint, within the meaning of s 4 (*h*) and cannot be also regarded as a complaint under s 476 of the Code, **52 C. 668.**

But *see* **3 Rang. 48** where instead of making a formal complaint the Court ordered the prosecution of the appellants under s. 476 of the Code, and forwarded a copy of the order to the District Magistrate for the necessary action, it was held that this was merely a formal defect and did not vitiate the order

VIII.—JURISDICTION AND POWERS OF COURT TO WHOM CASE IS SENT

49. Order sending case is of itself sufficient to confer jurisdiction on Magistrate to whom accused is sent.—When the case is sent to the nearest Magistrate, the order sending down the case is of itself sufficient to confer jurisdiction, **16 M. 461**, where SHEPHARD, C J, says 'The substitution of the description '*nearest*' for '*having power to try*' in the 1872 *Code is significant The power to send the supposed offender to the nearest* Magistrate of the first class is quite irrespective of the local jurisdiction of the Magistrate to whom the offender is forwarded S 177 in no way curtails the power under this section It affects only the power of private complainants and the Police and not the power of a Magistrate acting under this section **Ratanlal 88.** *See* also **26 M. 640, 32 M 49** at **p. 57.** In **1 S. L. R. 84 = 8 Cr. L. J. 209,** it was however, *held* that the word '*nearest*' is merely directory, not mandatory and does not confer jurisdiction. The Magistrate to whom the accused is sent must have local jurisdiction over the offence An European accused was committed to the Calcutta High Court Sessions by a Magistrate in the Alipore District During the trial a witness stated that the evidence given by him before the committing Magistrate was false On an application made under s. 195 for sanction after the completion of the trial, the trial Judge directed a prosecution under s 476 and sent the case to the nearest first class Magistrate at Alipore, **43 C. 542.** But it should be noted that under the present section as amended a Court acting under section 476 must make a complaint to a first-class Magistrate having jurisdiction and it is not now enough merely to send a case to the nearest Magistrate of the first class

50. The word 'nearest' refers to area of jurisdiction and not to distance of headquarters—The Sub-Magistrate of *Pulladam* made an order under this section and sent the case for inquiry to the Head Assistant Magistrate of *Pollachi* within whose jurisdiction *Pulladam* was though geographically *Pulladam* was nearest to *Coimbatore* than to *Pollachi* *Held*, the order of the Magistrate was not invalid The word '*nearest*' must be construed reasonably It has reference to the area of the jurisdiction of the Magistrate to whom the case is required to be sent and not necessarily to his headquarters **Weir II, 590.** Sending the case to another Magistrate not the nearest is an irregularity cured by s. 537 (*b*), **1 S. L. R. 84 = 8 Cr. L. J. 209.** But now under the recent amendment the word "nearest" is dropped and 'having jurisdiction" is put instead thereby making the meaning clear

51. Officer before whom offence committed should not himself try the case in another capacity—*See* s 487 When the officer presiding over the Court exercises revenue as well as magisterial jurisdiction and an offence is committed before him sitting as a Revenue Court, it will not be a proper compliance with the provisions of this section for the officer presiding to make the case over to himself as the nearest Magistrate of the first class **2 A. 405.** The obvious intention of the Legislature is that the officer before whom the offence is committed should not himself charge and try the accused **15 W. R. 88, 12 W. R. 18.** But a Sessions Judge is not by reason merely of having as a District Judge ordered an inquiry under this section disqualified under s. 487 from trying the case or hearing any appeal when the case has been tried by a Lower Court, nor is he personally interested in the case within the meaning of s 556, **16 C 766; 7 C. W. N. 708; 5 Pat. 450.**

52. Powers of Magistrate to whom case is sent.—(*i*) *Magistrate must dispose of the case sent to him.*—A Magistrate is bound to proceed with the investigation of a case sent to him by a Civil Court by adopting the procedure laid down in Chapters XVIII, XX and XXI, **7 B. H. C. R. Cr. Ca. 29.** In **26 B. 785**, it was *held* that the Magistrate was bound to proceed with the investigation of a case sent down by a Civil Court under this section, the words "*such Magistrate shall thereupon proceed according to law*" being imperative. Nor can he refuse to take cognisance of an offence, on a case sent to him by a Civil Court under this section, **13 B. 109.** When an attaching peon reported to a Munsiff of obstruction in carrying out execution proceeding, *held* the Munsiff was competent to proceed under this section and send the case to the District Magistrate for the prosecution of the persons who obstructed the attachment, and the Magistrate was not justified, having regard to sub-sec. (2) of this section, in refusing to take cognisance of the case, **31 C. 664.** *See* also **7 A. 871.**

(*ii*) *May discharge.*—He is competent to discharge the accused under s. 253 if in his opinion the evidence against the accused is not sufficient to warrant their committal to the Court of Session. The Sessions Judge has power, under s. 436, should he see fit, to order the case to be committed, **5 B. H. C. R. Cr. Ca. 41.**

(*iii*) *Cannot return case.*—If the case is sent by a Civil Court, the Magistrate is bound to complete the inquiry and cannot return the case to the Civil Court, **3 B. L. R. Ap. Cr. 47; 7 B. H. C. R. Cr. Ca. 29; 12 W. R. 41.**

(*iv*) *May dismiss complaint.*—If the order under s. 476 is made without jurisdiction, the Magistrate is competent to dismiss the complaint, **10 M. L. T. 389 = (1911) 2 M. W. N. 431 = 12 Cr. L. J. 556.**

(*v*) *Proceedings cannot be dropped because sanction is subsequently given.*—If after drawing up a proceeding under this section, ordering prosecution under s. 193, I.P.C., and while the prosecution is still being proceeded with, sanction is given in respect of the same, the original proceeding is not dropped but such sanction is really a continuation of the same proceeding, **9 C. W. N. 127 = 2 Cr. L. J. 15.**

53. Magistrate to whom case is sent cannot direct compensation to be paid if he dismisses case.—A Magistrate to whom a case is sent under this section has no jurisdiction while acquitting the accused to direct compensation to be paid. The decree-holder complained to the Civil Court of obstruction and proceedings were directed under s. 476 and after the trial the Magistrate directed the decree-holder to pay compensation. *Held*, the order was not valid under s. 250 as the decree-holder was not the complainant, **14 Bom. L. R. 1166 = 1 Bom. Cr. Ca. 237 = 14 Cr. L. J. 1.** *See* Note 18 at p. 706.

54. Does cancellation of order under sub-sec. (1) operate as stay of proceedings under sub-sec. (2)?—Where a Munsiff decreed in plaintiff's favour, holding the suit bond to be genuine and, at the same time, sent down the defendant under this section to the nearest first-class Magistrate to be tried for an offence under s. 193, I.P.C., and on appeal the Appellate Court finding the defendant's evidence to be true reversed the Munsiff's decree. *Held*, the result of the civil appellate judgment must be taken to be, that the order of the Munsiff under this section was not maintainable, as the basis of that order had gone, and that, on production of the appellate judgment it was the duty of the Criminal Court to withhold its hands and to proceed no further; and even if the defendant had been convicted by the Criminal Court and the conviction upheld by the Sessions Judge, the High Court would set aside the conviction, although the accused did not move the High Court to quash the proceeding as soon as the judgment of the Civil Appellate Court was pronounced in his favour, **12 C. W. N. 1 = 6 C. L. J. 703 = 6 Cr. L. J. 354.** Where a Magistrate dismisses a complaint and directs a prosecution under this section and the Sessions Judge directs further inquiry setting aside the order of dismissal but passed no order in respect of the order under s. 476, *held* the said order remains good until it is quashed. It does not cease to be operative; all that **12 C. W. N. 1 = 6 C. L. J. 703** lays down is that when the Appellate Court dissents from the opinion of the first Court that a statement made by a person was false and reverses the decree of that Court, the order of the first Court under s. 476 directing the prosecution of the deponent should be quashed and not that the order ceases to be operative without being quashed. Therefore the Magistrate to whom the case has been sent may continue the inquiry, **21 M. L. J. 795 = 10 M. L. T. 47 = (1911) 2 M. W. N. 9 = 12 Cr. L. J. 323.** In **6 L. B. R. 59 = 13 Cr. L. J. 492** it is laid down that if an order under s. 476 (1) directing an inquiry by another Magistrate is set aside, it is just and proper that proceedings under sub-sec. (2) before that Magistrate shall also cease.

IX.—REVISION OF ORDERS.

55. Sessions Court cannot revise.—A Deputy Magistrate having decided that certain witnesses (who had given evidence before himself and before two other Magistrates on different occasions relating to charges

of rioting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances *Held*, that whether the Deputy Magistrate had intended to pass an order under this section or to make a complaint under s 195 (1) (*b*) the Sessions Judge had no power to interfere, **23 M. 205** *followed in* **7 Bom. L. R. 84 = 2 Cr. L. J. 54.** It is the High Court alone that has power to revise under s 439 under its general powers of superintendence A Sessions Judge has no such power, **34 C. 42.** *See* also **14 C. W. N. 132.**

56. Sessions Judge cannot under s. 437 direct further inquiry when the original Magistrate has not only discharged the accused, but directed prosecution of complainant.—A Sessions Judge has not the power to set aside an order of discharge when the prosecution of the complainant has been ordered under s 476 for an offence under s 211, I P C, and if the Sessions Judge is of opinion that the order should be set aside, he should refer the matter to the High Court, **15 Cr. L. J. 1 (C.)** *followed*, **15 Cr. L. J. 16 (C.)** *See* Note 35 to s 437

57. High Court competent to revise.—*See* Note 57 under s 439 The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, made under this section, directing the prosecution of any person for offences referred to in that section The High Court, under s 439 [illegible] h order of an inferior [illegible] *contra, see* **13 B. 109;** [illegible] pinion between the High Courts on this point. But now the Legislature has limited this power of interference of superior Courts *See* s 537, cl (*b*) The case in **26 M. 98** where a Full Bench of the Madras High Court took the view that an order under this section, being in the nature of a complaint is not subject to revision by the High Court, was expressly repudiated by all the other High Courts in India and is now *overruled* by **33 M. 48 (F.B.)** where it was held *following* **21 M. 124 (F.B.)** that the High Court has power under s 439 to interfere, on grounds other than want of jurisdiction when a Criminal Court has taken action under s. 476 and no change was effected in the revisional power of the High Court by the Code of 1898 Under the 1882 Code orders under this section were doubtless subject to revision under s. 439 and the words in sub-sec (2) of the present Code, do not operate to make the proceedings of the Magistrate merely a complaint. Sub section (1) contemplates an order being passed after such inquiry as may be necessary, and that order is something more than a complaint as defined in the Code, for a Magistrate who receives it, is bound to take action on it and has not the option of postponing the issue of process under s 202 or dismissing it under s 203 The words "*as if on complaint made and recorded under s* 200" do not mean that the proceedings taken under sub-sec (1) is to be regarded merely as a complaint and not as an order. The words added to s 537 certainly contemplate such orders as being subject to revision, and moreover it is not one of the sections enumerated in sub-sec (3) of s 435, **3 L. B. R. 234 (F.B.) = 5 Cr. L. J. 123.** In **26 A. 249,** STANLEY, C.J, was of opinion that an order under this section sending a case to a Magistrate, is not really a complaint though it is of the nature of a complaint *See* **23 A. 249; 26 A. 249; 1908 A. W. N. 22 = 4 A. L. J. 811 = 7 Cr. L. J. 3; 1908 A. W. N. 27 = 4 A. L. J. 803 = 7 Cr. L. J. 1; 26 B. 785; 8 C. W. N. 73; 1 L. B. R. 286; 3 Bur. L. T. 101 = 12 Cr. L. J 85; 3 Bur. L. T. 119 = 11 Cr. L. J. 734; 4 Bur. L. T. 246 = 12 Cr. L. J. 521; 1904—06 U. B. R. (Cr. P.) 4; 1907 U. B. R. (Cr. P.) 1 = 6 Cr. L. J. 25; 4 N. L. R. 140 = 8 Cr. L. J. 351; 9 N. L. R. 184 = 15 Cr. L. J. 33; 5 P. R. 1908 = 103 P. L. R. 1908 = 7 Cr. L. J. 281; 158 P. L. R. 1911 = 33 P. W. R. 1911 = 12 Cr. L. J. 216; 29 M. 100; 40 Cr. 477 (F.B.).** It is open to the High Court to consider in revision whether the person against whom the order is made is prejudiced by the absence of a preliminary inquiry, **20 C. 349; 15 C. W. N. 691 = 14 C. L. J. 123 = 12 Cr. L J. 209; 7 S. L. R. 187 = 15 Cr. L. J. 641; 19 C. W. N. 127 = 16 Cr. L. J. 320; 48 B. 401 = 26 Bom. L. R. 289, 7 Lah. 108.**

58. High Court will not interfere merely because on facts it may take a different view.—Where a Magistrate had taken upon himself the responsibility of starting a case under ss 182 and 211, I P C, and he does this advisedly and his order shows that he has acted with circumspection and mature deliberation, his order should not be lightly interfered with, on a mere question of fact by the High Court in revision, **1908 A. W. N. 27 = 4 A. L. J. 803 = 7 Cr. L. J. 1.** Similarly, the Chief Court of Punjab in **18 P. R. 1902** laid down that revision should be granted only if there be some error of law, some irregularity, some abuse or failure to exercise jurisdiction and not simply because the Revisional Court has formed a different opinion from that of the Courts below on the merits of the case In **23 A. 249,** STRACHEY, C.J, remarked that if the Court below had proceeded upon merely fanciful ground or grounds so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then the High Court would interfere, even on the merits, but such power would

not be exercised where the Court below had arrived at a judicial opinion on substantial grounds, merely because the High Court disagrees with that opinion. The High Court must have regard to the nature of the revisional jurisdiction and must not in a case arising under s. 476 any more than in any other case allow what would virtually be an appeal from the Court below, **35 C. 909; 9 N. L. R. 184 = 16 Cr. L. J. 33.** The High Court will, however, set aside an order when the ordering Court in forming whatever opinion it did, takes action on merely fanciful ground or grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, **10 N. L. R. 177 = 16 Cr. L. J. 161; 18 Cr. L. J. 1015.**

59. Power of High Court under s. 439 to revise orders made by Courts other than criminal.—It is now held by all the High Courts except Bombay and Punjab in **7 P. W. R. 1908 = 5 P. R. 1908 = 7 Cr. L. J. 281** and **26 B. 785**, that a Criminal Bench cannot revise orders made by Courts other than criminal. *See* Note 11 under s. 435.

(*i*) *Civil Court.*—A Criminal Bench of the High Court cannot interfere under s. 439 with proceedings of Civil Courts under this section. Application must be made under s. 115 of *the Civil Procedure Code* V of 1908, **40 C. 477; 8 C. W. N. 73;** a Criminal Bench may deal with such orders only if authorised by the Chief Justice under s. 14 of *the High Courts Act*, **40 C. 477 (F.B.).** *See* **28 A. 554 (F.B.)** which *overrules* **26 A. 249; 30 M. 311; 31 M. 510; 26 M. 139; 4 L. B. R. 138 = 7 Cr. L. J. 416; 7 L. B. R. 76 = 6 Bur. L. T. 144 = 14 Cr. L. J. 496; 34 A. 393; 4 L. B. R. 339 = 9 Cr. L. J. 24; 17 O. C. 25 = 16 Cr. L. J. 217; 17 M. L. T. 268 = 16 Cr. L. J. 232; 1915 U. B. R. III, 83 = 17 Cr. L. J. 82.** An order by a Settlement Officer acting under Chapter X of *the Bengal Tenancy Act*, is revisable only under s. 115 of *Civil Procedure Code* or under s. 15 of *the High Courts Act*, **40 C. 477 (F.B.); 31 M. L. J. 440.**

(*ii*) *Revenue Court.*—When an order under this section is made by a Collector, the High Court cannot interfere in revision as the Collector is not an inferior *Criminal* Court. The application, if any, for revision should be presented to the Board of Revenue to which alone the Collector is subordinate, **4 A. L. J. 701 = 1907 A. W. N. 277 = 6 Cr. L. J. 350; 3 S. L. R. 66 = 10 Cr. L. J. 395; 15 Cr. L. J. 2 (Oudh); 36 M. 72; 14 A. L. J. 1077.** Of course, the Collector would have had no jurisdiction to proceed under this section unless he had been acting as a Revenue Court. In **1902 A. W. N. 202** a Revenue Court made an order under this section and forwarded the accused to the District Magistrate, who acting under sub sec. (2) of this section, transferred the case to a Magistrate subordinate to him. After an unsuccessful application to the Sessions Judge to set aside the order, the High Court was moved in revision. *Held*, that neither the High Court nor the Sessions Judge had any jurisdiction in the matter. If the object of the application was to question the original order of the Revenue Court, the Appellate or Revisional jurisdiction was in the superior Revenue Court and as regards the only order passed by the District Magistrate it was a perfectly legal order made under sub-sec. (2) of this section.

(*iii*) *District Registrar.*—High Court cannot revise the orders of a District Registrar, **35 A. 109.**

60. Procedure when Bench of Chartered High Court hearing petition from order passed by Civil Court divided.—When the Judges of a Division Bench differ in a matter under revision before them under s. 115, *Civ. P. C.*, the opinion of the senior Judge prevails, cl. 36 of the Letters Patent and not s. 98, *Civ. P. C.*, being applicable, **18 M. L. T. 591 = 17 Cr. L. J. 42.**

61. Board of Revenue cannot revise order of Revenue Court.—The Board of Revenue has no power to set aside the order of an Income-tax Collector directing proceedings under s. 476, **36 M. 72.**

62. Procedure to be adopted when Munsiff desires to show cause.—A Munsiff, as a judicial officer, cannot under this section direct the prosecution of a person under ss. 228 and 500, I.P.C., in respect of contempt of Court and defamation. If the Munsiff desired to show cause against the rule issued by the High Court in respect of such a proceeding he should appear by Counsel, **6 C. L. J. 713.**

X.—STAY OF PROCEEDINGS.

63. Power of Chartered High Court to stay proceedings under this section.—The Madras High Court even when it was of opinion that it could not revise the orders under this section [**26 M. 98 (F.B.)**] *held* that it had the power to stay proceedings instituted under this section by a Civil Court during the pendency of an appeal. The power of general superintendence of s. 15 of *the Charter Act* and transfer (s. 29 of *the Letters Patent*) implied the power to send for the records in any case in the Lower Courts which must of necessity stay further proceedings in that case. The High Court has the power to point out to the subordinate Courts the

inexpediency of trying a case when it is likely to interfere with the due course of justice (34 C. 848 *referred to*), 31 M. 510; 18 M. L. T. 891 = 17 Cr. L J. 42; 43 A. 180.

64. Power of High Court to stay proceedings.—*See* 16 B. 729; 26 B. 785; 23 C. 610, 31 C. 858; 30 M. 226 and Notes under Heading XXIX, at pp 546 and 547 and Note 54 to s. 439 *Quære*, whether the High Court in the exercise of its civil revisional powers has power to stay criminal proceedings, 35 C. 909; 23 C. 610, but the Criminal Court should be asked to stay proceedings, 8 C. W. N. 31.

65. When stay of criminal proceedings desirable.—(*a*) *Pending suit.*—It would be a dangerous doctrine to lay down any hard and fast rule to the effect that a criminal trial or inquiry should of necessity be stayed, simply because a civil suit has been instituted between the parties in which some or all of the matters materially in issue in the criminal case would have to be determined, until the civil litigation was finally decided. The case in 34 C. 848 lays down no general rule A Court may well hesitate to give sanction to prosecute his adversary for an offence alleged to have been committed during the pendency of a civil litigation as, if it acceded to his request, it must, to some extent at least give him an unfair advantage by enabling him to hold over the head of his adversary for at least six months the threat of a criminal prosecution which might or might not eventually be undertaken But it is a very different thing to ask a Criminal Court which after inquiry held with this very object in view, has come to the conclusion that there are grounds for starting criminal proceedings against an individual to stay its hand indefinitely or at any rate, possibly for some years, because that individual has filed a civil suit. As held in 35 C. 909 it is very desirable that such a prosecution should be entertained as speedily as possible while the evidence on both sides is fresh, 13 C. W. N. 398 = 11 Cr. L. J. 4 In this case the civil suit was instituted nearly eight months after the criminal inquiries began and after the petitioner had been called on to show cause why he should not be prosecuted It is not an invariable rule that the criminal proceedings should be stayed during the pendency of civil litigation regarding the same subject matter Certain property was attached in execution of a decree Thereupon accused No 1 applied to have the attachment raised on the ground that he had purchased the property from the judgment-debtor under a sale deed executed long before the date of the attachment In the summary inquiry before the Civil Court, he produced the sale-deed which was supported by the evidence of accused No 2. The Civil Court found that the deed was a forgery and rejected the claim, and then, holding an inquiry under this section committed both accused to the Sessions Court on charges of perjury and forgery During the pendency of this inquiry, accused No 1 filed a civil suit to establish the genuineness of the sale-deed and to set aside the attachment He also applied to the High Court to quash the commitment or stay criminal proceedings pending the disposal of the civil suit. *Held* refusing the application, that the mere fact that a regular suit was filed to establish the genuineness of the sale-deed was not a sufficient ground for quashing the commitment or for adjourning the trial pending the hearing of a civil suit, 18 B. 581; 33 C.W. N. 969. Where on the refusal of the District Registrar to register certain documents, suits were instituted by the petitioners for the registration of the documents and the District Registrar ordered the prosecution of the petitioners for forgery of the documents, the High Court being of opinion that the petitioners had followed regular course prescribed by law to obtain registration stayed the criminal proceedings for three months only, in order to prevent the petitioners postponing the criminal proceedings for a long time by introducing delays in the conduct of the civil suit, 14 C. W. N. 131. *See* also 13 Cr. L. J. 1 (C.), 9 P. W. R. 1916 and 8 P. W. R. 1916.

(*b*) *Criminal Proceedings instituted when civil suit pending* —When a civil suit is pending, proceedings are instituted in respect of an offence under s 474, I P C., alleged to have been committed in the course of such suit, it is expedient that Criminal Proceedings should be deferred pending the final disposal of the civil suit, 19 C. W. N. 123 = 16 Cr. L. J. 309.

(*c*) *Pending appeal.*—Though ordinarily the High Court will not interfere with the discretion of the trying Magistrate and stay proceedings in a Criminal Court, pending the disposal of a second appeal on the civil side yet it will undoubtedly do so when imperatively required in the interests of justice, 6 C. 308; B. L. R. Sub. Vol 426; 16 B. 729; 18 B. 581, 26 B. 785; 3 C. W. N. 44; 5 C. L J. 233; 23 C 610, 14 C. W. N. 131, 34 C. 848; 31 M. 510. It was *held* in 35 C. 909 *following* 26 B. 785 that where a Civil Court on passing orders under this section being asked to postpone the proceedings until the disposal of the appeal to the High Court against the decree in the suit, refused to do so, but thought, it fit in the interest of justice to take immediate action the High Court should not stay proceedings on the ground that a civil proceeding is pending The pendency of civil proceeding is not a sufficient reason to quash under s. 215 a commitment made under s 478 *See* also 15 Bom. L. R. 968 = 1 Bom. Cr. Ca 212 = 13 Cr. L. J. 848 and 21 P. W. R. 1912 = 23 Cr. L. J. 175.

66. **Sessions Judge cannot stay proceedings of Civil Court.**—A Civil Court acting under s. 476 or s. 478 not being an inferior Criminal Court within the meaning of s. 435, a Sessions Judge has no jurisdiction under these sections to stay the proceedings taken by a Civil Court as he cannot call for the records in such a case, **Weir II, 602.** *See* also Note 26 at p. 1050.

XI.—APPEAL.

Under the new amendment it will be found that s. 476-A enables a superior Court to make a complaint where the Subordinate Court has omitted to do so and under s. 476-B an appeal is expressly provided for from orders under s. 476.

Superior Court may complain where Subordinate Court has omitted to do so.

476-A. The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1), may be exercised in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.

Notes.—1. Under the old Code there was a conflict of decisions as to whether an Appellate Court can institute proceedings under this section when the Lower Court has omitted to do so (*e.g.*, **32 B. 184; 34 C. 551; 10 C. W. N. 1091**).

But now under the present amendment, under the new s. 476-A a superior Court may complain where a subordinate Court has omitted to do so. Where a Munsiff refused to make a complaint under s. 476 for an offence under section 195 and the order was challenged before the District Judge who transferred it to the Additional Judge it was held that the Additional Judge was competent to take cognisance, **49 All. 792.**

2. **Direction to complain by the higher Court pending an application for sanction before a lower Court.**—The pendency of an application for sanction before a lower Court does not prevent a higher Court from granting a sanction under s. 476-A of the Code. **26 Bom. L. R. 713.**

Appeals.

476-B. "Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476-A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the Subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly."

Notes.—1. No appeal to the High Court against an order made under section 476-B.—Revisional jurisdiction not ordinarily exercised.—No appeal lies under the provisions of the Criminal Procedure Code against an order made by the Court to which the Court making a complaint under s. 476 is subordinate.

Although the High Court may in extraordinary cases exercise revisional powers in cases falling under s. 476-B of the Code, yet, generally speaking, where the Lower Appellate Court withdraws a complaint made under s. 476, it is very difficult for the High Court to interfere in revision.

The question whether a complaint should be made under section 476 is almost invariably a matter of discretion and if the trial Court or the Court to which it is subordinate thinks that no complaint should be made it is not desirable that the High Court should interfere.

Under s. 476 as amended the Court is directed, in case it thinks that proceedings should be taken, to make a complaint in writing signed by the presiding officer of the Court and forward the same to a Magistrate of the first class having jurisdiction.

A Court proceeding under s. 476-B should, if it quashes the direction to prosecute, direct withdrawal of the complaint; it is not enough to direct that the sanction granted by the trial Court should be withdrawn, **26 Bom. L. R. 289.**

2. Abatement of appeal on the death of the appellant.—The right of appeal under s. 476-B does not survive on the death of the appellant and the appeal abates. **47 A. 359.**

3. The duty of the Appellate Court under s. 476-B.—In deciding an appeal under this section the Appeal Court should reconsider the entire matter on its merit and should take a complete review of all the facts and if the Appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside The words "the offence which appears to have been committed' mean the facts before the Court, unless rebutted, show that an offence has been committed **23 A. L. J. 515.** But the appellate Court has no jurisdiction to take additional evidence in a matter coming up under section 476-B **51 Mad. 603.**

4. Operation of ss. 476-A and 476-B.—From the scheme of the new amendments it appears that if the Subordinate Court has neither made a complaint under s. 476 nor rejected an application for the making of a complaint, then the Superior Court may take action under s 476-A and make a complaint. But where the Subordinate Court has rejected the application or has granted that application by a formal complaint, then, the procedure contemplated by the Code is by way of an appeal to the Superior Court under s 476 B

4-A. Where the District Judge on appeal under this section directed the lower Court to submit a fresh complaint, held that this order was not valid An appeal under s 476-B must be dealt with as an ordinary appeal under s 424 It cannot be sent down to the lower Court nor can it be summarily dealt with An appeal under section 476-B, Cr P C, must be treated as a miscellaneous civil appeal and regulated by **O. 41 C. P. C.** and not by ss 422, **424 Cr. P. Code, 54 Cal. 355 = 31 C. W. N. 281**; *see* also **53 Cal. 827**; **55 Cal. 1277.**

Further, *held* that an appeal under s 476-B of the Code is barred under Art. 154 of the Limitation Act if filed more than thirty days after the order rejecting the application under s 476, **52 C. 1009.**

5. Whether an appeal lies to the High Court under s. 476-B from an appellate order of the District Judge making a complaint which the Subordinate Judge refused to make.—*Held*, that no appeal lies under s. 476-B of the Code to the High Court from an appellate order of the District Judge making a complaint under s 476, which the Subordinate Judge might himself have made but refused to make, **6 Lah. 56.**

But *see* **5 Pat 262** where **6 Lah. 56** is disapproved and it is *held* that an appeal lies on behalf of the person against whom complaint is made by the District Judge In the Patna as well as the Lahore case the facts were the same In both the cases the Sub-Judge had refused to make a complaint and from this order an appeal was preferred under s 476-B to the District Court, and the District Court passed an appellate order under s. 476-B to lodge a complaint. It goes without saying that in the case of every order to file a complaint whether made by a subordinate or superior Court, the procedure laid down under s 476 is to be followed in sending the complaint to the nearest Magistrate, etc., though the application may be made by a party under s 476 or 476-A, or the party may ask the Court to file a complaint in an appeal under s. 476-B

The Patna High Court appears to hold that an appeal is provided under s 476 B in all cases where "Any person against whom a complaint under s 476, has been made by any Court" (*See* **8 Pat 274.**) This is how the s 476-B is construed by the Patna High Court Tho words "any Court' may mean the Court of of First Instance or the Appeal Court and would include both the Sub-Judge and the District Judge And the conclusion arrived at by the Patna High Court is that where any Court, whether the trial Court or the Appeal Court lodges a complaint by following the procedure under s 476, a right of appeal is given under s 476-B to a person against whom such complaint is filed

But it is submitted that the Patna decision cannot be upheld, and, on the contrary, the decision in **6 Lah. 56** correctly interprets, s 476-B for the following reasons —

(1) The policy of the Criminal Procedure Code is not to allow two appeals as a rule in criminal matters According to the construction put by the Patna High Court on s 476-B there would be two appeals under that section *See* **5 Rang. 523, 8 Pat. 428.**

(2) The words "or s 476-A" in s 476-B would be quite superfluous, because every District Judge taking action under s. 476-A will have to proceed under s 476 and to file a complaint under s 476 So even without the mention of s 476-A in s 476-B an appeal would lie under that section as the actual complaint is filed by the District Judge under s 476 *See* **51 Mad. 777 = 29 Cr. L. J. 786** (2) and also **55 Cal. 836 = 29 Cr. L. J. 483,** where the position has been fully discussed, *see* also **55 Cal. 765 = 32 C. W. N. 164.**

(3) **Section 476-B has the words**—

'Any person on whose '*application.* —The word application is very important and clearly indicate the circum tances under which an appeal is allowed under s 47 B

Under this section an appeal is only allowed in the following cases :—

(*a*) When an application is made under s. 476 to the trial Court, *i.e.*, Sub-Judge and he refuses to grant it.

(*b*) When an application is made for the *first time* to the District Court under s. 476 (where no application was made to the trial Court, *i.e.*, Sub-Judge) and the District Court acts under s. 476-A.

For purposes of appeal, s. 476-B contemplates an order refusing a complaint or making a complaint on an *application* by a party either under s. 476 or 476-A. Over such an order on such an application only a right of appeal is allowed under s. 476-B. This section does not seem to contemplate a right of appeal over an appellate order, rejecting or making a complaint, which order is itself passed in an appeal under s. 476-B, and which cannot be said to have been passed on an application either under s. 476 or 476-A.

On this point, *see* also **26 Bom. L. R. 289 ; 52 Cal. 478 ; 8 Pat. 428 ; 56 Cal. 824.**

5-A. Refusal of trying Magistrate to entertain complaint.—Where a third-class Magistrate refused to make a complaint and thereupon an appeal was preferred to the Deputy Magistrate, first class and the latter directed a complaint to be lodged and the trying Magistrate refused to do so. The Deputy Magistrate ordered in appeal that a complaint should be filed, *held* (1) that the original order of the Deputy Magistrate became final by reason of its not being appealed against and its validity could not be impugned again at the trial and (2) though the Deputy Magistrate was empowered under s. 407 (2) to hear appeals, was not an ordinary Court of appeal against the trying Magistrate and in consequence the later order under **s. 476-B** was without jurisdiction, **56 Cal. 824.**

6. Whether revision lies to the High Court over an appellate order passed under s. 476-B.—As regards revision all the High Courts seem to have been agreed that in most cases revision lies to the High Court over an appellate order passed under s. 476-B by a District Court. *See* **26 Bom. L. R. 289 ; 52 Cal. 478 ; 5 Lah. 56 ; 5 Pat. 262.** But the Allahabad High Court has *held* that there is no revision to the High Court under s. 439 in case of an order passed under s. 476-B by a superior *Civil Court*, **24 A. L. J. 217 ; 26 All. 249 (F.B.)** *followed.* In this case the Munsiff dismissed an application under s. 476, and refused to file a complaint. There was an appeal over this order to the District Judge and the District Judge under s. 476-B allowed the appeal and ordered a complaint to be filed under s. 476. Under these circumstances it was *held*, that where an order is passed under s. 476 by a superior *Civil Court*, the case does not fall under s. 439, because ss. 435 and 439 must be read together and under these sections High Courts have power to revise the Records of only Criminal Courts and not Civil Courts.

The word proceeding in ss. 435 and 439 refers to a criminal proceeding; and therefore where a superior Civil Court acts under s. 476-B the proceeding is a civil proceeding and not a criminal one and so ss. 435 and 439 cannot apply to such a proceeding and therefore there cannot be any revision.

In **26 Bom. L. R. 289** the proceedings concerned were in the Civil Courts; and revision was sought over an order of the District Judge in a civil matter and still it was held that though an appeal would not lie over an order passed by a District Judge under s. 476-B still revision may lie under s. 439 though the High Court, as a rule, will not interfere with the discretion of the Lower Courts. In view of the remarks in **24 A. L. J. 217** the decision in **26 Bom. L. R. 289** will have to be reconsidered.

6-A.—Appeal from an order by a single Judge of the High Court.—An appeal lies to a Division Bench of the High Court from an order made by a single Judge on the original side granting or refusing sanction to prosecute, **56 Cal. 932.**

7. Limitation in the case of an appeal under s. 476-B against an order making a complaint.—Limitation begins to run from the date of the making of the complaint and not from the date of the order of the District Judge directing that a complaint be drawn up ; because s. 476-B of the Code gives a right of appeal to a person against whom a complaint *has been made*. **7 Lah. 77 ; 56 Cal. 932.** *Cf.* Note 4 above for limitation in case of rejection to file a complaint.

477. (Power of Court of Sessions as to such offences committed before itself), omitted by s. 129 of Act XVIII of 1923.

The Joint Committee Report, 1922, says—

"Section 477 is inconsistent with section 476 as proposed by the Bill because the latter section made it obligatory on the Court to make a complaint and send it to a first-class Magistrate.

This defect has been removed by one of the amendments we have made in section 476, but we are doubtful whether s 477 should stand We considered a proposal to enable a Court of Sessions to try a case committed to it after a complaint had been made by itself but we do not think it desirable that a Court which has instituted the proceedings should dispose of the case itself, and we have, therefore, introduced a clause into the Bill repealing s 477"

Power of Civil and Revenue Court to complete *inquiry* and commit to High Court or Court of Sessions.

478. (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Sessions, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Sessions, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Sessions, as the case may be

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may * exercise all the powers of a Magistrate, and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, † "and of Chapter XXXIII in cases where that chapter applies and shall be deemed to have been held by a Magistrate"

Notes.—1. Scope of the words "any such offence"—These words mean an offence referred to in s. 195, and not an offence referred to in that section qualified by the circumstances under which it is committed, *i.e.*, committed by a party to any proceeding in any Court, in respect of document given in evidence in such proceeding, as described, in cl. (*c*) of s. 195 of the 1882 Code **22 C. 1004; 18 B. 581,** *contra* **15 M. 224** and *see* Notes 3 and 20 to s. 476, **37 C. 250.** This section must also be regarded as supplementary to s 195

2. Preliminary inquiry necessary and the procedure under Chapter XVIII must be strictly followed —A Civil Court has no power to order the commitment of a person for offences under *ss. 471, 466 and 193* I P C, without holding the preliminary inquiry required by this section, **22 W. R. 52.** Where a Court elects to commit the accused itself, the procedure as to preliminary inquiry into cases triable by a Sessions Court (Chapter XVIII) must be strictly followed, **4 M. 227 = Weir II, 583** The preliminary inquiry must be conducted strictly under Chapter XVII If the offence has not been committed before Court itself or if the offence be one not exclusively cognisable by a Court of Sessions (or one which in the opinion of the Court ought to be tried by a Court of Sessions) the Court which considers further inquiry to be necessary cannot commit the case to the Court of Sessions, but must send it to a competent Magistrate, **4 B. 287,** *see* **16 A. L J. 805; 40 A. 32.**

3. After taking steps under s. 476, Court cannot proceed under this section.—The procedure prescribed in this section *viz* of completing the investigation and committing the accused etc, is only alternative, and when a Civil Court has once sent a case for inquiry under s 476 before a first-class Magistrate and the latter discharges accused under s. 209, the Civil Court has no power to revive the case against the accused and issue notice upon him to show cause why he should not be proceeded against before itself, **Ratanlal 959.**

4. Proceedings which may be construed as orders under this section.—An Assistant Sessions Judge before whom a witness gave a false deposition took cognisance of the case under s 190 (*c*) in his capacity as District Magistrate On objection being taken for want of previous sanction under s 195 alleging that the action taken by the officer as a District Magistrate was not tantamount to a sanction by him as a Civil Judge, *held* that the action taken by the officer was in effect action which as a Civil Judge he was perfectly competent to take under this section, as the offence was brought under his notice as a Civil Court in the course of a judicial proceeding As a Civil Judge he could either transfer the case to himself as a Magistrate for enquiry or completing inquiries as a Civil Judge commit the accused **9 Bom L R 212 = 5 Cr. L. J. 202** No action having been taken on a sanction a complaint was lodged by the *Karkun* of a Magistrate under the orders of the Magistrate in the Court of the nearest first-class Magistrate *Held* that the proceedings were instituted under s 476 **34 B 38**

5 Sessions Judge not entitled to stay proceedings of Civil Courts under this section—A Civil Court acting under s 476 or this section not being an inferior Criminal Court within the meaning of s 435, a Sessions

* The words and figures subject to the prov s ons of s 443 were omitted by Act XII of 1923
† These words and figures — were inserted by *ibid*

Judge has no jurisdiction to call for the records of a Civil Court and to stay the proceedings relating to an inquiry into a charge of an offence held by that Court under this section, **Weir II, 602,** *see* Note 68 to s. 476.

6. **Stay of criminal proceedings pending civil litigation.**—*See* Note 67 under s. 476.

7. **Whether an order of commitment under this section by a Judge of the High Court can be quashed.**—A witness in a civil suit before the High Court, was committed to the High Court Sessions for trial on charges of perjury. On appeal against the order of commitment, *held* that assuming such an appeal could be preferred under the geneal words of clause 15 of the Letters Patent, s. 215 of the Code modifies the general provisions of clause 15 of the Letters Patent and that as no point of law is involved the order of commitment cannot be quashed, **43 M. 361.**

Procedure of Civil or Revenue Court in such cases.

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Sessions, as the case may be, together with the witnesses for the prosecution and defence.

Notes.—*See* s. 206 as to Magistrates authorised to commit for trial.

Procedure in certain cases of contempt.

480. (1) When any such offence as is described in sections 175, 178, 179, 180 or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender, * to be detained in custody and at any time before the rising of the Court on the same day, may, if it thinks fit, take cognisance of the offence and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month unless such fine be sooner paid.

(2) Nothing in †*"section 29-A or Chapter XXXIII" shall be deemed to apply* to proceedings under this section.

Notes.—1. Scope of the sections referred to.—S. 175.—Omission to produce a document before a public servant by a person legally bound to produce such document. S. 178—Refusing oath when duly required to take oath by a public servant. S. 179—Refusing to answer a public servant authorised to question. S. 180—Refusing to sign a statement made to public servant when legally required to do so. S. 228—Intentional insult etc., to a public servant sitting in any stage of a judicial proceeding.

2. **Form of warrant.**—As to the form of warrant in certain cases of contempt when fine is imposed *see* Sch. V, Form No. 38. As to the form of the record, *see* s. 481. *Cf.* Notes at pp. iii and iv of the Appendix.

3. **Prevarication may amount to contempt.**—Prevarication by a witness may, though it does not necessarily amount to a contempt of Court within the meaning of s. 228, I.P.C., and under this section, **10 B. H. C. R. 69**; see *contra* **4 B. H. C. R. Cr. Ca. 6** and **7**; **15 W. R. 5.**

4. **Latitude must be allowed to counsel in conducting the case.**—*See* Notes 1 and 2 under s. 484. Some latitude should be allowed to a member of the Bar, insisting, in the conduct of his case, upon his question being taken down or his objection noted, where the Court thinks the question inadmissible or the objection untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial, unless the prisoner's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or to interrupt the Court, **6 Bom. L. R. 541.** An irrelevant question put to a witness cannot amount to a contempt under s. 228, I.P.C., though a persistence in vexatious or irrelevant questions, after warning, might amount to a contempt, **44 P. R. 1867.** But *see* **46 B. 973.**

5. **When there is no intention to insult, there can be no contempt.**—*See* Note 1 under s. 484.—Where an accused person in making an application for transfer of the case pending against him inserted in

* The words "whether he is an European British subject or not" were omitted by Act XII of 1923.

† The words "s. 29-A or Chapter XXXIII" were substituted for the words and figures "s. 443 or s. 444" by Act XII of 1923.

such application assertions of a scandalous or defamatory nature concerning the trying Magistrate, *held* that there being no intention on the part of the applicant to insult the Court, but merely to procure a transfer of his case the conviction under s 228 I P C, was bad, **1898 A. W. N. 145.** An application for transfer from a particular Court on the ground of a probable miscarriage of justice, is not a contempt, **34 P. R. 1869.** A Court has power to deal with an accused, only if he committed one of the offences enumerated herein, a person therefore cannot be convicted under this section for walking with creaking shoes near the Court room, **5 M. L. T. 286 = 9 C. R. L. J. 309.** In **38 A. 284**, the case in **1898 A. W. N. 145** *was followed*

6. No contempt, unless Magistrate sitting in course of judicial proceedings.—In an inquiry *held* by a second-class Magistrate about a breach of the peace, which arose in consequence of a dispute between two castes the accused said to the Magistrate in a defiant and insolent manner "that he would never permit the castes to be friendly even if the Magistrate were to shoot him dead" The Sub-Magistrate thereupon fined him Rs 50 and the Joint Magistrate reversed the conviction on the ground that he was not sitting in any stage of a judicial proceeding and this reversal was upheld by the High Court as perfectly correct, **Weir II, 605** While a Tahsildar was hearing a civil case, he allowed the proceedings to be interrupted by the accused, a lambardar who had brought part of a sum due from him for revenue and in the course of which the accused was alleged to have abused the Tahsildar and was prosecuted, *held* that the Tahsildar was not sitting in any stage of a judicial proceeding and the conviction under s 228 was unsustainable, **40 P. R. 1881**; *see* also **36 P. R. 1886.**

7. Section not applicable to village headmen in Madras.—The head of a village is a Criminal Court, but he cannot take cognisance of a contempt under this section, because under no provision of the law has he power to fine —*Mad H C Pro*, *26th July*, 1870 Ss 480—482 do not apply to Village Munsiff therefore, where a Village Munsiff was intentionally insulted in the discharge of his Magisterial duties by the accused, who was thereupon convicted by a second-class Magistrate on Police report, *held* that the conviction was right as the Magistrate had jurisdiction and the want of sanction or complaint on the part of the Village Munsiff was a defect curable by s 537, **15 M. 131.**

8. Contempts must be dealt with before rising of Court—The procedure laid down in this section should be strictly followed The provisions of the section should be applied *then and there* at any rate before its rising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under this section. Where a Magistrate, in whose presence contempt was committed, took cognisance of the offence immediately, but in order to give the accused an opportunity of showing cause postponed his final order for some days, *held* that, under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone the final order until the accused has had an opportunity of showing cause against it, and that he should have directed the detention of the accused and dealt with the matter at once or before his rising **11 A. 361.** When a proceeding under this section was instituted immediately after the reading out of a final order and it was objected that the judicial proceedings have been concluded by the reading of the final order, the Court could not proceed under this section *held*, that the accused was rightly convicted under this section, **16 P. R 1897**—*Per* ROE, C.J It might also be *held*, that the whole sitting of a Court for the disposal of judicial work from the opening to the rising of the Court is a judicial proceeding and that the necessary interval between the conclusion of one case and the opening of another is a stage in a judicial proceeding S 482 need not be read with this section and that section does not require the Magistrate to draw up proceedings on the same day that the offence is committed **35 C. 161.** The rule applies only to action taken under this section

9. Change of capacity of offended officer does not give jurisdiction.—An officer before whom whilst acting in a particular capacity an offence under s 228, I P C, is committed cannot in another capacity take up and try the offence. Where the officer does not follow the procedure laid down in this section the case must be tried by an officer other than the person before whom the contempt was committed, **12 W. R. 18.** *See* also **15 W. R. 2.** The Ruling in **22 W. R 10** to the effect, that if the Court does not proceed under this section or s 482 it cannot make the contempt the subject of a complaint under s 195 to a Magistrate, is perhaps of doubtful authority having regard to the language of s 195

10. Sentence cannot be passed in excess of Rs. 200 for interruption—Notwithstanding the provisions as to punishment in s 228, I P C, a Court proceeding itself under this section (*i e*, when dealing with an offence) cannot pass a sentence in excess of that prescribed herein, **Weir II, 603.** If it considers a fine too light a sentence for the offence, it ought, under s 483 to refer the case to some competent Magistrate, **10 W. R. 47**; **Ratanlal 64.**

11. Right of appeal.—An appeal lies from an order under this section. *See* s. 486 and a Sessions Judge cannot decline to interfere on appeal, merely because in his opinion '*the matter is a mere trifle.*' He is bound to hear the appeal, and to come to a finding, whether the conviction is legal or illegal, **Ratanlal 978.**

12. Imprisonment in default to be in Civil Jail.—Though the section is silent as to the jail in which the imprisonment is to be carried out, the offender is generally sent only to the Civil Jail. Where a person is committed to jail for contempt, the Government is bound to supply him with rations, in the same way in which they are supplied to the other prisoners in the jail, **3 W. R. Cr. (Let.) 21.**

13. No process fee payable by party.—No fee is chargeable for serving and executing any process such as a notice, rule, summons or warrant of arrest which may be issued by any Court of its own motion, solely for the purpose of taking cognisance of and punishing any act done or words spoken in contempt of its authority, *Wilkins, p.* 87.

14. Has a Chartered High Court power to punish for contempt of inferior Courts?—*In Governor of Bengal* v. *Moti Lal Ghosh*, **41 C. 173**, the Calcutta High Court *held*, that it had no jurisdiction to punish, as an offence in a summary proceeding, conduct in relation to a proceeding, in a mofussil Criminal Court, such as commenting on a case pending before that Court and differed from the decision of the Madras High Court in **21 M. L. J. 832 (F.B.) = 12 Cr. L. J. 525,** where it was held that the High Court had jurisdiction to punish in a summary proceeding contempts of inferior Courts. *See* Note 1 under section 2 of the Appendix.

15. Comment on pending proceedings may amount to contempt.—It is a contempt of Court to make comment on a pending case if the comment can in the least be taken to have the effect of prejudicing the fair trial of an accused person, **14 Bom. L. R. 231 = 1 Bom. Cr. C. 106 = 13 Cr. L. J. 461.** An article in a newspaper reflecting on the party to a suit, more especially when he is under cross-examination is a contempt of Court, **15 C. W. N. 771.** As the law now stands it is only the Chartered High Court that have power to punish for such contempts.

16. Suit against Magistrate for punishing person under this section when offence committed.—Where a Magistrate charged a person with an offence under s. 228, I.P.C., alleged to have been committed by the accused by walking in view of the Magistrate with shoes on, while discharging his duties as a Magistrate and it was found that he acted *bona fide*, *held* no suit could be maintained against him in damages, **9 M. L. T. 444.**

Record in such cases.

481. (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

Notes.—1. Disregard of procedure will lead to reversal of conviction.—Where the procedure laid own in this section, as respects the recording of facts constituting the offence with any statement that the offender may make, as well as the finding and sentence was disregarded, the High Court set aside the conviction as illegal, **4 M. H. C. R. 229.** The directions of this section "to record facts constituting the offence," are mandatory, and the omission to record the particulars mentioned herein any proceedings taken under s. 480, is fatal to such proceedings, **10 C. W. N. 1062 = 4 C. L. J. 415 = 4 Cr. L. J. 210.**

2. Record must show nature and stage of judicial proceeding.—Where all that appeared from the record was that the Court of a Tahsildar was at a certain village for the purpose of attesting transfers in his capacity of a Revenue Court and that the accused had in the course of a conversation acted insolently and were convicted under s. 480, but the record did not show that at the time of the insult the Tahsildar was acting in any stage of a judicial proceeding; *held*, the conviction must be set aside for non-compliance with the provisions of sub-sec. (2), **36 P. R. 1886.** Where there is no evidence on the record from which it can be gathered what was the judicial proceeding or what was the stage of that proceeding which was interrupted, the order cannot be sustained though any irregularity can be cured by s. 537, **15 Cr. L. J. 621 (M.).**

3. Specific offence charged must be stated and opportunity of answering it given.—A contempt of Court being a criminal offence, no person can be punished for such unless the specific offence charged against

him is distinctly stated, and an opportunity given him of answering—*In re Pollard*, (1880) **L. R. 2 P. C. 106; 13 C. W. N. 685 = 19 M. L. J. 324 (P.C.).**

4. Trivial incidents ought not to be magnified into offences.—*See* **4 M. H. C. R. 146 at p. 147**, where the Appellate Court held it to be no contempt, a laugh and hesitation in speaking, which the Lower Court held to be one It was found that there was no intention to insult the Judge As to whether prevarication would constitute contempt, *see* also **5 M. L. T. 286 = 9 C. L. J. 309.** Notes 3 and 5 under s 480 and Notes to s 484

Procedure where Court considers that case should not be dealt with under section 480

482. (1) If the Court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 480 such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or, if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate to whom any case is forwarded under this section shall proceed to hear the complaint against the accused person in manner hereinbefore provided

Notes.—1. Trial to be by officer other than the one before whom contempt was committed.—" Section 482 distinctly contemplates that the trial is to be by a judicial officer other than the person before whom the contempt was committed. There is nothing to warrant the inference that an officer before whom while acting in a particular capacity, a contempt has been committed, punishable under s 228, I P C, can in another capacity take up and try the offence, an offence committed against himself If he could do so, it would be in violation of that fundamental rule in the administration of justice that no man can be a judge in a case wherein he is interested' *Per* NORMAN, J, **12 W. R. 18 at p. 21.**

2. Case not to be dismissed because Court is unable to record any statement.—The Court should record a statement of facts constituting contempt and the statement of the accused and then forward the case to a Magistrate, **11 W. R. 49.** Where a Court proceeding under this section was unable, owing to the offender—a barrister—having left the Court house, to record any statement from him explanatory of his conduct, *held* that the dismissal of the case on the ground of no such explanatory statement being recorded was improper, **Weir II, 604; 6 M. H. C. R. Appx. XVI.**

3. Section 480 does not limit the time for institution of proceedings under s. 482.—A Court acting under this section is not bound to take proceedings on the same day, as it is when acting under s 480, **35 C. 161.**

When Registrar or Sub-Registrar to be deemed a Civil Court within sections 480 and 482

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1877, shall be deemed to be a Civil Court within the meaning of sections 480 and 482

Note.—*The Indian Regulation Act III of* 1877 is now repealed and the law on the subject consolidated by Act XVI of 1908 In Madras (G O No. 229 Judicial, 10th February, 1890) and in United Provinces (*Allahabad Gazette*, 1888, *Pt I p* 378) every District Registrar has been declared to be a Civil Court within meaning of ss 480 and 482 This section is based on **13 B. L. R. Appx. XL = 22 W. R. 10**, but no notification has yet been issued with regard to Sub-Registrars, and exceptional provisions, like those embodied in section, are not to be drawn out into all their logical consequences **12 B. 36** *See* also **2 C. W. N. 244** and Note 8 under Heading II to s. 476

Discharge of offender on submission or apology

484. When any Court has under section 480 or section 482 adjudged an offender to punishment for or forwarded him to a Magistrate for trial refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or an apology being made to its satisfaction

Notes.—1. Court will always do well to accept earnest assurances of pleaders that there was no intention to insult the Court.—A pleader was tried and punished for contempt by a Munsiff for having used certain words which the Judge thought was derogatory to his position and the Munsiff declined to accept the assurance of the pleader that the words were never meant to apply to the Court. The High Court, postponed the case in order to give the Munsiff an opportunity to consider whether he should not accept the assurance with these remarks: "I think that the learned Munsiff should have accepted that assurance as coming from a gentleman of the standing of the pleader, as a full and real assurance that he never intended to make use of that expression and did not use that expression with reference to the Court. The Judge will always do well to give the fullest belief to the words addressed to him in real earnestness from a gentleman at the Bar." The Munsiff not having accepted the assurance, his Lordship accepted the same as sufficient and set aside the order punishing the pleader, **11 A. L. J. 958 = 14 Cr. L. J. 687.** *See* Note 4 to s. 481.

2. Courts ought not to take too much notice of sudden lapses during moments of excitement.—Litigants are bound to conduct themselves in an orderly manner but too much notice should not be taken of the sudden lapse during a moment of excitement, into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously. When the offender was detained and adopted a submissive attitude when brought before the Court later after the excitement had worn off, due admonition sufficient for preservation of order at the most a petty fine, would meet the necessities of the case, **23 P. W. R. 1912 = 13 Cr. L. J. 567.**

Imprisonment or committal of person refusing to answer or produce document.

485. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

Notes.—1. Form of warrant of commitment, *see* Sch. V, Form No. 39.

2. Complainant is not a witness.—A complainant can hardly be held a witness punishable for refusing to answer under this section, and even a witness cannot be punished for not answering a question which is irrelevant to the real issue or which he is not legally bound to answer, **13 B. 600.**

3. Duty of witness when incriminating question put.—If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled, **3 M. 271 (F.B.)** *followed* in **12 B. 440,** where it was held that protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which then he has been compelled by the Court to give (BIRDWOOD, J., *dissenting*). *See* also **21 C. 392; 16 A. 88; 32 C. 756.** The same construction was put on the Canadian Act in *Queen* v. *Williams*, **26 Can. R. 583,** *overruling Queen* v. *Hender Shott,* but the Chancery Divisional Court has pronounced in *Queen* v. *Hammand*, 34 Can. Law Journal No. 5, p. 164, a contrary opinion, holding that the immunity embodied in the section 5 of *the Canadian Evidence Act*, (which is substantially identical with s. 132 of *the Indian Evidence Act*) extends even to persons who had not objected or asked to be excused from answering incriminating statements, **2 C. W. N. 169.**

4. Not bound to answer questions asked with a view to criminal proceedings being started.—If a Judge asks questions with a view to criminal proceedings being taken against the witness, the witness is not bound to answer them, and cannot be punished for not answerieg them under s. 179, I.P.C., **10 B. 185.**

5. Commit him to custody.—It is advisable, but not necessary, to limit the period of commitment to a fixed time. When a person is in custody for contempt of Court, any application for release should be made to the committing Judge, **1 Ind. Jur. N. S. 23.**

6. **Power of Chartered High Court to commit for contempt.**—The power of the Chartered High Courts, to commit for contempt is not under this Code and the Penal Code, but under the Common Law of England, *Macdermott* v *The Justices of British Guiana*, **5 Moore's P. C. C. (N.S) 466.** *See* also *The Champion*, **2 Atkyns 469**; *in re Davies*, **L. R. 1 Q. B. D. 236; 8 C. W. N. 346; 1 Hyde 79; 10 C. 109 = 10 1 A. 171; 33 B. 240.**

486. (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable

Appeals from convictions in contempt cases.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency town shall lie to the High Court, and an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session or the Sessions division within which such Court is situate

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge and in other cases may be made to the District Judge, or, in the presidency towns, to the High Court

Note.—Ordinarily appealable, *i e*, in the majority of cases, **11 B 438 at p. 440.** In Civil cases an appeal lies from an order, refusing an application to commit for contempt of Court, **25 C. 236.**

487. (1) Except as provided in sections* 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court,† shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt ‡ of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding

Certain Judges and Magistrates not to try offences referred to in s 195 when committed before themselves

(2) Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court

Notes.—1. Prohibition is personal.—The prohibition contained in this section is a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged, **1 M. 305**, but curiously enough, having regard to the language of the section where sanction was given by an officer in his capacity as a revenue officer, the trial of the case by the same officer as Deputy Magistrate, was held not illegal **Weir II, 613.** A second-class Magistrate, who issues an order under s 144 has no jurisdiction to punish for its disobedience, **10 B. H. C. R. 424; 1 B. 339; 24 M. 262; Ratanlal 904** which *distinguishes* **18 B. 380, 13 C. W. N 223.** Also, a Magistrate whose summons has been disobeyed has no jurisdiction to try the offence, **Weir I, 82; II, 612.** *See* Note 65 to s **144**

2. Exemption for Judges of High Court—The High Court as a Court of record has the power of summarily punishing for every contempt without sending the accused for trial to the ordinary Courts of criminal jurisdiction **8 W R. 32.** *See* the remarks of BHASHYAM AIYANGAR J in **24 M 523 at p. 548**

* The figures 477 were omitted by Act XVIII of 1923

† The words *and the Recorder of Rangoon* were repealed by *the Lower Burma Courts Act* VI of 1908 *See* s 48 and the second Schedule

‡ As to als for contempt of authority of a Criminal Court or Magistrate in British Baluchistan see *British Baluchistan Criminal Justice Regulation* VIII of 1896 Schedule, s 16

3. **Prohibition extends to Sessions Judge.**—A Sessions Judge is not competent to try the case of a person who has given false evidence before him in a Criminal case. In other words, the prohibition in the section extends to Sessions Judge, **14 A. 354.** A Sessions Judge who has omitted to take action under s. 477 in respect of an offence referred to in s. 195, committed before his own Court, has non-jurisdiction to try such offence, notwithstanding that it may be exclusively triable by a Sessions Court, **Weir II, 609.** But in **Weir II, 607** it was *held* that a Sessions Judge who was the Judge before whom an offence under s. 193, I.P.C., was committed is not precluded by this section from hearing an appeal in the case. **Weir II, 607.**

4. **Section applicable to Presidency Magistrates.**—Under this section the Chief Presidency Magistrate has no jurisdiction to try a person for an offence under s. 188, I.P.C., for disobedience of his own order. The terms of this section are wide enough to include a Presidency Magistrate, and where the High Court sets aside a conviction for the reason that the trying Magistrate had no jurisdiction, it is not the duty of the High Court, ordinarily to direct a re-trial. The order of the High Court merely setting aside the conviction and sentence, is no obstacle to the accused being re-tried on the same charge at the instance of the prosecution, **12 C. W. N. 246 = 7 C. L. J. 70 = 7 Cr. L. J. 103.**

5. **Prohibition is restricted to Judges of Criminal Courts or Magistrates.**—Where sanction was given by an officer in his capacity as a revenue officer, the trial of the case as Deputy Magistrate was *held* not illegal, **Weir II, 613.** A District Judge, who has sanctioned the prosecution of a party for forgery, is not debarred from trying the offence in his capacity of a Sessions Judge, **6 B. 479; 14 A. 354.** It would be inconsistent to hold that a Sessions Judge may under s. 477 try an offence committed before him as Sessions Judge, but that he may not try such an offence if committed before him as District Judge. The prohibition is restricted to a "*Judge of a Criminal Court*" and that being so, a strict construction must be placed on the words " as such Judge," and it must be held that they do not include a Judge of a Civil Court or a District Judge, **16 C. 766** at **p. 771 (F.B.)** *overruling* **16 C. 121**; *followed* in **18 B. 380.** Nor is a Sessions Judge debarred from hearing an appeal from a conviction by the District Magistrate to whom he had sent the case for inquiry, under s. 476, while acting as District Judge, **7 C. W. N. 708.** This circumstance would not also constitute "personal interest" within the meaning of s. 556. The illustration to s. 556 is *distinguished* in the above Ruling. *See* Note 9 below and Note 7 to s. 477.

6. **Magistrate not excluded when sanction is in respect of offence not committed in Court.**—Whereupon a report by a Police-officer that false information was given by *A*, the District Magistrate gave sanction to his prosecution for giving such information; *held*, that this section does not apply to the case and prevent the District Magistrate from hearing the appeal against the conviction of such person, inasmuch as the offence was not committed before himself, etc., within the meaning of this section, **27 C. 452**; nor does this section prevent the District Magistrate from trying the case himself. Section 195 (1) (*b*) has reference to an offence under s. 211, I.P.C., but only when such offence is committed in, or in relation to any proceeding in Court, **12 P. R. 1905 = 74 P. L. R. 1905 = 2 Cr. L. J. 66.** Where a false charge is made to the Police and on their report, the District Magistrate directs the prosecution of the informer, there is nothing to prevent his trying the case himself. *See* Note 9 below.

7. **Magistrate not excluded, unless matter had been before him in course of judicial proceeding.**—*B* charged certain persons with theft before a Police-officer, who brought it to the notice of a Magistrate having jurisdiction. The Magistrate directed the Police to investigate into the truth of such charge. Having ascertained that such charge was false, the Magistrate took proceedings against *B* on a charge of making a false charge of an offence, and convicted him of that offence. *Held*, that as such false charge was not preferred by *B* before such Magistrate, the offence of making it was not a contempt of such Magistrate's authority and such Magistrate was not precluded from trying *B* himself, nor was his sanction or that of some superior Court, necessary for *B's* trial by another officer, **3 A. 322.**

8. ***Magistrate not excluded, if offence was committed before him in a non-criminal capacity.***—Magistrate is not debarred by this section from trying an accused person under s. 174, I.P.C., for disobedience of a summons issued by him in his capacity as a *Mamlatdar*, **18 B. 380 (F.B.)**, but *see* **Ratanlal 70** and **904; 27 Cr. L. J. 1344.** Where the accused would not allow the attachment of his property in execution of a decree of the Cantonment Small Cause Court, the Judge of that Court had no jurisdiction as a Magistrate to try him under s. 186, I.P.C., **22 P. R. 1879.** Where a Settlement Officer, who was also a Magistrate, summoned as Settlement

[illegible] the language of the section There can be no reason for recording him as competent merely because he issued summons in a different capacity If the policy of the law has been that the accused will not have a fair trial, if the disobedience for which he is tried is the order of the trying officer, regard must be had to the sameness of the individual, and not to the sameness of capacity However as the language of the section stands there can be only one interpretation of it.

9. Magistrate excluded if offence was before him as a Criminal Court.—Accused was summoned to produce certain documents, but failed to produce them saying that they were not in his possession. The Magistrate, having found that the statement was incorrect, charged him with having committed an offence under s. 175, I P C., and himself tried and convicted him, *held*, that the Magistrate was precluded by this section from trying the case himself and that none of the sections excepted (*i e*, ss. 477, 480 and 485) was applicable to the case, **13 M. 24.** An order whether original or appellate granting or refusing sanction under s. 195 is a judicial proceeding A Magistrate who has refused to set aside an order sanctioning a prosecution on a charge of perjury, has no jurisdiction under this section to try the case himself, **20 M. 383, 16 A. L. J. 432, 23 C. W. N. 520, 5 Pat. 450**

10. Prohibition in section extends to all contempts.—S 473 of Act X of 1872, which, except as therein provided, forbids a Court to try any person for an offence committed in contempt of its own authority is not limited to offences falling under Chapter X of the I P C, but extends to all contempts of Courts, **1 B. 339.** The words in contempt of authority are general, and are not to be construed as limited to cases where the alleged offence is in the nature of a contempt of Court, **24 M. 262, 18 B. 380 (F.B.).**

11. Giving false evidence in judicial proceeding is contempt of Court.—The offence of intentionally giving false evidence in a judicial proceeding cannot be tried by the Magistrate before whom the false evidence is given. The offence being an attempt to pervert the proceedings of a Court to an improper end, is a contempt of its authority, **10 B. H. C. R. 73, 1 A 625 (F.B.) 1 B. 311,** and therefore the Magistrate himself cannot try a person for giving false evidence before himself **7 M. H. C. R. Appx. XVII, 22 W. R. 49; 1 A. 129,** or for the abetment of such an offence, **7 M. H. C. R. Appx. XXVII.** Under the 1872 Code, a Court of Session had no power to commit to itself a person charged under s 193 I P C, with giving false evidence before itself, **4 C. 570 = 3 C. L. R. 599, 3 M. 254, 5 C. 184 at p 187, 2 A 405.** But now s 477 makes an exception in the case of a Sessions Judge Where, however, a Sessions Judge without taking action under s 476 or s 477, merely sanctioned the prosecution of the accused for having given false evidence in a trial before him and they were committed for trial by a Magistrate on the charge for perjury and was tried and convicted by the same Sessions Judge, *held*, that the trial was without jurisdiction and the conviction must be set aside **Weir II, 609.**

12. Duty of Court when sufficient ground forthcoming—Where a Court thinks that there is sufficient ground for inquiring into a charge mentioned in s 195 it should proceed under this Chapter, observing the provisions of this section, **3 A. 62.**

13. Even when Judge qualified to try, transfer may be desirable—Where a District Magistrate had procured the initiation of a number of proceedings [illegible] in conviction came up before him in appeal, the [illegible] he should hear the appeal ordered its transfer to t[illegible] to the desirability of transfer in similar circumstances But the circumstance that the Sessions Judge had expressed an opinion unfavourable to a person accused of an offence belonging to a class of cases, excepted by this section from the general rule that no Court shall try an offence committed in contempt of its own authority, is in itself no ground for transferring the trial to another Sessions Court, such a state of things being one the existence of which the law necessarily contemplates, when it authorises a Sessions Judge to try such cases, **Weir II, 608.**

14. Accused must always be given opportunity for explanation.—A conviction without giving an opportunity to the accused for explanation is bad, **13 C. W. N. 685 = 19 M. L. J. 324 (P.C.),** *re Pollard*, **L. R. 2 P. C. 106 (1868) = 5 Moore P. C. N. S. 111.**

3. **Prohibition extends to Sessions Judge.**—A Sessions Judge is not competent to try the case of a person who has given false evidence before him in a Criminal case. In other words, the prohibition in the section extends to Sessions Judge, **14 A. 354.** A Sessions Judge who has omitted to take action under s. 477 in respect of an offence referred to in s. 195, *committed* before his own Court, has non-jurisdiction to try such offence, notwithstanding that it may be exclusively triable by a Sessions Court, **Weir II, 609.** But in **Weir II, 607,** it was *held* that a Sessions Judge who was the Judge before whom an offence under s. 193, I.P.C., was committed is not precluded by this section from hearing an appeal in the case. **Weir II, 607.**

4. **Section applicable to Presidency Magistrates.**—Under this section the Chief Presidency Magistrate has no jurisdiction to try a person for an offence under s. 188, I.P.C., for disobedience of his own order. The terms of this section are wide enough to include a Presidency Magistrate, and where the High Court sets aside a conviction for the reason that the trying Magistrate had no jurisdiction, it is not the duty of the High Court, ordinarily to direct a re-trial. The order of the High Court merely setting aside the conviction and sentence, is no obstacle to the accused being re-tried on the same charge at the instance of the prosecution, **12 C. W. N. 246 = 7 C. L. J. 70 = 7 Cr. L. J. 103.**

5. **Prohibition is restricted to Judges of Criminal Courts or Magistrates.**—Where sanction was given by an officer in his capacity as a revenue officer, the trial of the case as Deputy Magistrate was *held* not illegal, **Weir II, 613.** A District Judge, *who has sanctioned the prosecution of a party for forgery*, is not debarred from trying the offence in his capacity of a Sessions Judge, **6 B. 479; 14 A. 354.** It would be inconsistent to hold that a Sessions Judge may under s. 477 try an offence committed before him as Sessions Judge, but that he may not try such an offence if committed before him as District Judge. The prohibition is restricted to a "*Judge of a Criminal Court*" and that being so, a strict construction must be placed on the words "as such Judge," and it must be held that they do not include a Judge of a Civil Court or a District Judge, **16 C. 766 at p. 771 (F.B.)** *overruling* **16 C. 121**; *followed* in **18 B. 380.** Nor is a Sessions Judge debarred from hearing an appeal from a conviction by the District Magistrate to whom he had sent the case for inquiry, under s. 476, while acting as District Judge, **7 C. W. N. 708.** This circumstance would not also constitute "personal interest" within the meaning of s. 556. The illustration to s. 556 is *distinguished* in the above Ruling. *See* Note 9 below and Note 7 to s. 477.

6. **Magistrate not excluded when sanction is in respect of offence not committed in Court.**—Whereupon a report by a Police-officer that false information was given by *A*, the District Magistrate gave sanction to his prosecution for giving such information; *held*, that this section does not apply to the case and prevent the District Magistrate from hearing the appeal against the conviction of such person, inasmuch as the offence was not committed before himself, etc., within the meaning of this section, **27 C. 452;** nor does this section prevent the District Magistrate from trying the case himself. Section 195 (1) (*b*) has reference to an offence under s. 211, I.P.C., but only when such offence is committed in, or in relation to any proceeding in Court, **12 P. R. 1905 = 74 P. L. R. 1905 = 2 Cr. L. J. 66.** Where a false charge is made to the Police and on their report, the District Magistrate directs the prosecution of the informer, there is nothing to prevent his trying the case himself. *See* Note 9 below.

7. **Magistrate not excluded, unless matter had been before him in course of judicial proceeding.**—*B* charged certain persons with theft before a Police-officer, who brought it to the notice of a Magistrate having jurisdiction. The Magistrate directed the Police to investigate into the truth of such charge. Having ascertained that such charge was false, the Magistrate took proceedings against *B* on a charge of making a false charge of an offence, and convicted him of that offence. *Held*, that as such false charge was not preferred by *B* before such Magistrate, the offence of making it was not a contempt of such Magistrate's authority and such Magistrate was not precluded from trying *B* himself, nor was his sanction or that of some superior Court, necessary for *B's* trial by another officer, **3 A. 322.**

8. **Magistrate not excluded, if offence was committed before him in a non-criminal capacity.**—Magistrate is not debarred by this section from trying an accused person under s. 174, I.P.C., for disobedience of a summons issued by him in his capacity as a *Mamlatdar*, **18 B. 380 (F.B.)**, but *see* **Ratanlal 70** and **904; 27 Cr. L. J. 1344.** Where the accused would not allow the attachment of his property in execution of a decree of the Cantonment Small Cause Court, the Judge of that Court had no jurisdiction as a Magistrate to try him under s. 186, I.P.C., **22 P. R. 1879.** Where a Settlement Officer, who was also a Magistrate, summoned as Settlement

Officer a person to attend his Court and such person neglected to attend, and such officer as a Magistrate charged him with an offence under s. 174, I P C., and tried and convicted him on his own charge *held*, that such conviction was illegal, **2 A. 405; 13 M. 24; 14 A. 354.** The *Madras Law Journal* (Vol. 4, p 287) observes with regard to the Ruling in **18 B. 380**, " there can be no doubt in this case the policy of the law has evidently been frustrated by the language of the section There can be no reason for recording him as competent merely because he issued summons in a different capacity If the policy of the law has been that the accused will not have a fair trial, if the disobedience for which he is tried is the order of the trying officer, regard must be had to the sameness of the individual, and not to the sameness of capacity However as the language of the section stands there can be only one interpretation of it."

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10. Prohibition in section extends to all contempts.—S 473 of Act X of 1872, which, except as therein provided, forbids a Court to try any person for an offence committed in contempt of its own authority, is not limited to offences falling under Chapter X of the I P C , but extends to all contempts of Courts, **1 B. 339.** The words in contempt of authority are general, and are not to be construed as limited to cases where the alleged offence is in the nature of a contempt of Court, **24 M. 262; 18 B. 380 (F.B.).**

11. Giving false evidence in judicial proceeding is contempt of Court.—The offence of intentionally giving false evidence in a judicial proceeding cannot be tried by the Magistrate before whom the false evidence is given The offence being an attempt to pervert the proceedings of a Court to an improper end, is a contempt of its authority, **10 B. H. C. R. 73 , 1 A. 625 (F.B.) , 1 B. 311** , and therefore the Magistrate himself cannot try a person for giving false evidence before himself, **7 M. H. C. R. Appx. XVII; 22 W. R. 49 , 1 A. 129,** or for the abetment of such an offence, **7 M. H. C. R. Appx. XXVII.** Under the 1872 Code, a Court of Session had no power to commit to itself a person charged under s 193, I.P C , with giving false evidence before itself, **4 C. 570 = 3 C. L. R. 599 , 3 M. 254; 5 C. 184 at p. 187 , 2 A. 405.** But now s 477 makes an exception in the case of a Sessions Judge Where, however, a Sessions Judge without taking action under s 476 or s 477, merely sanctioned the prosecution of the accused for having given false evidence in a trial before him and they were committed for trial by a Magistrate on the charge for perjury and was tried and convicted by the same Sessions Judge , *held*, that the trial was without jurisdiction and the conviction must be set aside, **Weir II, 609.**

12. Duty of Court when sufficient ground forthcoming.—Where a Court thinks that there is sufficient ground for inquiring into a charge mentioned in s 195 it should proceed under this Chapter, observing the provisions of this section, **3 A. 62.**

13. Even when Judge qualified to try, transfer may be desirable.—Where a District Magistrate had procured the initiation of a number of proceedings against the same person and one of them which had resulted [illegible] considering that it was not altogether seemly that [illegible] Judge, **24 W. R. 58.** *See* also **5 M. H. C. R. 212** as [illegible] the circumstance that the Sessions Judge had expressed an opinion unfavourable to a person accused of an offence belonging to a class of cases, excepted by this section from the general rule that no Court shall try an offence committed in contempt of its own authority, is in itself no ground for transferring the trial to another Sessions Court, such a state of things being one the existence of which the law necessarily contemplates, when it authorises a Sessions Judge to try such cases, **Weir II, 608.**

14. Accused must always be given opportunity for explanation.—A conviction without giving an opportunity to the accused for explanation is bad, **13 C. W. N. 685 = 19 M. L. J. 324 (P.C.)**, *re Pollard*, **L. R. 2 P. C. 106 (1868) = 5 Moore P. C. N. S. 111.**

CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

Order for maintenance of wives and children.

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding * "one hundred" rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

Enforcement of order.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month *or until payment if sooner made:*

Provided that, if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that *there is just ground for so doing*.

† "Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due."

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex-parte*. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

‡ * * * *

§ (7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

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* The words in "——" were substituted for the words "fifty" by *ibid*

† This proviso was added by Act XVIII of 1923.

‡ Sub-section (7) (original) was omitted.

§ Sub-sections (8) and (9) were re-numbered respectively (7) and (8) by *ibid*.

*(8) "Proceedings under this section may be taken against any person" in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child

Note.—For levy of fines, *see* ss 386—389, for recording evidence in summons-cases, *see* s. 355 Imprisonment may be simple or rigorous *See* s. 3 (25) of *the General Clauses Act* 1897 **9 A. 240** The jurisdiction conferred by this section is not punitive and is preventive rather than remedial, **3 P. R. 1893.** The N Y Cr P Code (ss 914—926) treats the subject as a special proceeding of a criminal nature—'*Stokes Anglo-Indian Codes,*' Vol II, p 29, introduction.

Notes.—1. Changes in the section by the amending Act XVIII of 1923 Instead of rupees fifty rupees hundred can now be given as maintenance allowance per month In sub-sec. (3) instead of the words "wilfully neglects" the words "fails without sufficient' cause are substituted by a new proviso to sub-sec. (3) A period of one year is laid down for the recovery of arrears of maintenance Original sub-sec. (7) is omitted *see* now s. 340 which expressly provides for the right of giving evidence

The word "accused" is deleted from sub-sec. (8) and in its stead the word "person' is substituted thereby making it clear that the person proceeded against under this section is not an accused person.

2. Forms of warrant.—As to forms of warrant of imprisonment on failure to pay maintenance, *see* Sch. V, Form No 40, and to enforce the payment of maintenance by distress and sale, *see* No 41

ANALYSIS OF NOTES.

I.—SCOPE AND NATURE OF PROCEEDINGS.

3. Chapter applies to European British subjects.—*See* **10 P. R. 1871; 49 M. L. J. 335.**

3 A. ***Enforcement in India of maintenance orders made outside India.***—Now under Act XVIII of 1921 provision is made for the enforcement in British India of maintenance orders made in other parts of His Majesty's Dominions and Protectorates and *vice versâ* Under that Act the Court of the Chief Presidency Magistrate or the District Magistrate is constituted a Court of summary jurisdiction and under certain conditions and circumstances mentioned in that Act the Chief Presidency Magistrate in a Presidency town or the District Magistrate in the Mofussil is empowered to enforce such maintenance orders made outside British India. This jurisdiction is somewhat analogous to the Magisterial jurisdiction under s 488

4. Nature of proceedings under this Chapter.—(*i*) *Proceedings are judicial proceedings* —*See* s 4 (*m*) at pp 13-14 The proceedings under this Chapter are judicial proceedings in their nature, and must not be conducted as if they were ministerial matters. The notes of evidence must not be inadequate and vague, and the order recorded should be on distinct findings of fact **5 A. 224, 5 Bom. H. C. R 81.**

(*ii*) *Proceeding is a criminal case within the meaning of s* 528 —A proceeding under this section is a criminal case within the meaning of s 528 and the District Magistrate may withdraw a case instituted under this section from the file of the first-class Magistrate to his own file, **5 P. R. 1905 = 2 Cr. L. J. 40.** *Cf* **25 B 179; 28 C. 709.**

* These words in ' —— ' were substituted for the words the accused may be proceeded against by Act XVIII of 1923

(*iii*) *Order awarding maintenance is order made in a 'criminal trial' within meaning of s.* 15 *of Letters Patent.—See* **17 M. L. T. 330 = 16 Cr. L. J. 328.**

(*iv*) **Maintenance proceedings under s. 488 wholly governed by the provisions of the Criminal Procedure Code.**—In a maintenance proceeding under s. 488 when the plea of insanity is set up on behalf of the counter-petitioner, the Magistrate is bound to hold a judicial inquiry into his sanity and put him, if necessary, under medical observation, **48 M. 388 = 48 M. L. J. 187.**

5. **Proceeding under this Chapter not a civil suit.**—The proceedings under this Chapter do not amount to a civil suit where the issue is to the social standing of the wife and the amount of alimony appropriate, or the kind of education children of a person in the father's position ought to receive and the amount, if any property payable in schooling fees for them. These are questions beyond the scope of this Code. The Code in providing 'maintenance' does not intend to go further than to ensure to the wife or children food, clothing and lodging. It does not provide for schooling fees, **1909 U. B. R. I. 17 = 11 Cr. L. J. 40.**

6. **Neglect or refusal to maintain is no "offence" and the person proceeded against is not an accused person in the ordinary sense—Effect thereof.**—Though cls. (7) and (9) refer to the defendant in a maintenance case as an 'accused' it is clear from the nature of the proceedings as also from the facts that an oath can be administered to him that he is not an accused person in the ordinary sense of that term, **17 C. P. L. R. 127 = 1 Cr. L. J. 864.** The neglect or refusal to maintain mentioned in this section is not an '*offence*' as defined in s. 4 (*o*), that is to say, is not an act or omission made punishable by law and therefore, (1) s. 177 does not determine the place of inquiry, **18 P. P. 1885; 3 P. R. 1893;** (2) s. 20, cl. (*ii*) of *the Court-fees Act*, 1870, does not apply to processes issued under this section, **16 M. 234;** (3) when the Magistrate orders a person to make a monthly allowance under this section there is no conviction of any offence and no appeal lies, **7 W. R. 10; 5 Bom. H. C. R. 81;** (4) ss. 202 and 203 are inapplicable to such proceedings and a Magistrate having jurisdiction to determine such application cannot refer it to his subordinate for inquiry or dismiss it on his report, **29 P. R. 1905 = 2 Cr. L. J. 421; 11 M. 189;** (5) proceedings are of a civil nature and parties are competent witnesses. *See* s. 120 of *the Evidence Act* and sub-sec. (7), **18 A. 107; 18 B. 468; 16 C. 781;** (6) compensation cannot be awarded to accused, **6 M. L. T. 261 = 11 Cr. L. J. 156** *following* **16 M. 234.**

7. **Statutory right created by section is independent of and not controlled by personal law.**—(*i*) *Of a wife.*—Under the law of the *Shea* sect of Muhammadans, a *moota* wife is not entitled to maintenance but such a provision of the law does not interfere with the statutory right to maintenance, given by this section, **8 C. 736 = 11 C. L. R. 237; 6 W. R. 60; 19 M. 461; 5 A. 226;** and children of a *nikah* wife are legitimate, **18 W. R. 28.** The fact that under the personal law a person is bound to maintain is not conclusive, *e.g.*, a wife under the Muhammadan Law is entitled to maintenance during *iddat*, **20 M. L. J. 12 = 10 Cr. L. J. 502.**

(*ii*) *Of a child.*—An illegitimate son of a Hindu by a non-Hindu woman (here a Christian) is not entitled under Hindu Law to maintenance (**4 C. L. R. 164,** *referred to*). *He may be entitled to maintenance* under this section, but his rights hereunder, can be enforced only by the particular remedy provided by the section, and to the extent herein provided. Consequently, he cannot enforce it by suit, nor does the right survive the death of his putative father. In the case of illegitimate children entitled to claim maintenance under the common law, *i.e.*, the personal law applicable to them, the statutory remedy given by this section will only be a cumulative remedy and will not take away the remedy under the common law to enforce such right by action against the father during his life-time or after his death against his estate, **27 M. 13.** The father of a child born during the continuance of the form of marriage known as *sumbundhum* under the *Marumakkathayam Law* as observed by the *Nayar* community of *Malabar*, is liable to have an order made against him for its maintenance under this section, **22 M. 246 and 247** (*footnote*). *See* the subject of the liability of a *Numboodri Illom* property, to maintain the *Nayar* children of one of the members of the *Illom*, discussed at great length by the Full Bench of the Travancore High Court in A. S. 147 and 171 of 1079 (*Malabar Law Quarterly*, Vol. I, p. 37). The right of a wife and of children to be maintained by the husband and by the actual father, is a statutory right, and the duty is created by express enactment independent of the personal law of the parties. If the children be illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing an allowance for maintenance. If the children be legitimate and the parties are governed by the Muhammadan Law, the mother may have the right to custody until they attain the age of seven years, and in any case they are entitled to be maintained till then. But if the parties are governed by *Marumakkathayam Law*, it is doubtful whether the father could be held to have neglected his duty to provide or his children, if they are actually being maintained by the *karnavan* of the mother's *tarwad* who is bound by law to

maintain them *Quære?* Whether the *karnavan* of the mother's *tarwad* has any *locus standi* to make an application for the maintenance of her children, when the law has imposed the same duty on himself and when he himself has sufficient means to perform that duty, **19 M. 461.** It was however *held* in **25 M. L. J. 355 = 14 M. L. J. 223 = 14 Cr. L. J. 597,** that the fact of the child belonging to a well-to-do *tarwad* had nothing to do with the liability of a father who has sufficient means to maintain his child and neglects to do so. But this view was *dissented* from in **19 M. L. T. 23 = 17 Cr. L. J. 16,** where it was *held* that s 488 has no application to cases of children having independent means of their own or have a right to be maintained by a *tarwad*.

Although the offspring of a *sammandham* is not entitled to an order for maintenance against the father in case the *tarwad* has means to maintain. But where the *tarwad* is not in a position to maintain an order for maintenace may be passed against the father under s 488 **46 M. L. J. 324**

8. Cases where special marriage laws were considered—

(i) *Sumbundhum marriage*, **22 M. 246 ; 22 M. 247** (*footnote*).
(ii) *Mirumakkathayam Law*—Moplahs, **19 M. 461.**
(iii) *Jats Karao marriage*, **4 N.-W. P. 128.**
(iv) *Chinese marriage*, **7 Bur. L. T. 71 = 15 Cr. L. J. 434.**
(v) *Karen marriage*, **15 Cr. L. J. 590 (Bur.).**
(vi) *Muhammadan marriage and divorce* —*See* Notes 38—45

II.—JURISDICTION AND COMPETENCY OF COURTS.

9. Meaning of the words 'may order.'—The use of the word '*may*' in this section shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made though the discretion has to be exercised judicially and reasonably and not capriciously, **31 M. 185.** *See* also **20 M. 470.**

10. Jurisdiction—place where complaint to be instituted.—There was some conflict of opinion on this point. In **9 B 40, 3 P. 1893** and **24 C. 638** it was *held* that the application must be tried where the husband resides while in **5 N.-W. P. H. C. R 237** and **13 A. 349** it was *held* that the application must be heard where the wife resides, but the law is now settled by sub-sec. (9) in accordance with the decision in **9 B. 40** and **24 C. 638.** The general rule enunciated in s 177, does not apply to proceedings under this section, **13 P. R 1885 ; 3 P. R. 1893** Sub-sec. (9) does not give the wife or child the right to select a *forum* other than that where the husband or father is then residing or last resided with the applicant, **1904 U. B. R. I. Cr. Pro , p. 10 = 1 Cr L. J. 545.** *See* also **110 I. C. 239 = 29 Cr. L. J. 687.** Occasional visits of a husband to a wife who lives apart from him, do not give jurisdiction to a Magistrate in the district in which the wife resides. For purposes of cl (9) a man may be said to reside with the mother of his illegitimate children, if he visits her only occasionally at her settled abode, so long as he has the intention of continuing to so visit her, and where she has no permanent residence elsewhere, two months' stay at a place where she is occasionally visited by the father of the children, is sufficient to constitute that place as 'residence' for purpose of this section, **5 S L. R. 220 = 13 Cr. L J. 522.**

Reside—The construction of the words 'residence,' 'dwelling' as used in ss 16 and 20 of *the Civil Procedure Code* and in other statutes has been considered in several decisions *see* **8 B 227 ; 6 B. 100 ; 18 B. 290, 1 A. 51, 21 C. 634 ; 5 M. H. C. R. 101, 36 C. 964.** A man may have a number of residences, **3 A. 91 (P.C.)** A man who has no permanent place of residence resides where he is for the time being, **8 M 205, 25 B. 176.** *Alexander* v *Jones* **L. R. 1 Ex. 133.** Temporary residence sufficient to give jurisdiction, **21 C. W. N. 812 ; 49 All. 479 ; 53 Bom. 781.**

11. Proceedings of Magistrate not empowered void.—If any Magistrate not being empowered by law in this behalf passes an order of maintenance, his proceedings shall be void S 530, cl. (*n*). A second class Magistrate is not entitled to act under this section, **22 W. R. 30,** unless he be a Sub Divisional Magistrate A Magistrate of the first class though not empowered to take cognisance of an offence, may act under this section, **5 N -W. P. H. C. R. 237.**

11-A. Wrong Court—An order under this section would not be vitiated because the proceedings were instituted in a wrong Court to such a case, s. 531 and *not* s 530 (*n*) is applicable **30 Cr. L. J. 535 = 115 I. C. 602.**

12. Magistrate to whom complaint is made cannot refer case for inquiry to Subordinate Magistrate.—A Magistrate has no power under this section to refer a complaint for inquiry and report to a Subordinate Magistrate, and any order passed upon such report is illegal, **11 M. 199.** A Magistrate cannot direct an inquiry under this section to be made by a Magistrate of a rank below the first class, **Weir II, 617.**

The petition not being a complaint within the meaning of s. 4 (*h*), the Magistrate to whom it is presented, should hear the case himself, and cannot refer it to a Subordinate Magistrate and dismiss it on his report, as s. 203 is inapplicable to such a petition, **29 P. R. 1905 = 90 P. L. R. 1905 = 2 Cr. L. J. 421.**

13. **Can fresh application be entertained after previous dismissal?—"Res judicata."**—When a duly empowered Magistrate has decided a matter under this section, by dismissing the application after hearing the evidence offered, the District Magistrate cannot entertain the complaint *de novo*, **1 C. L. R. 89; 17 Cr. L. J. 106 (C.).** The petitioner's remedy, if any, is in a superior Court. There is no appeal against the order, but it is subject to revision under s. 439, **5 B. H. C. Cr. Ca. 81; 7 W. R. 10; 20 W. R. 58;** but the dismissal of a complaint on one state of facts is no bar to the Magistrate awarding maintenance on a complaint based on a different state of facts which may subsequently arise, **Weir II, 633.** The rejection of an application in one district for want of jurisdiction, is no bar when application is renewed in the district having jurisdiction, **5 N.-W. P. H. C. R. 237.** *See* **9 B. 40.** The principle of *res judicata* is applicable to criminal as well as civil proceedings. Therefore, where, a husband, who had been ordered to pay maintenance to his wife, objected to its continuance on the ground of her adultery, and that objection was adjudicated upon by the Magistrate, another Magistrate is wrong in re-opening matters already adjudicated upon, and his order directing discontinuance of the allowance is illegal, **5 A. 224; 17 Cr. L. J. 106; 24 P. R. 1916 (Cr.).** But *see* **4 L. B. R. 337 = 9 Cr. L. J. 21.** Where an application under sec. 488, Cr. Pro. Code, for the maintenace of an illegitimate child was dismissed for default and the Magistrate entertained a fresh application. *Held*, that there was no bar to the Magistrate entertaining the fresh application inasmuch as there was no adjudication of the first application, **24 C. W. N. 32.**

14. **When first order becomes inoperative, fresh application may be entertained.**—A Magistrate ordered a husband to maintain his wife. Against this order the husband applied to the High Court. Subsequent to this, an agreement was entered into between the parties, but the husband did not act up to his promise. On the application of the wife to enforce the former order, it was *held*, that the Magistrate was right in not enforcing it, as it had become inoperative when the agreement began to operate; but that, if the wife applied again under this section *de novo*, the Magistrate should deal with any fresh application on its merits. *B. H. C. Cr. Rule*, No. 8 of **15th March, 1888; 1888 A. W. N. 217; 27 A. 483.**

15. **Magistrate not competent to restore case once dismissed.**—The Code does not empower the Magistrate to re-hear a petition once dismissed, **9 C. W. N. 125 = 1 C. L. J. 214 = 2 Cr. L. J. 13; 17 Cr. L. J. 106 (C.).** *See* also **Weir II, 628.**

16. **Who may enforce order for maintenance.**—Any Magistrate in any place where the person against whom the order is made may be, may enforce the order, under s. 490. A second-class Magistrate may enforce it, **Ratanlal 288.** But s. 490 does not deprive the Magistrate who made the order of the power of enforcing it, **4 M. 230; 7 L. B. R. 116 = 15 Cr. L. J. 701.** As to the powers of such Magistrate there is some conflict as to which, *see* Notes 5 and 6 to s. 490 and Note 68-A.

17. **Who may cancel order for maintenance.**—An application under sub-sec. (4) or (5) to have an order for maintenance passed under sub-sec. (1) set aside should be made to the Magistrate who passed the original order or to his successor in office, who and who alone has jurisdiction in the matter, **25 A. 545,** but *see* **10 M. 13** and Note 6 to s. 490.

III.—CONFLICT OF ORDERS OF CIVIL AND CRIMINAL COURTS.

18. **Effect of order on jurisdiction of Civil Courts.**—(*i*) *Order for maintenance does not bar civil suit for declaration that no maintenance is payable.*—In **18 A. 29** it was *held* following **20 W. R. Civ. 58,** that the order for maintenance cannot be set aside by a suit in a Civil Court praying for a decree to the effect that the wife in whose favour such order was made has no right to maintenance. *See* also **32 C. 479,** where it was stated that if the Magistrate had made an order granting maintenance, possibly a suit would not lie in the Civil Court to set aside that order. But in **30 M. 400** it was *held* following **Weir II, 615** and **14 C. 276** that the Magistrate's order for maintenance does not take away the jurisdiction of the Civil Court and a suit claiming a declaration that maintenance is not payable is maintainable and **18 A. 29** was *distinguished.* An order for maintenance passed in favour of an illegitimate child, at the instance of the mother, furnishes a good cause of action to the alleged father for a declaratory suit against the child and mother that the child was not his illegitimate son, **17 O. C. 331 = 26 In. Ca. 526,** where the above cases are discussed, *see* also **9 O. C. 49 = 8 Cr. L. J. 229.**

(*ii*) *Order refusing maintenance does not bar suit in Civil Court for maintenance.*—A Hindu woman applied under this section to a Magistrate for maintenance of her child alleging that the defendant was its putative father The Magistrate refused maintenance and she sued in a Civil Court. The defendant contended that the order of the Magistrate was conclusive and the suit was therefore not maintainable *Held* this section does not bar a suit in any Civil Court. It simply enables a Magistrate to pass an order for maintenance under a given state of circumstances Further, s. 11 of *the Civil Procedure Code* of 1882 (s 9 of Act V of 1908) allows a suit in respect of a matter of a civil nature unless the suit is barred by a special enactment. There being no enactment barring the cognisance of the suit it was maintainable It was contended also that the Hindu Law does not authorise maintenance being granted to illegitimate children (**7 M I A. 18**). *Held* apart from Hindu Law, maintenance is awardable in such cases on general principles The defendant having begotten the child, was bound to provide for its maintenance, **32 C. 479.**

(*iii*) *Civil Courts cannot issue injunction against Magistrates*—Civil Courts cannot grant injunction restraining the Magistrate from enforcing an order under this section **30 M. 400.** The person in whose favour the decree is passed should apply to the Magistrate and satisfy him that by the order of the Civil Court his order for maintenance cannot be enforced and ask him on the authority of **5 C. 558** and **7 B. 180** to abstain from giving any further effect to his order for maintenance, **14 C 276—289.**

(*iv*) *Civil Court not competent to set aside order of Magistrate*—It is not competent to a Civil Court to make a decree setting aside an order of maintenance by a Magistrate, **Weir II, 614, 32 C. 479, 18 A 29, 20 W. R. (Cr.) 58.**

19. Effect of subsequent decree on previous order under this section—(*i*) *Decree for restitution of conjugal rights may supersede order for maintenance of wife*—Where a Criminal Court ordered a husband to pay a monthly allowance towards the maintenance of his wife and children and a Civil Court subsequently on the suit of the husband for restitution of the conjugal rights gave him a decree, it was *held* that the order of the Criminal Court ceased to have any effect from the date of the decree of the Civil Court **13 W. R 52** An order of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance if the wife should persist in refusing to live with her husband and a Magistrate ought to cancel his previous order or rather treat it as determined if the wife failing to comply with the decree for restitution refuses to live with her husband, **23 B 434, 6 P. R 1883; 46 P. R. 1906 = 4 Cr. L J. 73; 27 A. 483, 17 Cr. L J. 412, 33 M. L. J. 449.** But where the suit for restitution is brought—not with a view to take the wife back but simply to evade the payment of the allowance awarded by the Criminal Court the order of the Magistrate must remain in force until the husband executed the decree against his wife by taking her home—*B H C Cr Rule* (*Bombay Gazette*, 8th January, 1892 JARDINE and TELANG JJ) Where a *bonâ fide* decree obtained from the Civil Court was subject to certain conditions, non compliance of the husband with those conditions would justify the wife s having left his custody and would revive her right to maintenance under the magisterial order passed under this section. The powers of the Magistrate under this section to consider the grounds of refusal by the wife to live with her husband include the power to decide whether the conditions of such a subsequent decree for custody of the wife have been complied with by her husband **4 P. R. 1906 = 115 P L R 1907 = 4 Cr. L. J. 73.** A decree for restitution of conjugal rights does not affect the order for maintenance of a child, **6 L B. R. 127 = 14 Cr L. J. 98; 43 B. 885.**

(*ii*) *Effect of subsequent divorce*—*See* Note 5 to s 490

(*iii*) *Subsequent compromise decree supersedes previous order under this section.*—On the complaint of a Muhammadan wife a Magistrate passed an order for maintenance against the husband Subsequent to this the husband sued in a Civil Court for restitution of conjugal rights In that suit a compromise was effected hereb t was agreed that the h sband sho ld pay the w fe a mon h al o [illegible]

[illegible] ug it was passed on a compromise, superseded the order of the Magistrate for maintenance If the husband did not act up to the terms of the compromise it was the duty of the wife to prefer her objections if any, to the Civil Court She cannot put in force the order of the Magistrate ordering the payment of maintenance The High Court therefore set aside the order altogether, **27 A 483** where **22 B 484** is *referred to*

(*iv*) *Subsequent declaratory decree may make previous order unenforceable*—(*i*) *Against wife*—After passing an order under this section, the alleged husband instituted a suit for a

declaration that the complainant was not his wife and the Civil Court passed a decree accordingly. When proceedings were instituted to enforce the order for maintenance, the defendant pleaded the decree of the Civil Court but the Magistrate disregarded the decree. *Held*, that when a competent Civil Court has decided that the woman is not and never has been the wife of the defendant, a Magistrate cannot in proceedings under s. 488 hold that she is the wife and direct the defendant to maintain her. The Magistrate was bound to recognise the decree and should have refused under s. 490 to enforce the order, **9 O. C. 49 = 3 Cr. L. J. 229.** (*ii*) *Child.*—Subsequent to an order for the maintenance of an illegitimate child, the alleged father instituted a suit for a declaration that he was not the father of the child and obtained a decree. *Held*, that the decree of the Civil Court did affect the order of the Magistrate and it was open to the alleged father to demand that the Magistrate should refuse to enforce his previous order and that under s. 490 the Magistrate should refuse to enforce the order, **16 Cr. L. J. 609 (O.).**

On obtaining the decree of a Civil Court that a child is not his illegitimate child, a person is entitled to ask the Magistrate not to give effect to his previous order awarding maintenance to the child (**33 M. L. J. 449** *followed*), **46 M. 721.**

20. Duty of Magistrate when decree is passed subsequently.—The jurisdiction conferred on a Magistrate to settle the maintenance is as pointed out in **32 C. 479** and **30 M. 400** only auxiliary to that possessed by the Civil Courts and a Magistrate ought to take the judgment of a competent Civil Court into consideration, if it settles the question of relationship and finally places the matter out of the pale of discussion, **16 Cr. L. J. 609 (Oudh).** A Magistrate who has awarded maintenance is bound in the interests of justice to take the judgment of a Civil Court into consideration passed subsequent to his order before proceeding to enforce his first order, **Weir II, 614.** It is not open to a Magistrate to ignore a final decree of a Civil Court, the jurisdiction vesting in him under this section, being auxiliary to that of the Civil Court. Where, therefore, an order of a Magistrate directing maintenance has been superseded by the decree of a Civil Court, the Magistrate is not entitled to enforce his previous order, **Weir II, 615; 14 C. 276; 23 B. 494; 9 O. C. 49 = 3 Cr. L. J. 329, 16 Cr. L. J. 609 (Oudh).**

21. Magistrate not competent to entertain application when previous decree is in force.—A woman is not entitled to an order under this section from a Magistrate, when a decree for maintenance obtained by her in a Civil Court is in force, **Weir II, 615.** When the husband has obtained a decree for restitution of conjugal rights and which decree is in full force, an application for maintenance by the wife under this section ought not to be entertained, **(1910) U. B. R. I. 34 = 11 Cr. L. J. 662; 33 M. L. J. 449.** But where the decree of the Civil Court could not be executed on account of insolvency proceedings, the Magistrate has jurisdiction under this section to pass an order for maintenance in favour of the wife, **31 Bom. L. R. 1366.**

But in **46 A. 877 = 22 A. L. J. 806** it was *held* that where the decree for restitution of conjugal rights against wife was passed by Civil Court and thirteen months after the passing of the decree the husband was found illtreating the wife so much that she had to leave him, the Magistrate was justified in passing an order under s. 488 for maintenance as the applicant was quite justified in refusing to live with her husband.

21-A. An alimony order of the Probate, Divorce and Admiralty Division in England is no bar to a wife's application under s. 488.—It is now held in **49 M. L. J. 335** that a monthly alimony order of the English Probate, Divorce and Admiralty Division is no bar to an application by the wife under s. 488 if, in fact, the husband has neglected to maintain his wife either by payment of alimony or otherwise. In such a case, the Magistrate's power to order maintenance is not taken away.

Enforcement in India of maintenance orders made outside India.—*See* now for the enforcement in British India of maintenance orders made in other parts of His Majesty's Dominions and Protectorates and *vice versa* Act XVIII of 1921 (*Maintenance Orders Enforcement Act*).

IV.—CONDITIONS NECESSARY FOR AN ORDER FOR MAINTENANCE.

22. Any person having sufficient means may be directed to maintain his wife or child.—The law requires that the person on whom the order of maintenance is issued, must have sufficient means to support, **1882 A. W. N. 179.** An able-bodied man who is not prevented by any physical infirmity from working may be presumed to have sufficient means to support himself and his child, **(1911) U. B. R. I. 90 = 13 Cr. L. J. 162; 50 M. L. J. 44.** The *onus* is on him to show that he has no sufficient means. The fact that the husband may be of slender means, does not justify absolute refusal of an order for some maintenance, **Weir II, 617.** The fact that the father or husband is a professional beggar, **Weir II, 616,** or is an undivided member of a Hindu family

13 M. 17, or is a youth of 16 years and still studying at school, **4 N.-W. P. H. C. R. 123**, does not relieve him from the obligation imposed by this section of maintaining his wife or legitimate or illegitimate child

23. Order may be made only against husband or father of child.—In the case of a minor husband, his father cannot be ordered to pay maintenance to son's wife, **26 P. R. 1903**; nor can the father be made jointly liable with the son as no such arrangement is contemplated by s 488, **12 P. R. 1914 = 15 Cr. L. J. 577**; **21 P. W. R. 1914 = 15 Cr. L. J. 529.**

24. Proof of valid marriage and existence of marital relation necessary.—A woman is not entitled to obtain a Magistrate's order under this section until she has proved that she is validly married to her alleged husband, and that she is justified in living apart from him, nor can a Magistrate pass an order before he finds, that the complainant is the wife of the defendant, **16 B. 269.** When the validity of the marriage is questioned, it is for the applicant to prove that she was the legally married wife according to the *personal* law by which the parties are governed, **7 Bur. L. T. 71 = 15 Cr. L J. 434.** Unless there is such proof, no order can be made under this section, **7 L. B. R. 270 = 16 Cr. L. J. 39.** It is only one proof of the existence of the relationship of husband and wife that a Magistrate can make an order (under this section) of maintenance to a wife, but where the cessation of conjugal relation has been proved, the responsibilities attached thereto must cease, and a Magistrate is competent to stay an order maintenance already made and to refuse to issue his warrant and to try all questions raised before him which affect the right of the woman to receive maintenance, **8 C. 558 = 5 C. L. R. 21**; **8 A. 226.** Where the marriage is disputed, the Magistrate should himself try and decide the question and not refer the parties to a civil suit, **11 P. R. 1881.** In proceedings under this section *census records* are not, however, admissible as evidence notwithstanding anything to the contrary in *the Indian Evidence Act* *See* s 12 of Act X of 1900 When the evidence of marriage is doubtful but if it be proved that the parties co-habited for several years as man and wife, the presumption that there was a valid marriage will prevail, **17 Cr. L. J. 112.** *Karao marriage among Jats valid*—Amongst the Jats a '*karao*" marriage is valid, and as the childern are entitled to inherit to their father, a woman so married is entitled to claim maintenance from her husband, **4 N.-W. P. H. C. R. 123.** *See* also **6 W. R. 60.**

25. Means of wife does not relieve husband.—A husband having sufficient means, is bound to maintain his wife and is not relieved of the obligation, by the circumstance that the wife may have relations able and willing to maintain her, **Weir II, 615**, **11 C. W. N. 6**; **16 Cr. L. J. 80 (M.)** The proposition that a wife who has ample means of her own is not entitled to maintenance is not correct The contention, that in *Burma* the earnings of a wife are the joint property of herself and her husband and that when the husband leaves the wife in the enjoyment of the whole of her earnings, there is no neglect or refusal cannot be sustained, **10 Bur. L. R. 166** That the wife may earn by her own labour is no consideration, **1887 A. W. N. 107.**

26. Child must be in existence and "unable to maintain itself."—For meaning of the word 'child,' *see* Note 47 No order under this section can be passed for the maintenance of an unborn child, **3 N.-W. P. H. C. R. 70**, **Weir II, 613.** It is obvious that the words "*unable to maintain itself*" refers to a child and not to a wife, **10 Bur. L R. 166**; **1 Cr. L. J. 883 (Bur.).** The father is bound to maintain the child whatever the position of the mother may be, **7 Bur L T. 34 = 15 Cr. L. J. 278.** Inability is a necessary condition A child who is deaf and dumb and unable to maintain itself, is entitled to maintenance although it may have arrived at the age of majority, **5 N.-W. P. H. C R. 237.** The fact that the child is not in a starving condition cannot be set up in answer to an application under this section. The questions which the Magistrate has to decide are (*i*) is the child unable to maintain itself? (*ii*) has the father neglected or refused to maintain it? **8 Bur. L. R 96.** Where it was alleged that a girl 17 years old, the daughter of a dancing woman was old enough to maintain herself, *held* the law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself, **37 M. 565.**

In **2 Rang 682** the words "unable to maintain itself" were interpreted to mean inability to earn a complete livelihood such as an adult person might earn without depending on any other person. A father being bound to maintain his child under the age of majority, in fixing the sum payable the Court should pay no regard to the fact that the child is able to contribute towards its support by means of its own labour or work of any kind

27. Does the inability refer to physical inability or to poverty?—The inability referred to in the section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of means, **25 M. L. J. 358 = 14 M. L. T. 228 = 14 Cr. L. J. 597**, but this view was dissented from in

19 M. L. T. 23 = 17 Cr. L. J. 16 and it was held that no order can be made in favour of a well-to-do child or a child having a legally enforceable claim against a *tarwad*. *See* Note 4 (*ii*).

28. **In case of illegitimate children paternity must be clearly established.**—The Court would be wrong in taking into account the similarity of the names and the features of the child, and the defendant, **16 C. 781** When maintenance is claimed for an illegitimate child, it is not enough to find that the defendant may have been the father, but the Magistrate must be able to find that in all reasonable probability, none else could have been, **Weir II, 621.** A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children, **18 B. 468.** Acts of familiarity before the time that the bastard child could have been begotten are receivable as corroborative evidence, *see* sub-secs. (6) and (7) and *Cole* v. *Manning*, **L. R. 2 Q. B. D. 611.** *See* Note 75 below.

29. **Actual neglect or refusal to maintain must be established—order cannot be made on contingency of default.**—*A neglect or refusal to maintain his wife by the husband may be by words or by conduct*; it may be expressed or implied, **9 Bom. L. R. 359 = 5 Cr. L. J. 334.** When the defendant has denied his paternity, that is a fact from which the Court may infer neglect to maintain, **6 S. L. R. 208 = 14 Cr. L. J. 303**; it is not open to a Magistrate, even in the case of the parties (husband and wife) consenting, to make an order awarding maintenance on the contingency of a default thereafter on the part of the husband to maintain. To give jurisdiction to a Magistrate, an actual neglect or refusal to maintain must be established, **Weir II, 630.** Before passing an order under this section, a Magistrate ought to ascertain whether the husband had been called upon to maintain his wife, having regard to the conditions of Hindu society, **22 W. R. 30.** As to a husband's liability to maintain a Muhammadan child-wife, *see* **24 W. R. 44.** The grounds upon which the order is based, should be set out in the order itself.—*M. H. C. Pro., 28th November*, 1876. Although an actual refusal is not proved, if a father (or husband) does not in fact maintain his child or wife, he neglects to do so, **8 Bur. L. R. 96.** Where both the parties agree to live together no 'refusal' to maintain can be inferred from the deposition of the wife who asserted that though she was willing to live with her husband, the latter refused to maintain her, **46 P. W. R. 1914 = 213 P. L. R. 1915 = 16 Cr. L. J. 86.**

The fact that the husband who is in arrears of maintenance has been adjudicated an insolvent is conclusive that he is unable to pay the amount due and therefore is not guilty of wilful neglect within the meaning of s. 488 (3) of the Code, **50 C. 867.**

V.—WIFE'S RIGHT TO MAINTENANCE.

30. **When wife is not entitled to order for maintenance.**—*See* sub-sec. (4).—(*i*) *When husband and wife are living separately by mutual consent.*—A wife is not entitled to receive an allowance under this section, if she and her husband have entered into an agreement which provides for their living separately and they are so living separately by mutual consent, **Ratanlal 870.**

(*ii*) *When private arrangement is made for her maintenance.*—Where the maintenance of a wife was, by arrangement made at the time she began to live separately from the husband, provided for by the assignment to her of some land, *held* that the Court had no jurisdiction to award her additional maintenance on the ground that the yield of the land was insufficient for her maintenance, **Weir II, 648.**

(*iii*) *When wife leaves husband of her own accord without sufficient reason.*—The proviso to sub-sec (3) does not authorise a Magistrate to entertain an application for separate maintenance, on the ground of illtreatment, from a wife whose husband has not neglected or refused to maintain her, but who has of her own accord left her husband's house and protection, and to order an allowance to be paid to such wife on evidence of illtreatment, **6 N.-W. P. H. C. R. 205.** But if the husband, either refuses to maintain her or turns her out or illtreats her, so as to make it impossible for her to live in the house, this will amount to refusal or neglect on his part to maintain her, **5 Bom. L. R. 614; 21 P. W. R. 1914 = 115 P. L. R. 1914 = 15 Cr. L. J. 529.**

(*iv*) *When she is living in adultery.*—Where there has been desertion by a wife of her husband for many years, coupled with adultery, and no attempt has been made to seek the husband's pardon for past misconduct, the wife is not entitled to an order for maintenance, merely because at the time when she makes her application she may not be "living in adultery," **Ratanlal 506.** *See* Note 36.

(*v*) *Adultery accompanied with loss of caste.*—The use of the word "may" in this section shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made, though the discretion has to be exercised judicially and reasonably and not capriciously. Thus, where the wife was

guilty of a single act of adultery with a low caste man, and the Magistrate refused maintenance, the High Court refused to interfere, though the wife could not be said to be *living in adultery* within the meaning of clauses (4) and (5), **31 M. 185; 5 N. L. R. 19 = 9 Cr. L. J. 390;** *see* also **52 Bom. 160 = 30 Bom. L. R. 79.**

(vi) *When she refuses his offer to receive her in his house*—except on account of adultery or cruelty, **111 I. C. 669 = 29 Cr. L. J. 909.**

31. It is no longer necessary for wife to prove habitual cruelty.—In the proviso, the words "that he habitually has treated his wife with cruelty" are omitted and the words "*that there is just ground for so doing*" are substituted This alteration gives Magistrates larger discretion in giving maintenance—*Sel Com Rep* The present Code does not restrict payment of maintenance when the wife is living separately to cases in which she has been treated with habitual cruelty, **U. B. R. (1897—1901) 1, 104** is no longer law, **4 Bur. L. T. 269 = 13 Cr. L. J. 85.** Where it is proved that a husband has not refused or neglected to maintain his wife a Criminal Court acting under this section, has no jurisdiction to make an order upon the husband for her maintenance, on the ground that the husband has been guilty of cruelty to her But that is a very different thing from holding that no evidence of cruelty can be admitted in a proceeding under this section to prove, not indeed cruelty as a ground for separate maintenance but the conduct and acts of the husband from which the Court may draw the inference of neglect or refusal to maintain the wife. A neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be expressed or implied In order to find out the intention of the Legislature in enacting a particular provision in a Statute, it is a cannon of interpretation, that the Court must have regard to the context of the whole section and not confine itself to its words detached from the whole of its context It is a rule of construction that in interpreting a section which is ambiguous, the Court may look into the state of the law, as it existed before the Statute containing the section was passed **9 Bom. L. R. 359 = 5 Cr. L. J. 334,** where **6 N.-W. P. H. C. R. 205** and **5 Bom. L. R. 614** are *referred to*

32. Rulings under old Code, as to what amounts to cruelty in law.—The previous Codes used the term '*cruelty*' There was no definition of cruelty, but it was held that the criterion of legal cruelty justifying a wife s desertion is the same in this country as in England, *viz*, whether there has been actual violence of such [illegible] of it, **1 B.** [illegible] A false [illegible] from the wife amounts to cruelty, **1 B. 164 at p. 166.** The present Code however, omits the word *cruelty* and uses instead "*just ground for so doing*" What is just ground will have to be determined with reference to the circumstances of each individual case. *See* **8 B. L. R. Appx. XIX.** If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the veneral disease to her, recklessly has connection with her and thereby communicates the disease to her, he is guilty of cruelty, *Boardman* v *Boardman*, **L. R. 1 Prob. and Mat. 223.** If force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health, and renders a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation—*Kelly* v *Kelly*, **L. R. 2 Prop and Mat. 31, 59.** *See* **1 B. 164 at p 174;** *Tomkins* v *Tomkins*, **1 Swab and Trist 168.**

33 What are not just grounds for refusing to live with husband?—(i) *Minority of wife*—The Court has no authority to award maintenance when the husband offers to maintain the wife in his house merely because the wife is a minor and it might be better she should live with her parents **1 P. R. 1882.**

(ii) *Incompatibility of temper and presence of a second wife* in the house are not legally sufficient for the award of a separate maintenace to a wife, **21 P. R. 1873; 30 P. R 1881; 31 P. R. 1882, 2 P. R. 1878.** The fact that a younger wife is likely to suffer annoyance from the elder wife and there is reason to fear that her husband may not protect her from such annoyance, is not sufficient cause for refusing to live with her husband, **1904 U. B. R. Cr. P. C. I., p 10 = 1 Cr. L. J. 545; (1910) U. B. R. 34 = 11 Cr. L. J. 662.** But if the husband is found to treat her unkindly owing to the presence of the other wife, she may claim separate maintenance, **14 P. R 1904.** But disagreement with husband's family is no sufficient ground for separate maintenance **21 P. R. 1870.** The inability of a husband and wife to agree to live together is no ground for decreeing separate maintenance, **6 W. R. 59.**

(iii) *Marrying a second wife*—Where polygamy is allowed, the fact that the husband has married a second wife is not a sufficient reason, within the meaning of this section to justify the award of separate

maintenance, **7 M. 187; 66 P. R. 1887; Ratanlal 7; 12 P. R. 1914 = 15 Cr. L. J. 577.** She can only claim maintenance in cases where she can prove that her husband has habitually treated her with cruelty. Where, however, a Burman Buddhist takes a lesser wife, without the consent of his head wife, the refusal of the head wife to live and cohabit with her husband, unless she is provided with a separate residence, is not a sufficient reason for refusing her maintenance under s. 488, **4 L. B. R. 340 (F.B.) = 9 Cr. L. J. 25** *overruling* **4 L. B. R. 146.** Similarly, if a man marries a second wife and she does not know of the previous marriage she may refuse to live with the chief wife and claim maintenance, **3 Bur. L. T. 154 = 11 Cr. L. J. 750.** But if she had knowledge it would be otherwise, **U. B. R. (1897—1901) 1, p. 104.**

(*iv*) *Husband keeping a concubine in the house.*—Concubinage is so far recognised among Hindus that the circumstance of a Hindu husband keeping a concubine in his house will not entitle a wife to a maintenance allowance, provided the husband is willing to receive her and treat her with the consideration which is due to her position as a wife, **Weir II, 641; 17 M. 260.** The question in each case will be whether the conduct of the husband is such as the wife consistently with self-respect and due regard to her position as wife can live in the house of the husband. Therefore adultery on the part of the husband may constitute sufficient cause for refusing to live with him, **20 M. 470 (F.B.).**

(*v*) *Husband's failure to pay dower.*—The fact that in a civil suit by the husband for restitution of conjugal rights, the wife successfully resisted his claim by a plea of unpaid prompt dower is not a sufficient reason for her refusal to live with her husband, **6 P. R. 188; 15 P. R. 1880.**

34. What is a proper offer to maintain?—(*i*) *It must be bonâ fide.*—An offer to maintain must be a *bonâ fide* offer and not made with the object of escaping obligation, **13 Cr. L. J. 55 (Burma).**

(*ii*) *It must be an offer to maintain with the consideration due to her position as a wife.*—*See* **17 M. 260; 20 M. 470.**

(*iii*) *Must the offer extend to observing conjugal duties?*—An offer by a Hindu, having two wives to maintain his first wife by allowing her to live in his house, and by supplying her with grain to be cooked and eaten separately, coupled with a refusal to live with her as husband and wife, does not come within the meaning of the proviso to this section, **6 M. 371.** This was *disapproved of* in **16 B. 269,** where it was *held* that there is no authority for the proposition that the words " as his wife must be read into the proviso to sub-sec. (3) and that it is sufficient that the husband has offered to maintain his wife in his house. When no neglect or refusal to maintain is found against the husband, it is for the wife to establish a justiying cause for her living apart. The object of this section is to provide for maintenance and not to enforce conjugal duties, **42 M. L. J. 566.**

35. What are not sufficient grounds to refuse maintenance.—(*i*) *Supicious conduct of wife.*—A Magistrate cannot refuse to make an order of maintenance merely because he considers the conduct of the applicant open to suspicion. The matters recognised by this section as disentitling a wife to maintenance, must be proved to justify dismissal of an application for maintenance, **Weir II, 647.**

(*ii*) *Refusing to attend a Panchayat convened to consider her conduct.*—A wife's refusal to attend a Panchayat convened to consider a charge of adultery against her, is no reason for rejecting an application by her under this section, **15 Cr. L. J. 52 (M.).**

(*iii*) *Delay in applying for maintenance.*—Delay on the part of a wife in complaining of her husband's neglect to maintain her, is no ground for dismissing the complaint, **Weir II, 615** and **616.** A wife does not lose her right to maintenance, because she may not have advanced her claim, immediately on her husband's desertion of her, **Weir II, 616.**

(*iv*) *Offer by the husband to reform and maintain his wife when she has at the date of application, good reason not to live with him.*—Where the applicant's wife, with his approval, went to stay for a while with her mother, and while she was there, a serious quarrel took place, which resulted in the wife refusing to return to her husband. The husband subsequently took a woman to live with him as his mistress, and she lived with him up to the time when this case came on for hearing before the Magistrate, and before the Magistrate, the wife agreed to return to her husband within a week on his putting away his mistress and promising to have nothing more to do with her; but subsequently she refused to abide by that arrangement. *Held*, that an offer made in Court by the husband to give up his mistress does not deprive the wife of her right of refusal to live with her husband, **14 Bur. L. R. 240 = 8 Cr. L. J. 422.** The wife's right to refuse is not demolished by the fact that the husband was driven to concubinage by his wife's continued refusal to live with him. Where the breach between husband and wife is irremediable and it is impossible for the latter to return to the husband and live with him, after many

years' separation without fresh trouble and dispute, she will be entitled to live separately and get maintenance, **26 P. W. R. 1914 = 170 P. L R. 1914 = 15 Cr. L. J. 554**

(v) *Change of religion by husband*.—The rejection of an application for maintenance by the wife of a Christian, who has reverted the Hinduism is wrong **4 M. H. C. R. Appx. III.**

36 **Meaning of 'adultery' and 'living in adultery' as used in this section.**—(*i*) *Adultery*—Under the I P C, adultery is an offence committed by a man against another man in respect of the wife of the latter and it is an offence which cannot be committed by a woman Adultery under the I P C is not committed by a man who has sexual intercourse with an unmarried woman or with a widow, or even with a married woman, whose husband consents to it. But adultery in this section is used in the wider and ordinary sense of voluntary sexual connection between either of the parties to the marriage, and someone, married or single of the opposite sex other than the offender's own husband or wife This construction is not inconsistent with s 4 (2) Therefore adultery on the part of the husband, not being such as would be punishable under I P C, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under this section, **20 M. 470 (F.B)** *overruling* **17 M. 260.**

(ii) '*Living in adultery*'—The words "*living in adultery*" refer rather to a course of conduct or at least to something more than a single lapse from virtue, and therefore a single act of adultery does not necessarily amount to living in adultery, so as to disentitle the wife from applying for maintenance under this section, **30 M. 332** (where **26 A. 326** and **20 M. 470** are *referred to*), **5 N. L. R. 19 = 9 Cr. L. J. 390.** Where the wife who applied for maintenance had some two years prior to the date of the application given birth to an illegitimate

[illegible]

with a low caste man which led to her expulsion from caste it is not necessary to prove that she is living in adultery, **31 M. 185.** Where the husband disclaimed paternity of a child born to his wife and the wife in consequence, took to living in her father's house, *held* in the absence of proof that she was living in adultery the wife was entitled to an order under this section, **1881 A. W. N. 113, 37** and **62.** *See* also **26 A. 326; 1904 A. W. N. 23.** In **1881 A. W. N. 62,** the exact questions to which alone the Magistrate should address himself in an application of this nature, are set forth at great length *See* also **29 C. W. N. 647.**

37. **Cancellation of order for maintenance.**—*See* Notes under Heading X below

38 **Is it not open to a wife to make a contract discharging husband's true liability?**—Where a wife first applied for maintenance for herself and child, but on receipt of a certain lump-amount from the husband, withdrew her application and later on, again applied stating that the lump amount has been expended, and the husband objected that the lump amount had been paid in final settlement of all her claims *held* that on such

[illegible]

has been invested, it would have yielded a sufficient income to maintain her for the rest of her days, this question is immaterial, if in fact the money was spent or lost and is no longer yielding a sufficient income The language of the section is inconsistent with a wife making a contract to absolve the husband from liability The object of the law being to prevent the wife, whom her husband is able to support from becoming a burden to other people this object would not be attained by a contract which ultimately leaves the wife, to the charity of her neighbours The section does not say that a wife is not eligible for maintenance, if she is able to maintain herself or if she has made a bad use of the money which her husband gave her sometime back, **1905 U. B. R. (Cr. Pr) 45,** where **1892—96 U. B. R. 64** and **1897—1901 U. B. R. 108** are *referred to* This decision seems to require re-consideration as it is open to the parties to live separately by mutual consent

(a) SPECIAL RIGHTS OF MUHAMMADAN WIFE

39. **Muhammadan wife not bound to go to Kazi before seeking help of Court.**—A Muhammadan wife is not bound to seek the assistance of the Kazi before applying to the Magistrate for maintenance, **Weir II, 615.**

40. **Moota wife is entitled to maintenance**.—*See* **8 C. 736; 6 W. R. 60** and Note 5

41. **Husband's marriage with wife's step-mother, sufficient reason for separate maintenance.**—The marriage of a Muhammadan with the step-mother of his wife, being prohibited, the wife is entitled to say she will not live with her husband, during the continuance of his marriage with her step-mother, **Weir II, 647.**

42. **Husband liable to maintain wife till date of divorce.**—Where the defendant was called on to show cause against an order of maintenance passed against him and he divorced his wife (the plaintiff) in the presence of the Court, it was *held*, that even if such divorce made such change in the circumstances as to justify the Court in altering the order on the application of the husband, yet the defendant would not be relieved of his liability of maintaining his wife from the time the order was passed till the date of divorce, **10 A. 59**; *see* also **7 B. 180**; where **19 W. R. 73** *dissented from*, **21 P. R. 1894.**

43. **Magistrate must enquire into plea of divorce.**—When a husband ordered to make allowance for the maintenance of his wife pleads non-liability on account of his having divorced her, it is open to the Magistrate to entertain and enquire into such plea, and if he finds it established, to refuse to enforce his order at least after such date as the divorce operates, **21 P. R. 1894.** The Magistrate is bound to entertain such application and determine the question, **1915 U. B. R. I. 53 = 16 Cr. L. J. 531**; **17 O. C. 260 = 15 Cr. L. J. 646.** In **Weir II, 620**, it is said the Magistrate is bound to enquire into the validity of the plea, and if he finds in the affirmative, then no further maintenance can be ordered. *See* also Note 2 to s. 489.

44. **Right of divorced wife to maintenance during 'Iddat.'**—*Iddat* is the period during which a woman whose marriage has been dissolved by divorce or death is bound to wait before she is free to marry again. *Iddat* is primarily imposed with a view to ascertain whether the woman is pregnant, so that the paternity of the child that is born to a woman whose marriage has been dissolved may be fixed. Under the Hanafi Law, a divorce (*talak*) whether revocable (*rajai*) or irrevocable (*bayan*) does not completely destroy the relationship of husband and wife until after the expiry of the period of *iddat*. Therefore a wife is entitled during *iddat* to an order for maintenance under s. 488. She is also entitled during the period of *iddat* to the benefit of an order for maintenance which had been made in her favour before divorce—the pronouncement of *talak*, **20 M. L. J. 12 = 10 Cr. L. J. 502** *following* **Weir II, 617, 5 A. 226** and **19 A. 50**; **5 P. R. 1905 = 85 P. L. R. 1905 = 2 Cr. L. J. 50** *dissenting from* **1885 A. W. N. 29, 4 Bur. L. T. 13 = 12 Cr. L. J. 82.** But an order for maintenance for a time subsequent to the period of *iddat* is illegal, unless pregnancy is alleged, **Weir II, 617**; **19 W. R. 73**; **5 A. 226**; **5 P. R. 1905.**

45. **Order does not deprive husband of right to divorce.**—An order made by a Magistrate, directing a Muhammadan husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced, **8 B. H. C. R. Cr. Ca. 95**; **7 B. 180**; **14 C. 276**; **1 Bom. L. R. 345**; **19 A. 50 (F.B.)**; **19 W. R. 73 = B. L. R. Ap. XXXIII.** The dissolution of the bond of marriage when once validly effected must have the result of stopping the operation of a Magistrate's order made in favour of a wife, **17 O. C. 260 = 15 Cr. L. J. 646**; **21 P. R. 1894**; **1915 U. B. R. I., 53 = 16 Cr. L. J. 531.** *See* Note 5 to s. 490.

46. **Repudiation of wife by husband having come to her knowledge is good divorce.**—A Muhammadan against whom an order for the maintenance of his wife had been passed under this section, paid into Court the arrears due from him, with a sum in addition on account of the wife's *iddat*, and in an application accompanying such payment set out in clear terms that he had repudiated his wife. The repudiation was three times repeated in the application. *Held*, that this having come to the knowledge of the wife was a good divorce under the Muhammadan Law, and that it was not necessary that the writing of divorce should be specially addressed to the wife, **1899 A. W. N. 85.** According to the Hanafi Law it is not necessary that the *talak* or words of repudiation should be addressed directly to the wife to constitute a valid divorce, **33 M. 22** where **4 C. 588** is *dissented from* and **30 B. 537**; **36 C. 184** *approved*. An order under this section for the maintenance of a Muhammadan wife, passed more than three months and thirteen days after divorce, by words which had not been repeated three times, was held to be illegal, **1888 A. W. N. 116.**

VI.—RIGHT OF CHILDREN TO MAINTENANCE.

47. **Meaning "of child."**—The word 'child' as used in the section, simply means son or daughter. Reference to age is purposely omitted in the section, the object being any son or daughter is entitled to claim maintenance so long as he or she is unable to maintain himself or herself, **28 P. W. R. 1910 = 11 Cr. L. J. 427.** The word 'child' means one who has not attained the age of majority, **37 M. 565.** *See* Note 26 above as to the meaning of "unable to maintain itself." *See* **Note 26 and 2 Rang. 682.**

48. **Is a child having means of its own entitled to maintenance?**—In **25 M. L. J. 355 = 14 Cr. L. J. 597** it was *held* that if the child is not of sufficient maturity to earn a livelihood, then, even if that child belongs to well-to-do *tarwad*, the liability of the father is not taken away. But this view was *dissented from* in **19 M. L. T.**

23 = 17 Cr. L. J. 16 where it was observed as follows —"I think the ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained, as in this case, as to a child which is able to earn by its own exertions This is a summary procedure provided by this section, and it does not cover entirely the same ground as the Civil Liability of the father to maintain his child It does not seem to have been within the contemplation of the legislature that a child which is well to do should be entitled under s. 488 to an order for maintenance as against its father," 19 M. 461 was *referred to*

49. Is it open to Magistrate to refuse order for maintenance if father offers to maintain children if they live with him ?—A mother, who has the custody of the child and who has to maintain it, is entitled, so long as that state continues, to the allowance granted for the maintenance of the child **Weir II, 630.** A father cannot refuse to maintain his children on the ground that they are not living with him, **U. B. R. 1902-03; 1 Cr. P. C. 7; 12 Bur. L R. 33 = 2 Cr. L. J. 830; U. B. R. 1910, Cr. P. C. 1 = 11 Cr. L. J. 488; 8 Bur. L. T. 134 = 16 Cr. L. J. 656; (1910) 1 U. B. R. 34 = 11 Cr. L. J. 662.** If the father wishes the children to live with him his obvious course is to get an order from the proper authority giving him the custody of the children Living together in the case of husband and wife is a thing of a special character It is an incident of matrimony *See* also **25 M. L. J. 355 = 14 M. L. T. 223; 8 Bur. L. T. 134 = 16 Cr. L J. 656.** Merely sending a man to go and ask the child to come and live with the father does not amount to an offer to maintain the child and absolve the father of his liability, **7 Bur. L. T. 34 = 15 Cr. L. J. 278.** A mother having the custody of her child applied under this section for its maintenance by its father Before the receipt of summons under her application the father had neither asked for the custody of the child nor offered to provide for it in any way He now made an offer in Court to maintain the child, if it was left with him *Held,* that a present offer to maintain will not take away the Magistrate s jurisdiction under this section, to order him to pay for the child s maintenance, **1905 U. B. R. (Cr. P. C.) 39** where **1902 U. B. R. (Cr. P. C.) 7, 18 P. R. 1894, 16 W. R. 62** and **2 L. B. R. 46** are *referred to* *See* Note 50, **112 I. C. 476.** *Contra*—A father offering to maintain his children on condition that they live with him cannot be said to refuse to maintain them, and though by express provision of law an order of maintenance can be passed notwithstanding such offer in favour of a wife on certain specified grounds there is no similar provision in the case of children, **18 P. R. 1894; 21 P. W. R. 1914 = 15 Cr. L. J. 529.** Where a father has custody of his minor children and is maintaining them properly, the mere fact that they go and live with their mother would not make him liable to be charged for maintenance, though he refuses to maintain them unless they return to his custody, **8 L. B. R. 105 = 16 Cr. L. J. 217.** The proper course for the mother is to get a certificate of guardianship of her children by proving that the father is an unfit person, and when this has been done, to resort to the provisions of this section if the father refuses to make an allowance for the child, **18 P. R. 1894.** *See* **22 P. R. 1917 (Cr.).**

But in a Bombay case it was *held,* that with regard to the maintenance of children it is sufficient under sub-sec. (1) s 488 if the neglect or refusal to maintain them is proved On such proof, the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making an order. Of course the Magistrate is entitled to take such offer into consideration, **27 Bom. L. R. 339 = 49 B. 562.**

(i) *Father not relieved of liability when mother is of right entitled to custody as under the Muhammadan Law*—Under Muhammadan Law, the mother is entitled to the custody of her children till they reach the age of puberty, even when she has been divorced by her husband, but that does not relieve the father from the obligation of maintaining the children Where, therefore, a Muhammadan father contended that as the mother (his divorced wife) had the custody of the children, he was not bound to maintain them, but that he was willing to maintain them, if the children were made over to him, *held,* that the father was bound to pay for the maintenance of the children in the custody of the mother, and that his conduct amounted to a refusal or neglect within the meaning of this section, **6 Bom. L. R. 536**, *see* also **9 Lah. 313.** When, however, the child is a girl admittedly between 14 and 15 years of age and therefore of puberty, the father is entitled to custody, even if the treatment of her mother by the father is against him The father should not be charged with her maintenance if he offers to support her in his own house, **11 P. L. R. 1904.**

50. Magistrate not competent to go into the question of the lawful guardianship of a child.—In determining questions under this Chapter, a Magistrate has no power to enter into any question as to the lawful guardianship of a child There is nothing in the Code which would warrant a Magistrate in ordering a

mother to surrender her illegitimate child to its father, although such child be of the age of maturity. A refusal by the mother to make over the custody of child in such a case would be no ground for stopping an allowance previously ordered, **4 C. 374** *followed* in **17 P. R. 1895.** *See* also **19 M. 461.** When a father offers to maintain his children, a Criminal Court has no jurisdiction, merely because he refuses to make a money allowance to the children who prefer to remain with their mother apart from him, to make an order that he shall do so; nor in a summary proceeding under this section, is the Court competent to enter upon an enquiry as to the fitness or unfitness of the father to act as guardian of his children, **18 P. R. 1894.**

51. Children living with adulterous mother or removed from the father without his consent, not entitled to maintenance.—A father cannot be ordered to pay a maintenance allowance for a child who elects to live with its mother, while the latter is living in adultery, **Weir II, 630**; nor where the children are removed by their mother from their father's custody and without his consent although he was entitled to the custody equally with the mother and the latter has prevented the children from returning to the father, **Weir II, 632.**

52. What are not proper grounds for refusing maintenance.—(*i*) *That the mother of the illegitimate children is a married woman.*—The circumstance, that the mother of illegitimate children is a married woman, is in itself no ground for dismissing the claim for their maintenance. The intention of the Legislature is to enforce the liability of the husband of a woman and of the male parent of an illegitimate child as the person primarily responsible for their maintenance, **Weir II, 619,** and the words of this section are sufficiently wide to include a married woman, claiming maintenance for her illegitimate children from the putative father, **18 B. 468.**

(*ii*) *Divorce of mother.*—Even a valid divorce of the mother will not free the father, from liability to maintain his children, **1 Bur. L. R. 145.**

(*iii*) *Decision of Civil Court on the claims of the mother.*—A decision of the Civil Court, refusing to enforce a contract or agreement against a man for a maintenance of a woman cannot preclude either the woman from applying or a Magistrate from making an order for the maintenance of their illegitimate child, **17 W. R. 49.**

(*iv*) *That the mother is living separately from her husband.*—A Muhammadan mother being the natural guardian of her minor daughter, would be entitled to claim maintenance for the child even though she is living separately from her husband and may have no valid grounds to refuse to live with her husband, **16 C. W. N. 27.** *See* also the case in **15 C. W. N. 136** (Christians).

(*v*) *That the mother has sufficient means to maintain the child.*—The father is bound to maintain his child whatever the position of the mother may be, **7 Bur. L. T. 34 = 16 Cr. L. J. 278.** But if the child itself has sufficient means or is entitled to be maintained out of the mother's *tarwad*, an order for maintenance cannot be passed, *see* Note 48.

53. Is it open to a lawful guardian to compromise the claim of a child under this section?—A compromise made by the lawful guardian of a minor, acting *bonâ fide* for his benefit, cannot be set aside even at his instance, except on proof of fraud. Therefore, where a mother on behalf of her illegitimate minor children compromised and renounced a future claim for their maintenance, by executing a document in consideration of the payment of Rs. 300, *held* that under the circumstances there could be no neglect to maintain within the meaning of this section, **Weir II, 631.** But where there is nothing to show that the agreement was really for the benefit of the child and the presumption from the circumstances under which the compromise was made, being that the child would be materially injured by such a manifestly inadequate adjustment of its claim to maintenance during minority; the agreement is not binding on the child or any person who may become the guardian subsequent to the death of the mother, **13 P. R. 1885.** *See* **25 A. 165; 8 Bur. L. R. 96.** The better view is, that a father cannot divest himself of his liability to maintain his child by any agreement with his wife or mother of the child, **Weir II, 658.** It is submitted that the statutory right cannot be compromised unless such power is specially recognised by the Statute. The Magistrate is not competent to consider such a compromise. *Compare* Not 38 at p 1188.

54. Order awarding maintenance to child cannot be cancelled.—*See* Note 79.

VII.—CONTENTS OF ORDER AWARDING MAINTENANCE.

55. Considerations in fixing the rate of maintenance.—In determining the amount of maintenance no luxury should be allowed, but necessaries of life should be considered according to the station in life of the applicant and the means of the respondent, **4 Bur. L. T. 269 = 13 Cr. L. J. 55.** 'Maintenance' is intended for

food, clothing and lodging It does not include schooling fees, **U. B. R. 1909, 1 Cr. P. 17 = 11 Cr. L. J. 40.** *See* Note 5

56. Rupees one hundred represent the maximum amount each person entitled to maintenance can get.—In the case of twins, a separate sum should be awarded for each Also, the order may include more than one bastard child, if begotten by the same man upon the same woman, *Skinn*, **1 Bott. 470.** Where a wife applied for maintenance for herself and her four children and the Magistrate ordered the husband to pay Rs. 50 for maintenance of the wife and Rs 10 for each child every month *Held*, that the order was legal The husband was liable to maintain his wife and each of his children and the Magistrate might order him to pay as much as Rs. 50 for each of them, if each child was living with a different person and the fact that all the children were at the time in custody of the mother cannot affect the question of what should be paid to each child **4 Bar. L. T. 139 = 12 Cr. L. J. 583.** Under the new amendments rupees one hundred is now fixed as the maximum under s 488 *See* **49 M. L. J. 335.**

57. Magistrate in passing order at certain rate cannot direct prospective increase of rate.—An order fixing a sum for the maintenance of a child containing a prospective order for an increase of the amount awarded as the child grows older, is unauthorised by law, **2 N.-W. P. H. C. R. 454; 12 C. 535; 14 M. 398.** A Magistrate cannot make an order for maintenance at a progressively increasing rate, but he can from time to time alter it under s 489. In the case of a child, the allowance should be such a proper allowance, as may suffice for the maintenance of the child, till it is able to maintain itself, **2 N.-W. P. H. C. R. 454.** If the father or (husband) is aggrieved, he could apply to the Magistrate under s 489, **9 W. R. 1.** A Magistrate in passing an order for maintenance at a certain rate, cannot direct a prospective increase of the rate The fact that a child who has been awarded maintenance, has grown older would no less constitute "*a change in the circumstance of the person receiving the allowance*" within the meaning of s 489, than would the death of the child or the birth of another, and therefore the rate can be varied under s 489, as the child gets older, **14 M. 398.**

58. Magistrate cannot fix duration of maintenance—A Magistrate is not competent in any case to fix the duration of maintenance to children until they come of age, **18 P. R. 1894; Weir II, 634.** But in England an order of payment "till the child shall no longer be chargeable on the Parish" was *held* good *Mathews*, **2 Salk 473**; *Johnson*, **Comb. 69.**

59. Order cannot be retrospective.—An order directing the payment of maintenance with retrospective effect from a certain date is illegal Under sub-sec. (2), the allowance can be made, at the most, from the date of the application for maintenance, **Weir II, 635.** But an order directing payment *in advance* from the date of the Magistrate's order is perfectly legal, **Ratanlal 189**; *see* also **7 Lah. 365.**

60. Payment of maintenance must be monthly and in coin—The payment ordered must be a monthly payment An order directing payment of two cloths annually, **Weir II, 627,** or grain, **Weir II, 626** and **627; 19 P. R. 1911; 3 P. R. 1887**; or providing separate residence, is not in accordance with the Code, **31 P. R. 1887; 1 P. R. 1876.** To such an order an alternative one for a specified quantity of grain cannot be added, **3 P. R. 1887.** But where a compromise filed by the parties and accepted by the Magistrate contained an agreement that an annual sum was to be paid to the wife for the value of cloth *held* that effect could be given to the general intention of the parties as disclosed by the *razi* by allotting in the monthly maintenance the value of the cloths agreed to be paid annually, **Weir II, 634** In England, when a father was ordered to pay £9 in gross and after that so much weekly, the order was *held* good *Odam*, **1 Salk 124; 1 Bott. 497; 26 Bom. L. R. 186.**

60-A. Conditional order illegal.—An order for maintenance passed on condition that the woman resides in her house is illegal, **14 P. R. 1917 (Cr.), 7 Lah. 313.**

61. Order for payment into public treasury is illegal.—An order directing the payment of a maintenance allowance into a public treasury is not sanctioned by law, **Weir II, 627.**

62. Magistrate cannot make order in terms of compromise—when claim settled amicably, case

VIII.—PRACTICE AND PROCEDURE.

63. **Ordinarily inquiry must be full as in warrant-case.**—Ordinarily the inquiry should be full, as in the trial of a warrant-case. But when an order directing a monthly payment of a fixed sum of money was made on the consent of the parties, the necessity for taking evidence being thereby dispensed with, *held* that the order was not illegal, **Weir II, 629.**

(*i*) *Should not be summary.*—Proceedings under this section cannot be conducted as in a summary trial under Chapter XXII. Evidence must be recorded as prescribed by s. 355. Where summary procedure was adopted, the High Court in **20 C. 351** directed a fresh trial.

(*ii*) *Evidence must be duly recorded.*—An order awarding maintenance without recording evidence, **Weir II, 628,** or on the evidence taken by a Subordinate Magistrate and order passed thereon in the absence of the defendant husband, is illegal, **11 M. 199; 361 P. L. R. 1905.** The various elements required to sustain an order under this section must be strictly proved by evidence recorded on oath, **13 W. R. 19.** The Magistrate cannot dispose of the case upon knowledge acquired by him in another case, **8 W. R. 67.** Proceedings under this section are judicial in their nature and must not be conducted as if they were ministerial matters. The notes of evidence therefore must not be inadequate and vague, and the order recorded should be one on distinct findings of fact, **5 A. 224.**

64. **Attendance of complainant may be dispensed with.**—There is nothing in the section which requires the personal attendance of the person in whose favour the order for maintenance is made. It is left to the discretion of the Magistrate to dispense with the attendance of the complainant, **19 P. R. 1903** *referring to* **3 P. R. 1893; 12 A. 69; 15 C. 775; 21 C. 588.**

65. **"Ex-parte proceedings."—Inquiry ought not to be conducted in absence of accused unless Magistrate is satisfied that he is wilfully absent.**—In a case under this section, the defendant was summoned to appear before a Magistrate on a certain day, but the summons did not specify the place of appearance *Held*, that the Magistrate ought not to have passed an *ex-parte* order in the defendant's absence as there was no failure to appear, because no place was specified at which the petitioner was to appear, **7 M. H. C. R. Appx. XLIII.** In the Court of a District Magistrate, an application was made against a person for the maintenance of an illegitimate child, on the ground that he being its father, neglected to maintain it. The District Magistrate made over the complaint to an Honorary Magistrate of the first class for inquiry. The Honorary Magistrate after a lengthy inquiry, reported the case to be false. But the District Magistrate not satisfied with the result, ordered process to issue against the putative father and made over the case to a Deputy Magistrate. This officer, without issuing any notice to the father asked the pleader who conducted for him the proceedings before the Honorary Magistrate, to conduct the case. The pleader declined on the ground that he had no instructions. Thereupon the Deputy Magistrate proceeded with the case *ex-parte* and ultimately made an order against the petitioner. *Held*, that the provisions of sub-sec. (6) of this section had not been complied with. The evidence was not taken by the Deputy Magistrate in the presence of the petitioner. That ought to have been done, unless the personal attendance of the petitioner has been dispensed with, in which case it ought to have been taken in the presence of his pleader. Unless the Court was satisfied that the petitioner was wilfully avoiding the service of summons or wilfully neglecting to attend the Court, evidence should not have been taken *ex-parte*, **1 C. L. J. 102.** Summons was served on the husband of one *P* under this section to attend the Court, either in person or by duly authorised vakil on a certain day, but on that day the case was postponed to another day although the vakil of the husband was present. In the meantime the case was again adjourned to another day, and notice was served on the pleader. When the case was called on a *mukhtyar* appeared on behalf of the husband, but the Magistrate refused to hear him and decided the case, *ex-parte* holding that the husband wilfully neglected to attend. *Held*, that in the circumstances of the case, although the Magistrate was justified in refusing to hear the *mukhtyar*, he was not entitled to proceed *ex-parte*, **2 Bom. L. R. 700.** *See* proviso to sub-sec. (6) power to set aside *ex-parte* order.

66. **Duty of Magistrate when husband offers to maintain his wife.**—When the husband offers to maintain his wife, the Magistrate must consider any ground of refusal on the part of the wife to live with her husband and receive evidence which may be offered one side or the other, **8 W. R. 67.** Where an offer to maintain the wife is made, the Magistrate should ask the woman whether she is willing to live with the petitioner. If she refuses, it is for the Magistrate to consider the grounds of such refusal and pass such order as he thinks fit, **9 Cr. L. J. 501 (M.); 1883 A. W. N. 233.** Failure to determine the question is equivalent to an omission to determine the question of neglect or refusal and is an error in law, **6 N.-W. P. H. C. R. 205.**

67. Non-payment of process-fee —An application for maintenance should not be dismissed on failure of the applicant to comply with an order for payment of process fee, neglect to maintain not being an offence, and process-fees being leviable under *the Court-fees Act* only in respect of an offence, 16 M. 234. But now under s. 204, sub-sec. (3), Magistrate may dismiss the complaint if fees are not paid within a reasonable time

IX.—ENFORCEMENT OF ORDER FOR MAINTENANCE.—Sub-sec. (3).

68. Before passing order of commitment, Magistrate must be satisfied that non-payment of the maintenance was due to wilful neglect.—Before an order for imprisonment can be passed, it must be proved that the non-payment of the maintenance is the result of wilful negligence on the part of the defendant **22 C. 291**; *followed* in **25 C. 291**; **25 A. 165.** Imprisonment cannot be awarded in anticipation of default, **5 M. H. C. R. Appx. XXXIV.**

68-A. Jurisdiction of Magistrate who made the order to enforce it, is not ousted by change of residence of party ordered —The provisions of s 490 cannot be held to derogate from s 488 (3) He can issue a warrant under s 386 for the distress and sale of any movable property belonging to the person against whom this order is passed. Such a warrant can be executed either within the local jurisdiction of the Magistrate or without such limits, **111 I. C. 852 (2) = A. I. R 1923 Mad. 1171** under s 387 when it has been endorsed by the District Magistrate within the local limits of whose jurisdiction the movable property is found S 490 merely provides an alternative course by enabling the person in whose favour the order was passed to apply direct to a Magistrate in any district where the person bound by the order may be, **7 L B. R. 116 = 13 Cr. L. J. 701.** *See* Note 3 to s. 490

In **27 Bom. L. R. R. 63 = 49 B 906** it was *held per* FAWCETT, J, that under s 488 (3) read with s 386 (1) (*a*) it is competent to a Magistrate to issue a warrant for levying the amount of maintenance due by attachment and sale of any movable property belonging to the person ordered to give maintenance even if such property consists of a share in a joint Hindu family property

69. Imprisonment is not punishment for contempt of Court's order, but merely a means of enforcing payment.—The imprisonment which can be awarded under this section is not a punishment for contempt of the Court's order, but merely a means of enforcing payment of the amount due and upon the payment of that amount being made, the defendant is entitled to his release "It cannot be regarded as a punishment for the breach of the order, for if that were the case, the punishment would follow upon the breach of the order, irrespective of any success or the reverse in the levying of the amount by warrant, whereas that is not what the section enacts. According to the express terms of the section, the disobedience of the order may be never so gross and wilful, and yet, if the amount ordered to be paid is realised in full by execution of the warrant, no sentence of imprisonment is to follow This conclusively shows that the sentence is not for the disobedience or contempt of the Court's order Nor again would it be right to hold that the sentence of imprisonment is an absolute sentence, for the law says that the Magistrate may sentence such person 'for the whole or any part of each month's allowance remaining unpaid to imprisonment. That shows that the imprisonment is for the unpaid portion of the maintenance, or, in other words, that it is owing to default of payment of the unrealised portion of the maintenance and if that is so, the imprisonment that is ordered ought to cease upon payment being made' *Per* BANERJEE and SALE, JJ, in **22 C 291** at p. 296 The imprisonment, if served, does not absolve the person from liability for arrears of maintenance **3 W. R. 61.** *See* also **12 P. R. 1919 (Cr.)**

70. Defaulter entitled to be released as soon as payment is made.—'*Or until payment if sooner made* —These words in sub sec (3) supersede the decisions in **8 M. 70** and **Weir II, 639** Now the defaulter is entitled to be released as soon as payment is made, **20 M. 3.** They are in accordance with the decision in **22 C. 291**, *see* Notes 69 and 71

71. Enforcement of payment of accumulated arrears.—(*i*) *Enforcement of payment of arrears is in discretion of Magistrate* —No hard and fast rule can be laid down as to whether a Magistrate should grant or refuse an application for recovery of arrears of maintenance The Magistrate should ascertain in each case under what circumstances the arrears came to accumulate and if there was no good reason why the application for recovery should not have been made with greater promtitude, whether it would be equitable and in accordance with the spirit of the Criminal Procedure Code to enforce payment of the accumulation The Magistrate should also consider whether he should enforce payment of any part of the arrears where in his opinion it is not proper to enforce payment of the whole of the arrears, **1909 U. B. R. 111, Cr. Pro , pp. 19** and **21 = 11 Cr. L. J. 79**

where **20 M. 3** is *distinguished.* But now see proviso newly added to sub-sec. (3) proceeding that an application for maintenance amount must be made within one year from the date on which it became due.

(*ii*) *Only one warrant may be issued for the whole of the arrears due at the time of issue.*—Where six months' arrears were due, an order for separate warrants of commitment awarding a separate sentence of imprisonment of one month on each warrant is bad in law, as the law contemplates a single warrant of commitment in respect of the arrears due at the time of the issue, **22 C. 291; 7 M. H. C. R. Appx. XXXVII; Ratanlal 801; 31 P. R. 1880; 7 Bur. L. T. 225 = 15 Cr. L. J. 434.**

(*iii*) *Mode of computing sentence awardable in default of payment of arrears.— Is a Magistrate competent to order more than a month's imprisonment at one time?* ALLAHABAD AND BURMA.—A warrant for the levy of arrears of maintenance for fifteen months is not illegal, but one month's imprisonment would alone be awardable in default as if the warrant only related to a single breach of the order. "The third paragraph of s. 488 ought to be strictly construed, and, as far as possible, construed in favour of the subject. Under the section a condition precedent to the infliction, of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance, and after distress has been issued, *nulla bona* is the return. The section contemplates one warrant and one punishment and not a cumulative warrant and cumulative punishment."—*Per* STRAIGHT, J., **9 A. 240.** *See* also **P. J. L. B. 316; U. B. R. (1902-03) I, 3.** On the other hand, the Madras High Court has *held* that such imprisonment is not limited to one month. The procedure contemplated by the Code appears to be to deduct the sum levied from the sum due, and then to ascertain how many months' arrears the balance represents. The maximum imprisonment that can be imposed will then be one month for each month's arrears and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear, **20 M. 3** *overruling* **6 M. H. C. R. 22;** *approved in* **25 C. 291; 12 P. R. 1877.** The Burma Chief Court in **7 Bur. L. T. 225 = 7 L. B. R. 351 = 15 Cr. L. J. 434,** *held, following* **9 A. 240,** and *dissenting from* **20 M. 3,** that when a Magistrate issued a warrant for arrears of maintenance for more than one month and when the allowance for more than one month remained unpaid after the execution of the warrant, he was not competent to pass a sentence of imprisonment exceeding one month. *Per* ORMOND, J, "I can find nothing to support the conclusion that the section authorises one month's imprisonment for every month's arrears when one warrant is issued for the recovery of several months' arrears. The words 'for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant' in cl. (3) should be read as meaning 'for the whole amount or any part of a month's allowance remaining unpaid on each occasion after the execution of the warrant'." *See* also **8 M. 70.**

72. When order for maintenance cannot be enforced.—(*i*) *If defaulter becomes insolvent.*—An insolvent who has obtained a protection order, is not liable for arrest or imprisonment in respect of arrears of maintenance when such arrears are included in the schedule filed by him. Maintenance ordered to be paid is not a fine, penalty or forfeiture, but it is a purely civil liability and a debt within the meaning of s. 13 of the *Insolvent Act* (11 and 12 Vict., Chapter 102). Its enforcement by a Criminal Court cannot affect the matter, **5 C. 536 = 5 C. L. R. 458.**

(*ii*) *If defaulter dies, order cannot be executed against his estate.*—Sub-sec. (9) is quite explicit in regard to the necessity for the presence of the party against whom the evidence is being taken and on his death the order cannot be enforced against his estate, **41 C. 88.** Cf. *Harrington, in re*: *Wilder* v. *Turner,* **1906) 2 Ch. 687.**

(*iii*) *If the claim has been released or rendered inoperative by decree.*—When an application is made to a Magistrate to enforce an order for maintenance, passed under this section, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released, **10 M. 13,** *e.g.*, by operation of law, or by divorce, **5 A. 226; 15 A. 143** *overruled by* **19 A. 50; 1885 A. W. N. 29** and *see* Note 45. If, in disposing of a suit, a Civil Court decides any matter which might have the effect of disentitling a wife to maintenance, a Magistrate, who has awarded maintenance, is bound, in the interests of justice, to take the judgment of a Civil Court into consideration before proceeding to pass a fresh order enforcing payment of the allowance, **Weir II, 614; 14 C. 276;** or by agreement of parties, **36 P. R. 1902,** but *see* **Weir II, 649.** If any agreement is made after the order of the Magistrate, it has the effect of superseding the previous order and whatever rights it might give rise to in a Civil Court, neither the agreement nor the order was one that could be enforced summarily under this section, **42 P. R. 1888.** A Muhammadan wife applied for maintenance under this section. Pending proceedings the parties compromised and in terms of the compromise, an order was made under this section that the husband should give his wife half his land and a house to reside in, or in defult Rs. 9

a month Subsequently the husband divorced the wife, and the wife executed the order of maintenance The Sub-Divisional Magistrate set aside the order of his predecessor as to the gift of half of the husband s lands and house and ordered that the wife might receive arrears of payment of Rs 9 for the period of her *iddat* and thereafter that Rs 5 per mensem would be paid for the upkeep of her two boys A warrant was issued for the realisation of the total arrears The District Magistrate found that the case should have been dismissed in the first instance and the order for execution refused on the ground that according to the principles laid down in **42 P. R. 1888,** the enforcement of an order of compromise under this section falls within the jurisdiction of a Civil Court and not of a Criminal Court *Held,* on revision, the view of the District Magistrate should be upheld, **39 P. R 1905 = 108 P. L. R. 1905.** An agreement by a husband to maintain his wife by giving her a house and jewels and by delivering to her annually a certain quantity of grain and money cannot be made the subject of an order under this section, nor enforced under it, **6 M. 283 ; 12 P. R. 1890.**

(*iv*) *If wife has been divorced*—When a divorce is proved, the order for maintenance becomes *functus officio* and ought not to be further executed, **1 Bom. L. R. 346** *See* Note 45 and Note 5 to s 490 *See* also **19 W. R. 73.**

(*v*) *If the wife has voluntarily returned to her husband*—Wife returning to live with husband subsequent to order renders the order ineffectual subsequent to the date of her return, and if she subsequently leaves him again or is turned out the former order cannot be given effect to but she must institute fresh proceedings, **1888 A. W. N. 217.** *See* Note 14

(*vi*) *Sufficient cause*—Under sub-sec (3) of s 488 before a Magistrate puts a maintenance order in execution he is bound to consider the sufficiency of the cause alleged and refuse execution if he is satisfied if the cause is sufficient The phrase "sufficient cause' in sub-cl (3) as amended shows that the Magistrate should use a judicial discretion after looking to all circumstances of the case, **48 M. L J. 494.**

73. What are not proper reasons for refusing to enforce order.—(*i*) *Rate of maintenance too high*—A Magistrate cannot refuse to enforce an order for maintenance when in a further inquiry, evidence is given to show that the allowance granted was excessive, but he can revise the rate of maintenance to be allowed subsequent to the date of such inquiry, **Weir II, 636.** Though upon a change of circumstances being shown, the existing order may be modified, still, so long as that order remains in force, it must carry with it its proper consequence **22 C. 291.**

(*ii*) *Delay*—Where an application for recovery of accumulated arrears is made after great delay, a Magistrate should not, even when declining to enforce payment of arrears refuse to enforce payment from the time of the new application, as the order of maintenance deserves to be enforced as long as it holds good, **1909 U. B. R. 111, Cr. Pro., pp. 19** and **21 = 11 Cr. L J. 79,** where **4 Bur. L. R. 29** *approved* and **20 M. 3** *distinguished* But see now proviso newly added to sub sec (3) prescribing a period of one year within which to apply for the maintenance amount

(*iii*) *That the party does not reside within the district*—*See* Note 3 to s 490

73-A. The counter petitioner may, on proof the circumstances mentioned in sub-section (5) get the order cancelled or altered under section 489 But until the order is so cancelled or altered it must be deemed to be in force The fact that the wife had returned to live with her husband would not have the effect of bringing the order to an end automatically, **50 Mad. 663**, *see* also **28 Cr. L. J. 237.**

74. Arrears cannot be recovered by suit—A suit will not lie to recover arrears of maintenance, the order must be enforced according to the provisions of the section **2 P. R. 1876 (Civ)** 'But the Jagir income of a person when collected by revenue authorities can be taken in satisfaction of the arrears of maintenance due under an order passed against such person,' **3 P. R. 1889.**

75. Breaking open inner door for execution of warrant.—A Police-officer, entrusted with the execution of a warrant for the levy of the amount of maintenance recoverable under this section, can break open an inner door of the house of the person against whom the order is made. The principle laid down in **3 B. H. C. R. A. C. 127,** as regards civil processes, applies *a fortiori* to criminal processes, **Ratanlal 431.**

76. Court-fee on application for arrears of maintenance due—Application to enforce payment of maintenance already awarded, under this section, is chargeable with a fee of eight annas under Sch. II, Article I (*b*) of Act VII of 1870 The defaulter cannot be order to repay the said fee, **Ratanlal 488.**

77. Date of enforcement may be postponed by consent of parties.—Where the date of the enforcement of the order is postponed by consent of the parties to a date other than the date of the order, the High Court will not interfere, **Weir II, 635.**

78. Security cannot be taken in anticipation of default.—This section does not provide for the taking of security in anticipation of default, **24 W. R. 72.**

X.—CANCELLATION OF ORDER AWARDING MAINTENANCE.

79. Sub-sec. (5) applies only to orders in favour of wife.—No power to cancel order awarding maintenance to a child.—There is no provision in this section for cancelling an order awarding maintenance to a child, though enforcement may be declined, **17 P. R. 1886.** Where an order has been passed by a competent Court for payment of maintenance to a child, the only power that exists for modifying such an order is that given by s. 489, **1904 A. W. N. 149.** A Magistrate has no power to cancel a previous order made by another Magistrate for the maintenance of a child of a divorced Muhammadan wife, who has married again. Such an order of cancellation is illegal. A Magistrate has no power to cancel an order under this section except on the ground of change of circumstances mentioned in s. 489, **27 A. 11.** *See* Note 4, s. 489, **48 M. 503 = 48 M. L. J. 183.**

80. Order for maintenance of child not affected by decree for restitution of conjugal rights.—Where after a wife obtained an order under this section for the payment of a sum by the husband for the maintenance of their child, the husband subsequently obtained a decree for restitution of conjugal rights against the wife. *Held*, that the husband was not absolved from the liability to pay maintenance. It may be otherwise if he obtained an order for guardianship of the child, **6 L. B. R. 127 = 14 Cr. L. J. 98** and also **2 L. B. R. 46.** The cases in **13 W. R. 52, 23 B. 484, 27 A. 483,** all deal with the effect of a decree for restitution of conjugal rights on an order for the maintenance of a wife.

81. Order in favour of wife must be cancelled on proof of her living in adultery.—It is open to a husband, upon whom an order for the maintenance of his wife has been made, to prove after such order that his wife is living in adultery, and upon such proof a Magistrate is justified in cancelling his order, **8 B. H. C. R. 124; 1882 A. W. N. 168; 24 C. 638; 5 A. 224; 5 N. L. R. 19 = 9 Cr. L. J. 390.** Where on the application of a wife to enforce an order granting maintenance, the husband pleaded (*i*) that the wife was of bad character, (*ii*) that she had agreed to take a sum less than the amount ordered and (*iii*) that he was willing to take her to live with him, if she will be of good character, and the Magistrate dismissed the pleas without making an inquiry and sentenced the husband, *held* setting aside the sentence, that the pleas set up were good and ought to have been inquired into, **36 P. R. 1902.** A Magistrate rejected the application of the husband for cancellation of the order of maintenance on the ground that it was not proved that the petitioner's wife was at the time living in adultery although she might have committed adultery seven months before. *Held*, that adultery committed by a wife subsequent to an order obtained by her for maintenance, disentitles her to claim a continuance of maintenance and entitles the husband to apply for cancellation of the order if it amounts to living in adultery, **Ratanlal 353; 1882 A. W. N. 168.** In a proceeding for cancelment of an order for maintenance, the evidence of adultery should not be general and inconclusive, but specific and cogent, **1893 A. W. N. 56;** maintenance should not be discontinued solely on account of a single act of adultery on the part of the wife, **30 Cr. L. J. 403 (2) = 115 I. C. 161 (1).** The birth of an illegimate child is not enough under cl. (5) to cancel an order previously passed, **5 N. L. R. 19 = 9 Cr. L. J. 303.**

82. Order cannot be cancelled on production of disputed compromise.—It is not competent to a Magistrate to cancel an order for maintenance on the ground that the parties have entered into an arrangement evidenced by a deed, the validity of which is denied by the complainant, until it has been declared by some competent tribunal to be binding on the parties, **Weir II, 649.**

XI.—FURTHER INQUIRY, APPEAL AND REVISION.

83. District Magistrate not competent to direct further inquiry.—When an application for maintenance is refused by a Deputy Magistrate, a District Magistrate cannot direct a further inquiry under s. 437, **25 A. 545.** *See* also **1 C. L. J. 102.**

84. No appeal lies against order awarding maintenance.—When the Magistrate orders a person to make a monthly allowance under s. 488, there is no conviction for any offence and no appeal lies, **7 W. R. 10; 5 Bom. H. C. R. 81.**

85. **No Letters Patent appeal against order of single Judge made in revision.**—No appeal lies under s 15 of the Letters Patent, against the order of a single Judge made on a revision petition against the order of a Magistrate under s 488, as the order is one passed in a criminal trial In **5 Bom. H C. R. 81** it was *held* that maintenance proceedings were judicial proceedings of a Criminal Court from which no appeal lay, **17 M. L. T. 330 = 16 Cr. L. J. 326.**

86. **Revision.**—When the order of a Magistrate under s. 488 is no longer enforceable in consequence of a decree of a Civil Court as, *e g*, when subsequent to the order of a Magistrate directing a person *A* to pay maintenance to an illegitimate child a Civil Court decrees in a declaratory suit brought by *A* that he is not the father of the illegitimate child, the High Court acting in revision may set aside the order awarding maintenance, **16 Cr. L. J. 609 (O.).**

87. **High Court may revise or direct further inquiry.**—When a father in law is ordered to pay maintenance to his son's wife, **5 B. H. C. R. Cr. 81; 4 N. W. P. H. C. R 123; 26 P. L. R. 1903; 12 P. R. 1914 = 15 Cr. L. J. 577**, or where the rate of maintenance is excessive, the High Court has power to set aside or modify the Magistrate's order or to direct further inquiry with a view to decide what amount should be allowed **Weir II, 575 and 634**, and *see* Note 6 to s 489 An order fixing the rate of maintenance at Rs 150 per mensem (exceeding Rs 100 p m) is without jurisdiction and can be set aside, even though the husband has acquiesced in it for some time **28 Bom. L. R. 1299**

But an application in revision to the High Court to set aside an order on the ground that the marriage was null and void without an attempt to prove the same in the proceedings before the Magistrate cannot be entertained *Ibid.*

Alteration in allowance

489. (1)* On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit, provided that if he increases the allowance, the monthly rate of † one hundred rupees in the whole be not exceeded

‡ (2) Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or as the case may be vary the same accordingly

Scope of the section.—The section contemplates cases where there is a change in the financial circumstances of the person affected, **30 Bom. L. R. 617.**

Notes.—1. Does this section apply to the total discontinuance or merely to an alteration of the amount?—These words refer not only to a change in the pecuniary circumstances of the person paying or receiving the allowance, but to a change in any of the circumstances which might be taken into consideration in passing an order under s 488, **21 P. R. 1894.** They do not refer to a change in the *status* of the parties which would entail a stoppage of the allowance, **19 A. 50 (F.B.)** *overruling* **15 A. 143.** *See* also **1885 A. W. N. 29; 8 B. H. C. Cr. Ca. 95; 7 B. 180; 14 C. 276.** The words "*the Magistrate may make such alteration etc*, preceded as they are by the word '*wife*' and followed as they are by a limitation as to the amount of the monthly allowance clearly indicate that the "*alteration in the allowance*" contemplated by this section, only amount to a power to alter the amount and not to a total discontinuance thereof —*Per* MAHMOOD, J in **5 A. 226.** *See* also **5 C. 558.** But a change of circumstances may be the result of divorce among Muhammadans, **19 W. R. 73 = 10 B. L. R. Appx. XXXIII** or to the wife living in adultery It may be said that these cases are covered by s 488 (5), but the better view seems to be, that this section applies as well to a case of total discontinuance of the allowance Thus, in 1877, petitioner was ordered to pay a maintenance allowance to his daughter In 1884, the daughter was married and was living with her husband, who was willing to maintain her On petitioner's application under this section for a cancelment of the order of 1877, the Magistrate declined to interfere on the ground that in his opinion, the husband, was not bound to maintain his wife, until she attained puberty, *held* that the order of the Magistrate, declining to interfere, could not be supported, the husband having in virtue of the marriage undertaken the obligation of supporting his wife, (the daughter of the petitioner) the latter was no longer in a

* This section was renumbered by Act XVIII of 1923

† The 'one hundred were substituted by *ibid*

‡ Sub-sec (2) was added by *ibid*.

position to require an allowance from her father, **Weir II, 650.** *See* also **11 C. W. N. 100** which adopts the same view. *See* Note 72 to s. 488 and Note 5 to s. 490.

2. **What would be valid change in circumstances?**—A Magistrate may, under this section, from time to time, alter the rate of the monthly allowance granted as maintenance under this section as, *e.g.*, the child getting older or the birth of another child or death of a child, **12 C. 535; 14 M. 398.** But in **27 A. 11**, a Muhammadan wife who had obtained an order for the maintenance of her infant child got a divorce and married another husband. The first husband sought to set aside the order of maintenance on the ground that the second husband had undertaken to maintain the child. *Held*, there was no such change in the circumstances of the infant as is contemplated by this section, which is the only provision in the Code which empowers a Magistrate to modify an order under s. 488 for maintenance of children. Similarly a husband cannot claim a reduction of the amount of allowance, ordered to be paid by Court, to his deserted wife on the mere ground that she might possibly be able to earn something by her own labour, **1887 A. W. N. 107.**

3. **Reduction of rate—Such order operates only prospectively.**—A Magistrate has no power to reduce the rate of maintenance which has accrued due in arrears. An order reducing the rate can operate only as regards payment accruing after date of the order of reduction, **Weir II, 650.**

4. **Court acting under this section not to question propriety of original order.**—In dealing with an application for increase of maintenance, a Magistrate has no jurisdiction to enquire into the propriety or otherwise of the order for maintenance originally made, **Weir II, 650.**

5. **Is a party desirous of getting order set aside bound to proceed under this section?**—When a person against whom an order for maintenance is made considers that such an order should no longer be in force against him for some reason such as, *e.g.*, the existence of a subsequent agreement, he should apply under this section to the Magistrate who passed the original order, **9 W. R. 1; 17 P. R. 1885.** He should not raise the objection before the Magistrate enforcing the order under s. 490, **25 A. 165.** When the parties make an agreement, subsequent to the order under s. 488, modifying its terms, it will be competent to the party interested to apply under this section and get the order altered, **25 A. 165.** But *see* Note 5 to s. 490.

6. **Execution not to be suspended.**—An application for an alteration of the order by reduction of the allowance ordered, is no ground for suspending execution of an order for realisation of moneys due, as that order carries with it all the proper consequences so long as it remains in force, **22 C. 291.**

7. **Effect of a decree for restitution of conjugal rights on an order for maintenance.**—When a decree for restitution of conjugal rights is passed but the husband does not execute it and goes on paying maintenance, it is not open to the Court to increase the amount on a fresh application by the wife as the first order is put an end to by the decree, **21 Bom. L. R. 766.** But in **49 M. L. J. 269** where a husband against whom an order for maintenance was passed under s. 488 subsequently obtained a decree for restitution of the conjugal rights and it appeared to the Court that he was not at all anxious to get his wife back to live with him on the ordinary terms of husband and wife. *Held*, that as the object of the restitution decree was merely to get the maintenance order cancelled and not a *bona fide* wish to live amicably with her, the Court should not exercise its discretion under s. 489 (2) and cancel the order for maintenance.

Enforcement of order of maintenance.

490. (1) A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

Notes.—1. '*May be enforced.*'—The word 'may' was substituted for the word 'shall' in Act X of 1882 and the object of the Legislature in making the above alteration obviously was to enable the Magistrate to consider any reasons that may be urged against the enforcement of the order than those for which separate provision is made by s. 488 (5) and s. 489, **16 Cr. L. J. 609 (O.).**

1-A. Remission of Court-fee.—In the exercise of the power conferred by s. 35 of *the Court-fees Act* VII of 1870, the Governor-General in Council is pleased to remit the fees payable under the said Act on a copy of the order when the copy is given under s. 490 to the person named therein—*Gazette of India*, 1886, Pt. I, p. 506. Under rules passed by the Calcutta High Court under s. 20, cl. (*ii*) of *the Court-fees Act*, a fee of one rupee has

been fixed for serving and executing a warrant for the levy of maintenance of a wife or child and also a percentage on the amount of maintenance levied, *viz*, 2 per cent. on sums not exceeding Rs 100 and when the sums exceed Rs 100 then 2 per cent on Rs 100 and 1 per cent. on the amount of excess such percentage is to be deducted from the proceeds of any property sold, or to be paid with the amount levied and with the other costs of process as stated in the warrant—*Calcutta Gazette*, 1874, p 478, **21 W. R. Rules, etc, 12**

2 **Order directing payment in advance.**—A Magistrate's order directing the payment of maintenance allowance in advance from the date of the Magistrate's order is legal under s 538 of Act X of 1872 (now this section), **Ratanlal 189.**

3. **Section does not deprive Magistrate making order of power of enforcing it**—This section does not deprive the Magistrate who has made an order for maintenance, of the jurisdiction given him by s 488 (3) When the defendant is beyond his jurisdiction, he may, in his discretion exercise the jurisdiction or refer the applicant to the Magistrate having jurisdiction at the place where the defendant is to be found **4 M 230.** In **7 L. B. R 116 = 15 Cr. L. J. 701,** the case in **4 M. 230** was considered and it was *held* that the law gives the applicant the option of proceeding either in the Court which originally passed the order of that having local jurisdiction over the respondent, but there is no authority under which either of those Courts could refuse to exercise a jurisdiction which it possesses merely on the ground that some other Court also have concurrent jurisdiction

4 **Competency of second-class Magistrate to enforce order duly made.**—A second class Magistrate of a place where the husband is at the time, is competent to enforce the order for maintenance made against such husband by any competent Magistrate in that behalf, **Ratanlal 288**

5. **Magistrate bound to consider every plea that may affect enforcement of order.**—Where in answer to an application for enforcement of an order under s 488 for the maintenance of a wife the party against whom such order is subsisting, pleads that he has lawfully divorced his wife and therefore the order can no longer be enforced, it is the duty of the Court hearing the application to entertain and consider such plea and if it finds the plea established, to decline to enforce the order for any period subsequent to the date when the marriage ceased to subsist between the parties In such case, where the parties are Muhammadans, the marriage will be deemed to subsist until the expiration of the *iddat* **19 A. 50** *overruling* **15 A 143** The Magistrate should likewise decline if the defendant proves that the claim has been released **10 M 13,** or that the wife has voluntarily returned to live with the husband, **1888 A. W. N. 217.** With the return of the wife, the previous neglect or refusal ceases to exist and if a new cause for proceeding under s. 488 subsequently arises it must be proved by fresh evidence **1904 U. B. R. Cr. P. C. I., p. 10** The conditions specified in the second clause of this section have special reference to cases in which enforcement is sought at a place other than that in which the order was originally passed, or by a Magistrate other than the one who passed it and cannot be considered exhaustive, and it is open to any party to such order to show cause against its enforcement and to ask for its cancellation or alteration on any of the grounds specified in ss 488 and 489 in one and the same petition and inasmuch as the Magistrate s order for maintenance of a wife must be in favour of a person bearing that legal character under the personal law which governs the parties, such order cannot enure for the benefit of and cannot be enforced in favour of one who no longer bears that character under the law, and it is incumbent on the Magistrate when the question is raised before him to satisfy himself that the woman still possesses the character by virtue of which she was enabled to obtain an order of maintenance, **21 P. R. 1894.** It is the duty of a Magistrate who is applied to enforce an order for maintenance passed under s 488, on an objection being raised that the woman has ceased to be a wife by reason of subsequent divorce, to enquire whether there has been or has not been a legal and valid divorce, and if he finds that there has been a valid dissolution of the marriage, he ought not to issue an attachment warrant or otherwise to execute the order, it having become in fact *functus officio* **17 O C 260 = 15 Cr. L J. 646** The cessation of the conjugal relationship by reason of a subsequent divorce or the decision of a competent Court on the question of marital or filial relationship in question can justify a refusal **16 Cr. L. J. 609, 1915 U. B. R. I. 53 = 16 Cr. L. J. 531.**

6. **Are powers of executing Magistrate other than the one who made the order limited by terms of this section?**—In **10 M. 13** it was *held* that a Magistrate other than the one who made an order under s 488 was competent to decline to enforce the order for reasons not within the terms of this section *e g*, that the claim had been released But in **25 A. 165,** KNOX J, declining to follow **10 M. 13,** *held* that a Magistrate called upon, under this section, to enforce an order of maintenance under s 488 has no jurisdiction to take into consideration anything further than (*i*) the identity of the parties, (*ii*) the non payment of the allowance, and (*iii*)

where the person to whom the maintenance is awarded is the wife, that she still holds the position of wife. The fact that the parties had made an agreement subsequent to the order, modifying its terms, is not a matter for the Magistrate's consideration in enforcing the order. If the person against whom the order for maintenance is made considers that such an order should no longer be in force, for some reason other than those mentioned above, it is for him to apply under s. 489 to the Magistrate who passed the original order or to his successor in office. *See* Note 20 to section 489 as to effect of Civil Court decree.

CHAPTER XXXVII.

Directions of the Nature of a Habeas Corpus.

Power to issue directions of the nature of a *habeas corpus*.

491. * (1) "Any High Court" may, whenever it thinks fit, direct—

(*a*) that a person within the limits of its † "appellate criminal" jurisdiction be brought up before the Court to be dealt with according to law;

(*b*) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(*c*) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(*d*) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of any commission from the Governor-General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners, respectively;

(*e*) that a prisoner within such limits be removed from one custody to another for the purpose of trial, and

(*f*) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2) ‡ The "High Court" may from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal *State Prisoners* Regulation, 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, of *the State Prisoners Act*, 1850, or *the State Prisoners Act*, 1858.

Note.—Under the old section power under this section was expressly given only to the High Courts at Calcutta, Madras and Bombay within their ordinary original civil jurisdiction. Under the new amendment all the High Courts are empowered to act under this section within the limits of their appellate criminal jurisdiction, *see* **43 M. L. J. 396 (F.B.)** and also **46 C. 52; 52 C. 319 = 29 C. W. N. 98.**

Scope.—(1) No application for issue of a writ of Habeas Corpus can be maintained apart from the Code of Criminal Procedure.

(2) The provisions of the Bengal Criminal Law Amendment (Supplementary) Act of 1925 rendering the provisions of s. 491, Cr. P. C., inapplicable to persons detained under that Act, are valid in Law, **54 Cal. 727 = 31 C. W. N. 593.**

Notes.—1. The Regulations and Acts referred to in the section relate to State prisoners. For similar powers conferred on provincial Magistrates, *see* s. 552; as to European British subjects, *see* s. 456.

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* The words "any High Court" were substituted for the words "any of the High Courts of Judicature at Fort William, Madras and Bombay" by Act XII of 1923.

† The words "appellate criminal" were substituted for the words "ordinary original civil jurisdiction" by *ibid*.

‡ The words "High Court" were substituted for the words "each of the said High Courts" by Act XII of 1923.

2. Habeas Corpus—"This the most celebrated prerogative writ in the English law, is a remedy for a person deprived of his liberty It is addressed to him who detains another in custody, and commands him to produce the body, with the day and cause of his caption and detention, and to do, submit to and receive whatever the Judge or Court shall consider in that behalf"—WHARTON'S *Law Lexicon*

"*Cepi corpus et poratum habeo*"—(I have taken the body and have it ready) a return made by the Sheriff upon an attachment *Capias, etc*, when he has the person, against whom, the process was issued, in custody

3. Are the High Courts still entitled to issue writ of 'habeas corpus'?—In **39 C 164** the question was raised whether the writ of *habeas corpus* has not been altogether abolished and, if so, whether it is competent to the Indian Legislature to take away that supreme right, but the point was not decided as s 491 was *held* to apply in the circumstances of the case

In **28 Bom L R. 471** it was specifically held that the High Court of Bombay has jurisdiction to issue a writ of Habeas Corpus for the production of a person outside British India provided it is satisfied that he is in the custody or control of a person within its jurisdiction

3-A. Native State.—Where the person wanted is in the custody of a Native State, power to issue directions under s 491 (1) cannot be exercised, **27 A. L. J. 520 = 119 I. C. 527.**

4. Scope of sub-section (a).—*Dealt with according to law* is a phrase of such wide and general meaning that it is fairly open to many constructions In the case of children it might not unreasonably be extended so as to take in what ordinarily happens when the parties have recourse to the Courts under the Guardian and Wards Act instead of under this section **12 Bom. L. R. 891 = 11 Cr. L. J. 687.** By s 491, it appears to be entirely left to the discretion of the Court whether it should or should not direct the person to be brought before it to be dealt with according to law, but Rule 794 of the Bombay High Court Rules deprives the Court of all further discretion and commands that in the absence of cause being shown against the rule which is a very different thing from allowing the Court to exercise its discretion even where technically the cause is inadequate, the Court shall pass an order that the person or persons improperly detained shall be delivered to the person entitled to their custody, **12 Bom. L. R. 891 = 11 Cr. L. J. 687.**

5. Scope of sub-section (b).—The sub-section itself provides that the remedy, which the Court gives, goes no farther than setting the persons detained at liberty, **12 Bom. L. R. 891 = 11 Cr. L J. 687.** *A de facto* guardianship of children would be sufficient to sustain a conviction under s 381, I P C., and as against strangers such guardianship would entitle him to an order for restoration to his custody under s 491, sub-sec. (2) does not apply when the children are not illegally or improperly detained **8 M. L. T. 300 = 11 Cr. L J. 641.** A Hindu father who has become a *Sanyasi*, is not the guardian of his children and he does not regain his rights in the natural family if he renounces his *sanyas*, **21 M. L J. 195 = (1911) 1 M W. N. 36 = 8 M. L. T. 300 = 11 Cr. L J. 641.**

The applicant came from village which was once British territory but was recently ceded to the Raja of Benares under a treaty For some years past, he lived and carried on business in Bombay On 17th September, 1924, he was arrested by the Police Commissioner under s 3 (*a*) of the Foreigners Act On 23rd September, he applied to the High Court under s 491 No order of Government under s 3 of the Foreigners Act was forthcoming, on October 14 when the application was finally heard *Held*, that under the circumstances the applicant should be set at liberty inasmuch as in the absence of any order of Government, his continued detention was an illegal or improper detention within the meaning of s 491 (1) (*b*) or alternatively he was not being dealt with according to law within the meaning of s. 491 (1) (*a*) **26 Bom. L. R. 1252 = 49 B. 222.**

The Police in Calcutta cannot retain custody under s 5 of the Calcutta Immoral Traffic Act of a girl removed from a brothel after she has attained the age of 16 years **30 C. W. N. 72.**

6 The sole consideration for Court ought to be the benefit and welfare of person brought before it—Parents and guardians cannot divest themselves of their right of guardianship by contract A delegation of parental authority is revocable at any time, and it is the duty of the parents and guardians to revoke it if used to the detriment of the children. And it is also open to the Court within whose jurisdiction the children are found to revoke it at any time if sufficient cause be shown for interference Ordinarily, no doubt the Court will be very slow to interfere with parents or the arrangement made by parents for the custody and education of their children, but it will deprive them of such custody if it be absolutely necessary in the interests of the children, and *a fortiori*, it will for similar reasons take the children out of the custody of persons selected by the parents

especially when the parents, have put it out of their power to interfere themselves, for the protection of their children. The jurisdiction of the Courts in such cases is essentially a parental jurisdiction and that description of it involves that the main consideration to be acted upon in its exercise is the *benefit or welfare of the child.* The term '*welfare*' in this connection must be read in the largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting in the true interests of the child would or ought to do. *The Queen* v. *Gyngall,* (1893) **2 Q. B. D. 232.** The welfare of the child is not to be measured by money only, or by physical comfort only. The word must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded, *re McGrath,* **(1893) 1 Ch. 143.** Even a father, if it be shown that cruelty or corruption is to be apprehended from him, would be deprived of the custody of his children, *The King* v. *Greenhill,* **(1836) 4 A. and E. 264;** and so would a mother be deprived of her custody if she is living in open adultery. *In re G.,* **(1899) 1 Ch. 719.** It is well established that the Court will not ordinarily force a minor more than fourteen if a boy, and more than sixteen if a girl, to remain in a custody to which he or she objects, and that before deciding as to the custody of younger children who are still old enough to form an intelligent preference, it will take account of their wishes as one element in the case, *Pollard* v. *Rouse,* **33 M. 288.** The underlying principle of every writ of *habeas corpus* (and proceedings under this section) is to ensure the protection and well-being of the person brought before the Court under that writ. The real interest and well-being of the person ought to be not only the determining but the sole consideration, **12 Bom. L. R. 891 = 11 Cr. L. J. 687.** Courts of Equity in England always exercise a discretionary power to control the father's or guardian's legal rights of custody, *Queen* v. *Gyngall,* **L. R. (1893) 2 Q. B. D. 232.** Thus a master is not entitled to a *habeas corpus* for the purpose of recovering the custody of an apprentice, who of his own accord had entered the service of another person, the object of the writ being merely to protect personal liberty, *R.* v. *Reynolds,* **6 P. R. 497 (1795).** A contract of apprenticeship cannot be specifically enforced against a minor either directly or by restraining him by taking service under others or by restraining others from employing him, *Le Francisco* v. *Barnun,* **(1889) 43 Ch. D. 165; 33 M. 288.** In India, cases of conflict frequently arise between parents or guardians of minors and Christian Missionaries. The principles governing such conflict, are laid down in **16 B. 307; 1 M. L. T. 347; 23 C. 290** and **18 B. 636** and *see* also **60 P. R. 1901 (Civ.) = 167 P. L. R. 1901.** In **11 Bom. L. R. 75 = 9 Cr. L. J. 214,** there was a conflict between the mother and the executor of the father as regards custody of a minor and it was *held* that the former is entitled to the custody of the person of the minor as against the latter unless there was in the will a specific appointment of the executor as guardian. In **12 Bom. L. R. 891 = 11 Cr. L. J. 687,** the contest was between the Muhammadan mother and father to the custody of two children. By Hindu as well as by English law the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust and he cannot therefore during his life-time substitute another person to be guardian in his place. If he affects to do so, the authority conferred upon the substituted guardian is revocable, and the question whether the father is entitled to revoke it depends on the infants' interests, welfare, parentage and religion, *Besant* v. *Narayaniah,* **4 In. Ap. CCCXIV = 38 M. 807 (P.C.), 48 M. 299.**

7. Procedure.—(*i*) *Application to whom made.*—When an application is made under this section, it should be made to the Judge appointed to exercise ordinary original criminal jurisdiction of the High Court (*Quære per* MACLEAN, C.J., whether. that is the proper Court), **2 C. W. N. 333, 44 C. 76.** Where a Divisional Court has refused to grant a rule *nisi* for *habeas corpus*, the Court of Appeal has no original jurisdiction to grant such a rule, Le *Gros, ex-parte,* **30 T. L. R. 249.** But *see* now **52 C. 319** which holds that the Criminal Appellate Bench has jurisdiction to deal with an application under s. 491.

(*ii*) *Right to begin.*—When the person who obtains a rule under s. 491 is brought before the Court his counsel begins, **39 C. 164—172.**

(*iii*) *May be granted in civil or criminal proceeding.*—A writ of *habeas corpus* may be granted in a civil or criminal proceeding, *R.* v. *Barnardo,* **L. R. 23 Q. B. D. 305; 33 M. 288.**

(*iv*) *Appeal lies against order.*—The petitioner as step-mother claimed to be entitled to the custody of her deceased husband's minor son, who was living with *D*, his maternal uncle. She obtained a rule calling upon *D* to show cause why the child should not be delivered to her. After argument the rule was discharged. *Held,* that the order dircharging the rule was a judgment within the meaning of cl. 15 of *the Letters Patent*, 1865, and that, therefore, under that clause the petitioner had a right to appeal against the order, **14 B. 555;** where a single Judge of the High Court, acting under this section (or s. 456) refuses, an application for release from

illegal custody an appeal lies under cl 15 of *the Letters Patent* as such order is a judgment and not passed in a criminal *trial*, though it may be said to have been passed in a criminal *matter*, **29 C. 286 (F.B.), 28 Bom. L. R. 471.**

8. Alien enemy not entitled to writ.—See *Weber ex-parte* **31 T. L. R 602,** where it was *held* that an alien enemy is not entitled to a writ of *habeas corpus* But an alien enemy would be entitled to apply, *see* **18 B 636.**

9. Power of High Court to issue order under this section when person detained under warrant issued under Extradition Act, 1903.—It was laid down in **39 C. 164,** that the High Court has jurisdiction under this section to issue an order and to examine whether a person detained in public custody under *the Indian Extradition Act* is legally detained, and this jurisdiction is not taken away merely because the Government of India have already issued a warrant for surrender under sub-sec (8) of s 3 of the said Act The power of the High Court to interfere otherwise by way of revision *e g*, under s 491 is untouched, **42 C. 793.** But *see* also **56 C. 52.** *See* now **52 C. 319** for the effect of the amendment of section 491

Powers of High Court outside the limits of appellate jurisdiction.

***491-A.** "Any High Court established by Letters Patent may exercise the powers conferred by section 491 in the case of any European British subject within such territories, other than those within the limits of its appellate criminal jurisdiction, as the Governor General in Council may direct"

PART IX.

SUPPLEMENTARY PROVISIONS

CHAPTER XXXVIII

OF THE PUBLIC PROSECUTOR

Power to appoint Public Prosecutors

492. (1) The Governor General in Council or the Local Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors

†(2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of Police below ‡ such rank as the Local Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case §

Note—Referring to the amendment of this section the Select Committee say—

We are doubtful whether the second amendment made by the Bill in s 492 really effects what was intended In some places there are special Police Acts and they do not invariably give the Local Government power to delegate to Assistant Superintendents the powers of a District Superintendent Moreover there is a variety of nomenclature and we think it better to leave it to the Local Governments to prescribe the rank of Police-officers who may be appointed Public Prosecutors for the purposes of a particular case

Notes.—1. Who is a Public Prosecutor?—*See* s 4 (*t*) for definition

(*i*) *Pleader appointed with District Magistrate's permission is not Public Prosecutor*—In a criminal appeal pending before the Chief Court, *R*, a brother of the murdered man petitioned the District Magistrate for permission to support the conviction in the Appellate Court and permission being granted, engaged the services of a pleader for that purpose *Held* that the order on *R s* petition did not constitute such pleader a Public Prosecutor under this section **29 P. R. 1886**

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*This section was inserted by the Criminal Law (Amendment) Act XII of 1923 s 31

† The words ' in any case committed for trial to the Court of Session were omitted by Act XVIII of 1923

‡ The words 'such rank as the Local Government may prescribe in this behalf were substituted for the words ' the rank of *Assistant District Superintendent*' by *ibid*

§ ' Any case substituted for ' such case by *ibid.*

(*ii*) *Prosecutor appointed for special case is not a Public Prosecutor.*—A person appointed by a District Magistrate to conduct prosecution in a Sessions Court for the purpose of a case has not the power of a Public Prosecutor with regard to withdrawal under s. 494, **8 A. 291 (F.B.)**; **1886 A. W. N. 94**; **Weir II, 653**; but now *see* s. 495 (2).

2. **In criminal cases, the Crown by the Public Prosecutor is the party and not the complainant.**—The offence is dealt with as an invasion of the public peace and not a mere contention between the complainant and the accused. The Crown is therefore the party and not the complainant, **13 B. 389.** *See* also **30 A. 525.**

3. **Non-appointment of Public Prosecutor does not invalidate trial.**—The provisions of s. 270 that every trial before a Court of Session shall be conducted by a Public Prosecutor, is merely directory. The absence of a Public Prosecutor in a Sessions trial or a defect in his appointment, is at most an irregularity curable under s. 537, **35 P. R. 1887.**

4. **Powers of Government Pleaders to withdraw.**—The powers of Government Pleaders, who have not been appointed Public Prosecutors, under this section, to withdraw prosecutions are limited to the circumstances described in s. 240, **Weir II, 652.**

5. **Convicting Magistrate must not be appointed as Crown Prosecutor.**—In **8 B. H. C. R. Cr. Ca. 126**, the High Court censured the appointment of the Magistrate, who in the first instance had tried and convicted the accused, to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case in the following terms:—"The appointment as Crown Prosecutor of the Magistrate, who tried the case, was a most improper and singular proceeding. To convert a Judge into an Advocate seeking to uphold his decision before another tribunal is at least in the annals of British jurisprudence, quite unprecedented, and most objectionable, as he has a personal interest in the case, which a Public Prosecutor should not have. Having accepted the office, the Magistrate ought to have endeavoured to perform its duties with that calmness and impartiality which should ever characterise a Public Prosecutor." *See* also the remarks of NORMAN, J., in **4 B. L. R. Appx. I.** But they may be so appointed. In the United Provinces all Joint Magistrates and Assistant Magistrates exercising first-class powers, have been empowered to prosecute in Sessions trials.—*Government Notification*, 31st December, 1870.

6. **Public Prosecutor represents the Crown and not the Police.**—The purpose of a Criminal trial is not to support at all cost a theory, but to investigate the offence and to determine the guilt or innocence of the accused. The duty of a Public Prosecutor is to represent not the Police but the Crown and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of anyone else, **42 C. 422**; **42 C. 957.** *See* Note 2 at p. 766.

7. **Duty of a Public Prosecutor.**—It has been well said by a learned Judge: 'The Counsel for the prosecution has most accurately conceived his duty, which is to be an assistant to the Court in the furtherance of justice, and not to act as Counsel for any particular person or party.' He should not by statement aggravate the case against the prisoners, or keep back a witness, because evidence may weaken the case for the prosecution. His only object should be to aid the Court in discovering truth. A Public Prosecutor should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. "There should be on his part no unseemly eagerness for, or grasping at, conviction." *Per* WESTROPP, C.J., "In the case of Crown prosecutions in England, where the Attorney-General or Solicitor-General is conducting the case for the prosecution there is never the least vestige of animosity or prejudice. It is regrettable that the practice and procedure here in India is different, and I see no reason why that prevailing in England should not be adopted."—*Per* MACLEAN, C.J., **8 C. W. N. 17.**

(*i*) *Duty of Public Prosecutor to call witnesses.*—*See* **5 C. 614**; **8 C. 121 = 10 C. L. R. 151**; **10 C. 1070**; **14 C. 245**; **21 C. 642**; **7 A. 904**; **14 A. 521**; **15 A. 6**; **16 A. 84 (F.B.)**, **20 A. 158**; **5 Bom. H. C. R. 85**; **1 P. R. 1888**; **3 S. L. R. 200 = 11 Cr. L. J. 410.** *See* Note to s. 286 at pp. 765—769 and Notes 8—10 at pp. 714—715. As to the position and functions of the *Legal Remembrancer* in the Calcutta High Court, *see* **7 C. W. N. 11** and Note 4 to s. 417. *See* also **12 P. R. 1916** and **42 C. 422**, as to the duty of the prosecutor to call witnesses.

(*ii*) *Can the District Magistrate direct Public Prosecutor to file complaint?*—A person cannot delegate to another the right to file a complaint. A District Magistrate cannot, therefore, authorise the Public Prosecutor to file a complaint on his behalf, **13 P. R. 1915 = 184 P. L. R. 1915 = 20 P. W. R. 1915 = 16 Cr. L. J. 251.** *See*, however, Note 3 to s. 4 (*h*) at p. 7.

8. No Court-fees for documents required by Public Prosecutor.—Copies of all documents which a Public Prosecutor may require have been exempted from Court fees.—*Government of India Notification*, 21st January, 1886.

9. Madras Rules as to Public Prosecutors.—*See* pp. 154-155 of *the Madras Criminal Rules of Practice*, 1912.

Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction.

493. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.

Notes.—1. Public Prosecutor always at liberty to avail himself of private help.—When the assistance of counsel has been accepted, that assistance cannot be excluded at any of the stages of the trial, **11 B. H. C. 102.**

2. Counsel instructed by a private person cannot conduct a prosecution on behalf of Government in a trial before a Court of Session without being specially empowered by the District Magistrate. Counsel so instructed can attend and watch the case on behalf of their client, but they cannot conduct the prosecution, **Oudh R. C. No. 31.** In no Court is a pleader (in the meaning of the Code) appointed by or on behalf of the complainant, and not by or for Go[illegible]
29 P. R. 1885. *See* Notes to s. 270 [illegible]
charge put in by a private party wit[illegible]

* * * * * *

Effect of withdrawal from prosecution.

494. Any Public Prosecutor * may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person, † "either generally or in respect of anyone or more of the offences for which he is tried," and upon such withdrawal—

(*a*) if it is made before a charge has been framed, the accused shall be discharged, ‡ "in respect of such offence or offences,"

(*b*) if it is made after a charge has been framed, or when under this Code, no charge is required, he shall be acquitted ‡ "in respect of such offence or offences"

Notes.—1. Section does not apply to security proceedings under Chap. VII.—Ss. 494-495 apply only when the proceedings could end in an acquittal or discharge of the accused. Security proceedings do not contemplate the framing of a charge at all and as the result of the proceedings neither an order of discharge nor of acquittal is to be passed. Hence ss. 494-495 do not apply to security proceedings, **36 M. 315.** *See* Note 10 to s. 430.

2. Prisoner charged or committed to Sessions must be acquitted and not discharged.—When a person is committed to the Sessions on a charge he cannot be discharged, but must be acquitted under cl. (*b*), **12 M. 35.** Certain persons were charged by a District Magistrate with the offence of robbery. The complainant moved the High Court praying that inasmuch as the charge of robbery was against more than five persons, and was really or ought to have been a charge of dacoity, the Magistrate might be directed to commit the accused persons to the Court of Session. Before the disposal of this application, the Public Prosecutor having applied to the Magistrate to withdraw the charge of robbery, the Magistrate allowed the withdrawal and recorded on the charge of robbery, an order of acquittal. *Held*, that whether or not the accused ought to have been charged with dacoity, they were in fact charged with robbery and this being so, the only order the Magistrate could pass, if he permitted that charge to be withdrawn was an order of acquittal under cl. (*b*) of this section and the High Court declined to make any order, **1904 A. W. N. 277 = 2 A. L. J. 30 = 2 Cr. L. J. 21.**

* The words "appointed by the Governor-General in Council or the Local Government" were omitted by Act XVIII of 1923
† The words "—" were inserted by *ibid*
‡ The words "—" were added by *ibid*

3. **Public Prosecutor can withdraw either generally or in respect of anyone or more of the charges.**—A Public Prosecutor could under the old section, only withdraw all the charges under trial or none. He was not competent to withdraw one only of the charges. But under the new amendment he can either withdraw generally or in respect of anyone or more of the charges.

4. **Practice—Reasons for withdrawal of charge.**—If the Public Prosecutor withdraws a charge and the Court approves of it, the accused shall be acquitted. Neither the Public Prosecutor nor the Judge is called on to give any reasons for his action, **5 M. L. T. 216.** But *see* **22 C. W. N. 69 ; 48 C. 1105.**

On a permission for withdrawal under s. 494 it is not necessary to record reasons for such permission, **2 Pat. 708.**

But in a Rangoon case it is *held* that prosecutors, with the exception of the Advocate-General, may not withdraw from a prosecution without giving reasons and without the consent of the Court. In withholding or according consent the Court is acting in a judicial capacity and it must record its reasons, **1 Rang. 756** (**22 C. W. N. 69** *followed*).

4-A. An order under this section is a judicial order and the Court should record reasons but is not bound to do so. The discretion cannot be said to be improperly used if the Magistrate relies on the discretion of the Public Prosecutor and sanctions the withdrawal in order that his evidence might be available as against the co-accused.

Ss. 337 and 494, Cr. P. Code, need not be read together and the former section does not control the latter. But once an accused is acquitted as a consequence of the prosecution being withdrawn, he cannot be retried even though he refuses to give evidence for the prosecution, **56 Cal. 1023.**

5. **Withdrawal after charge bars re-trial.**—An order of acquittal on the withdrawal of the prosecution after charge is a valid acquittal to which s. 403 applies, **9 N. L. R. 26 = 14 Cr. L. J. 135.** *See* Note 26 to s. 403. Second trial and conviction after such discharge is illegal. Where the accused was charged with an offence under s. 304, I.P.C., and on the Public Prosecutor having, with the consent of the Court, withdrawn from the prosecution, was acquitted and discharged by the Sessions Court after taking the opinion of the assessors on the evidence recorded in the case, *held*, that the Public Prosecutor having withdrawn from the prosecution with the consent of the Court, an acquittal should have been recorded without taking the opinion of the assessors. An acquittal was a matter of right to the accused, whatever the opinion of the assessors might be, **Ratanlal 307.**

5-A. **Summons-case Public Prosecutor withdrawing from prosecution.**—In a summons-case, the Public Prosecutor withdrew from the prosecution before the accused had been served and the accused was acquitted under s. 494 of the Code. *Held*, under s. 429, that the Rule of English Law requiring the accused to have been tried as well as acquitted in order to bar further proceeding which is embodied in section 494 of the present Code is inapplicable to the statutory acquittals subsequently introduced into the Code, *i.e.*, the sections now numbered 494, 247, 345 ; which are intended to bar further proceedings whether the accused can be said to have been tried or not, **40 M. 976.**

6. **Further inquiry should not be directed when charge properly withdrawn.**—When it is not shown that the order of discharge under this section when it was made was not a proper order, no further inquiry should be directed under s. 437, **(1911) 2 M. W. N. 74 = 12 Cr. L. J. 440.** Fresh proceedings may be instituted if further evidence is forthcoming.

7. **Revision.**—(*i*) *High Court cannot revise order of acquittal.*—The High Court has no power to interfere with an acquittal under this section, **5 M. L. T. 216.**

(*ii*) *Can High Court interfere with discretion of Magistrate?*—*Quære* whether the High Court has power to interfere in revision with the discretion of a Magistrate in giving his consent to the withdrawal of the prosecution under s. 494, **(1914) M. W. N. 776 = 15 Cr. L. J. 641.**

8. **Accused against whom charge is withdrawn competent witness against co-accused.**—Where several accused were charged before the Magistrate under *the Gambling Act* (Bom. IV of 1877) and before any evidence had been let in, the Public Prosecutor withdrew, with the consent of the Magistrate, from the prosecution of two of the accused, and they were discharged and they were examined as witnesses for the prosecution, *held* following **5 Bom. H. C. R. Cr. 1** and **1 B. 610—619** that they were competent witnesses. *See* **47 C. 154.** *Per* WHITWORTH, J., *dissenting* that 'the accused were discharged solely that they might be used as

witnesses, and not upon a consideration of the evidence which affected them The consent of the Court was not based upon judicial considerations and therefore the accused were not competent witnesses,' **25 B. 422; 47 C 154.**

9. Withdrawal of prosecution against an accomplice.—A Local Government in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness, against others accused with him, **33 C. 1353**, where **1 B. 610** and **10 C. W. N. 847** are *followed* *See* Note 8 at p. 850 An accomplice, if not an accused under trial in the same case, is a competent witness, and may be examined on oath The prosecution must be withdrawn and the accused discharged under this section before he would become a competent witness. But if the Court purporting to act under this section sanctions the withdrawal of the prosecution but *omits* to record an order of discharge and the accused continues to be kept in custody, his position is in no way changed from that of an accused, **33 C. 1353** where **2 A. 260, 16 B. 661, 23 B. 213, 7 W. R. 44, 10 C. L. R. 553, 20 A. 426, 3 B. H. C. R. Cr. Ca. 59,** *R* v *Rudd* **Cowp. 331** (1775) are *referred to* But where the accused person is in fact discharged from custody by virtue of a withdrawal of his prosecution and the Magistrate trying the case takes judicial notice of such withdrawal the omission to use the formal words "I discharge this accused' would be at most an irregularity curable under s 537 (*a*) Where there has been an effective withdrawal of the prosecution against an accomplice and his position as a witness could not be adversely affected even though the Court did not comply with the clear provisions of s 494 (*a*), *held* that the accomplice was a competent witness though no formal order of discharge was passed **7 A. L. J. 86 = 11 Cr. L. J. 21; 18 C. W. N. 1213 = 15 Cr. L. J. 693** where **33 C. 1353** is *distinguished* *See* also **5 C L. J. 224 = 5 Cr. L. J. 142** and Notes 18—20 at p 740 *See* also **18 Bom. L. R. 268 = 17 Cr. L. J. 256.**

10. Withdrawal of prosecution in appeal.—The Public Prosecutor has no right at the appellate stage of the case to present any petition for withdrawal under section 494 even though the petition was inspired by the District Magistrate, **104 I. C. 449 = A. I. R. 1927 Cal. 816.**

Permission to conduct prosecution.

495. (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of Police * below a rank to be prescribed by the Local Government in this behalf † but no person, other than the Advocate General, Standing Council, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to do so without such permission

(2) Any such officers shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer

(3) Any person conducting the prosecution may do so personally or by a pleader

(4) An officer of Police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted

Notes—1. An officer of Police, not below a rank to be prescribed by the Local Government—IN MADRAS Police officers not below the rank of a first grade Head Constable in charge of a Police station have been empowered to conduct prosecutions (G O No 1564, Judicial, dated 19th July 1887) IN THE PUNJAB no Police officer below the rank of a Deputy Inspector is permitted to conduct a prosecution (*Punjab Gazette*, 1887, Part I, page 84) IN BENGAL (*Pol Man.*, Vol. I, page 271) IN ASSAM (*Man*, page 186) IN THE UNITED PROVINCES (*All Man*, page 215) and IN THE CENTRAL PROVINCES (*Central Provinces Gazette*, 1893, Part II page 131, *Man*, page 155), no Police-officer below the rank of a Sub Inspector has been authorised to conduct the prosecution, and IN BURMA an officer not below the rank of a Sergeant of Police (*Burma Gazette*, 1886, Part I, page 360).

* As to conduct of prosecution by Police-officers in Upper Burma, notwithstanding anything in this section, *see* Regulation V of 1892 Schedule XIV (*Upper Burma Criminal Justice Regulation*) In British Baluchistan see *the British Baluchistan Criminal Justice Regulation* VIII of 1896 Schedule s 17 *See* also s 145 of *the Indian Railways Act* IX of 1890, as to conduct of the prosecution in Railway cases.

† The words ' with the previous sanction of the Governor General in Council ' were omitted by Act XXXVIII of 1920

2. **Permission granted to unqualified persons to appear for prosecution.**—The words "any person" include persons other than certificated pleaders. It is, however, discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution.—*M. H. C. Pro., 2nd September*, 1892. The High Court, as a Court of Revision, has no power to revise an order passed by a Magistrate in the exercise of his discretion under this section, permitting a person to conduct a prosecution, **Weir II, 655; 1914 M. W. N. 776 = 15 Cr. L. J. 641.** In **6 P. R. 1905**, the Punjab Chief Court in declining to interfere with the order of a Magistrate refusing permission to allow the prosecution to be conducted by a pleader remarked, that it is not improper for the District Magistrate, if he considered that the too frequent appearance of pleaders for the prosecution in petty criminal cases, was detrimental to the interests of justice, to advise Courts subordinate to him by a general circular on the subject. *See* also **12 M. L. J. 354 = Weir II, 401** and **Weir II, 400.**

3. **Private Prosecutor can do so only with permission of Court.**—With the exception of the Advocate-General, Standing Council, Government Solicitor or other officer generally or specially authorised by the Local Government in that behalf, no person whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate, **6 C. 59; 17 Cr. L. J. 486.**

4. **Private Prosecutor may appear personally or by pleader.**—Any person whether a private complainant or not, when permitted to conduct a case as prosecutor, may instruct Counsel to appear, **11 B. H. C. R. 102.**

5. **Reason for the exclusion of Police investigating officer from prosecuting.**—In all important cases, and especially in cases of murder and dacoity, the Police-officer making the investigation should be examined as a witness, regarding the circumstances of the investigation. It is generally important to the trying authority to know why, where and when the accused persons were arrested. It is often important to ascertain what the witnesses said when they were first questioned by the Police, and whether such statements agree with those subsequently made by the witnesses in Court, **Ratanlal 173.** *See* also **18 W. R. 18; 8 B. 534.**

6. **Conduct of prosecution by investigating Police-officer improper, but trial not invalidated.**—Where a Police Inspector got information that persons were carrying on a wagering business and having satisfied himself, obtained a warrant under s. 6 of *the Bombay Gambling Act* IV of 1887 and effected the arrest of the accused and the seizure of their books; *held*, that the Police Inspector had taken a part in the investigation within the meaning of sub-sec. (4) of this section, though he may not have examined any of the witnesses, and consequently, the Police Inspector was not qualified to take any part in the proceedings, except as a witness. Where the Police Inspector thus disqualified is allowed to conduct the prosecution, it is a grave irregularity, but unless the accused were prejudiced, the irregularity does not invalidate the trial, but is cured by s. 537 **26 B. 533.**

7. **Quære whether stranger may be permitted to conduct prosecution.**—"It is doubtful whether the words 'any person' in s. 495 would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only," **11 A. L. J. 313 = 14 Cr. L. J. 389.** In this case the High Court set aside the order granting permission.

8. **"Any such officer"—Withdrawal by unauthorised person.**—These words in cl. (2) refer only to the 'Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf' mentioned in sub-sec. (1). If an Advocate, privately engaged by the complainant and permitted by the Magistrate to appear for the prosecution, withdraws from the prosecution, the effect provided in s. 494 does not follow; in other words, the trial proceeds, **1908 U. B. Cr. P. C. 15 = 10 Cr. L. J. 14.** Even if a Police Inspector is specially permitted to conduct a prosecution under cl. (1) he would not be competent to withdraw the case under cl. (2), **1911 M. W. N. 106 = 9 M. L. T. 203 = 11 Cr. L. J. 722.** But *see* **46 C. 700.** Where on the day appointed for the hearing and before the inquiry, a Police Inspector appeared and said that he withdrew the case against the accused and the Magistrate thereupon discharged the accused; *held*, that the Magistrate had no power to pass such an order and further enquiry was ordered. The Police Inspector had not been permitted to conduct the prosecution under s. 495 and if he was not so permitted, he would have had no power to withdraw the case under s. 495 (2) even if he came within the purview of the words 'any such officer' in that clause, **1911 M. W. N. 106.** An acquittal following on the withdrawal by an unauthorised officer is of no effect, **10 Cr. L. J. 501 (M.).**

A Prosecuting Inspector cannot be regarded as a Public Prosecutor for purposes of withdrawal under s. 495 (2), **46 A. 88.**

CHAPTER XXXIX *

OF BAIL

496. When any person other than a person accused of a non bailable offence is arrested or detained without warrant by an officer in charge of a Police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail.

In what cases bail to be taken.

Provided that such officer or Court, if he or it thinks fit, may instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided

† Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub section (4), or section 117, sub-section (3)

Notes.—1. *See* s 4 (*b*) for definition of "bailable" and "non bailable", and s 4 (*p*) for definition of "an officer in charge of a Police-station," s 55 for an example of an arrest of a person not accused of an offence, s 86 for the taking of bail by a Magistrate, s 60, etc., for the production before a Magistrate and *see* s 514 for forfeiture of bail bond

1-A. For form of bond and bail-bond.—*See* s 555 and Schedule V, Form Nos III, XXV, XLII

Court fees—Bail bonds exempt—Under s 19, cl xv of *the Court fees Act* VII of 1870 bail bonds in criminal cases recognisances to prosecute or give evidence, and recognisances for personal appearance or otherwise are exempted from Court fees

2 General nature of the right to be admitted to bail.—"Bail" is not intended to be punitive, but only to secure the attendance of the prisoner at the trial *Per* RUSSELL, L.C J *In re Charles Rose,* **14 Times L. R. 213.** *See* also *in re Barronet* (1852) **1 El. v Bl. 1;** *Reg* v *Scaife,* (1841) **9 Dowl. 553, 2 C. W. N. 125.** The detention of an accused under trial is not intended to be penal, but its object is to secure attendance, **36 C. 174,** but *see* Note 2 to s 498 The seriousness of an alleged offence and some evidence of its perpetration by the accused would, however, justify detention. "We may express a hope that Magistrates will always be lenient to accused persons at any rate, until they are convicted" *Per* PARSONS, J, **22 B. 549.** A Magistrate is not competent to refuse bail, unless the law sanctions such refusal, **1 C. L R. 130** In exercising the discretionary power to admit a person to bail, Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence and the character, means and standing of the accused, **A. I. R. 1929 Lah. 284.**

3. Difference between 'recognisance' and 'bail.'—S 496 coupled with Form XLII of Sch V contemplates two kinds of security, namely, (1) the simple recognisance of the principal and (2) security with sureties. Where an Act provides for release on 'bail that means' security with sureties and this is the meaning which has been attached to the word in the practice and procedure of the Courts as distinct from the simple recognisance of the principal, **15 C. W. N. 736 = 12 Cr L. J. 358.** 'Bail' means the freeing or setting at liberty one arrested or imprisoned upon others becoming sureties by recognisance for his appearance at a day and place certainly assigned, he also entering into his own recognisance The party is delivered (or *bailed*) into the hands of the sureties and is accounted by law to be in their custody, they may, if they will, surrender him to the Court before the date assigned and free themselves from further responsibility

4. Bail may be claimed as of right by person not accused of non-bailable offence.—It must be understood that for every bailable offence, bail is a right and not a favour, detention in the lock up is the alternative, not the original order The bail demanded should never be excessive with reference to the social status of the party The amount of bail and the offence charged with the section under which it is punishable, should always be stated on the face of the order directing the accused to be detained in the lock up Bail may be tendered and must be accepted at any time before conviction. *Punjab* Cr, Vol. II, p 239 *S* arrested under the proviso of s 114, applied to be released on bail, but the District Magistrate trying the case refused to bail the accused on the ground of expediency and his pleader s inability to show a provision in the Code how a bail could be claimed *Held,* that under this section bail may be claimed as

* The provision of this Chapter and of Chapter XLII shall so far as may be apply to bail given and bonds executed under s 123 (4) of *the Indian Railways Act* IX of 1890

† This proviso was added by Act XVIII of 1923

of right not only by one accused of bailable offence, but by "*any person other than a person accused of a non-bailable offence*" who is arrested or detained without warrant by an officer in charge of a Police-station or appears or is brought before a Court, **6 C. P. Cr. 31.** It has, however, been *held* in **36 M. 474,** that s. 496 does not give an absolute right to bail to any person who is not charged with a non-bailable offence and that section must be read along with other provisions of the Code giving a special right of detention to a Court. Therefore the provision in s. 107, cl. (4) that a Magistrate before whom a person is sent under that section (may in his discretion detain such person in custody until the completion of inquiry) is not subject to or controlled by s. 496. *See* **14 C. W. N. 138.** Notes 7 and 11 below. *See* **9 S. L. R. 158 = 17 Cr. L. J. 77.** *See* now the new proviso to the section which expressly says that powers under s. 107, cl. (4) are not subject to the operation of ss. 496 and 117, cl. (3).

5. **Who may release on bail.**—(*i*) *See* ss. 57 (2), 59 (3), 60, 63, 169, 170, 496, 497 for powers of Police officer to release on bail; (*ii*) ss. 76, 86, 91, 167, 186, 217, 426, 427, 466, 475, 476, 477, 478, 496, 497 for the general powers of Courts to release on bail; (*iii*) s. 432 for bail by a Presidency Magistrate on making a reference; (*iv*) s. 438 for bail by District Magistrate when making reference; (*v*) ss. 432, 438 for powers of Sessions Judge to release on bail, and (*vi*) ss. 426, 434, 498 for powers of High Court.

6. **Leaving decision as to sufficiency of bail to Police illegal.**—The practice of leaving to the Police the decision as to the sufficiency of bail, when bail has been ordered by the Court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself and not with the Police, **16 C. 455,** though the Court may call for a report from the Police. *Cf.* Notes 89—91 at p. 203.

7. **Bail and detention in custody in cases under Chapter VIII.**—*See* ss. 107 (4), 123 (2) and 114, Notes under them. Where a person appeared in answer to a summons requiring him to find security for good behaviour for one year, and the Magistrate adjourned the hearing of the case in order that the accused person might produce evidence as to character; *held,* that the Magistrate was empowered to take a personal recognisance from the accused person for his appearance at the adjourned hearing, **6 N.-W. P. H. C. R. 366; 12 Cr. L. J. 533 (B.).** *See* Note 4. The words "at any stage of the proceedings" indicate that there is nothing to confine the operation of this section to a period anterior to the hearing. *See* **17 Cr. L. J. 77.** *See* now the new *proviso* to s. 496 which expressly lays down that ss. 107, cl. (4) and 117, cl. (3) are not subject to section 496.

8. **Magistrate may make himself personally responsible if bail improperly refused.**—If bail be improperly refused, the Magistrate in addition to an action for damages, will be liable under s. 166 or s. 342, I.P.C. But the refusing or accepting of bail is a judicial and not merely a ministerial duty (*contra, see* **29 M. 100**), and a mistake in the performance of that duty without malice, will not be sufficient to sustain an action, **2 M. H. C. R. 396.**

9. **Money may be deposited instead of executing bond.**—S. 513 permits of a deposit of a sum of money or Government Promissory Notes to be given, except in the case of a bond for good behaviour, in lieu of executing a bond.

10. **Bond should be by accused and not by agent, when personal attendance of accused dispensed with.**—Where the personal attendance of an accused person is dispensed with, a recognisance bond, if deemed necessary, should be taken from *him* and not from his *agent* though he may appear by agent, **5 B. H. C. R. Cr. Ca. 64.**

11. **Section applies to Appellate Court—Reasons for refusing bail must be given.**—The petitioners who were convicted of bailable offences appealed to the District Magistrate and applied for bail. The District Magistrate admitted the appeal, but made the order "bail refused" on the bail petition without giving any reasons. The petitioners then moved the High Court. *Held*, the fact that no reasons were given was ground sufficient for the granting of bail by the High Court. *Held further*, that as the District Magistrate could only have acted in the exercise of his jurisdiction as regards bail under s. 496, he was obliged to grant bail under that section, **14 C. W. N. 188.**

When bail may be taken in case of non-bailable offence.

497. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a Police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of * "an offence punishable with death or transportation for life:"

* The words "—" were substituted for the words "the offence of which he is accused" by Act XVIII of 1923

* Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail

(2) If it appears to such officer or Court at any stage of the investigation inquiry or trial as the case may be that there are not reasonable grounds for believing that the accused has committed † a non bailable offence but that there are sufficient grounds for further inquiry into his guilt the accused shall pending such inquiry be released on bail or at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereafter provided

‡ (3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing

‡ (4) If at any time after the conclusion of the trial of a person accused of a non bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence it shall release the accused if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered

§ (5) A High Court or Court of Session and in the case of a person released by itself any other Court may cause any person who has been released under this section to be arrested and may commit him to custody

Note—Referring to the amendment of the section the Select Committee say—

It was pressed upon us that the provisions as to bail in non bailable cases are much too stringent One suggestion made to us was that in s 497 We should delete all words after may be released on bail in sub-sec (1) and the whole of sub-sec. (2) The result would have been to give all Courts full discretion in the matter of allowing bail in non bailable cases and we felt generally that this was going too far What we have done is to allow the Court or Police-officer to release on bail in a non bailable case unless there appear to be reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation and as some safeguard against this we have provided for a review by the Sessions Court or the High Court of any order admitting to bail in a non bailable case Some of us—including all the official members of the Joint Committee—are of opinion that this decision goes too far and that in the end it will not tend towards the administration of justice.

Notes.—1 *See* Chapter V A for arrest without warrant s 170 etc. for appearance before Magistrate s. 167 for detention in Police custody and s 344 for remanding accused into custody

2 General rule in non bailable cases—Under the old law the general rule was that bail could not be granted in respect of non bailable offences except under special circumstances (**8 Bom L R 420 = 36 C. 166**) But under the new amendment the intention of the Legislature seems to be to make the rule with regard to the granting of bail less stringent and now except in the case of offences punishable with death or transportation for life an accused person can be ordinarily admitted to bail.

With regard to persons under the age of sixteen or any woman or any sick or infirm person the Legislature has further relaxed the stringency of the law with regard to the granting of bail even in the case of offences punishable with death or transportation for life

2 A Meaning of the words 'punishable with death or transportation for life—The phrase death or transportation for life in s. 497 does not extend to offences punishable with transportation for life only but means only those offences for which death and transportation for life are alternative sentences The case in **2 Rang 546** which by implication ruled that the phrase punishable with death or transportation for life covers offences punishable only with transportation for life is *dissented from* **3 Rang 538** The phrase death or transportation for life must be read disjunctively as if it ran punishable with death or with transportation for life **5 Rang 276**

* The words — were substituted for the words such offence by *ibid*
† This proviso was added by *ibid*
‡ These sub-sections were added by Act XVIII of 1923
§ This sub-section was substituted for the original sub section (3 by *ibid*

3. **Section does not control powers to defer taking of evidence.**—This section assumes that evidence has been taken, and provides for the release of the accused on bail, if the evidence so taken is not such as to raise a strong presumption of the guilt of the accused person; but this section does not import that the taking of the evidence may not be deferred, **6 M. 63 at p. 65.** *See* **11 B. L. R. Appx. 8.** It is, however, the right of an accused person to demand that the charge against him should be tried without any unreasonable delay and such delay will dispose the Court to grant the bail, **36 C. 166.**

4. **Proceedings involving determination as to bail are judicial.**—The proceedings in which it has to be determined whether an accused person has to be admitted to bail by a Magistrate is a judicial proceeding, and as such cognisable by the High Court in its revisional powers, **6 M. 63 at p. 65.**

5. **Bail cannot be demanded when accused is discharged.**—Where a Magistrate after inquiry comes to the conclusion that the case against the accused is not proved, and discharges him, he has no authority to demand bail. It is only in cases where further inquiry is pending and the accused has not been discharged that bail can be demanded under this section, **10 W. R. 34 = 1 B. L. R. (S.N.) 26.** Bail cannot be demanded merely because more evidence might turn up.

6. **Sub-Magistrate's order as to bail not subject to revision by District Magistrate.**—The discretionary power vested in a Magistrate by this section is not revisable by the District Magistrate. If he considers the order as to bail passed by a Subordinate Magistrate to be wrong, he should report it to the High Court. He ought not to have made a transfer, the mode of giving effect to his opinion that the order was wrong, **22 B. 549.** A District Magistrate has no power to order re-arrest of a person released on bail by a Sub-Divisional Magistrate, **4 Bur. L. T. 70 = 12 Cr. L. J. 244.**

7. **Revision of bail order by High Court.**—Where a Sessions Judge, after considering the evidence comes to the conclusion that there are no reasonable grounds for believing the accused guilty, and admits him to bail, the High Court will not go beyond the finding and discharge the bail, either under s. 439 or under any other provision of law, **10 M. L. J. 411.** *See* **1 C. L. R. 130; 5 A. L. J. 419 = 1908 A. W. N. 195 = 8 Cr. L. J. 49.** But even where both the Sessions Judge and trying Magistrate have refused bail, it is open to the High Court to grant bail, **36 C. 174.** *See* Note 2 to s. 498 and Note 54 to s. 439, now under sub-sec. (5) a High Court or a Court of Session has power to revise an order of bail; and the Court granting bail can review its own order.

8. **Remand order to be made in presence of accused.**—An order for remand should be passed in the presence of the accused person. To remand is to re-commit to custody and therefore as a magisterial commitment requires the presence of the prisoner, his remand or re-commitment also requires that presence so as to give him an opportunity of applying to be admitted to bail, **4 B. L. R. Appx. I.** *M. H. C. Pro., 10th June,* 1867. *See* Note 16 at p. 883.

9. **Magistrate may cancel bail under sub-sec. (3), but must give reasons.**—If it appears subsequently on the production of further evidence that a case has been made out against the accused released on bail, it is competent for the Magistrate to declare the bail bonds cancelled and to direct the accused to surrender, **10 C. W. N. 1093 = 4 Cr. L. J. 221; 36 C. 166 at p. 173; 36 C. 174.** Reasons must be recorded for cancelling the bail **(1911) 2 M. W. N. 138 = 12 Cr. L. J. 503.** Where an accused person had been let out on his bond it was held in **38 M. 1088** that a warrant issued for his arrest without recording reasons was illegal. *See* now sub-sec. (3) as amended.

10. **Duty of Court to release on bail when further remand applied for.**—*See* **6 M. 63** and **69, 36 C. 174, 11 N. L. R. 162 = 16 Cr. L. J. 705** and Notes 18—20 at pp. 883-884. The High Court would be very cautious in interfering with the discretion of the Magistrate in a case, where the prosecution, after the inquiry has begun before the Magistrate, does not tender evidence that the accused has some guilty connection with the non-bailable offence, **Ratanlal 892.**

11. **Validity of bond to appear before Police.**—The wording of ss. 499 and 514 makes it abundantly clear that a Police-officer in charge of a Police-station has power to make it a condition of a bond that the accused person shall attend before the Police at the time and place mentioned in the bond, and that if he fails so to attend and a Magistrate of the first class is satisfied that the bond has been forfeited, any person bound by the bond can be called upon to pay the penalty thereof. To hold that in such cases the bond can be conditioned merely for appearance *before a Court* would render nugatory the provisions which enable the Police to take bail-bonds from accused persons during the course of the inquiries and would moreover make

meaningless the provisions of s 499 and s 514, **11 C. 77** *dissented from* if it intended to lay down a general proposition that a bail bond under s. 497 cannot be conditioned for the appearance of the accused before the Police, **21 P. R. 1913 = 6 P. L. R. 1914 = 6 P. W. R. 1914 = 14 Cr. L. J. 631.** *See* Note 4 to s. 514

12. Bail under the Criminal Law (Amendment) Act 1908 —*See* Note 5 to s. 498

12-A. Bail under the Extradition Act.—*See* **26 Bom. L. R. 984.**

13. American cases.—If facts do not sustain the charge of murder contained in a warrant bail may be allowed —*People* v *The Sheriff of Westcester*, **1 Park 159.** In a case of a man-slaughter, where there is no reasonable doubt of the prisoner's guilt bail will not be allowed —*Ex parte, Taylor*, **5 Cow. 39.** But even in a capital case bail ought to be allowed, unless the proof be evident and the presumption great. *People* v *Perry*, **8 Abb. 27**; *People* v. *Hyler*, **2 Park 570.** That a case has been twice tried and the jury in both cases disagreed, presents a proper case for admitting to bail.—*People* v *Perry*, **8 Abb. Pr. (N S) 27.**

Power to direct admission to bail or reduction of bail.

498. The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive, and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not direct that any person be admitted to bail, or that the bail required by a Police-officer or Magistrate be reduced

Notes.—1 Power and scope of High Court and Sessions Court to bail.—The High Court has concurrent jurisdiction with that of a trying Magistrate and not merely revisional jurisdiction, **36 C. 174.**—*Per* MITRA, J., at p **177.** The provisions of this section are not controlled by those of s 497, and it is open to the High Court or a Court of Session, to admit any person to bail for good and sufficient cause, the general rule, however, in respect of non bailable offences is, that bail is not to be taken except in special circumstances, **Weir II, 657**; **5 Rang. 276.** An accused should not, however, be admitted to bail, where the probability of his conviction being wrong depends on a mere technical ground, **Ratanlal 480.**

The provisions of s 498 of the Code are particularly wide and the Sessions Judge has power thereunder to admit to bail a person whose case has been referred under s 123 (2), pending the hearing of the reference, **50 C. 969.**

(*i*) *Even before case is put up before Magistrate*—In granting bail, the High Court and the Court of Session have unlimited powers of judicial discretion They can exercise the power soon after the arrest of the accused by the Police, even before the case is sent up to a Magistrate, **7 Bur. L. R. 86.**

(*ii*) *Accused committed for trial may be let on bail*—The Sessions Judge has power to admit to bail the accused committed for trial on a charge of a non bailable offence, **1882 A. W. N. 234 (F.B.).**

(*iii*) *Even convicted person may be let on bail*—S 498 is not confined to cases prior to conviction. In **1903 A. W. N. 195 = 5 A. L. J. 419,** it was stated that s. 498 gives the High Court and the Court of Session very wide powers to admit to bail, even where an accused person has been convicted and has not appealed. Under s. 390 of the 1872 Code it was held in **1 A. 151 (F.B.)** and **1882 A. W. N. 234 (F.B.)** that bail could not be granted in the case of a convicted person but the grounds on which the decisions rest are no longer tenable by the changes introduced by the Legislature. But *see* Note 3

2. Principles which should guide High Courts in granting or refusing bail.—The main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these, which has always guided English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond.—*Per* MITRA, J, in **36 C. 174.** But *see* **36 C. 166,** where it is laid down that in exercising its discretion under s 498 the High Court should not confine its attention only to the question, whether the prisoner is likely to abscond or not. There may be other circumstances, which may also affect the question of granting bail to accused persons charged with crimes of a grave character The English cases are not necessarily a safe guide in interpreting sections of the Code "As the High Court, our power to grant bail 'in any case' as given by s. 498 is quite unfettered, though we consider that in exercising our discretion [illegible] rities to grant bail imposed by [illegible] Courts other than High Court [illegible] us as well as by every other

Court unless anything appears to the contrary. The extended powers given to the High Court under s. 498 are certainly not to be used to get rid of this very reasonable and proper provision of the law," **42 C. 25.** *See* also Note 2 to s. 496 and Note 2 under s. 497. Bail is not to be withheld merely as a punishment, the requirements as to bail are merely to secure the attendance of the accused at the trial. The test is to be applied by reference to the following considerations amongst others: (1) The nature of the accusation; (2) The nature of the evidence in support of the accusation; (3) The severity of the punishment which conviction will entail; (4) The character of the sureties, *i.e.*, whether they are independent or indemnified by the accused; (5) The character and behaviour of the accused. Any allegation that the accused is tampering or attempting to tamper with evidence would be a cogent ground for refusing bail, **6 Pat. 802.**

(*i*) *Bail pending inquiry before Magistrate.*—An accused person ought to be released on bail until reasonable grounds are made out on the evidence, for believing him to be guilty. When a Magistrate issued warrants for the arrest of certain persons for a non-bailable offence, against whom there were no reasonable grounds on which he might believe that they were guilty of the offence, for which another person was accused on facts inconsistent with their guilt, the Calcutta High Court directed that on their arrest, they should be admitted to bail, **10 C. W. N. 1093 = 4 Cr. L. J. 221.** Where there has been unreasonable delay in trying the accused and no evidence is adduced after remand, the High Court will be disposed to grant bail, **36 C. 166.** It is no doubt the case that a High Court has absolute discretion in the matter of granting bail and is not bound by the provisions of s. 497, but the Legislature having placed the initial stage of dealing with crimes with Magistrates and having in fact enacted that persons accused of non-bailable offences shall not be released on bail except under the terms of s. 497, a High Court is bound to follow the general law as a rule, and not to depart from it except under very special circumstances, especially so in the initial stages of a case, **6 L. B. R. 172 = 14 Cr. L. J. 171.**

(*ii*) *When Sessions Judge has been moved.*—The High Court will not ordinarily interfere where a Session Judge acts with due care in the exercise of his discretion, **5 A. L. J. 419 = 1908 A. W. N. 195 = 8 Cr. L. J. 49.**

3. Jurisdiction of Sessions Court to release on bail person convicted by itself pending appeal.—Where a Sessions Judge after convicting the accused, released them on bail pending their appeal to the High Court; *held*, he had no jurisdiction to do so, in spite of the use of the words "any person" in this section. The High Court can do so, but not the convicting Court itself. The latter Court has given its final opinion that the accused is guilty and deserves imprisonment. It cannot then, consistently with the principle of finality indicated in **10 B. 176 (F.B.)** vary its own order by admitting the convicts to bail. The word "any" in the section must be read, subject to the limitation that is implied in that principle. The section indicates generally the powers of a Sessions Judge to release on bail all prisoners, who, he thinks, may be found to have been wrongly convicted, and whose case he can either deal with himself or has power (s. 438) to refer to the High Court. The section does not give him power in any way to alter or vary his own order, **4 Bom. L. R. 55.** *See* also **15 P. R 1908.** *Contra, see* Note (iii). As to rulings under the old Code, where the language employed was "any accused person," *see* **1 A. 151 (F.B.)**; **1 B. R. L. Ap. Cr. 7; 23 W. R. 40 at p. 42.**

4. Power of High Court to admit to bail, pending appeal to Privy Council.—Where a person who was convicted at the Criminal Sessions of the Madras High Court, which conviction was reviewed by the High Court under s. 26 of *the Letters Patent* obtained from the Privy Council special leave to appeal and the Privy Council had on the petitioner's application for bail expressed the opinion, that the matter of bail should be decided by the High Court, and an application was accordingly made to the High Court; *held*, that the High Court had jurisdiction to release the accused on bail, pending the decision of the Privy Council, and having regard to the rule laid down by the Judicial Committee in *ex-parte Carew*, **L. R. 1897 A. C. 719,** as to the circumstances in which an appeal in a criminal matter would be admitted by the Privy Council, *held* that the accused ought to be released on bail, **24 M. 161.**

But the Punjab Chief Court held that after deciding a criminal case, whether on Original, Appellate or Revision side and upholding the conviction of a prisoner, it has no power under s. 498 to the Code to suspend the operation of his sentence and to release him on bail, on his asserting his intention to appeal to His Majesty in Council, because (*a*) the section does not refer to a case where the Court is *functus officio*, but refers to cases where the Court has still some power left as regards the sentence of the accused; (*b*) the Criminal Procedure Code does not provide for an appeal to the Privy Council and does not provide, for the release of the accused appealing to the Privy Council, **15 P. R. 1908 = 19 P. W. R. 1908 = 8 Cr. L. J. 89** where **4 Bom. L. R. 55** is *referred to* and **24 M. 161** *distinguished.*

The High Court has no power, after disposal, on revision of a case tried by a Magistrate, to grant bail under s. 498 of the Code or cl 41 of the Letters Patent, 1865, in order that a petition may be made to the Privy Council for special leave to appeal or until such petition has been disposed of by the latter, *per* RICHARDSON, J —The High Court has no inherent jurisdiction to liberate an accused on bail, **50 C. 585.**

5. Special powers of High Court to grant bail—

(*i*) *Coroners Act* 1871 —In **31 C. 1**, it was *held* that after a Coroner has drawn up an inquisition against a person under Act IV of 1871, and committed him to prison, the High Court alone is empowered to release such person on bail, but now by the amending Act IV of 1908 the Magistrate, to whom the accused is sent under s 26 has power to release on bail.

(*ii*) *Extradition Act* XV of 1903 —*See* Appendix II The Extradition Act provides for bail to be furnished by person accused of certain crimes and the matter is one which must be regulated by this Code The High Court has the fullest discretion in the matter, but regard must be had to the provisions of s 496 and the circumstances of the case, **15 C. W. N. 736 = 12 Cr. L. J. 358.**

(*iii*) *Sindh Frontier Regulation* III of 1892 —An application for bail on behalf of an accused who is being tried by a Jirgah of Elders under s 8 of the Sindh Frontier Regulation does not lie to the High Court under s 498 **5 S. L. R. 105 = 12 Cr. L. J. 568.**

(*iv*) *Criminal Law (Amendment) Act ss* 12 *and* 14 —*See* Appendix XII Where the provisions of Part I of the Criminal Law (Amendment) Act have been applied to proceedings before a Magistrate in respect of an offence the Sessions Judge ceases to have jurisdiction to grant bail under s 498, the exercise of such jurisdiction being inconsistent with the special procedure prescribed in the said part The proper Court to apply to for bail in such a case is the High Court whose power to admit to bail is not affected by the Act, **37 C. 439.** But the High Court in exercising its discretionary power under that section, will take into consideration the terms of s 12 of the Act, **37 C. 412**

(*v*) *S* 50 *of the Indian Insolvent Act*.—The Criminal Procedure Code has no application to such a case, **17 B. 334.**

6. No Letters Patent appeal against order of single Judge refusing bail.—An order refusing bail to an accused is an order in a criminal trial It is not a judgment within the meaning of clause 15 of *the Letters Patent* and no appeal lies against such an order of a single Judge, **19 M. L. J. 478 = 11 Cr. L. J. 279.**

7. Application for bail containing irrelevant or scandalous matter not to be entertained —Where a prisoner applied to the High Court to be admitted to bail pending the disposal of his appeal and the petition contained defamatory allegations, consisting, *inter alia*, of irrelevant attacks on the trying Magistrate and other officers in the service of the Government of India, the Court refused to allow the petition to be filed and ordered it to be returned, **15 B. 488.**

Bond of accused and sureties

499. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the Police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the Police-officer or Court as the case may be

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge

Notes.—*See* Notes under s 514 for forfeiture of bond

1. Form.—As to form of bond and bail bond on a preliminary inquiry before a Magistrate *see* Sch V, Form No 42

2. Contents of bond —(*i*) *Must provide for money penalty* —**17 C. P. L. R. 113 = 1 Cr. L. J. 834.** (*ii*) *Time and place must be mentioned* —Time and place must be mentioned in the bond itself **1885 A. W. N. 44.** (*iii*) *Total of surety bonds not to exceed amount of accused's own recognisance* —When an accused person is released on bail with sureties the sureties should ordinarily be made jointly and severally liable for the same

amount as the accused, and cannot be made liable for more. The total of the sums recoverable from them must not exceed this amount, **2 L. B. R. 235; 1905 U. B. R. 31 = 2 Cr. L. J. 463.** But *see* **36 C. 362,** Note 22 to s. 514.

3. **Is it illegal to require the daily attendance of accused?**—There is nothing illegal in requiring the accused to execute a bond for appearance daily, **6 Mad. H. C. R. Ap. 38.** But *see* **20 W. R. 23 = 11 B. L. R. Ap. 8** where it is stated that it is impossible to say that admitting him to bail upon recognisances condition in such a way is the same thing as releasing the prisoner.

4. **Bond may be conditioned to appear before Police.**—The words "until otherwise directed by the Police-officer" show that a bond under s. 497 may be conditioned to appear before the Police and the provisions of s. 497 are not limited to appearance before the Court, **22 P. R. 1913 = 6 P. L. R. 1914 = 6 P. W. R. 1914 = 14 Cr. L. J. 631.** *See* Note 11 to s. 497 and Note 4 to s. 514.

5. **Only one bond from accused and his sureties.**—In a good behaviour case it was *held* that only one bond should be taken from the accused and his sureties for one determinate amount, the sureties engaging to be bound jointly and severally for the same amount as the accused so that it may be realisable from anyone of the obligers. There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally, exceeding in the aggregate the amount for which the accused is liable, **30 P. R. 1890.** *See* also Form No. 42, Sch. V.

6. **Magistrate must himself decide on fitness of sureties.**—*See* Note 6 to s. 496. *See* Notes 89—91 at p. 203.

Discharge from custody.

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released, and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

Form.—As to form of warrant, to discharge a person imprisoned on failure to give security, *see* Sch. V, Form No. 43.

Power to order sufficient bail when that first taken is insufficient.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Note.—Power to cancel bond or increase amount of bail.—When a surety for good behaviour has once been accepted, a Magistrate has no power subsequently to cancel the security bond, though he may be of opinion that the surety is an unfit person, **1 C. W. N. 394; 16 P. R. 1905; 28 P. R. 1901.** *See* Note 97 at p. 205. A Magistrate is justified in increasing the amount of bail if by further enquiry the case turns out more serious than he first imagined, **4 P. W. R. 1912 = 66 P. L. R. 1912 = 13 Cr. L. J. 474.**

Discharge of sureties.

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such persons to find other sufficient sureties and, if he fails to do so, may commit him to custody.

Note.—Magistrate must act on application of surety—It is only on the appearance of the person released on bail that the bond of the sureties is discharged (sub-sec. 3). When a surety applies for a cancellation of his bond under this section there is no such thing as hearing the application on the merits The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused. Hence if a surety after once presenting an application for the cancellation of his bail bond fails to appear in person or by pleader such failure cannot deprive him of his right to treat the bond as cancelled When once the application is presented and received there is no option left to the Magistrate but to act under this section **9 Bom L R. 1185**

CHAPTER XL

Of Commissions for the Examination of Witnesses

When attendance of witness may be dispensed with

Issue of commission and procedure thereunder

503. (1) Whenever in the course of an inquiry a trial or any other proceeding under this Code it appears to a Presidency Magistrate a District Magistrate a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay expense or inconvenience which under the circumstances of the case would be unreasonable such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class within the local limits of whose jurisdiction such witness resides to take the evidence of such witness

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government the commission may be issued to such officer

(3) The Magistrate or officer to whom the commission is issued or, if he is the District Magistrate he or such Magistrate of the first class as he appoints in this behalf shall proceed to the place where the witness is or shall summon the witness before him and shall take down his evidence in the same manner and may for this purpose exercise the same powers as in trials of warrant cases under this Code

(4) Where the commission is issued to such officer as is mentioned in sub-section (2) he may delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India

Notes—*See Chapter XXV for the mode of taking evidence in inquiries and trials*

1 Power given by s 503 cannot extend beyond India.—S 503 provides for the issue of a commission in criminal cases in India where the witness is residing in India or in the territories of any Prince or Chief in India There is no provision in this Code for the issue of a commission in criminal cases for the examination of a witness residing elsewhere **10 Cr L J 571 (A) 5 B 338**

(*i*) *No power to issue commission for examination of witnesses in England*—The High Court has no authority in a criminal case pending before it to issue a commission or a letter of request to the English Courts for the examination of a witness residing in England *see* also **20 P R 1878** Statute 22 Vict Cap 20 (if it has any reference to criminal cases at all) merely enables the English Scotch or Irish Courts to enforce attendance of a witness before the person named i [illegible] where in His Majesty s dominions The Courts in [illegible] cedure for authority to make such an order and nc [illegible] XXXVII of the rules of the Supreme Court of Judicature in England have been made to carry into effect the provisions of 22 Vict. Cap 20 s 6 and other Acts But where the Act itself does not authorise the issue of a letter of request independently of the issue of a commission the rules made under the Act cannot authorise the issue of such commission **10 Cr L J 571 (A)**

(*ii*) *No power to issue commission to a Colonial Court to take down evidence.*—In 5 **B.** 338 it was *held* that the Bombay High Court had no power to issue a commission to Mauritius in a criminal case. *See* also the statement of the Advocate-General at p. 337 of 3 **B.** 334. The powers given by this Code (s. 503) cannot of course extend beyond India; nor has the law been altered by *the Evidence Commission Act*, 1885, 48 and 49 Vict., Cap. 74, s. 3 which deals with taking evidence in criminal cases and enables Indian and Colonial Courts required by mandamus to take evidence in a criminal case arising beyond their jurisdiction to take such evidence in a particular manner. It does not, however, empower Indian or Colonial Courts to mandamus other Courts abroad to take evidence in criminal cases. In England under 13 *Geo. III.*, cl. 68, ss. 40, 44, 45 and 1 *Will. IV.*, cl. 22, ss. 1 and 2, the Court of King's Bench is authorised to issue a mandamus to Indian and Colonial Courts in certain criminal cases, but Indian and Colonial Courts have no power to issue a mandamus, to another or to English Courts to take evidence in criminal cases, and there is in my opinion no provision of law by which witnesses in criminal cases arising at Chidambaram can be exercised in Ceylon.—*Opinion of the Advocate-General, Madras, dated 27th February*, embodied in G.O. No. 464, Judicial, 12th March, 1904.

(*iii*) *No commission can issue to French-India.*—As evidence taken before French Courts is inadmissible in criminal trials before English Courts, and as the French Government is advised that it is not open to them to empower a British Consular Agent to administer an oath and enforce the attendance of witnesses within French territory, there appears to be no way in which commissions issued by English Courts in criminal cases for the examination of witnesses in French-India can be executed, unless s. 503 of the Criminal Procedure Code is amended. Sessions Judges and Magistrates are therefore requested to discontinue the issue of commissions under this Court's Circular No. 2781, dated 13th October, 1886, which is hereby recalled, except in so far as it relates to commissions issued for execution in British India by French Courts.—*H. C. Cir., 4th October*, 1887, *Nos.* 25—49. *Madras Rules*, *Nos.* 24 *and* 25, *p.* 12.

(*iv*) *Can commission issue to Nepal?*—Is Nepal in British India? *See* **7 C. W. N. 635** and Note 14.

1-A. It is the duty of a Political officer representing the British Government in the territory of a Native State, irrespective of the actual place of residence of such officer to execute the commission. Under the Code he has no option to decline to execute a commission on the ground of inconvenience or some other reason. The provisions of this section are mandatory in this respect, **9 Lah. 347**; *see* also **118 I. C. 643 = A. I. R. 1929 Lah. 104,** where it is *held* that if the view that the Agent to the Governor-General, Punjab States, has no power to compel attendance of witnesses who are residents of an Indian State, is correct, then the statutory provisions of s. 503 (2) are futile and the Government should consider the question of either securing such powers or of repealing the law which authorises criminal courts to issue commission to such officers.

2. Section 503 applies to issue of commission only in cases pending before Courts therein specified.—Where the District Magistrate purporting to act under this section ordered a Subordinate Magistrate before whom the case was pending, to examine one of the witnesses in her own house; *held*, that the order was illegal, as this section related to the issue of a commission and not to a case where the trying Magistrate had to examine a witness himself, and that even if the order be treated as an order for issue of a commission, the District Magistrate could not pass such an order without a reference under s. 506, being made to him, **2 S. L. R. 8 = 10 Cr. L. J. 211.**

3. Application for commission must be made after commitment to the Court to which case is committed.—A committing Magistrate though he is competent to examine a witness on commission in the course of the inquiry, has no jurisdiction after making the order of committal, to issue a commission, so that the evidence recorded might be available, if need be, at the trial before the Court of Session or High Court. The party who desires to have witnesses examined on commission, must apply for it after the commitment either to the High Court or to the particular Judge exercising original criminal jurisdiction or to the Court of Session as the case may be, **19 C. 113** *followed* in **19 B. 749** at **p. 756.** The view of Wilson, J., in the Calcutta case, that the application should be made before the commencement of the trial, and an application made during the trial and after the jury had been sworn was too late, because a trial and a commission could not go on at the same time, seems to be opposed to the plain language of sub-sec. (1), which empowers a party to apply for a commission at any time, in the course of a trial.

4. Commission to examine in criminal cases, purely discretionary.—In **8 C. 896,** Wilson, J., refused the application of a witness (who was 63 years old and unable to attend on account of sickness), saying that, in a criminal case, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interest of the prisoner. The issue of a commission is entirely in the discretion of the Court.

5. Expense or inconvenience of securing attendance of witnesses not sufficient ground for issue of commission.—Inconvenience to a witness is no ground for issuing commission especially when the question of identification of stolen property was a most material one, and the evidence of the owner and his wife and servant was of the utmost importance the whole case resting on such evidence, and as regards the ground of expense the sum of Rs 500, it must be said, was not large or unreasonable, considering that the entire case rested on the evidence of those witnesses, and that the accused had not had an opportunity to cross-examine these witnesses as his position did not permit him to make arrangements for that purpose *Held* that the Sessions Judge was not justified in issuing a commission under this section Also, if evidence taken on a commission in an inquiry be admitted at the trial, the circumstances stated in s 33 of *the Evidence Act* to excuse the attendance of the witness must be established and inconvenience to witnesses is not a ground allowed by s 33 of *the Evidence Act*, **5 A. 224.**

6. Commission to examine expert witness not desirable.—Where an expert witness in handwriting appears to be the principal witness in the case, no application to examine him on commission should be granted, **9 M. L. T. 334 = (1911) 2 M. W. N. 97 = 12 Cr. L. J. 64.**

7. Witness residing within the jurisdiction of the Court may be examined on commission.—There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness by commission when he is within the jurisdiction Where a Government servant, who had executed his recognisance to appear and give evidence for the prosecution at a criminal trial at Bombay, was subsequently ordered to a distant station on public service, and could not, with due regard to public interests, return to Bombay in time for the trial *Held* on the application to Government, that his evidence might be taken by commission before his departure from Bombay, **6 B. 285.** In **24 C. 551** it was doubted whether a Presidency Magistrate or High Court has power to issue a commission for examination of a witness within the Presidency town. *See* Note 12

8. Right of pardanashin to be examined on commission.—A *pardanashin* woman summoned as a witness in a criminal case has a right to be exempted from personal attendance at Court and to be examined on commission, *see* **4 C. 20 = 3 C L R. 93; 15 C. 775, Weir II, 659, 42 C. 19.** In **11 P. W. R. 1913 = 14 Cr. L. J. 3,** the High Court directed the Magistrate to examine a *pardanashin* witness on commission and remarked that a Magistrate ought not to assume that a woman who is the daughter of a prostitute is not *pardanashin* when it is alleged that she is living a married life and she is obviously entitled as such to be treated with respect despite her lowly origin

Contra—*See* **5 A. 92** where it was *held*, that it cannot be admitted as a general principle that *pardanashin* ladies, whose evidence is required in criminal trials are to be allowed to compel the Courts to examine them at some other place than the Court house itself Although there is no provision in the Code which protects *pardanashin* ladies from appearing in Court of Justice, nevertheless it is very undesirable to compel the attendance of such persons Where a Magistrate considered it necessary to take the evidence of a *pardanashin* lady, who objected to appear in Court the High Court directed him to make arrangements so as to take her evidence either in an empty Court room in the presence of himself, the accused and the pleader for the prosecution, or, if no empty Court room were available in his own private room or some other room in the Court building, **12 A. 69.** *See* also **1 S L R. 5 = 9 Cr. L J. 249,** Note 1 under s 506, Note 3 above and Notes 9 and 10 at p 592

9. Complainant can be examined on commission—The term *witness* will certainly include the complainant. If a complainant calls himself to testify to matters within his knowledge, he will as regards such testimony, be a witness for the prosecution and the issue of a commission for his examination is perfectly legal, **10 P. R 1896, 11 P. W. R. 1913 = 43 P. L. R. 1914 = 14 Cr. L. J. 3,** and more so, when the complainant is a *pardanashin* lady, **Weir II, 659.** The terms of s 503 are very wide They refer not only to an inquiry or trial but to any other proceeding and a complainant is a witness and may be exam ... **42 C. 19.**

Contra—Where a *pardanashin* lady sets the criminal law in ... iant, her position is not the same as that of an ordinary lady witness ... rlg ... used to have her evidence taken in his presence in Court. Were it ... is ... he dangers and mischief that would arise, **5 A. 92.**

10. Mode of examining pardanashin ... ng
Magistrate or Magistrate of the first class in a ... be

doubtful whether a Presidency Magistrate or the High Court has under this section power to issue a commission for examination of a witness within the Presidency town. But there is nothing to prevent a Presidency Magistrate from examining a witness residing within his jurisdiction at some place other than the Court-house, **24 C. 551.** *Gosha* women who are cited by parties as witnesses need not be compelled to attend Court for the purpose. If the witness secures a house or room near the Court-house, her evidence may be recorded there, regard being had to her *gosha* being preserved, **12 Cr. L. J. 501 (M.)**; **4 S. L. R. 257 = 12 Cr. L. J. 398.** *See* **16 C.** 238 and Notes 2 to 5 to s. 353.

11. Admission of secondary evidence when witness examined on commission.—Where a commission to take evidence issues to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary to prove a refusal to produce the original, **9 C. 939.**

12. Onus of proving that evidence taken on commission is admissible is on party who relies on evidence.—In a case where a commission was issued under this section for the taking of the evidence of witnesses in Nepal, and the accused was convicted on such evidence; *held*, that the *onus* of proving that Nepal is in British India, as defined by s. 3 (27) of *the General Clauses Act* X of 1897, lies on the party who alleges that the evidence taken there, is proper evidence and on their failing to do so, the conviction must be set aside, **7 C. W. N. 635.** *Quære.*—Whether *Nepal* is in British India?

13. Evidence taken on commission issued by Magistrate, admissible in subsequent stage of same case.—Under the previous Codes it was held that the evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken by an order made by that Court under s. 76 of Act X of 1875 (same as the present section), or unless it is admissible under s. 33 of *the Evidence Act*, **6 C. 532; 19 C. 113; 6 A. 224; 19 B. 749.** But *see* now cl. (2) of s. 507 and Notes 1 and 2 thereunder.

14. Fresh objections may be taken to admissibility of documents after return of commission.—If when evidence is taken before a commission, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground, it not being necessary to state all the objections to the admissibility of a document, when it is first tendered, **9 C. 939.**

15. Commission evidence admissible in trial for offence committed on high seas.—Evidence taken under a commission is admissible in a trial for an offence committed on the high seas, the procedure applicable being that of the Court by which the trial was held, *i.e.*, *lex fori*, **16 C. 238.**

16. Delegation of commission is permitted by sub-sec. (4).—Under s. 503 of Act X of 1882, when commission was issued to an officer representing the British Indian Government for examining a witness residing in a Native State, he was bound to execute such commission personally and could not delegate his function to a subordinate, **1896 A. W. N. 106.** This difficulty has now been removed by the addition of sub-sec. (4).

17. Magistrate executing commission, whether Court for purpose of granting sanction.—During the pendency of a Sessions case, a witness was examined on commission under this section. Subsequently, the Deputy Magistrate who examined the witness on commission being applied to, granted sanction to prosecute the witness under s. 193, I.P.C. *Held*, that the proper authority to grant sanction in the matter was the Sessions Court, and not the Deputy Magistrate who acted only as a Commissioner, although the Commissioner appointed under this section, may be a Court within the meaning of this section for the purpose of issuing process against the witness, and for recording his evidence, still he was not a Court within the meaning of s. 195 (1) (*b*). The word *Court* in s. 195 means, the Court whose duty it is to consider the evidence and to decide whether it is true or false, **11 C. W. N. 909 = 6 Cr. L. J. 160.** *See* Note 69 at p. 509.

18. Examination of Mint Master, etc., in cases of false coining.—When the evidence of an officer, connected with the Mint of the Currency Department is required as to the genuineness or as to the spuriousness of a coin or currency note, the Courts and Magistrates are recommended to send the coin or note to the Mint Master or to the Commissioner of Paper Currency, as the case may be, under cover of their Court seal or by a messenger whose evidence can afterwards be taken, and, at the same time to issue a commission for the examination of such officer or a witness under the provisions of this section. This rule prevents the great inconvenience of officers being called away from their duties on mere ordinary occasions. In special cases, a careful discretion is to be exercised regard being had to the conditions above stated.—*Bom. Bk. Cir.*, *p.* 35.

19. Commission sent to Hyderabad (Deccan)—With a view to secure uniformity of practice in respect of commissions issued by Criminal Courts for the examination of witnesses at Hyderabad, the following particulars have been communicated for information and guidance by the Secretary to the Resident, and should be observed by all Courts in these Provinces —As a rule all such commissions should be addressed to " The First Assistant Resident,' and all remittances sent with such commission should be made payable to 'The First Assistant Resident" without giving the name of the gentleman holding the appointment. No commission should ordinarily be addressed to the Resident nor should any remittance be made payable to him No commission should be sent direct to His Highness the Nizam s Minister without the intervention of the Residency office Distant dates should be fixed for the return of commissions, and names of the witnesses to be examined should be given in full with their correct address The street or lane where they reside should, as far as possible, be ascertained and stated Commissions for examination of witnesses residing at Secunderabad (Husen Sagar) or at Bolarum (Alwal) should be invariably addressed to the Cantonment Magistrate, Secunderabad and the Superintendent of Police, Bolarum, respectively, and remittances in such cases should be made payable to the officer to whom the commission is addressed Remittances intended for the First Assistant Resident should be made payable at Hyderabad and not at Secunderabad —*C P Cr Cir*, Pt. II, No 53

20. Translation of commission when to be made.—Commission sent for execution to any place where the language is different from that of the Court issuing them, should be accompanied by translations in the language of such place or in English Para 98, *Bom H C Cr Cir*, p 77

21. Madras rules as to examination of witnesses on commission issued by French Courts.—The following rules approved and sanctioned in G O No 2396, Judicial, dated 4th September, 1886 have been made by the Madras High Court —Commissions in criminal cases issued by French Courts for the examination of witnesses residing within the jurisdiction of any Criminal Court in this Presidency, shall be executed by such Court free of cost, any expenditure incurred on account of batta and travelling expenses of witnesses being debited to the contingent fund of such Court —(*H C Cir*) *13th October*, 1886, *No* 2781

22 American cases —A commission is a process issued under the seal of the Court and the signature of the clerk, directed to one or more persons, designated as Commissioners, authorising them to examine the witness upon oath on interrogatories annexed thereto, and to take and return the deposition of the witness according to the directions given with the commission —S 638 of N Y Cr P C A commission will not be granted for the examination of the plaintiff in his own behalf whilst he is a fugitive from justice residing in a foreign territory *McMonagle* v *Konkey*, **14 Hun. 326.** The power to issue a commission is an innovation of the common law and must be strictly pursued *Dwinelly* v *Howlland*, **1 App. Pr. 87.** It depends solely upon the statute, **44 How. Pr. 432.** Application must be made upon affidavit showing (1) the nature of the crime charged, (2) the state of proceedings in the action, and that issue of fact has been joined therein (3) the name of the witness, and that his testimony is material to the defence of the action, and (4) that the witness resides out of the State S 6319, N Y Cr P C It is not necessary to state what proof is expected —*Eaton* v *North*, **7 Barb. 631.** Affidavit may be made by agent or attorney (*ibid*) or by a third party —*Demar* v *Van Zant* **2 Johns. Cas. 69**

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to *" such Presidency Magistrate," who thereupon may compel the attendance of and examine, such witness as if he were a witness in a case pending before himself

Commission in case of witness being within Presidency town

†(1 A) When a commission is issued under this section to a Chief Presidency Magistrate, he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him

(2) Nothing in this section shall be deemed to effect the power of the High Court to issue commissions under the Slave Trade Act, 1876, s 3

Note —Scope of the reference to the Slave Trade Act —The statute referred to in the last paragraph is for the punishment of offences relating to the slave trade by British subjects or other persons protected by the

* The words — were substituted for the words the said presiding Magistrate by Act XVIII of 1923

† This sub-section was inserted by *ibid*

British Government, and s. 3 enable the High Court to obtain evidence by commission in such cases.—PRINSEP. The Act referred to is 39 and 40 Vict., Chap. 46.

Parties may examine witnesses.

505. (1) The parties to any proceeding under this Code, in which a commission is issued, may respectively forward any interrogatories in writing, which the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed * "or to whom the duty of executing such commission has been delegated" shall examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate or officer by pleader, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

Note.—American cases.—Witness must answer each question specifically.—*Union Bank* v. *Torry*, **5 Duer. 626.** Witness is not allowed to read his answer from a paper prepared beforehand.—*Creamer* v. *Jackson*, **4 Abb. Pr. 413**; *Commercial Bank* v. *Union Bank*, **11 N. Y. 203.** An objection to a question as leading must be made on settlement of the interrogatories, or it is waived.—*Hazlewood* v. *Heminway*, **3 Th.** and **C. 787.** A party who has taken the testimony of a witness residing abroad under a commission may read the deposition though the witness be in Court; he is not bound to call the witness, but he may be called and examined by the other side.—*Phainix* v. *Baldwin*, **14 Wend. 62.**

Power of provincial Subordinate Magistrate to apply for issue of commission.

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application; and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

Notes.—1. District Magistrate may issue commission for examination of purdah witnesses.—The District Magistrate has power to issue commission for the examination of female witnesses in suitable cases. Where the life led by the women is ordinarily so secluded (though not so secluded as Muhammadans), that appearance in a public Court would cause them an amount of embarrassment and distress which it would not be right to inflict unless the circumstances of the case make it necessary, the balance of convenience is in favour of dispensing with the attendance of such women, **1 S. L. R. 5 = 9 Cr. L. J. 249.** This case did not decide that an application for commission should be granted unless there were special reasons to the contrary. It merely decided that a District Magistrate was competent to issue commission for examination of witnesses in suitable cases, **4 S. L. R. 257 = 12 Cr. L. J. 398.**

2. District Magistrate cannot issue commission without reference.—*See* Note 2 to s. 503.

Return of commission.

507. (1) After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of *the Indian Evidence Act*, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

* The words "—" were inserted by *ibid*.

Notes —1. Object of sub section (2) —Sub-sec. (2) is based on the case reported in **19 B 749** Its insertion is thus accounted for — Various High Courts have held that the depositions taken under this Chapter are only evidence in the Court from which the commission issued and that if the evidence is required in another Court a fresh commission must be issued. We have therefore provided that depositions may subject to certain qualifications be received at subsequent stages of the case —*Sel Com Rep* *See* the next Note

2 **Practice —Admissibility of evidence taken on commission by committing Magistrate** —Evidence taken under a commission issuing from the Chief Presidency Magistrate s Court during the course of inquiry before him cannot be used in evidence at the trial before the High Court under this section **19 C 113** *approved* in **19 B 749, 6 C 532** This difficulty is now removed by sub-sec. (2) Depositions of a witness taken on commission issued by the committing Magistrate and forming part of the record of his inquiry is admissible in evidence at the trial in the Sessions Court under s 33 of *the Indian Evidence Act* if the requirements of the proviso to the section have been satisfied. Much difficulty will be experienced if the actual presence of the accused so as to afford him an opportunity of cross-examining were insisted on but the requirements of s 33 *Indian Evidence Act* are satisfied if the accused could have submitted cross-interrogatories **19 B 749** *See* **16 C 238**, where evidence taken on commission was held to have been rightly admitted on the trial of a seaman for an offence committed on the high seas

3 **Deposition recorded in Colony not admissible as evidence** —Government accorded sanction under s. 188 for prosecuting a person in respect of offences punishable under ss 405 408 409 and 477 A I P C which were committed by him in Singapore The complainant moved under s 506 for the issue of commission for the examination of four important witnesses in Singapore The Advocate-General gave as his opin on that Government has no power under s 189 to direct that depositions recorded in Singapore be admitted as evidence in British India and that the Government of Singapore cannot be asked to direct the Magistrate having jurisdiction at Singapore to summon the witnesses and record the depositions as the said section has no application to a case in which the Court of inquiry or trial is incompetent to issue a commission *Madras* G O No 1803 Judicial dated 27th December 1909 *See* Note 1 to s 503

Adjournment of inquiry or trial.

508. In every case in which a commission is issued under section 503 or section 506, the inquiry trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission

Note —The discretion given by this section must be exercised in a reasonable manner so as not to subject the accused person to unnecessary detention *See* the remarks of WILSON J in **19 C. 113**

CHAPTER XLI

SPECIAL RULES OF EVIDENCE

Deposition of medical witness

509. (1) The deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused or taken on commission under Chapter XL may be given in evidence in any inquiry trial or other proceeding under this Code although the deponent is not called as a witness.

Power to summon medical witness

(2) The Court may, if it thinks fit summon and examine such deponent as to the subject matter of his deposition

Notes —1. Evidence of medical witness how to be recorded—

Bombay —The section requires that the deposition of a medical witness should not only be taken but also attested in the presence of the accused by the Magistrate in order to render it admissible in other proceedings. An attestation in the following form should therefore always be appended to such deposition *viz* —

Taken before me and signed by me in the presence of the accused.

(Signature of Magistrate)

Date

—*Bom. H C Cr Cir* p 18.

Bengal and Assam.—In order to secure compliance with provisions of this section Magistrates are hereby directed to sign at the foot of the depositions of medical witnesses a certificate as follows:—" The foregoing deposition was taken in the presence of the accused who had an opportunity of cross-examining the witness. The deposition was explained to the accused and was attested by me in his presence—Magistrate. *Calcutta Gazette*, 27th May, 1891, Part I, p. 547; *Assam Gazette*, 6th June, 1891, Part III, p. 326.

When the attestation is wanting, the Sessions Judge should summon such witness to give his evidence, **N. A. Agra, 7th June, 1862, p. 122.** The circumstance that the evidence of the Civil Surgeon given in English was not interpreted to the accused, was held to be of small importance, where it was understood by the prisoner's counsel, and all necessary questions were put to the witness, **24 W. R. 50.** The insertion of the italicised words enables the deposition of a medical witness taken on commission, to be put in evidence, which could not have been done under the previous Code, **18 C. 129.**

2. **Deposition must be interpreted to accused to enable him to cross-examine witness.**—Before the medical officer leaves the Court, his deposition is to be fully interpreted to the accused, who is to be allowed to cross-examine. In order to ensure that the medical officer's deposition may in all cases be admissible under this section, the Magistrate must sign at the foot of it a certificate in the following form:—" The foregoing deposition was taken in the presence of the accused, who had an opportunity of cross-examining the witness. The deposition was explained to the accused, and was attested by me in his presence." This is, of course, specially necessary when the deposition is taken in an inquiry preparatory to commitment to the Sessions.—*C. P. Cr. Cir.*, Part II, No. 55, *N.-W. P. H. Cr. Cir.*, para. 38, p. 17.

3. **Magistrate's record must show that deposition was taken and attested in accused's presence.**—Before the deposition of a medical witness, taken by a committing Magistrate can be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence, not merely presumed under s. 144, ill. (*e*) of *the Evidence Act* to be so taken and attested, **9 A. 720.** This section does not enact that a deposition of a Civil Surgeon shall be taken and attested by the Magistrate in the presence of the accused. What it does provide is that a deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the deposition, make it apparent that he has done so. Section 80 of *the Indian Evidence Act* does not affect the matter, **10 A. 174** at **p. 178.** The examination of a medical witness taken and duly attested may be given in evidence in any criminal trial; but in order that such evidence may be admissible against any individual accused person, the examination must have been taken in the presenee of the accused person, 8 **C. 739 = 12 C. L. R. 233; 18 C. 129; 4 C. W. N. 49.** Where no objection was taken when the evidence was put in, that the evidence had not been taken in the presence of the accused, it was *held* that such irregularity, even if it existed, did not vitiate the proceedings, as it was not shown that it had prejudiced the prisoner, **8 C. 739 = 12 C. L. R. 233.**

4. **Any Magistrate may take the deposition.**—'*Taken and attested before a Magistrate*,' *i.e.*, any Magistrate not necessarily the committing Magistrate while holding the preliminary inquiry, **1893 A. W. N. 180.**

5. **Civil Surgeon's extra-judicial opinion is no evidence.**—The only opinion of a Civil Surgeon which can be considered in judicially dealing with the case, is an opinion expressed by him when examined as a witness on oath. A copy of a letter from the Civil Surgeon containing expressions of his opinion is inadmissible in evidence as it is extra-judicial, **8 C. 211 = 10 C. L. R. 11; 12 W. R. 25,** but the medical officer who held the *post-mortem* examination, may use the report to refresh his memory when giving evidence, **9 C. 455 = 11 C. L. R. 569.**

6. **Substance of report from medical subordinate is no evidence.**—The substance of a report from a subordinate medical officer, with an expression of concurrence by the Civil Surgeon, cannot be read in evidence under this section, **11 W. R. 2.** A Sessions Judge is not authorised to allow a surgeon to describe the *post-mortem* appearances merely from the knowledge acquired by him from a perusal of the notes made by another surgeon, **Ratanlal 549.**

7. **Post-mortem report not evidence—how it may be used.**—The only use of the medical officer's report will be to assist the Police in getting up the case, to refresh the memory of the medical officer at the time of giving his deposition and to aid the judicial officer in framing his queries. It cannot be admitted as evidence [except under s. 32, cl. (2), and s. 33 of *the Evidence Act*], nor is it sufficient to read it over to the medical officer and swear him to the truth of it; his deposition must be recorded *de novo* and at length in the

presence of the accused The Magistrate should therefore look into the case and make himself acquainted with its particular features before the medical officer enters the Court, in order that proper questions may be asked — *C P Cr Cir*, Part II, No 55, **6 C. W. N. 98.** A *post mortem* report is not evidence The person who made the report can use it to refresh his memory when giving evidence but the report itself is not admissible in evidence Therefore when another medical expert is being asked his opinion on facts hypothetically stated the facts cannot be taken from the report but must be taken from admissible evidence on the record **9 C 455 = 11 C. L R. 569, 27 C 295, 11 W. R. 25.** A *post mortem* report is not admissible as evidence except to contradict the officer who made it. It may, however, be used by that officer when under examination for the purpose of refreshing his memory, **27 C. 295.**

8 **The real use of and abuse of medical evidence.**—It is not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved **11 W. R. 25.** A Judge is not entitled to discard the whole of the direct evidence of credible and unimpeached witnesses who depose that with their own eyes they saw certain things done, upon the strength of the opinion of a medical witness, to the effect that those things could not have been done, **1889 A. W. N. 74**; nor should a Judge elect himself into a medical expert without taking proper medical evidence **1883 A. W. N. 189.** As a matter of precaution medical evidence as to the cause of death should never be dispensed with in a case of murder, although prisoner admits having killed the deceased and pleads extenuating circumstances.—**N. A. Agra, 2nd January, 1862, p. 1.**

Medical witnesses in murder cases—In all cases of murder the committing Magistrate should bind over the medical witness to attend at the Sessions Court at the trial unless grave inconvenience will be caused thereby —*See* Rule 204 of the Madras Rules of Practice If he is not bound over the special circumstances necessitating a departure from the above rule should be noted in the preliminary register

9. **Procedure in case depending entirely on medical evidence**—In a case depending almost entirely upon the medical evidence the evidence of the Civil Surgeon should not be tendered or accepted as sufficient evidence All the evidence before the Magistrate as to the symptoms should be re taken and the Civil Surgeon should be examined as an expert in regard to the case of those symptoms **Weir II, 660.**

10. **When medical officer need not be examined by committing Magistrate.**—Except in the case provided for in s 512 the examination of a medical witness taken in the absence of the accused is inadmissible in evidence in a criminal trial When however, there is sufficient *prima facie* evidence to warrant a commit ment to the Sessions Court and the evidence of the medical officer is likely to be of a formal character and great inconvenience would result from his being summoned to a Magistrate s Court at a distance from the Sadar station, the examination need not be taken before the Magistrate, but the attendance of the medical officer before the Sessions Court should be ensured by the committing Magistrate. Under all other circum stances the Magistrate should invariably record the evidence of the medical officer before himself, **Ratanlal 81**

11. **Medical certificate is no evidence.**—The certificate of a medical officer as to the cause of death of a deceased person is no evidence The facts contained therein must be proved by examining such officer as a witness It is not sufficient to ask him merely to attest the accuracy of the statements made in the certificate *M H C Pro*, 18th July, 1881 This section does not in any way preclude the Sessions Judge from calling the Civil Surgeon and examining him as a witness and this should be done in every case in which the deposition taken by the Magistrate is essentially deficient or requires further explanation or elucidation, **9 C. 455 = 11 C. L. R. 569.**

12. **Medical officer's previous deposition not to be put in, unless he resiles from that deposition** — The evidence of a medical officer before the committing Magistrate whether attested or not by the Magistrate ought not to be admitted under s 288 unless he resiles from his original deposition **4 C. W. N. 49** But *see* **8 C. 739 = 12 C L. R. 233.**

Report of Chemical Examiner.

510. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code

Notes —1. Letter or certificate of a medical officer no evidence —A letter of a medical officer express ing an opinion is not evidence under this section **12 W. R. 25; 9 C. 455 = 11 C. L. R. 569,** but only the report. *See* Note 11 to s 509

2. **Original report should be put in evidence.**—The original report of the Chemical Examiner bearing his signature, and not a copy of the report, should be put in evidence, **15 W. R. 49 = 6 B. L. R. Appx. CXXII.**

3. **Report to be signed by officer having personal knowledge.**—In order that the report of the Chemical Examiner relating to the discovery of poison in matter submitted to him for examination, may be admitted in evidence under this section, it must be signed by the officer who detected the poison, and who, from personal knowledge, can certify to the correctness of the result emboded in it, **Weir II, 661.**

4. **Any Chemical Examiner or Assistant Chemical Examiner.**—The word '*any*' would cover an "Additional Chemical Examiner" and the word was specially introduced to meet **10 C. 1026.**

5. **When substances should be sent to Chemical Examiner?**—Substances ought not to be sent to the Chemical Examiner for analysis when there is neither a reasonable suspicion that poison has been used, nor anything in the *post-mortem* examination of the bodies leading to such supposition. Magistrates should limit their references to that officer to cases of urgent necessity, and in which the local medical officer cannot afford the information required. Civil Surgeons and District Superintendents of Police are to remember that the duty of making a reference to the Chemical Examiner and of requiring that officer to make a report, which shall be admissible under s. 510 of the Criminal Procedure Code, lies solely within the province of the Magistrate conducting the inquiry for which information on the character of the suspected substance is required; such references should not, under any circumstances, be made by them directly. If the Civil Surgeon can give a decided opinion regarding stains supposed to be those of blood, it is unnecessary to refer to the Chemical Examiner. But, if the Civil Surgeon is unable to settle the question, and, if evidence on it is desirable, it should be referred to the Chemical Examiner. Besides a copy of the *post-mortem* examination, the Chemical Examiner should be furnished with replies to the following queries, which replies the officer making the investigation has been directed to enter in his special diary:—

(*a*) What interval was there between the last time that the person, who is supposed to have been poisoned, ate or drank anything and the first appearance of symptoms of poisoning? (*b*) What interval was there between the last time of eating or drinking and the death of the person (if death occurred)? (*c*) Did the person move from the place where the first symptoms were noticed? If so, how far did he go? (*d*) What were the first symptoms? (*e*) Did vomiting or purging occur? (*f*) Did the person become drowsy or fall asleep? (*g*) Were any cramps or twitching of the limbs observed or tingling of the skin or the throat complained of? (*h*) Mention any other symptoms noticed. The Magistrate making the reference should give the Chemical Examiner all the information that may guide him to the correct analysis of the substance forwarded. It seems to be apprehended by some officers that such particulars might influence the judgment of the Chemical Examiner, whereas analysis rests on facts and ascertained phenomena, not on opinion; and in order to guide the Examiner, he should be furnished with the fullest possible details regarding symptoms and *post-mortem* appearances.—*Reg. and Ord., N.-W. P.*, s. 10, p. 364.

6. **Link to connect evidence.**—When committing cases, Magistrates must take care to send up evidence to prove that a body sent to hospital for *post-mortem* examination is really the body of the person referred to in the case under trial or that an article analysed by the Chemical Examiner was actually the article sent to him for analysis in the case under trial. Sessions Judges must insist on being furnished with such evidence and must not record either the Criminal Analyser's report or the evidence of the medical officer until the connecting links requisite to render them admissible have been established, **1 Bur. S. R. 634.** *See* also **1910 M. W. N. 77** at **p. 99.**

7. **Duty of Judge to warn jury when dealing with Chemical Examiner's report.**—The jury must be warned that before using the Chemical Examiner's report they must be satisfied on the evidence that the substances examined were in fact what they were to said to be, **18 C. W. N. 180 = 15 Cr. L. J. 147.** *See* also **10 C. 1026.**

Previous conviction or acquittal how proved.

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force:—

(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order; or,

(*b*) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

Notes.—1. Proof of identity of old offender by finger impressions.—The manner in which a previous conviction may be proved is not limited to the method laid down in this section. Any relevant evidence upon which a Court can properly base a finding, that the accused before it was on some previous occasion convicted for an offence will do as well as the methods indicated in this section. The papillary ridges on the bulbs of fingers and thumbs by means of which finger impressions are made, while proved to be almost beyond change from birth to death, are never wholly repeated in the case of the fingers of any other person and they therefore furnish a surer test of identity than any other comparable bodily feature. Where two prints made on different occasions resemble one another in the *minutiæ* and contain no points of disagreement, an irresistible conclusion arises that they were made by the same finger. The evidence of identification is thus both positive and negative and confirmation from other source is superfluous. Under s 45 of *the Evidence Act*, as amended by Act V of 1899, expert evidence may be given on finger impressions, while s 73 has been applied to them with necessary modifications so as to permit of comparison being made for arriving at a finding on the basis of their decipherment. But a document called '*a finger impression slip*' without authoritative signature or certificate of any kind showing it to be an authorised record of Police acts cannot be regarded as a public document within the meaning of s. 74 of *the Evidence Act*. Even if it is assumed that it is such a public document, it is nevertheless necessary under s 81 of *the Evidence Act* to prove it. The mere production of it does not prove it, and for evidentiary purposes such a document is no better than blank paper, with the accused's finger impressions on it, **8 N. L. R. 1 = 5 Cr. L. J. 220.** *See* also **6 C P. L. R. (Cr) 3; 1 C. W. N. 33** and **32 C. 759.** The moment there is some evidence of the identity of the accused on the record such as that a person of the same name as the accused and having a father of same name was convicted in the same district the accused may be asked to explain it under s 342 and if he makes admissions, further proof is unnecessary, **4 N. L. R. 163 = 9 Cr. L. J. 56.** *See* Notes 12 and 15 to s 342

2. By production of previous judgment.—Previous convictions should be proved by copies of judgments or by any other documentary evidence of the fact but having regard to the scope of s 342, an examination of the accused in respect of those convictions, is without legal warrant or justification **28 C. 689,** where **26 C. 49** is *referred to*, another mode of proof would be by hearing evidence. *See* s 310 (*c*) and s. 33 of *the European Vagrancy Act* IX of 1874 Appendix V

3. An extract certified.—But a mere *Kaifiat* from the record office is not sufficient, **6 B. L. R Appx. CLI = 15 W. R. 53.**

Record of evidence in absence of accused

512. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Record of evidence when offender unknown

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India.

for his good behaviour for six months and to deposit a sum of Rs. 7, which would be returned to him at the end of the six months if he had not in the meanwhile violated the order; *held*, that the order as to deposit was illegal under ss. 109, 118 and this section of the Code, **Ratanlal 671.**

2. **Surety cannot be allowed to deposit money instead of executing bond.**—The deposit allowed under s. 513, is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes, **32 B. 449.**

Procedure on forfeiture of bond.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorise* the attachment and sale of any movable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.† * * *

‡ "(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 514-B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

Note.—Referring to the amendment of this section, the Sel. Com. say—

"We note that preference has been expressed for the draft of sub-sec. (7) as contained in the original Bill and, on the whole, we have preferred to restore the original draft. It provides that in proceedings against a surety a certified copy to the judgment may be used to prove the commission of the offences which constituted a breach of the bond, but that this proof may be rebutted. It was indeed suggested to us that we should make a certified copy of the judgment conclusive proof but we are inclined to think that this would go too far."

* The word "attachment" substituted for the word "distress" by Act XVIII of 1923.
† The words "but the party who gave the bond may be required to find a new surety" were omitted by *ibid*.
‡ This sub-section was inserted by *ibid*.

14 Admissibility of previous judgment of conviction—

(*a*) *As against principal* —When the bond is given by the person bound down to keep the peace, the judgment convicting him of a breach of the peace is admissible in evidence against and may form a sufficient basis for an order under s 514, he having had an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held established, **25 C. 440 , 4 C. 865 (F.B.)**.

(*b*) *As against the surety Is it necessary for making the surety liable to re adduce evidence of breach of the bond by the principal ?*—In the case of a surety bond on condition that it shall be forfeited if the person for whom it is given is convicted of a breach of the peace, the judgment in the case in which such person is convicted would be admissible in evidence against the surety under s 43 of *the Evidence Act* as evidence of the fact of conviction, which is a relevant fact in the case, **25 C. 440.** The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been con victed of breaking the peace within the period covered by a bond would not be conclusive, if indeed it would be any evidence against the surety in a proceeding under this section Where the bond is given by a surety and the condition in the bond is that it shall be forfeited, not if the principal party is convicted of a breach of the peace, but if he commits a breach of the peace, the judgment convicting the principal of a breach of the peace is no evidence against the surety who was no party to it to prove that the party bound down to keep the peace has really committed a breach of the peace Such a fact must be proved by evidence taken in the presence of the surety, unless it is admitted by him **25 C. 440 ; 11 C 77.** The previous conviction is not an estoppel, because the nature of the proceedings is charged and the surety had never had an opportunity of contesting the conviction **15 W. R. 87.** But this view is not accepted in *Allahabad* and *Punjab* Where a person has given a security bond under s 118 for the good behaviour of another, and the principal during the term for which the bond is in force is convicted of an offence punishable with imprisonment, the production of the conviction and, if necessary, of proof of identity of the principal is sufficient evidence upon which the Magistrate is authorised to issue notice to the surety under this section to show cause why the penalty of the bond should not be paid In such a case it is for the surety to show what cause he can It is not incumbent on the Magistrate to re summon the witnesses on whose evidence the principal was convicted and practically to re try the case against the principal **21 A. 86** *followed* in **32 P. R. 1903** and **226 P. L R. 1911 = 12 Cr. L. J. 404.** But the conflict of decisions has been set at rest by sub sec (7) which is newly inserted See *the Sel Com Rep* in the preliminary note

BREACH AND FORFEITURE

15 Surety-bond must be construed strictly —*See* Note 3 to s 499 (*i*) *Bond not warranted by law cannot be enforced*—When a person was ordered to execute a bond under s 110, but by mistake a bond under s 107 was taken, *held* the bond was bad in law and the order forfeiting the security furnished by him was set aside The order against sureties was also cancelled **32 P. R. 1903.** In a case under s 498 I P C, there is no legal sanction for the Magistrate taking cognisance to issue a warrant to compel the complainant s wife to attend as a witness without first requiring her to attend by a summons as required by s 252 and it is only when the summons is neglected that severe measures can be taken *Held* that under the above circumstances the security given by a person standing surety for producing the woman in Court, is against law, and cannot be forfeited if he fails to carry out the terms of the surety bond *Held* further that in such like cases, forfeiture of the whole sum of security is a harsh measure in the absence of anythig to show that the surety was really responsible for the disappearance of the person for whose appearance he stood surety and without inquiry into the circumstances under which he came to stand as surety, **22 P. W. R. 1907 = 6 Cr. L. J 275.** As there is no provision in the Code permitting a Magistrate to take a recognisance from a prosecutor or witness to appear at an adjourned inquiry before himself, a recognisance so taken is a nullity and the forfeiture of it illegal —(*H. C Cir*, 18*th March*, 1868, *No* 480) So also a bail bond obtained by a Magistrate without jurisdiction from an accused person for his appearance before another Court outside his jurisdiction is not legal and a breach of such a bond cannot be dealt with under this section **A I. R. 1929 A. 914**

(*ii*) *Failure to appear on day other than fixed works no forfeiture* —Where a defendant charged with an offence bound himself to appear on a day fixed and did appear accordingly, but made default on the next day on which the case was called, *held* that there was no forfeiture of recognisance **4 M H. C. R. Appx. XLIV** (*Madras Rules, pp* 13 *and* 14). When the bond executed conditioned that the accused should attend on a specified date, and default was made on a date other than the specified date, it was *held* the penalty should not legally be enforced, **Weir II, 663** *B* having bound himself by personal recognisance to appear at a Magistrate's

bond, before calling on the party bound thereby to pay the penalty or show cause why he should not do so. The use of the words 'whenever it is proved' make it necessary that evidence should be taken and recorded by the Magistrate in the usual way in order to afford a foundation for his jurisdiction to call on the party to show cause and to declare his recognisance forfeited. When this is not done, there is a failure of jurisdiction, and the defect cannot be cured by silence, neglect or waiver, positive or negative of the party interested, **11 B. H. C. R. 170; 10 C. L. R. 571.** The procedure prescribed in this section is an exception to the general rule, 'that a man charged with an offence can only be convicted on evidence taken in his presence,' *see* the judgment of the referring Judges in **4 C. 865.**

(*i*) *Magistrate must be satisfied that default was wilful.*—In proceeding to forfeit a recognisance under s. 219 [514 (1), (2), (3)] a Magistrate is bound to form a reasonable opinion that there has been a wilful default before issuing the process.—(*H. C. Cir., 9th April, No.* 686.)

8. **Notice to show cause should be given to surety.**—Before a warrant can be issued for attaching the property of a surety, he should be called on to show cause why he should not pay the penalty mentioned in his bond, and it must appear clearly on the face of the record that he had such notice given him, **15 W. R. 82; 7 B. L. R. Appx. XXXVII; 9 W. R. 4.** A mere verbal or unrecorded order to show cause is not sufficient. The notice must be in Forms 45, 46 and 49 of Sch. V.

9. **On failure to show cause Magistrate may decide on evidence already recorded.**—If no cause is shown or if the party called upon, declines to cross-examine the witnesses, the Magistrate may of course proceed to dispose of the case upon the evidence as it stands, that is on the evidence already recorded by him in the absence of the party before issuing the notice to show cause. It is obviously sufficient for the purposes of justice that the party has had the opportunity of cross-examination, **4 C. 865 (F.B.).**

Absence of agent—Forfeiture of recognisance.—If the agent of the accused neglects to attend when the case is called on, the recognisance bond may be held to be forfeited and the accused made liable for the payment of the penalty. A Magistrate has no legal authority to secure the attendance of an agent by such a bond, **5 B. H. C. R. Cr. Ca. 64.** *See* ss. 116 and 205 under which agents may appear.

10. **When party appears to show cause there must be a regular judicial trial and legal enquiry.**—There must be a regular judicial trial and legal enquiry before the punishment can be inflicted, **12 W. R. 54 = 3 B. L. R. Appx. CLV; 155; 10 C. L. R. 571.** 'The language of s. 514 does not indicate that the *final* order making a person bound by a bond to pay can be made without taking any evidence in his presence or giving him an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established,' *per* BANERJEE, J. 'Before it can be declared that a bond executed by a surety is forfeited, there must be a formal finding arrived at after taking evidence in the presence of such surety, which evidence must prove that the principal person has so acted as to necessitate or render it advisable that the surety should by reason of the act of the principal forfeit his bond,' *per* WILKINS, J., **25 C. 440.**

(*i*) *No charge to be framed.*—*See* **2 M. 169.** Note 6.

(*ii*) *Party must be allowed to adduce evidence and Magistrate must issue summonses for appearance of the defendant's witnesses.*—*See* **11 C. 77; 25 C. 440.**

11. **Party charged to have opportunity to cross-examine witnesses.**—A Magistrate is not justified in forfeiting recognisance unless the party charged with a breach of the peace has had an opportunity of cross-examining the witness upon whose evidence the rule to show cause why recognisance should not be forfeited has been issued. The witnesses upon whose evidence the rule is granted ought to be present and subject to be cross-examined by the party showing cause, upon the occasion when cause is shown against the rule, **4 C. 865 (F.B.) = 4 C. L. R. 243.** The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture without any evidence taken in the presence of the surety to show that the forfeiture has been incurred, **25 C. 440.**

EVIDENCE.

12. **Evidence taken at another trial not legal evidence.**—Evidence taken in another trial and admitted for the purpose of inquiry under this section is no legal evidence against the accused, **12 W. R. 54 = 3 B. L. R. Appx. CLV; 10 C. L. R. 571; 11 B. H. C. R. 170.** The record of a case to which the obligor was not a party and which was not tried before the Magistrate by whom the bond in question had been called for, was held to be no evidence as to the obligor's liability in the matter then before the Court, **1891 A. W. N. 183.** *See* also Note 10 above.

13. **Party charged may himself give evidence.**—*See* Note 6 above.

14 Admissibility of previous judgment of conviction—

(*a*) *As against principal.*—When the bond is given by the person bound down to keep the peace, the judgment convicting him of a breach of the peace is admissible in evidence against, and may form a sufficient basis for an order under s 514 he having had an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held established, **25 C. 440; 4 C. 865 (F.B.)**.

(*b*) *As against the surety Is it necessary for making the surety liable to re-adduce evidence of breach of the bond by the principal?*—In the case of a surety bond on condition that it shall be forfeited if the person for whom it is given is convicted of a breach of the peace, the judgment in the case in which such person is convicted would be admissible in evidence against the surety under s 43 of *the Evidence Act* as evidence of the fact of conviction, which is a relevant fact in the case, **25 C. 440.** The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by a bond would not be conclusive, if, indeed it would be any evidence against the surety in a proceeding under this section Where the bond is given by a surety and the condition in the bond is that it shall be forfeited, not if the principal party is convicted of a breach of the peace, but if he commits a breach of the peace, the judgment convicting the principal of a breach of the peace is no evidence against the surety who was no party to it, to prove that the party bound down to keep the peace has really committed a breach of the peace Such a fact must be proved by evidence taken in the presence of the surety, unless it is admitted by him, **25 C. 440; 11 C 77.** The previous conviction is not an estoppel, because the nature of the proceedings is charged and the surety had never had an opportunity of contesting the conviction **15 W. R. 87.** But this view is not accepted in *Allahabad* and *Punjab* Where a person has given a security bond under s 118 for the good behaviour of another, and the principal during the term for which the bond is in force is convicted of an offence punishable with imprisonment the production of the conviction and, if necessary, of proof of identity of the principal, is sufficient evidence upon which the Magistrate is authorised to issue notice to the surety under this section to show cause why the penalty of the bond should not be paid In such a case it is for the surety to show what cause he can It is not incumbent on the Magistrate to re summon the witnesses on whose evidence the principal was convicted and practically to re-try the case against the principal **21 A. 86** *followed* in **32 P. R. 1903** and **226 P. L. R. 1911 = 12 Cr. L. J. 404.** But the conflict of decisions has been set at rest by sub-sec. (7) which is newly inserted See *the Sel Com Rep* in the preliminary note

BREACH AND FORFEITURE

15 Surety-bond must be construed strictly.—*See* Note 3 to s 499 (*i*) *Bond not warranted by law cannot be enforced*—When a person was ordered to execute a bond under s 110 but by mistake a bond under s 107 was taken *held* the bond was bad in law and the order forfeiting the security furnished by him was set aside The order against sureties was also cancelled **32 P. R. 1903** In a case under s 498, I P C there is no legal sanction for the Magistrate taking cognisance to issue a warrant to compel the complainant s wife to attend as a witness without first requiring her to attend by a summons, as required by s 252 and it is only when the summons is neglected that severe measures can be taken *Held*, that under the above circumstances the security given by a person standing surety for producing the woman in Court, is against law, and cannot be forfeited, if he fails to carry out the terms of the surety bond *Held* further that in such like cases, forfeiture of the whole sum of security is a harsh measure in the absence of anythig to show that the surety was really responsible for the disappearance of the person for whose appearance he stood surety and without inquiry into the circumstances under which he came to stand as surety, **22 P. W. R. 1907 = 6 Cr. L. J. 275.** As there is no provision in the Code permitting a Magistrate to take a recognisance from a prosecutor or witness to appear at an adjourned inquiry before himself, a recognisance so taken is a nullity and the forfeiture of it illegal —(*H. C Cir*, 18*th March*, 1868 *No* 480) So also a bail bond obtained by a Magistrate without jurisdiction, from an accused person for his appearance before another Court outside his jurisdiction is not legal and a breach of such a bond cannot be dealt with under this section **A. I. R 1929 A 914**

(*ii*) *Failure to appear on day other than fixed works no forfeiture*—Where a defendant charged with an offence bound himself to appear on a day fixed and did appear accordingly, but made default on the next day on which the case was called, *held* that there was no forfeiture of recognisance **4 M H. C. R. Appx. XLIV** (*Madras Rules, pp 13 and 14*). When the bond executed conditioned that the accused should attend on a specified date, and default was made on a date other than the specified date it was *held* the penalty should not legally be enforced **Weir II, 663.** *B* having bound himself by personal recognisance to appear at a Magistrate s

Court on the 17th January, 1890, or until the disposal of the case, *A* executed a bond as surety for *B's* appearance at the aforesaid Court on the aforesaid date. The bond was not in accordance with Form III or XLII of Sch. V of the Code, there being no provision in the bond for the continued attendance of *B* until otherwise directed by the Court, or for *B's* attending "on every day" of the inquiry. *B* failed to appear on the 3rd June, 1890, to which day the hearing had been adjourned. *Held*, that the surety-bond must be construed strictly, and as according to the grammatical construction of the bond, *A* did not bind himself to secure the attendance of *B* on any date other than the 17th January, 1890. *A's* bond was not forfeited, **Ratanlal 547.** A Magistate fixed the hearing of a case on a Sunday, and on the following Monday took up the case, and on account of the non-appearance of the accused, ordered the forfeiture of the bonds executed by the accused and their sureties. *Held*, that in the particular circumstances of the case, it was not the intention of the petitioners not to answer to their bail, and that it was the Court's mistake to fix the date and as they were not bound to appear on the day following, the bonds ought not therefore to have been forfeited, **2 C. W. N. 519.**

(*iii*) *Failure to appear before a Court other than fixed works no forfeiture.*—When the surety-bond guaranteed that the accused should appear before a Deputy Magistrate before whom the case was pending, but the case was subsequently transferred to the Court of the District Magistrate before whom the accused failed to appear, *held* that the non-appearance of the accused at the Court of the District Magistrate, was not a breach of the condition of the bond, which only guaranteed, the appearance of the accused before the Deputy Magistrate, **30 C. 107.** "Where the understanding in a bail-bond was to produce the accused in the Sessions Court on every date that may be fixed for hearing, or whenever required and in case of default, etc.," and subsequently the District Magistrate called on the sureties to produce the accused before him and on their failure to do so declared the bond forfeited, *held* that the sureties were not bound to produce before the District Magistrate, as the words "whenever required" meant only that a requisition might be made by the Court of Session for the production of the accused in that Court, **36 C. 749.** A bail-bond providing only for the production of certain accused persons before the Sessions Court on a certain date is complied with by the appearance of the accused before such Court on such date, and the sureties are not bound to produce them subsequently before the District Magistrate. A bail-bond to produce the accused in the Sessions Court on every date fixed for the hearing of an appeal, or whenever required, is also complied with by the attendance of the accused during the hearing; and, though a requisition might be made by the Court of Session for their subsequent production in that Court, the sureties are not bound to produce them thereafter before the District Magistrate. A bail-bond should contain a clear proviso for the production of the accused before the Court or officer who is to take measures to secure their surrender and to re-commit them to jail in terms of the warrant—*General Rules and Circular Orders* (*Criminal*) *of the High Court, Chapter I, Rule* 119, *referred to.* Where a surety conditioned that he would be responsible for the continued presence of an accused person at one Court, *Nowada*, it was *held* that the surety was released from liability under his recognisance by the permission which the Court at *Nowada* gave the accused without the surety's consent of leaving that place on business and also by subsequent transfer of the case to another Court—the Court at *Gya*, **13 W. R. 53.** A bail-bond by which the sureties bind themselves to be responsible for the appearance of the accused, *during the preliminary investigation*, cannot be forfeited if the accused abscond after the preliminary inquiry and during the trial at the Sessions, **9 W. R. 36; 18 A. L. J. 631; 2 Rang. 581.**

(*iv*) *Bond which does not provide for money penalty cannot be enforced.*—Every bond taken under the provisions of the Code as security for the performance of a promise must necessarily include a money penalty for the breach of such promise. A document which does not provide for penalty or forfeiture of any kind is mere waste paper, **17 C. P. L. R. 113 = 1 Cr. L. J. 854.**

(*v*) *If condition of bond is to appear whenever called upon, reasonable notice must be given.*—Where the condition of bail-bonds given by the accused and by the surety was that the accused should appear when called upon, it was *held* the accused and the surety were entitled to reasonable notice of the time at which the former would be required to attend.—*M. H. C. Pro.*, 4*th December*, 1878, **5 M. H. C. R. Appx. XV; 4 M. H. C. R. Appx. XLV.** The surety is always allowed a fixed time within which to produce the accused, **1885 A. W. N. 44.**

(*vi*) *Accused may be bound down to appear from day to day.*—There is nothing illegal in requiring defendants on bail to execute recognisance to appear from time to time as they may be required until the close of the trial. Before proceeding to enforce the penalty it is not necessary to give them notice.—(*H. C. Pro.*, 17*th November*, 1871, *No.* 1808.) There is nothing illegal in requiring accused persons to execute recognisances, to appear on every day from the date of the execution of the recognisance until the close of the trial, **6 M. H. C.**

[illegible]

no illegality in the forfeiture of his recognisance **Weir II, 658.** The liability under a bond conditioned for the appearance in Court 'up to the conclusion of the case' does not cease until the accused appears for receiving sentence and not when the Judge finds that the case against the accused is proved **32 P. R. 1914 = 16 Cr. L. J. 74.**

16. Sureties to a bail-bond discharged on suicide of accused.—Where an accused has committed suicide the sureties are not liable for the default of his appearance, and the fact that the sureties did not take steps to prevent the accused from committing suicide even though such possibility may have passed through their mind, does not amount to such neglect or default as to make them liable on the bond **37 M. 156, 16 C. W. N. 550 = 13 Cr. L. J. 592.** The principle laid down in *Merrick* v *Vander*, **6 Term. Rep. 50** and *Falkner* v *Critico*, **13 East 457** and *Robertson* v *Patterson* **7 East 405** *followed see* also **18 Bom. L. R. 683 = 17 Cr. L. J. 393.**

17. What amounts to a breach of bond for keeping the peace.—*See* Notes 112 and 113 at p 200 It has frequently been *held* that a bond to keep the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace and that the use of the word 'probably' in Form X, Sch V limits forfeiture to cases in which a breach of the peace is the probable and not merely the possible result of the act of the person bound over Thus a conviction for theft or for wrongful confinement and extortion will not justify a forfeiture of such bond (**18 W. R. 63; 19 W. R. 48**), nor will a conviction for the abduction of a woman (**7 P. R 1906**). In the present case a secret attempt to poison a person cannot reasonably be regarded as an offence which would probably result in a breach of the peace **22 P. R. 1912 = 47 P. W. R. 1914 = 262 P. L. R. 194 = 15 Cr. L. J. 605.** Before a recognisance can be forfeited, it must be proved that the accused person has either personally broken the peace or abetted some other person or persons in breaking it The mere fact that the accused is a servant of one of the two rival parties for whose benefit the breach took place is not sufficient, **11 W. R. 52.** A person bound down to keep the peace, some time afterwards, wrongfully confined and extorted a sum of money from two ryots, who were supposed to have committed theft on his lands. For this offence he was fined and his recognisance was forfeited *Held* that the matter ought to have ended with the fine, and the order as to forfeiture of recognisance was bad as no breach of the peace had occurred for the ryots had offered no resistance, **19 W. R. 48.** *See* also **18 W. R. 63.** In **7 P. R. 1906 = 4 Cr. L. J. 278,** a person was bound over to keep the peace, or not to do any act which would cause a breach of the peace. He, however, committed the offence of *abduction* within the period covered by the bond *Held*, that the bond was not liable to forfeiture the possible consequence of the offence committed being too remote to render the offender liable to forfeit his bond

18. What amounts to breach of bond for good behaviour.—*See* s 121 and Note 111 at p 209 The powers of determining the extent if any to which a conviction should justify the rigorous measure of forfeiture, should be reasonably and moderately exercised **7 P. W. R. 1914 = 62 P. L. R 1914 = 15 Cr. L J. 485.** The man who stands surety for another should always be treated in a considerate manner and it is contrary to all principles of justice that he should be held liable for a sudden act of violence, especially when he himself belongs to another village and has no possible opportunity of controlling the every-day life of the offender When men stand surety in respect of s 110 they undertake liability for such good conduct only on the part of the person for whom they stand surety as is indicated by the circumstances under which the security was demanded No man would ever undertake to be a surety if he was thereby compelled to undergo liability for any conceivable form of offence committed by the person for whom he stood surety, **15 P. R. 1913 = 14 Cr. L. J. 575** In this case *A* was required to give security for being suspected as a thief and receiver of stolen property, and *B* stood as his surety *A* was subsequently convicted on a serious charge for an offence under s 326, I P C, *held* that *B's* bond should not be forfeited. *See*, however, **10 P. R. 1915.** But where a person bound over to be of good behaviour was convicted under *the Gambling Act*, *held*, that such conviction was good ground for taking action under this section although having regard to the nature of the offence, the Magistrate might well exercise the discretion conferred on him by sub-sec (5) of this section, **1906 A W. N. 13 = 3 Cr. L. J. 91.** *Good behaviour* includes peace and he that is bound to be of good behaviour, is therein also bound to keep the peace, (**4 Steph Comm. 376.**) *See* s 121 and Notes thereunder

18-A. Bond may be in one district and breach in another.—*See* Note 114 at p 200

19. Compounding of offence will not prevent forfeiture.—A Magistrate is not prevented from taking steps under this section in cases in which a breach of the peace has been committed and the parties acting privately had compounded the offence, **26 A. 202.**

20. Is it necessary to take action immediately after breach?—*See* Note 116 at p. 211. If on failure of the accused to appear on the day fixed for hearing him, an order of forfeiture of the bond is passed on the next day, it is not invalid, **2 Bom. L. R. 589.** When a person who has entered into a recognisance to keep the peace is brought before the Magistrate, charged with an offence attended by violence within the period covered by the recognisance, the Magistrate ought, at the time of making the order in respect of the second alleged offence, to take into consideration the fact that there is an oustanding recognisance, and determine once for all whether he will proceed on it or not. If he does not make any order for forfeiture of the recognisance, it must be taken that he is determined not to proceed on it for that particular breach, and he cannot after the expiration of the period covered by the recognisance, and after making an order for such second charge, re-consider and add to such order by directing the forfeiture of the recognisance, **1 C. L. R. 134;** also **3 C. L. R. 406; 25 C. 440.** He cannot proceed piecemeal by passing a sentence and subsequently passing an order for forfeiture. When he orders forfeiture, he should inflict lighter punishment than he would otherwise inflict, **26 P. R. 1904.** But in **26 A. 202** these Rulings were entirely disapproved of, and it was *held* that a Magistrate who convicts a person (already bound over under Chapter VII) of an offence involving a breach of the peace and passes an appealable sentence, may ,very well wait until the period of appeal has expired or when an appeal has been filed, till it is decided, before he proceeds to take action under this section. Also when a Magistrate so convicting is unaware of the fact of the accused being bound over, he can institute proceedings under this section only when he becomes aware of the execution of the recognisance bonds. Cases may also occur in which subsequent proceedings taken after the lapse of a considerable time may be held bad. In veiw of the conflict of views on this point, a Full Bench of the Punjab Chief Court considered the point again and held that when convicting a person of an offence involving the forfeiture of the bond for the peace, if a Magistrate, who has knowledge of the fact that the person before him, has by his conduct forfeited his bond, does not make any order for forfeiture, he must be taken to have decided not to take action on the bond in respect of that particular breach of the peace and that he cannot thereafter re-consider and add to his order by directing forfeiture of the recognisance, **13 P. R. 1913 = 7 P. W. R. 1913 = 14 Cr. L. J. 67** *approving* of **26 P. R. 1904 = 1 Cr. L. J. 1100; 6 P. W. R. 1915 = 95 P. L. R. 1915 = 16 Cr. L. J. 194.** *See* also **32 P. R. 1903.** In **44 A. 657** it was held that where proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given the fact that such period has expired is no bar to their continuance, (**26 A. 202** *referred to.*)

21. Does the bond continue to be in force after it is once forfeited?—*Further breach within the period covered by the bond.*—When a bond for good behaviour is broken and the punishment for such breach is completely suffered before the period named in the bond expires, the sureties, when paying the forfeiture should be asked, whether they agree to the bond continuing in force, and if they do not agree, the Magistrate should proceed under s. 126 (3) and demand fresh security, **1904 U. B. R. 13.** In **4 C. W N. 121,** there was, however, an *obiter dictum* that a security to keep the peace once given is sufficient for that purpose, so long as it remains in force, in respect of every act of the person bound over breaking any of its conditions. But, having regard to the language of Sch. V, No. 11, this view is not correct, because the terms of the bond are "*in case of making default*" and not "in *every* case of making default."

Partial enforcement of bond extinguishes it wholly.—*See* Note 118 at p. 211. The forfeiture of a part only of the amount of a bond operates as a remission of the balance, and therefore the right of the State to recover such balance is at an end, and it cannot be regarded as forming the penalty of a new bond. *A* furnished security in Rs. 150 for his good behaviour for three years. He committed a breach of the bond and Rs. 25 of the penalty were forfeited. He again committed an assault under s. 352, I.P.C., within the said three years, and the Magistrate proceeded to forfeit Rs. 25 of the aforesaid bond. *Held*, that his order was bad in law, **11 P. R. 1889.**

22. Are both principal and surety liable to pay on forfeiture of bond?—*See* Note 117 at p. 211. A person who executes a bail-bond for the appearance of an accused is not a security in regard to the accused's bond, but has himself undertaken to produce the accused or in default to forfeit a sum of money. Therefore on forfeiture of the bond, the surety is not discharged by the fact that the property of the accused has been sold under s. 88 and forfeited to the Government and the amount of the accused's own bail-bond has been recovered, **10 Cr. L. J. 294 (M.).** Upon the foreiture of a bond by a person to keep the peace for a term (s. 107) the surety

is liable to pay the amount specified in the bond in addition to the penalty paid by the principal. The object of requiring sureties is not to ensure the recovery of the bond from the principal, but to serve as an additional security for the principal's keeping the peace (*see* 20 A. 208) This is not a case of ordinary suretyship for the payment of money, **36 C. 562** *dissenting from* **1905 U. B. R. (Cr. P. C.) 31 = 2 Cr. L. J. 463**, where it is *held*, that when the amount of the bond has been collected from the person bound over, there is no warrant for making a fresh demand on the sureties. The sureties required by s 109 or s 110 are merely sureties in the ordinary sense of the term They undertake that the principal will be of good behaviour, and in case of a breach, the principal and sureties are jointly and severally liable for the sum named in the bond and no more The penalty is not required to be paid twice over *See* also **26 P. R. 1894.** In my opinion the sureties to such are ordinary sureties When *A* promises in a bond to pay Rs. 10 to *B* on a certain contingency arising, and *C* and *D* subscribe an undertaking to be sureties for *A* it can only mean that *B*, at most is entitled to a penalty of Rs 10 which he can recover on the said contingency arising from anyone or all of three persons concerned, it is left to the option of the Government to select from among the three men that one against whom it will proceed, or it pleases, it may proceed against all three or any two and recover such fractions from each as it may think fit, **226 P. L. R. 1911 = 12 Cr. L. J. 404.**

22-A Forfeiture of bond against surety where principal is not bound.—One *R K* was arrested in Gwalior under warrant issued at Montgomery He was released on bail on *C S* standing surety for him. He failed to appear before the Magistrate at Montgomery, and that officer forfeited *C S's* security The arrest of *R K* was thereafter found by the High Court to have been illegal and *C S* then applied for revison of the order of forfeiture, *held* that although *R K* the principal, was under the circumstances not liable on his bond the surety *C S* was not free from liability on that account. S 128 of the Contract Act only explains the *quantum* of a surety's obligation when the terms of the contract do not limit and has no reference to the nature of the obligation of the principal, **2 Lat. 204 (19 B. 597** *followed*).

23. Order for imprisonment cannot be made before attachment and sale of property.—The words "and cannot be recovered by such attachment and sale' indicate that it is not competent to a Magistrate to direct that in default of payment, the person whose recognisance is forfeited should be imprisoned, without first ordering an attachment and sale of his movable property, **10 C. L. R. 571.**

24. Recovery of penalty is no bar to prosecution under Penal Code.—There is nothing in this section which prevents an accused person who has forfeited his bail bond by default of appearance, from being proceeded against under s 174, I P C., notwithstanding his surety has paid the penalty mentioned in the recognisance, **10 W. R. 4 = 1 B. L. R. Cr. 1.**

25. Liability of representative of deceased surety.—Sub sec (6) by which ' the estate of the deceased in the hands of his representatives will be liable *where the liability has accrued before his death* is new It was *held* the words " person bound ' do not include the representative of a deceased surety, and such representative is not liable to be proceeded against in a summary proceeding under Chapter XLII, **22 P. R. 1894.**

26. Portion of penalty may be remitted—Revision.—The High Court it was formerly *held* had no power to reduce the amount of recognisances which have been forfeited, but in the case of hardship the matter should be referred to Government, **3 C. 757 = 2 C. L. R. 408; also 8 C. L. R. 72; 19 W. R. 1; Ratanlal 20; 2 P. R. 1883.** But all these cases are no longer law, being decided under the old Codes. Now, the present Code (sub sec 5) empowers the Magistrates to remit any part of the penalty on forfeiture of a bond and s 515 even allows an appeal to the District Magistrate The High Court therefore has full power under ss 435 and 439 to revise orders made under this section or s 515, **15 P. R. 1905 = 2 Cr. L J. 131.** *See* also the judgment of SUBRAMANYA AIYER, J, in Cr Rev Case No 77 of 1907, *Madras High Court* *See* Note 2 to s 515 In **6 P. R. 1915 = 16 Cr. L. J. 287**, the High Court revised the order directing the forfeiture of a bond and ordered a part only of the penalty to be levied

27. Contract by principal to indemnify his surety is illegal—An indemnity bond executed by the accused in favour of his surety cannot be enforced, the consideration being illegal, **32 B. 449** *following Hermen* v. *Jeuchner*, **15 Q. B. D. 561.** Money deposited with the surety by the principal for such a purpose cannot be recovered back, **1 A. 751.**

*"**514-A.** When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 514, the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and, if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order."

Procedure in case of insolvency or death of surety or when a bond is forfeited.

†"**514-B.** When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only."

Bond required from a minor.

515. All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate shall be appealable to the District Magistrate or, if not so appealed, may be revised by him.

Appeal from, and revision of, orders under s. 514.

Notes.—1. First-class Magistrate not competent to hear appeal.—A first-class Magistrate not being a District Magistrate has no jurisdiction to hear an appeal against the order of a second-class Magistrate enforcing the penalty on forfeiture of a bond under s. 514, **Ratanlal 384**; a Sessions Judge is not competent to hear the appeal, **2 M. 169.** *See* s. 530 (*o*) as to the result of a Magistrate not duly authorised, revising an order under s. 514. *See* also **15 P. R. 1905.**

2. **High Court may revise District Magistrate's orders.**—The cases in **3 C. 757 = 2 C. L. R. 408** and **19 W. R. 1** decided under the Codes of 1861 and 1872 are no longer of any authority. The jurisdiction of the High Court under ss. 439 and 123 (*c*) is very wide and gives it the power to revise orders under this section. This general power is not taken away by the power of revision given to the District Magistrate by the section, as the jurisdiction of a superior Court cannot be taken away except by express words or necessary implication (*see* **4 B. 624**); **5 S. L. R. 179 = 13 Cr. L. J. 31.** *See* also **15 P. R. 1905 = 2 Cr. L. J. 131** and Note 26 to s. 514.

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognisances.

Note.—Scope of section.—Section 516 is only concerned with the power to direct the levy of the amount due and not with the forfeiture which is a condition precedent to the levy. The procedure on forfeiture is defined by s. 514. A power to try the forfeiture of the bond cannot be delegated under this section, **14 C. W. N. 295 = 10 Cr. L. J. 248.**

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

‡ **516-A.** "When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of."

Order for custody and disposal of property pending trial in certain cases.

Note.—Section 516-A is a new section enabling the Court to pass orders for the custody or disposal of property during an inquiry whereas under the old law under s. 517 an order for the disposal of property could only be made on the conclusion of an inquiry or trial.

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* Section 514-A was inserted by Act XVIII of 1923.

† Section 514-B was inserted by Act XVIII of 1923.

‡ Section 516-A was inserted by Act XVIII of 1923, s. 141.

517. (1) When an inquiry or a trial in any Criminal Court is concluded the Court may make such order as it thinks fit for the disposal * by destruction confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence

Order for disposal of property regarding which offence committed

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto such Court may direct that the order be carried into effect by the District Magistrate

† (3) When an order is made under this section such order shall not except where the property is live-stock or subject to speedy and natural decay and save as provided by sub-section (4) be carried out for one month or when an appeal is presented until such appeal has been disposed of

‡ (4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof on his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal'

§ *Explanation* —In this section the term property includes in the case of property regarding which an offence appears to have been committed not only such property as has been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise

Note.—Amendments.—Sub-sec. (1) is amended so as to make it clear that the phrase disposal of property means disposal by destruction confiscation etc *See* **28 C. W N 1094.**

Under sub-sec. (3) the period of one month is allowed for the presentation of an appeal or an application for revision where this is allowed

Sub-sec. (4) which is newly added enables the Court to restore the property to the possession of any person claiming it.

Notes.—1 Scope of section as enlarged Magistrate may deal with any property mentioned therein irrespective of commission of any offence.—To enable a Court to act under this section the property or document in question (*a*) must be produced before it or (*b*) be in its custody or (*c*) it must appear that an offence has been committed regarding it or (*d*) it must have been used for the commission of any offence and one of these conditions at least, must exist in an inquiry or trial in such Court. The operation of this section has been enlarged so as to enable a Magistrate to pass orders for the disposal of *any property* produced before him—*Statement of Objects and Reasons* Under the previous Codes the words any property were held to include as well property voluntarily produced before the Magistrate by a witness in the case as property seized by the Police or found on the person of the accused **12 B H C R Cr Ca. 217** Under s 517 of the Code of 1882 the Magistrate could make *such order as it thinks fit* for the disposal *of any document or other property produced before it* regarding which any offence appears to have been committed or which has been used for the commission of any offence *See* **24 C 499, 1 B 630; 46 P R 1888; 10 B 197; 14 C 834** And it had further been held that the application of that section *must* be limited to the offence actually under investigation in an inquiry or trial *See* **Ratanlal 500** Under the present Code the scope of the section as stated above is very much enlarged though the marginal

* The words — were inserted by *ibid*

† Sub-sec (3) was substituted for the original sub-sec. (3) by Act XVIII of 1923 s 142

‡ Sub-sec (4) was inserted by Act XVIII of 1923 s 142

§ *Cf* The Larceny Act XXIV and XXV V t Chap 86 s 1

note is left as it was. The words "*or in its custody or*" are newly inserted. Under the provisions of this section as it now stands amended, the Magistrate has now power to pass an order regarding the property produced before, or in the custody of the Court, even though no offence has been committed in respect of it, **34 C. 347.** An order may be passed now, under this section, even though there has been no conviction or offence proved in which the property produced has been used, if it appears to the Court that any offence has been committed, irrespective of the charge or the result of it, **Weir II, 666; 16 M. L. J. (Sh. N.) 4; 11 Cr. L. J. 188 (M.); 1893 A. W. N. 61; 16 Cr. L. J. 811.** The Rulings in **Ratanlal 500** and **981** and **46 P. R. 1888** are no longer law. The Ruling in **30 C. 690,** though under the present Code, seems to be erroneous, being based upon the Rulings under the previous Codes. In that case in acquitting the accused, the Magistrate, made an order, directing the idol, in repect of which the alleged offence was said to have been committed, to be delivered to the person in whose possession it was found. The Sessions Judge dismissed the appeal from this order, on the ground that the order, was not one under this section, as no offence was committed in respect of it. In revision, it was contended that the idol was practically in the custody of the Court, as the Magistrate who entertained the complaint, passed a provisional order, delivering the idol to the petitioner, on his giving security and directing him to produce it before the Court whenever called upon to do so—an order not justified by the Code, **7 C. W. N. 522.** The High Court erroneously held that no offence having been committed, the order directing the restoration of the idol was not an order under this section and was therefore not appealable under s. 520. The High Court did not deal with the question of the custody of the Court. The High Court has power, also, under s. 423 (1) (*d*) to make any consequential or incidental order that may be just or proper. Therefore it might well pass an order under this section, read with s. 439, as a Court of Revision, and thus exercise, in any event the powers of an Appellate Court. *See* also **6 C. W. N. 713; 9 C. W. N. 549 = 2 Cr. L. J. 269.** In **34 C. 986** it has been *held* that the first part of s. 517 appears to have reference to cases of offences relating to property or relating to documents, *e.g.*, where the Court directs as in cases of theft, or criminal misappropriation or offences of similar description that the property which is stolen or misappropriated be restored to its owner and the last words of the section, *viz.*, "*which has been used for the commission of any offence*" must refer to cases of the same nature, *i.e.*, to instruments like guns and swords produced in Court.

2. **Scope of ss. 517 and 523.**—S. 523 applies only to cases where the Police act *suo motu* and does not provide a procedure alternative to that provided by s. 517. *See* **17 B. 743; 22 B. 844; 2 A. 276; 1 B. 630.** FULTON, J., however, in **26 B. 552,** was of opinion that s. 523 applied equally whether the seizure by the Police is made under a Magistrate's warrant or without a warrant. *See* Notes to s. 523.

3. **When sample is produced in Court, whole bulk taken to be produced.**—When a portion of salt earth, salt or other article in bulk is produced and received in evidence as a sample of the bulk, the whole bulk is to be taken to have been produced before the Court, within the meaning of this section, **Weir II, 670.**

IN RESPECT OF WHAT PROPERTY OR DOCUMENT ORDER MAY BE MADE.

4. **Does section deal with immovable property?**—This section does not apply to immovable property. If the word 'property' comprehends both movable and immovable property, s. 517 then becomes much more comprehensive in its meaning than s. 522 which would thus be superfluous (**23 C. 372** *referred to*), **18 C. W. N. 1146 = 15 Cr. L. J. 175;** *see* also **36 C. 44; 1900 A. W. N. 81.** In **4 L. B. R. 229 = 7 Cr. L. J. 490,** it was however *held* that the word 'property' includes immovable property.

5. **Disposal of property found in accused's possession as to which no offence is committed.**—In a case of criminal breach of trust, a Magistrate directed by his order "that out of the money and ornaments recovered by the Police, the sum equal to the amount embezzled by the defendant (accused) should be made over to the complainant and the balance should remain with the Police until further orders pending the disposal of the other case—*vide* s. 517." *Held*, that there was nothing to show upon the record that any offence was committed in regard to the property found by the Police on the person of the accused or that it was used for the commission of any offence and that the Magistrate had no authority to make the order he did, **24 C. 499; Weir II, 665.** But the correctness of this ruling may be doubted having regard to the enlarged scope of the present section, **Weir II, 665.** *See* also **9 C. W. N. 549** and **22 B. 844; 34 C. 347** *dissenting from* **30 C. 690; 11 Bom. L. R. 16 = 9 Cr. L. J. 162.** In **Ratanlal 536,** it was laid down that, where an offence appears to have been committed regarding the money produced in a case, the Magistrate is entitled to refrain from making an order under this section, but if necessary, proceedings may be taken under s. 523, **42 M. 9.**

6. **Property remotely connected with the offence committed cannot be dealt with.**—A boat illegally used for hire in contravention of *Bombay Act* II of 1884 cannot be sold under this section. Neither this section

nor *the Bombay Public Ferry Act* of 1884 does warrant such sale **Ratanlal 686.** A man may use a *lathie* or other instrument for committing an offence and doubtless such a weapon can be dealt with under this section But boats which were used by the accused in going to commit the theft or in escaping from pursuit cannot be considered as property used for the commission of an offence If it could be so regarded one might conceive a case in which the house used by thieves or counterfeiters of coin for carrying on their unlawful trade would be liable for confiscation **8 C. W. N. 887.** An offence under s 124 A, I P C consists in publication but the Printing Press in which seditious matters have been printed, cannot be said to be property which has been used for the commission of an offence within the meaning of this section, the Press being but a remote instrument, **34 C. 986.** The accused was convicted of the offence of rash driving under s 279, I P C, and the convicting Magistrate passed an order under this section that the cart, pony and harness which the accused was driving should be sold and the sale proceeds paid over to complainant as compensation, *held* the order was illegal, **9 P. L. R. 1904 = 1 Cr. L. J. 38.** *See* also **37 P. W. R. 1907 = 6 Cr. L. J. 411; 8 C. W. N. 887; 4 P. L. R. 1904; 5 N. L. R. 59 = 9 Cr. L. J. 539.**

Property falsely alleged to be stolen—The petitioner falsely charged *A* with having stolen certain articles which were subsequently found in the petitioner's possession The petitioner was convicted under s. 182, I P.C., and the Magistrate directed the articles to be sold and the proceeds credited to Government The High Court set aside the order and directed them to be restored to the the petitioner, **9 C. W. N. 597 = 2 Cr. L. J. 273.** *See* also **9 M. 448.** *Contra* **24 M. L. J. 1,** Note 12 (1).

6-A. The clause "property regarding which an offence has been committed" in this section includes *movable property regarding the possession of which a quarrel is begun or a riot is begun whatever may be the* offence that is ultimately committed in the course of the quarrel or fight, **31 Mad. 606 = 29 Cr. L. J. 322 (2).**

7. Money given as bribe to public servant may be dealt with.—A public servant was convicted under s 161, I P C and the Magistrate passed an order under s 418, Act X of 1872, in respect of money produced by one of the witnesses and alleged to have been given as a bribe The High Court set aside this order, remarking that the section was inapplicable as it merely authorised the Magistrate to declare the ownership of the property which had been the subject of an offence, **Weir II, 665.** This was under the 1872 Code, but now the order of the Magistrate would be right as the money given as bribe may be considered as property which has been used for the commission of an offence, **Weir II, 665** (*footnote*). *See* also **Weir II, 666** and the confiscation order made in the ruling printed at **Weir I, 534**

8. Disposal of property to which original may have been converted or exchanged.—In view of the explanation, the objection that the coins directed to be returned are not the identical coins sold is unsustainable, **4 S. L. 255 = 12 Cr. L. J. 397.** The words 'conversion' and 'exchange' must be taken in their ordinary sense They apply to such acts as the melting down of gold and silver ornaments and the exchange of notes for cash. Where, therefore, *A* obtained a decree against *B* fraudulently on a forged note and in execution of the decree purchased *B's* garden and took possession thereof and was subsequently convicted of forgery and cheating, *held* that it was not open to the convicting Court to direct restoration of the garden to *B* as it could not be said that the garden was property acquired by the conversion or exchange of the forged promissory note into or for a decree, **4 Bur. L. T. 211 = 12 Cr. L. J. 473.**

9. No order as to thing not in existence when offence committed.—A Magistrate has no authority to make on order under this section in respect of a thing which was not in existence when the offence was committed, *e g*, an innocent purchaser of a stolen cow cannot be ordered to deliver up the calf which he got while the cow was in his possession, **10 M. 25.**

WHEN ORDER MAY BE MADE.

10. Order may be made only when there has been enquiry or trial.—When an order directing delivery of property is made by a Magistrate without any criminal proceedings before him or any other Magistrate, but merely on the application of the person in whose favour such order is made, such an order is entirely without jurisdiction and this section cannot apply to the case, **6 C. L. J. 707 = 6 Cr. L. J. 402.** Similarly, in **5 C. L. J. 229 = 5 Cr. L. J. 147,** an order passed by a Magistrate directing delivery of property to the complainant, merely upon a complaint that some accused persons were detaining it unlawfully is illegal The High Court, as a Court of Revision, set aside such an order, but declined to make a further order for restoration, on the ground that it would be illegal to do so

(i) *No order may be made when accused dies before trial.*—When a person charged before a Magistrate with criminal breach of trust in respect of certain jewels, died before trial, and before any evidence was recorded, and the alleged owner of the jewels which were recovered by the Police from the pledges and sent to the Magistrate along with the charge-sheet, applied to be put in possession of them under this section and s. 523 after inquiry as to their ownership, *held* that this section did not apply to the case and further that as there was no evidence or finding about ownership, s. 523 did not apply and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels. The case not coming therefore either under this section or s. 523, there was nothing to authorise the Magistrate to depart from the general rule that property taken under the authority of the law, for a particular purpose, should on the fulfilment of the purpose, go back to the custody whence it was taken, **29 M. 375**, where **22 B. 844** and **17 B. 743** are *referred to.*

(ii) *No order where trial is barred under s. 403.*—Where the trial of a person is barred under s. 403 it is not open to the Magistrate to pass an order regarding the disposal of property under this section as such an order could only be made "*when an inquiry or trial in a Criminal Court is concluded.*" The trial having been barred by s. 403, there was no inquiry or trial at all within the meaning of s. 517, **4 L. B. R. 229 = 7 Cr. L. J. 490.**

(iii) *No order when complaint is dismissed.*—A Magistrate cannot pass any order under this section when dismissing the complaint under s. 203 as it cannot be said that there was any enquiry or trial before him. **24 M. L. J. 1 = 14 Cr. L. J. 27.** Section 517 applies only when an inquiry or trial is concluded.

(iv) *Can any order be made when accused is absconding?—See* **26 B. 552**

11. Order ought not to be made before conclusion of inquiry or trial.—An order under this section cannot be made before the conclusion of the trial. *A* was charged with theft in respect of gold and silver ornaments of *B* and *C* with having dishonestly received and disposed of them, under ss. 411 and 414, I.P.C. In the course of an investigation the Police seized from *D* ingots of gold and silver into which they alleged *D* had converted the ornaments which had been pledged to him by *C*. On *A's* conviction the Magistrate ordered the gold and silver ingots to be made over to *B*. The proceedings against *C* were adjourned and subsequently *C* was convicted. On *D's* application for revision of Magistrate's order regarding disposal of gold and silver ingots, *held*, that the order was illegal, and that the Magistrate should pass fresh order according to law, **Ratanlal 957.** He must make the order at the time of passing judgment, **19 W. R. 3.** But in **26 B. 552,** a summons was issued for the appearance of two accused persons and certain property was produced on a search-warraut issued by the Magistrate. No further proceedings were taken against one of these persons, but he claimed the property seized as his own. It was *held* that he was entitled to an immediate inquiry, whether the property belonged, as alleged, to the complainant and formed the subject of the offence under trial or was in possession of that accused person as his own. But see the new s. 516 (*a*) which enables a Court to make an order of disposal during an inquiry or trial.

11-A.—Order can be made only after conclusion of trial and not on subsequent application.—Under s. 517 of the Code an order for the disposal of property can only be made upon the conclusion of an inquiry or trial and not on the application of a person subsequent to the conclusion of such trial. The applicant has his remedy by means of a civil suit, **4 Lah. 460.** *See* also **46 M. 162** holding that an order under this section must be made either at the time of disposing of the appeal or so soon thereafter that it may be treated as part of the appeal proceedings.

WHAT ORDERS MAY BE MADE.

12. Does 'disposal' include 'destruction' or 'forfeiture'?—*See* now sub-sec. (1) as amended which expressly includes destruction or confiscation, etc., under "disposal."

(i) *Order for disposal will include an order for forfeiture or confiscation.*—**Ratanlal 492.** The nature of the order to be passed for the disposal is not specified. If the property has been used for the commission of an offence, it is impossible to suppose that the Legislature intended that it should be returned to the owner who would be the person guilty of the offence. If the property is the subject of the offence as in cases of theft, misappropriation, etc., the proper order, of course, would be to direct it to be returned to the person from whom it was stolen or to the owner whose property was appropriated. The policy of the law as laid down in various enactments with respect to property used in the commission of an offence shows the order under this section may be according to the nature of the case either for the destruction of the property or for its forfeiture. A similar interpretation should be placed on s. 523. The power to order restoration is

discretionary and the Court is not bound to exercise it. On principle the view taken in **Weir I, 534**, apparently expressed in **9 M. 448** and **8 C. W. N. 887=1 Cr. L. J. 849** appears to be sounder than the contrary view expressed in **34 C. 986; 9 C. W. N. 597=2 Cr. L. J. 273** and **19 M. L. J. 254 = 9 Cr. L. J. 149.** 'Disposal' is a comprehensive word which would include forfeiture. An examination of the history of the section also shows that the powers of the Courts have been gradually widened. Where it was found *A* that had foisted certain articles into the accused's house for the purpose of bringing a false case of theft and brought a complaint in the investigation of which the articles were seized but the complaint itself was dismissed, *held* the Magistrate had jurisdiction under s. 523 if not under s. 517 to direct the articles to be forfeited, **24 M. L. J. 1 = 14 Cr. L. J. 27.**

(ii) *Contra.—The word 'disposal' does not include either confiscation or destruction of property.*—Under this section, a Criminal Court has no power to direct forfeiture of property, **34 C. 986; 37 P. W. R 1907= 6 Cr. L. J. 411.** A Court cannot under this section direct the confiscated article to be sold or destroyed, **19 M. L. J. 254 = 9 Cr. L. J. 149.** The object of the section is to enable the Magistrate to direct the property to be given to some person to whom it appears to belong or to allow it to continue in the possession of the person in whose possession it was found or to make some order of that character. Where, therefore, the accused was convicted under s. 182, I P C, for giving false information accusing *B* of theft of certain jewels, which were found on search in the accused's own house, and the Magistrate passed an order confiscating the jewels and directed them to be sold and a portion of the proceeds be paid to *B* as compensation, and in making the said order, the Magistrate professed to act under this section. *Held*, this section was never intended to authorise the disposal of property in that manner and the orders regarding confiscation and payment of compensation were set aside as illegal **9 C. W. N. 597.** Where a person was convicted of seditious publication under ss. 124 A and 153-A and the Press was directed to be confiscated and the Government contended that the Court had power to order confiscation inasmuch part of the Press was produced before it and the rest was in its custody and if confiscation is not legally permissible destruction might and should be ordered. *held*, that Chapter XLIII of the Code does not contemplate an order of such a nature. Penal laws are not to be extended in their scope. The Code of Criminal Procedure is a body of adjective law and such cannot readily be interpreted as authorising the infliction of a suffering or an encroachment of natural liberty or rights. In these circumstances it would be strange indeed if the Legislature which in ss. 62, 121, etc., of the Penal Code and in numerous other sections of other Acts has expressly provided for imposing penalty of confiscation upon persons convicted of specified offences, intended by using the general word 'disposal' to authorise the infliction of that punishment not merely on the offender under trial but also on others who may not even be before the Court. No distinction can be drawn between confiscation and destruction, **5 N. L. R. 59 = 9 Cr. L. J. 539**

13. Section invests Magistrate with a discretionary power which must be exercised judicially.—Section 517 invests the Magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially, i.e., according to sound principles of law and not in an arbitrary manner. But what that means is, not that the order is in the opinion of the higher tribunal of revision an improper one which it would not have passed but that having regard to the materials before the Court exercising the discretion that discretion was exercised in a legal manner. Now, if there were no materials whatever before him, the Magistrate ought to have returned the property to the person from whom it was produced. But if there were some materials, then the Magistrate's discretion came into operation, and it was for him to say what order ought to be passed having regard to all the facts in the case. Where there was a quarrel amongst the members of a joint Hindu family and the Magistrate, although holding that no offence was committed passed an order directing the return of the property to the complainant *held* this discretion ought not to be interfered with **11 Bom. L. R. 16 = 9 Cr. L. J. 162.** *See* also **17 Bom. L. R 922 = 16 Cr L. J. 783.** It should be exercised in favour of the person entitled to the possession of property before Court, so long as there is anyone entitled to the possession of the property, Government has no claim to it, **2 Bom. L. R. 768.**

(i) *Magistrate cannot on mere suspicion, order forfeiture of property.*—A Magistrate acting under this section cannot, on mere suspicion that an offence has been committed with respect to property produced during the trial of a criminal case, order forfeiture of the property, and he is only justified in so doing after having made a separate judicial inquiry in which the complainant has had an opportunity of explaining any suspicious circumstances **Ratanlal 492.** But when the accused was conv[illegible] under s. 241, I P C., and a counterfeit rupee which it was not shown had been delivere[illegible] red to anyone having been found in his possession, the [illegible] ordered its [illegible] the order was not strictly covered by the terms of this [illegible] order should

(*ii*) *Generally in cases of acquittal, property should be restored to the person from whom it is taken.*—After an accused has been acquitted of the offence of theft or burglary, the proper order to make is to direct that the property found in the possession of the accused should be restored to him. The complainant in that case could go to the Civil Court, file a suit and secure an order of injunction, **18 C. W. N. 959 = 15 Cr. L. J. 181.** When the accused are acquitted of the offence charged, any property seized by the Police during the investigation of the case from them, must be restored to them when no offence is found to have been committed in respect of it, **1 C. W. N. 561; 16 M. L. J. (S.N.) 24**; especially, in the absence of a finding in the case that it belonged to somebody else, **3 M. L. T. R. 334.** Where a second-class Magistrate found that no offence had been committed in respect of certain property, and ordered the property to be restored to the accused from whom it had been taken by the Police, it was *held* the order was in accordance with this section and s. 523, **Weir II, 669** and **538.** When the accused is discharged under s. 253, no offence is proved against him; therefore the pre-requisites of an order under this section being wanting, the property should be restored to the accused from whom it was taken. **Weir II, 665** and **666.** In **1 B. 630** *followed* in **9 M. 448; 24 C. 499; 14 C. 834; 10 B. 197; 17 B. 748; 22 B. 844** and **1896 A. W. N. 56,** it was *held* that upon general principles, on the acquittal or discharge of the accused, property should generally be restored to the person from whom it is taken, **14 C. P. 60,** or to the accused, **Weir II, 665** and **666,** but that when such property is delivered by Police under the illegal order of a Magistrate, the High Court has no power to order its restoration. This defect is now removed by additions made to s. 520. But having regard to the changes introduced in the sections, the decision in **30 C. 690** seems to be incorrect, and the order based on the general proposition that *property in respect of which no offence has been committed,* should be restored to the person in whose possession it was found, is not an order under this section, though this section in no way precludes the passing of such an order, **Weir II, 668.** *See* **20 C. W. N. 1302.**

(*iii*) *In special cases Magistrate may order property to be delivered to person other than the one in whose possession it was found.*—Even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made under this section for the delivery of the subject-matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged offence, **Mad. Cr. Rev. Case 477 of 1905** *referred to,* **34 M. 94.** Where a person was accused of dishonestly receiving stolen property, knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen *held* that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418, Act X of 1872, regarding its disposal and to refuse to restore it to the accused, **2 A. 276**; *cf.* **9 M. 448.** But *see* contra **54 Cal. 283.** Where a Magistrate convicted a person of the dishonest receipt of certain stolen bangles, and the bangles were on the same day ordered to be restored to the owner, and on appeal the accused was acquitted, the Appellate Court finding that though the appellant had clearly displayed the most gross want of common caution in buying such articles from a comparative stranger, it was not proved that he knew or had reason to believe the bangles were stolen. It was *held* that under the circumstances the Magistrate was right in refusing the application and leaving the applicant to his remedy in a Civil Court, **1893 A. W. N. 61.** Similarly, where a Magistrate finds the property belongs to the complainant in a case of theft, but acquits the accused on the ground that there was no dishonest intention on the part of the accused, he has jurisdiction to order that the property should be given over to the complainant, **16 M. L. J. (Sh. N.) 4** *followed* in **11 Cr. L. J. 138 (M.).** But where property belonging to the estate of a deceased person, was found with a person who was acquitted by the Magistrate of having dishonestly taken it, so as to amount to theft, it was *held,* that the Magistrate was not competent to order it to be given to the heirs of the deceased person and his order was cancelled, **1 B. 630.** *See* **14 C. 834.** It was further *held* that the High Court had no power to direct restitution of property, already delivered by the Police under an illegal order of the District Magistrate. In **8 B. 338,** where the accused was acquitted of having cut down and stolen wood belonging to the complainant, on the ground that he acted under a misapprehension that the land on which the trees grew belonged to him, the High Court refused to interfere with the Magistrate's order directing the wood to be given to the complainant, because he was really entitled to the possession of it.

(*iv*) *Magistrate has no discretion when accused convicted.*—Where a Magistrate finds that the complainant was assaulted and forcibly dispossessed of a bungalow and its contents by the accused and convicts the accused under s. 323, I.P.C., *held* it was the duty of the Magistrate to pass orders under this section and s. 522 directing restoration of the bungalow and its contents to the complainant, **36 C. 44.**

(*v*) *Property not to be returned when person in whose possession it was found disclaims it.*—A Magistrate is not justified in ordering that the property should be delivered to the accused when he disclaims

the property The Court should retain the property until one or other of the parties has established his right to it If it has been paid or delivered the Court has power to call upon the recipient to return it **37 W P R 1913 = 14 Cr L J 596**

(*vi*) *Proper order when there is a bonâ fide dispute and property perishable* —A complaint of theft in respect for certain fallen trees was dismissed as there was a *bonâ fide* dispute about the ownership but the Magistrate directed the trees to be delivered to the complainant on revision the order was set aside and the High Court ordered that the wood should be sold and the proceeds should be retained by the Court until they were shown to be payable to one or other of the parties either in virtue of a decree of Court or in virtue of an agreement amongst themselves **16 Bom L R 931 = 2 Bom Cr Ca 269 = 16 Cr L J 111** After attachment of certain trees proceedings under s 145 were dropped and the Magistrate directed the produce to be delivered to one of the parties though there was a dispute to the ownership *Held* the proper order was to retain the produce in the custody of the village officers until one party or the other obtained the order of a Civil Court and if the property was perishable or difficult to be kept in safe custody it might be sold and the sale-proceeds kept in deposit pending the same event **16 Cr L J 104 (M)**

(*vii*) *When two innocent parties claim the negligent party must suffer* —*See* **27 A 630**, in Note 16 (iii).

14 Orders which a Magistrate is not competent to make under this section—

(*i*) *Orders as to custody of children* —It is not competent to a Magistrate acting under this section to make orders regarding the custody of children **Weir II, 665 = I, 358**

(*ii*) *Order restraining the honouring of a hundi* —A Magistrate has no power to direct that a particular firm should not honour a *hundi* drawn on it on suspicion that the parties to the *hundi* had been guilty of some offence —*A H C Cr Rev* 539 *of* 1904

(*iii*) *Order as to buildings or boundary marks* —The words such order as it thinks fit occurring in this section cannot be held to authorise a Court to direct the removal of a building in respect of which an offence has been committed Where therefore the accused built a new wall abutting on a public thoroughfare in contravention of the rules of the Municipality of *S* and the Magistrate in addition to the sentence of f[illegible] ordered the wall to be pulled down *held* that the order so far as regards the wall was *ultra vires* and must be set aside **1900 A W N 81** Similarly where a Magistrate taking proceedings under s. 145 ordered boundary marks to be laid down defining the limits of the possession of the respective parties and it was contended that such an order was authorised by this section. *Held* that this section had no application, as the property in question was not in the custody of the Court nor was it property regarding which any offence [illegible] **27 A 300**; *see* **14 C. W N 79**

(*iv*) *Order permitting one of the parties to reap crops after cancelling order* [illegible] a Magistrate cancels proceedings under s 145 (1) on the ground there is no likelihood [illegible] he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the [illegible] if passed under this section is fit to be set aside under s 520 **3 C. L. J 573 = 3 Cr L J 455**

(*v*) *Court cannot detain property until owner proves title before Civil Court* [illegible] before a Court does not come within this section the only legal order which [illegible] the previous possession It has no authority to order detention of such [illegible] owner was proved before Civil Court **22 B 844** *See* however Note [illegible]

(*vi*) *Magistrate cannot bestow property in charity* —[illegible] ce disposal of the Magistrate in the sense of enabling him to best[illegible] gal such legal disposition thereof as seems right *i e* direct its [illegible] or permit it to continue in the possession in which it is found [illegible]

(*vii*) *Power to impound documents* —A [illegible] document which had produced in a pending case [illegible] ation prosecution being sanctioned under ss. 64 (*c*) and [illegible] effect were seized on a search-warrant and impounded [illegible] 311 = s. 68 (*c*) and the documents forwarded to the [illegible] minal reversed by the Sessions Judge and the [illegible] ne the return of the documents. *Held* that the [illegible]

Also, the action of the Deputy Magistrate in impounding these documents, not being illegal, the High Court had no power to order the return of these documents at that stage, before the Collector had acted under s. 40 of the Act, **25 M. 625.**

15. Is it competent for Court to impose conditions when directing delivery of property?—Where no offence is proved, the property should primarily be delivered to the person by whom it has been produced. If, however, a *bonâ fide* doubt exists as to the ownership, and the property is claimed by a person other than the person from whom it was taken, the Magistrate may impose conditions on the person to whom it is delivered in order that the property or the value thereof may be forthcoming in case the rival claimant establishes a title to it, **Weir II, 667** and **668** or the Magistrate may proceed under s. 523, if there be any reasonable doubt as to the person legally entitled to the property, **Ratanlal 492.** But where a Magistrate convicting the accused of theft sentenced him to imprisonment and fine, and directed that out of the fine, when recovered, a certain sum should be paid to the innocent purchaser of the stolen property, and then the said property should be returned to the owner. *Held*, that the order imposing a condition on the return of the property to the owner was illegal, **3 Bom. L. R. 449.** So also an order cannot be made directing a party to receive the property on condition of his producing the property or its equivalent value when ordered by a Civil Court, **19 M. L. J. 516 = 11 Cr. L. J. 68.**

Court cannot demand security for production of property when called upon.—On a complaint charging the accused with criminal breach of trust in respect of certain ornaments, the Magistrate directed a preliminary inquiry and thereafter passed an order directing the accused to execute a surety bond for Rs. 400, and to hold the ornaments in deposit with him as trust, and to produce them whenever required. In the meanwhile, the complainant was directed to have his claim proved in a competent Court. *Held*, that there was no section of the law, which enabled a Magistrate to make the order demanding security, for the production of the articles when required. If the Magistrate thought that a criminal offence had been committed, he ought to have proceeded to direct their production under s. 94 or, if necessary, take steps under s. 96; if he did not intend to take proper steps, the only course open to him was to leave it to the Civil Court to take such steps as it might think fit to secure the property. Also the order having been made in a matter which had come before the Magistrate in his judicial capacity, could not be regarded as an executive order merely, and that as a judicial order it was made without jurisdiction, **7 C. W. N. 522,** but *see* **Weir II, 668.**

16. Proper order when currency notes or current coin is produced before Court.—Currency notes must generally be returned to the person from whom they were taken, **1911 (2) M. W. N. 370 = 12 Cr. L. J. 400; 30 Mad. 916.** But in **Weir II, 670** and **440**, it was *held* that an order of a Magistrate directing that money obtained by the Police from the person to whom the same has been lent by a thief or receiver, should be paid over to the owner, is not in contravention of this section.

(*i*) *Rule as to money applies only to current coin.*—Where *Babashai* coin came before the Court as part of the stolen property and no custom is set up to show that it is current coin or legal tender in British India, it was *held* that the rule enunciated in the preceding note relating to the current coin of the realm, does not apply and the Court is at liberty, under this section, to award the same to the complainant, from whom they were stolen, **25 B. 702.**

(*ii*) *The rule that title to money passes by mere delivery is however limited to cases where receipt of money is bonâ fide.*—*See* **4 S. L. R. 255 = 12 Cr. L. J. 397.** An objection that the coins are not the identical coins stolen is unsustainable in view of the explanation.

(*iii*) *Rule as to currency notes modified, when the question is which of two innocent parties is to suffer.*—The petitioner, a dealer in hides, received the right halves of two currencey notes from another dealer in hides, as security for the payment of the price of skins delivered to the latter, who promised to give the other halves which had already been given to the respondent. It was found, that owing to the negligent conduct of the respondent, in having allowed the owner to retain the right halves with him, he committed fraud on the petitioner. The Magistrate after convicting the owner of the currency notes for cheating, ordered the return of the right halves to the petitioner. The Court of Session, acting under s. 520 annulled the order and directed the petitioner to hand them over to the respondent. *Held*, that the petitioner was entitled to recover the half notes originally made over to him from the respondent or to obtain compensation from the respondent, if he had parted with them inasmuch as it was owing to the negligence of the respondent that the owner of the currency note had committed fraud on the petitioner. Where a Subordinate Court makes an order under s. 520 directing the disposal of any property, regarding which an offence has been committed, the High Court can

interfere in revision against that order, ' and make any further order that may be just," **27 A. 630**, where **1898 A. W. N. 40** is *followed* The jurisdiction of the High Court, as a Court of Criminal Revision to consider the *rights* of the parties and make this order, seems open to doubt, *contra, see* **9 C. W. N. 849.**

17. Proper order when third parties are involved—

(*i*) *Rights of the pledgee of stolen property*—A Magistrate should not make an order for delivery to the owner or complainant of property regarding which an offence has been committed without giving the person (pledgee) from whom the property was taken an opportunity of being heard An appeal lies from such order, and the Magistrate should not under sub-sec. (3) of this section allow his order to be carried out until the period allowed for presenting such appeal has passed When however, the evidence disclosed a *prima facie* case, of a certain jewel having been obtained from the owner by means of an offence or fraud within the meaning of s 178, Prov (2), *Indian Contract Act* and being pledged subsequently to another person, the Court declined to interfere with the order of the Magistrate, directing the return of the jewel to the owner without hearing the person with whom the jewel was pledged In such a case the pawn broker from whom the jewel was taken, was held to have the right to bring a suit in the Civil Court to enforce his lien on the jewel **4 L. B. R. 13 = 6 Cr. L. J. 125.** But where certain jewels were given to the accused to sell but she did not sell them and her niece pawned them, and the Police seized the jewels from the pawnee and returned them to the owner under orders of the Magistrate, who convicted the accused of criminal breach of trust *held* the question as to the validity of the pledge, and the question whether the circumstances were such as to raise a reasonable presumption that the pawner as acting improperly ought to be left to a Civil Court, and the possession of the jewels ought not to be transferred in consequence of the Police having seized them The owner having given the jewels to be disposed of for money, he is not entitled to the assistance of a Criminal Court in recovering them from a pawnee to whom they were so disposed of, **3 Bur. L T. 111 = 12 Cr. L. J. 88**, **4 L. B R. 25 = 6 Cr. L. J. 135**, where **27 M. 424** and **12 B. L R. 42** are *referred to* *M* obtained a pair of diamonds worth Rs. 80 000 promising to return them the same day but instead of doing so, he pawned them with *C* for Rs 4 000 *M* was convicted of criminal breach of trust and *C* was directed to return the diamonds to *M* It was contended on the authority of **4 L. B. R. 25 = 6 Cr. L. J. 135** that the order for the return of the diamonds was wrong as they were not obtained by means of an offence or fraud, *held* following **4 L. B. R 13 = 6 L B. R. 125** that the order was justifiable in the circumstances of the case **3 Bur L. T. 111 = 12 Cr. L. J. 88**; but if the articles were given to a broker for sale and he sells the jewels but misappropriates the proceeds and is convicted of criminal breach of trust of the money, the purchaser of the jewels is protected by s 108 (except) to *the Contract Act*, and is entitled to have the jewels returned to him, **4 Bur. L. T. 170 = 12 Cr. L. J. 467.** *See* also **Weir II, 672**

(*ii*) *Refund of prize money obtained by cheating*—Where a person was convicted of cheating under s 420, I P C by falsely pretending to be the winner of a lottery prize and dishonestly inducing the lottery officials to pay the prize to him he may be directed to refund the money to the lottery officials under this section **15 Cr. L. J. 555 (Bur)**

(*iii*) *To purchaser in market overt no protection in India*—Under s 108, *Indian Contract Act* a seller cannot give to a buyer a better title than he himself has. *Held*, therefore the real owner of a stolen buffalo, was entitled to recover it from the possession of an honest puchaser who acquired it *bona fide* afte[illegible] had been bought and sold in market overt, **2 P. R. 1908 = 6 P. W. R. 1908 = 7 Cr. L. J. 279**; but *see* 7 [illegible] **8 P. R. 1872.**

18. Court competent to direct joint delivery.—Where it is found that subject-matter [illegible] r belongs partly to the accused who has been discharged and partly to him and another jointly [illegible] s to pass an order to deliver the property to both on their joint receipt, **34 M. 94.** h

EXECUTION OF ORDERS.

19. Defect of order as to finality.—An order after trial, made by a Crimina[illegible] of property under this section, is conclusive as to the immediate right to possess[illegible] of the order is that it determines which of the parties shall be left to sue in the [illegible] **12 Cr. L. J. 400.** The real owner may proceed against the holder of the pr[illegible] ...th Court to consider whether such person is entitled to retain such poss[illegible] ...rate the functions of a Civil Court, **1 B. 630**; **Ratanlal 500**; **29 M. 375.**

20. **Order should not be carried out at once but kept in abeyance.**—*See* sub-sec. (3). The intention of the Legislature is that even if the Magistrate directs restoration, the order should not be carried out at once but kept in abeyance till the order becomes really final either by their being no appeal or by any final order by a Court of final jurisdiction, **18 C. W. N. 959 = 15 Cr. L. J. 184.** When an order directing delivery of possession to one party is set aside by a higher tribunal, that order carries with it the incident of restoration which the Magistrate is bound to carry out, **18 C. W. N. 1147 = 15 Cr. L. J. 222.**

21. **Responsibility of Magistrate returning property before appeal time has expired.**—When a Magistrate in acquitting the accused, returned the money produced before him, before the expiry of the appeal time, and the accused on being called upon, subsequent to the disposal of the appeal to refund it, did not do so, it was *held* the District Magistrate should report the matter to Government, in order that the Subordinate Magistrate who was clearly responsible, might be called upon to make good the amount.—*M. H. C. Pro.* 784 *J., dated 22nd March*, 1891. If in such a case, the amount is not made good, the remedy is by civil suit against the Sub-Magistrate, accused or both.—*Mad. G. O.* No. 930 *J., dated 14th June*, 1904. The amount may also be recovered under s. 547 as if it were a fine, **19 A. 112.**

22. **Magisterial control ends when property is handed over.**—When a Magistrate hands over property to anyone of the parties, his control *qua* Magistrate ceases. If he takes again the same property from such person for the inspection of the Appellate Court, it does not come into his possession as property seized by the Police or property over which he had any power of disposal, **1897 A. W. N. 26.**

23. **Counterfeit coins to be sent to Bombay Mint.**—When any counterfeit coin has been ordered to be confiscated by a Court acting under the provisions of ss. 517, 523 and 524, the Court should send the same to the Mint at Bombay or to the nearest treasury or sub treasury officer, to be remitted by him to the Mint.—*Bom. H. C. Cr. Cir.*, p. 77.

POWERS OF APPELLATE AND REVISIONAL COURTS.

24. **Appellate Court can make an order under this section even when first Court does not do so.**—*See* Note 87 at p. 1026. An Appellate Court is entitled in an appeal from a conviction and in other cases, to make any amendment or any consequential or incidental order that may be just or proper. Thus, an order directing the restoration of property which was found to have belonged to the complainant, but the restoration of which was not ordered by the Court of First Instance, is a consequential or incidental order within the meaning of s. 423 (1) (*d*), **3 A. L. J. 770 = 4 Cr. L. J. 370.** *See* also **6 C. W. N. 713.** Under s. 520 the Appellate Court has the same powers as the Court which tried the case to pass an order under this section directing the parties to get their claim established in a Civil Caurt, **35 A. 374** where **9 C. W. N. 549 = 2 Cr. L. J. 269** is *followed*, **22 B. 844,** is no longer good law as it was passed under the old Code; but in **Weir II, 674,** it was held that the Appellate Court is not competent to pass any order under this section when the first Court fails to do so. *See* Note 87 at p. 1026 and *see* **39 C. 1050.**

25. **High Court may in revision pass an order under this section.**—*See* **15 Cr. L. J. 555 (Bur.)** and Note 66 to s. 439.

26. **Powers of Appeal and Revisional Courts to deal with orders made under this section.**—*See* s. 520 and notes thereto.

Order may take form of reference to District or Sub-Divisional Magistrate.

518. In lieu of itself passing an order under section 517, the Court may direct the property to be delivered to the District Magistrate, or to a Sub-Divisional Magistrate who shall in such cases deal with it as if it had been seized by the Police and the seizure had been reported to him in the manner hereinafter mentioned.

Notes.—1. 'Manner hereinafter mentioned.'—*See* s. 523.

2. **Scope of the section.**—An order under this section can be made only in respect of property (*a*) regarding which an offence appears to have been committed, or (*b*) which has been used for the commission of an offence, or (*c*) which has been produced before a superior Court, or (*d*) which has been in the custody of such superior Court, **Ratanlal 496.** In **14 C. W. N. 215,** the High Court set aside an order of a Sessions Judge made under s. 517 without an inquiry as to the ownership of a sum of money found with an acquitted person and *held*, that an order under s. 518 ought to have been made.

Payment to innocent purchaser of money found on accused

519. *When any person is convicted of any offence which includes, or amounts to theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him

Note.—Compensation not to be given out of fine imposed on convicted person.—Where no money is found in the possession of the person convicted as the thief or receiver of stolen property, it is not open to a Magistrate to grant compensation to the innocent purchaser out of the fine imposed on the convicted person, **Weir II, 671.** *See* also **3 Bom. L. R. 449** and **764.** On the conviction of an accused under s 380, I P C, out of the fine imposed, Rs 28 were ordered to be paid to one *B* an innocent mortgagee who had advanced money to the accused on the stolen property *held*, that ss 519 and 545 were not applicable to the case as no injury was caused to the mortgagee by the offence committed, **Ratanlal 631; Weir II, 672.** *See* Note 16 to s 517 as to the proper order to be made when the interests of pledgees are concerned

Stay of order under sections 517, 518 or 519

520. Any Court of appeal, confirmation, reference or revision may direct any order under section 517, section 518, or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

Notes.—1. Enlarged scope of this section.—This section is amended by the addition of the words "*and make any further orders that may be just*" It 'will enable a superior Court to give effect to an order setting aside the order of the Court of First Instance, if that order has been carried out by directing the restitution of property"—*Statement of Objects and Reasons* *See* also **5 S. L. R. 153 = 13 Cr. L J. 21.**

Cases superseded owing to enlarged scope of s. 517 —Owing to the enlarged scope of *s* 517, the Rulings in **9 W. R. 57; 1 B. 630; 8 B. 575; 14 C. 534; 22 B. 844** are no longer law The Ruling in **30 C. 690** though made in 1903, did not take into consideration, the alteration of the language of s 517 and the addition made to this section The jurisdiction of Courts of Revision is now undoubted by reason of the concluding words of this section *See* Note in **8 C. W. N. at p. 43** and **9 C. W. N. 549 = 2 Cr. L J. 269**

1-A. Application under this section in no sense an application by way of appeal.—*Held*, that the petitioner's application was in no sense an application by way of appeal from the order of the Magistrate, but an independent application to the Sessions Judge with a view to his taking action under ss. 517, 520 of the Code and no period of limitation is prescribed for such an application, **4 Lah. 49.**

2. "Court of appeal" means the Court to which appeals ordinarily lie.—These words are not necessarily limited to a Court before which an appeal is pending It may very often happen that the [illegible] of the propriety of an order under s 517 may, in no way, concern the convicted person, and it is [illegible] to construe this section in a way as shall make the power of the Judge to modify, alter or annul a Magistrate's order affecting one person, contingent on the accident whether another person has or has not chosen to appeal, **3 C. 379 = 1 C. L. R. 339; 9 M. 448; 2 A. 276.** The words '*Court of Appeal*' merely imply the Court to which appeals would ordinarily lie, and do not mean that an appeal must lie in the particular case in which an order has been passed as to property, **96 P. L. R. 1911 = 12 Cr. L. J. 400; 50 Mad. 916.** In [illegible], a second-class Magistrate discharged certain persons accused of theft and ordered the delivery of property to them. Though there was no appeal pending, the District Magistrate reversed the order so far as the delivery of property was concerned, and finding that the property had been taken from the possession of the [illegible] ordered it to be delivered to him *Held*, that the District Magistrate had jurisdiction under this section to set aside the order passed by the second-class Magistrate under s 517, **42 M. L. J. 401;** [illegible] But see [illegible] *dissenting from* **9 M. 448; 46 A. 623** *follows* **42 B. 664** In the case of an [illegible] of the trial Court [illegible] Sessions Judge and District Magistrate as a Court of Revision, have power under this section to [illegible] the order of the trial Court passed under s 517 and in the case of a conviction by a first-class [illegible]

* Cf the *Criminal Law (Amendment) Act* 30 and 21 Vict., c. 35, s. 9 from which this section has been [illegible]

District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under s. 517, by the trial Court, **7 R. 345.**

3. **Appellate Court not entitled to act, when order of Subordinate Court not one under ss. 517—519.**—When property is not disposed of by a Magistrate under this section, a Sessions Judge has no jurisdiction to hear an appeal against the order of the Magistrate and revise the same, **10 B. 197; 1 B. 630.** Since an order directing the restoration of property *in respect of which no offence has been committed*, to the person in whose possession the property is found, is not an order under this section, it is not appealable, **22 B. 844; 14 C. 834** *followed* in **30 C. 690.** But the correctness of this last Ruling was seriously doubted in **9 C. W. N. 549 = 2 Cr. L. J. 269** on the ground that **30 C. 690** does not advert to the alterations in the language of this section and the addition made to s. 520. In this last case, though the elephant was found to belong to *B*, still as the persons whom he charged with having committed an offence in respect of it were acquitted to that offence and they claimed the elephant and denied his ownership, the elephant was made over to one of the accused, especially as the elephant was found in his possession. In an appeal from a conviction, Appellate Court has no jurisdiction to pass any order under this section, when no order has been passed under s. 517 by the Subordinate Court which convicted the accused, **Weir II, 674.** *See* Note 24 at p. 1257.

4. **Sub-Divisional Magistrate not entitled to hear an appeal under this section.**—A Sub-Divisional Magistrate has no jurisdiction to hear an appeal under this section, as he is authorised under s. 407 only to hear appeals preferred by accused persons from conviction, *M. H. C. Cr. Rev.*, 525 *of* 1905 *followed in Cr. Rev., Case* 84 *of* 1908. **42 M. L. J. 401; 44 M. L. J. 56; 46 M. 162.**

5. **District Magistrate's power to set aside order for restoring property.**—Where property has been restored to the accused on their acquittal, a District Magistrate has no authority to reverse the order for its restoration. He should, if he wished to review a Subordinate Magistrate's proceedings, make an order for staying the execution till the disposal of the review and any reference thereon under s. 520, **8 B. 575.**

6. **The section contemplates but one appeal.**—A Sessions Court is not a Court of Appeal from a District Magistrate (first-class Magistrate) in respect of an order already passed by the latter, under this section on appeal from a second-class Magistrate, though under s. 438, it might report the matter to the High Court.—*M. H. C. Cr. Rev.*, 236 *of* 1904. Where a Sessions Court in appeal annuls the order of the trying Magistrate for delivering the property to the complainant, the remedy against such an order is by a petition for revision and not by way of appeal, **1898 A. W. N. 40.**

6-A. **District Sessions Judge not a Court of appeal, reference or revision with regard to an order of a second-class Magistrate.**—In a theft case a second-class Magistrate convicted the accused and directed the subject-matter to be handed over to the complainant. On appeal the Sub-Divisional Magistrate acquitted the accused and declined to interfere with the order of disposal. The Sessions Judge, on appeal directed the subject-matter to be handed over to the accused. *Held*, the Sessions' Judge's order was unauthorised by s. 520 as he was not a Court of Appeal, confirmation, etc., with reference to the orders of the second-class or the Sub-Divisional Magistrate, **47 M. L. J. 481.**

7. **During pendency of appeal none of the other Courts competent to act.**—If an appeal against an acquittal or conviction included an objection to an order under s. 517, or s. 518, or s. 519, then, during the pendency of the appeal, the concurrent jurisdiction of the other Courts specified in this section would be suspended, owing to seizin thereof by the Court of Appeal, **1904 C. P. L. R. 107,** neither under this section nor under s. 439, will the High Court exercise its revisional jurisdiction, except as a Court of last resort **1897 C. P. L. R. 47; 1904 C. P. L. R. 17.** The fact that by reason of the extent of the sentences inflicted appeals lie to the High Court, will not, however, in the least divest the Sessions Court of the relation in which it stands to the Magistrate's Court for the purposes of this section.

8. **Power of Appellate Court where property erroneously disposed of.**—In making an order under this section for restitution, the Court is not restricted by the terms of s. 517 or by any limited definition that may be given to the word restitution; it can make any order that may be just. Where, therefore, currency notes or current coin were erroneously disposed of under s. 517 and the notes and coin are changed before the passing of the Appellate order the repayment of an equivalent may be ordered, **5 S. L. R. 153 = 13 Cr. L. J. 21.** The intention of the Legislature in adding the words '*and make........just*' was obviously to enable a superior Court to give effect to an order setting aside the order of the Court of First Instance, if that order has been

carried out by directing the restitution of the property In this case if a Magistrate, contrary to the provisions of the last paragraph of this section, hands over the property to the complainant and a Sessions Judge on appeal annuls the conviction, he (the Judge) cannot direct the Magistrate to dispose of the property as if it were unclaimed. The proper order in such a case would be to direct the Magistrate to return the property to the person from whom he had received it, **1897 A. W. N. 26** This will authorise the Magistrate to recover it from the complainant, if necessary, by a civil suit, **19 A. 112.**

9. Notice must be given.—An order regarding disposal of property should not be passed without giving notice to the opposite party, **35 B. 253.** *See* also **17 Cr. L. J. 207 (Bur.), 46 M. 162; 5 Rang. 553.**

10. Court of revision has jurisdiction to act under this section only when there is neither appeal nor confirmation against the conviction—Where the case is one in which an appeal lies any party aggrieved by an order as to the disposal of property must go to the Court of appeal In such a case, a Court of revision has no jurisdiction to interfere with an order as to disposal of property It is only when there is neither an appeal nor a confirmation that a Court of revision or reference can act under this section, **35 B 253.** Where the Appellate Court in dealing with an appeal against the sentence has left untouched an order passed under ss 517—519, there exists no bar to an application for revision of that order being made in anyone of the Courts mentioned in s 520, **17 C. P. L. R. 107 = 1 Cr. L. J. 764; 42 B 664.**

11. High Court's powers of revision.—Where a Sessions Court in appeal annuls the order of a trying Magistrate for delivering the property to the complainant, the remedy against such an order is by a petition for revision and not by way of appeal **1898 A. W. N. 40.** The words 'any proceeding' in s 435 are wide enough to empower the High Court to revise an order of a Magistrate made under this section, **Weir II, 669** and **538** Any order made under s 517 may be revised by the High Court either under s 520 or in virtue of the powers conferred on it by s 439 read with ss 435 and 423 (*d*) **18 C. W. N. 959 = 15 Cr. L J. 184** *See* also **36 C. 44, 27 A 415.** The High Court will not interfere where the case is one in which an appeal lies, **35 B. 253.** *See* Notes 21 22 to s 439 **43 M. L. J. 87.**

12 Illegal orders under s 517, liable to be set aside under this section—When proceedings initiated under s 145 (1) are cancelled on the ground that there is no likelihood of a breach of the peace the Magistrate has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other Such an order if passed under s 517, is fit to be set aside under this section, **3. C. L. J. 573 = 3 Cr. L J. 466.**

Destruction of libellous and other matter

521. (1) On a conviction under the Indian Penal Code, sections 292, 293, 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, sections 272, 273, 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had to be destroyed

Notes—1. It was proposed to add a clause to the effect that if conviction is set aside on appeal or otherwise the order under sub-sec. (1) shall become void, but as similar provision is substantially made in cl (*d*), s 423 (1) the addition was omitted

2 Scope of the section referred to—S 292, I P C, deals with sale of obscene books, s 293 with having them in possession s 501 with printing etc., defamatory matter and s 502 with selling defamatory s 272 with adulterating food, s 273, selling noxious food s 274 adulterating any drug, etc., and s 275 with selling an adulterated drug, etc.

3. Other provisions of law which provide forfeiture—*See* ss 263 (2) 126 and 127 of *the Penal Code* So also s 24 of *the Arms Act* XI of 1878, s 15 of *the Abkari Act* I of 1886 s 10 of *the Explosives Act* IV of 1884, s 41 of *the Madras Forest Act* V of 1882, ss 52 and 84 of *the Indian Forest Act* VII of 1878, s 9 of *the Merchandise Marks Act* IV of 1889, s 4 of *the Metal Tokens Act* I of 1889 s 17 of *the Ancient Monuments Act* VII of 1904, s 12 of *the Opium Act* I of 1878, s. 17 of *the Petroleum Act* VII of 1873, s 7 of *the Poisons Act* I of 1904, s 79 of *the Madras Salt Act* IV of 1889, s 12 of *the Indian Salt Act* XII of 1882, s 3 of *the Madras Nuisances Act* III of 1889 and ss. 45, 46, 48 and 51 of *the Excise Act* XII of 1896

Power to restore possession of immovable property.

522. (1) Whenever a person is convicted of an offence attended by criminal force* "or show of force or by criminal intimidation" and it appears to the Court that by such force* "or show of force or criminal intimidation" any person has been dispossessed of any immovable property, the Court may, if it thinks fit, *"when convicting such person or at any time within one month from the date of the conviction" order† "the person dispossessed" to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

‡ "(3) An order under this section may be made by any Court of appeal, confirmation, reference or revision."

Notes.—1. Duty of Magistrate to pass orders in favour of party dispossessed.—Where a party was found to have been assaulted and forcibly dispossessed of a bungalow and its contents by the opposite party who was in consequence convicted under s. 323, I.P.C., *held* that it was the duty of the Magistrate to pass orders under ss. 522 and 517 directing restoration to the petitioner of the bungalow and its contents, **36 C. 34.**

CONDITIONS PRECEDENT FOR ACTING UNDER THIS SECTION.

2. There must be a conviction.—To disposses a person of property and to replace him by another under this section, it is necessary that there should have been a conviction of an offence. Consequently an order passed under s. 145, directing the possession of a house to be given through the Police is illegal and cannot be enforced under this section, as there was no conviction of an offence, **37 A. 654.** When the case is one of civil but not criminal trespass, a Magistrate is not warranted in passing an order under this section. When, during the absence of the complainant, the accused took possession of a house in her occupation and established there a boy, alleged to be the adopted son of the complainant's father, *held* no order could be passed for delivery of possession of the house to the complainant, as the accused could not be convicted by the Magistrate under s. 448, I.P.C. The house was ordered to be restored to the accused who were found in possession of it, **12 C. W. N. 269 = 7 C. L. J. 175.**

3. Offence of which accused is convicted must be attended by criminal force.—To justify an order under this section, the Court must find (*i*) that the offence of which the accused was convicted was attended by criminal force and (*ii*) that some person had been dispossessed of such property by the use of such force. Where, therefore, a person was convicted of criminal trespass (s. 447, I.P.C.), it was held *following* **25 C. 434** and **27 C. 174**, that the Magistrate was not justified in making the order restoring the property, **25 A. 341.** Where the accused dispossessed the complainant of his garden by breaking open the padlock of the gate, but used no force or violence and were convicted of the offence of criminal trespass, *held* the Court could not order restoration under s. 522, **18 C. W. N. 1146 = 15 Cr. L. J. 175.** In **26 M. 49**, WHITE, C J., was of opinion that to satisfy condition (*i*), it is not necessary that criminal force must form an ingredient of the offence of which the person is convicted. It is enough if the offence though not involving the use of criminal force as an ingredient, is yet attended by the use of criminal force. When therefore the petitioner was convicted of criminal trespass under s. 477, I.P.C., and the Magistrate made an order under this section directing that the complainant must be restored to possession, without finding that such trespass was attended by criminal force or that the complainant was dispossessed by such force, *held* on revision the order was made without jurisdiction. In **31 C. 691** it was *held* by the Full Bench *overruling* **25 C. 434** and cases like **5 C. W. N. 432** that followed it, that if criminal force was used by the accused by reason of which a party was dispossessed an order could be made under this section, *even though the criminal force was not an ingredient of the offence of which the accused was convicted.* In this case, the accused was convicted under ss. 341 and 114, I.P.C., for wrongfully restraining a person by the erection of a hut and the Magistrate made an order for the removal of the obstruction. The offence was, on the finding of the Lower Appellate Court, attended by criminal force and the complainant was dispossessed by the reason of the obstruction complained of. Still the Full Bench (MACLEAN, C.J., PRINSEP and GHOSE, JJ.), *held*, that the Magistrate had no jurisdiction to order the removal of the hut. The dispensing Judges (AMEER ALI and BRETT, JJ.), *held*, that on conviction, the Court had an inherent power to make the order for removal of the obstructions, though not under this section

* The words in "—" were inserted by Act XVIII of 1923.

† The words in "—" were substituted for the words "such person" by *ibid.*

‡ This sub-section was added by *ibid.*

(i) *The 'force' used must be to 'a person'*—The term 'force' is defined in s 349, I P C, as being applicable to force when used in conection with the human body Under this section, delivery of immovable property may be made to the person who has been dispossessed of it when the accused is convicted of an offence attended by criminal force. Where therefore the accused were convicted of rioting under s. 147, I P C, with the common object of destroying the complainant s fencing and raising of a new fencing on the complainant s land, it was *held* that violence herein was caused to the fencing and not to any person and therefore this section did not apply, as there was no use of criminal force to any individual, **18 C. W. N. 1150 = 15 Cr. L. J. 720.**

(ii) *Finding of use of criminal force necessary to support order*—The foundation of an order under this section should be the finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of specific immovable property by the use of criminal force, which force formed a material ingredient in the matter of a criminal conviction. And when such a finding has been arrived at, the order should be in terms to restore to the person who had been so dispossessed the property from which he had been dispossessed, **23 W. R. 54.** In **3 L. B. R. 20 = 2 Cr. L. J. 277,** applicants were convicted of criminal trespass. There was no finding or allegation that criminal force had been used in the commission of criminal trespass. Subsequently, the complainant made an application to the Magistrate for restoration or possession of land in respect of which the trespass was committed and the Magistrate, purporting to act under this section and without calling on the accused to show cause, ordered the possession of the land to be restored to the complainant. *Held,* that where there is no finding or allegation that criminal force has been used in the commission of criminal trespass an order under this section, restoring the possession of immovable property to the complainant cannot legally be passed. *See* also **7 C. L. J. 175 = 12 C. W. N 269; 16 P. R. 1919 (Cr.).**

(iii) *Mere show of force will not do but there must be actual use of it*—The words "attended by criminal force' mean not the *show* of criminal force as defined in ss 349 and 353 I.P C but the actual use of it Therefore, where, the accused was convicted under s 243, I P C, and the Magistrate made an order under this section for restoring possession of certain property to the opposite party, *held* that the order for restoration was bad in law, **25 C. 434; 5 C. W. N. 289 and 290.** But **25 C. 434** has been doubted in **11 C. W. N. 467 = 5 Cr. L. J. 278,** where it was *held* that under this section, whenever an accused is convicted of an offence attended by a show of force the Court has power to order the person who has been dispossessed by the accused of any immovable property by such show of criminal force, to be restored to the possession of the same

An essential ingredient of s 522 is that the offence of which the person is convicted must have been attended by criminal or, at the least by the show of criminal force, **21 A. L J. 593**

4. Where dispossession is not the result of criminal force, order for restoration bad.—Where the accused was convicted of rioting and an order was passed under this section to the effect that one of the witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction, *held* that as there was no evidence proving that the witness had been dispossessed by criminal force, the order of the Magistrate was bad, **Weir II, 674,** and not warranted by law, **1 C. W. N. 256; 4 C. W. N. 57** and **2 C. W. N. 187** and if the Magistrate assumed to act under s 145, the order should not have been embodied in his judgment, but should have formed the subject of separate proceedings A Magistrate exercising jurisdiction given by this section must be satisfied and show clearly upon his judgment that dispossession has taken place by reason of the exercise of criminal force as defined in s 350 I P C, **25 C. 434** *followed see* **27 C. 174.** But *see* **11 C. W. N. 467 = 5 Cr. L. J. 278.** *See* also **26 M. 49; 23 B. 494.**

5. Action may be taken, even though dispossession was under a claim of title.—When it was found that the complainant was all along in possession of a plot of land which he had showed with paddy, and the accused had failed in certain previous proceedings before the Assistant Superintendent of Survey to get this plot included in his holding, *held* the accused going upon the land with a body of men and ploughing up the paddy seedling in spite of the remonstrances of the complainant s servants constituted offences under ss. 447 and 426 I P C., even though he did so under a claim of title to the land That under the circumstances the fact that the accused set up a title to the land did not make the case against him one of a civil nature, and take it outside the jurisdiction of a Criminal Court, **11 C W. N 467 = 5 Cr. L J. 278**

6 Order may be made even when third parties are dispossessed—The object of the provisions of this section is to enable the Criminal Court by a summary order to restore the state of things which existed at the time of the dispossession by the convicted persons If in so restoring possession third parties are dispossessed they must be left to seek their remedy in the Civil Court and sub sec. (2) provides that any right or interest

they may have in the property shall not be affected. Thus in **5 C. W. N. 374**, an auction-purchaser was put in possession of a house, by dispossessing a tenant: subsequently, the accused forcibly dispossessed the auction-purchaser and the tenant re-entered. On the complaint of the auction-purchaser, the accused were convicted and the Magistrate directed the purchaser to be restored to the possession of the house, and ordered the tenant to vacate. It was contended that the order against the tenant was bad, as he was no party to the criminal proceedings. *Held*, the order was good, as the auction-purchaser was entitled to be restored to the actual possession of the house which he held at the time of his ejectment, and the Magistrate could not go behind the state of affairs at the time of the forcible ejectment which led to the criminal proceedings. The ruling in **23 B. 494** was in this case referred to and explained.

7. **Section does not apply when there has been no dispossession.**—This section is the only provision which enables a Magistrate to restore a dispossessed party, and the power can only be exercised in cases in which there has been a conviction of an offence, attended by criminal force, and dispossession has been effected by means of such criminal force, **Weir II, 98.** *See* **18 C. W. N. 399 = 15 Cr. L. J. 302.** *N* obtained possession in September, 1896, of a certain field in execution of his decree against *R*. On September 27th, 1897 *N* brought a complaint against *R* of criminal trespass under s. 447, I.P.C., in which he stated that *R* had illegally entered upon possession of the land about a month and a-half before, and sowed it with rice, and when *N* went to the field *R* pushed him out and refused to vacate the land or pass a *kabuliyat.* A third-class Magistrate found that *N* had obtained possession through a Civil Court and convicted *R* of the offence charged. On the application of *N*, dated 18th November, 1897, the same Magistrate passed an order under this section directing *N* to be put in possession of the land, but ordered the crops to be attached. Later on as *R* had disclaimed all interest in the crop, the Magistrate directed that, after deducting expenses, the crops should be given to *N*. At this stage one *V* intervened and claimed the crops as his, but his objection was over-ruled and possession of the land was made over to *N* on 29th January, 1898. *Held*, reversing all the orders of the Magistrate passed subsequent to the date of the conviction of *R*, that (1) all that the words "is convicted" in this section mean is, that there must be a conviction first had, and then the order can be made, (2) that an application for possession made shortly after the conviction may be considered to be a continuation of former proceedings and (3) that as the accused *R* had possession both prior to and at the time force was used, the dispossession was, therefore, not made by force, and that the order passed under this section was bad, **23 B. 494.** *Contra, see* **4 C. W. N. 308** as to points (1) and (2) and **5 C. W. N. 374**, where this Ruling is discussed.

8. **No jurisdiction to proceed under this section, when neither party is found to be in possession.**—Where neither party is found to be in actual possession, no order could be passed under this section directing restoration of the property, **Weir II, 675.**

WHEN ORDER SHOULD BE MADE.

9. **Order need not be simultaneous with conviction.**—An order under this section restoring possession of immovable property to a complainant can only be made simultaneously with the order of conviction and not subsequent thereto, **4 C. W. N. 308.** There is nothing in the Code which requires that an order under this section should be contained in the judgment convicting the accused or be passed before the judgment is signed. It may be an independent order and made subsequent to the date of the conviction. But it must be immediate, that is, directly arising out of the proceedings without any fresh decision on facts not before adjudicated upon being imported. The word "simultaneously" used in the judgment in **4 C. W. N. 308**, must be taken to mean "immediate," **23 B. 494** and **23 W. R. 54** *followed*, **14 Cr. L. J. 172 (C.).** In this case an order passed four days after the conviction of the accused was upheld. *See* also **39 C. 1050** and Note 8. The complainant promptly after the dismissal by the High Court of the revision petition against a conviction, applied for an order for possession, but the accused having filed a civil suit, no order was passed on the application until after the disposal of the suit, that is, about 20 months after the conviction when the application was renewed; *held*, that the Magistrate had discretion to pass an order for possession under s. 522. It is not necessary for him to pass such an order simultaneously with the conviction, and there is no illegality if he passes such order at any time after the conviction if the cause of delay is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased, **15 P. R. 1914 = 14 P. W. R. 1914 = 15 Cr. L. J. 275** *following* **23 B. 494** and **14 Cr. L. J. 172**, and *dissenting from* **4 C. W. N. 308.**

10. **Notice to accused not necessary.**—Under the law as it now stands, no notice is necessary to the accused inasmuch as the order for restoration of possession arises immediately out of the findings of the

Magistrate in his judgment and is amenable to appeal, **14 Cr. L. J. 172.** In this case an order passed four days after the conviction of the accused without any notice to the accused but without any fresh materials was held to be competent as the accused had not been prejudiced Although there is no explicit provision of law, requiring that a Magistrate who passes an order under this section, should give the party against whom it is proposed to make the order an opportunity of showing cause against it, he should do so as a matter of the due exercise of judicial discretion, **3 L. B. R. 20 = 2 Cr. L. J. 377.**

APPEAL AND REVISION.

11. Under the new amendment an order under this section may be made by any Court of appeal, confirmation, reference and revision.—Under the new amendment to s. 522 by the addition of clause (3) an order under this section may be made by any Court of appeal, confirmation, reference and revision **46 A 92** and within a month of the disposal of a criminal revisional petition filed against an order of a Lower Court **28 Cr. L. J. 191** and therefore the decisions in **39 C. 137** and **1050** disapproving **23 B. 495** are no longer good law *See* also **5 Pat. 438.** Order under this section must be set aside if conviction is set aside Where an order under this section is passed after an order of conviction and subsequently the conviction is set aside the order under this section must also be set aside even though the equities of the case may be entirely in favour of the complainant, **118 I. C. 392 = 30 Cr. L. J. 902 (2).**

12. Power of Lower Court to direct restitution when order is reversed—A Criminal Court is empowered to restore possession to a party who has been dispossessed by its order under this section when such order has been set aside as illegal by superior authority, **5 P. R. 1895** In a case in which the accused had been convicted of offences under ss 352 and 448 I P C the prosecutor had obtained an order under this section from the convicting Magistrate, restoring possession of property, the subject of the offence under s 448 I P C The accused having been acquitted on appeal applied for restoration of possession The Appellate Magistrate referred the case to the High Court On a preliminary objection that the High Court had no power to order restoration of property, *held* reading together s 423 (1) (*d*) and this section, the High Court had the power to order restoration of property, and this as a result of the amendment by the present Code of s 423 of the 1882 Code an order for restitution of possession being a consequential or incidental order **27 A. 415.** Where the High Court set aside an order of the Magistrate under this section directing possession of a garden to be delivered to a party, which had been carried out, and on the opposite party applying for restitution, the Magistrate refused the prayer on the ground that he had no jurisdiction to direct the Police to restore the possession of the party, *held*, that the order of the High Court carried with it the incident of restoration and the Magistrate ought to restore possession through the Police, **18 C W. N. 1147 = 15 Cr. L. J. 222.** The Rulings in **5 Bom. L. R. 25** and **5 C. W. N 250** denying the power of restitution to the High Court, when once the order of the Magistrate has been carried out, seem to be of doubtful authority *See* Note 11 above

13. Period of limitation for civil suit at the instance of party dispossessed.—Under Art 47 of Sch II of *the Limitation Act* XV of 1877, now IX of 1908 a suit to set aside an order under this section must be brought within three years from the date on which it was passed, **48 M. L. J. 372.**

Procedure by Police upon seizure of property taken under section 51 or stolen.

523. (1) The seizure by any Police-officer of property taken under section 51 or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property

Procedure where owner of property seized unknown

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation

Note.—*See* s. 170 (2) for power of Police to send articles and also s. 25 of Act V of 1861

Notes.—1. Provisions of the Codes of 1872 and 1882 compared.—The provisions of this section are wider than the corresponding provisions of the 1872 Code (ss. 415 and 416), and they enable the Magistrate to inquire into the ownership of property seized by the Police and deliver it to the person entitled to it instead of to the persons from whom it is taken, **8 B. 338** *followed* in **Ratanlal 365.** In the 1872 Code, the Court was not expressly given powers to pass orders respecting property 'used for the commission of any offence'; under s. 415 of 1872 Code there was no provision giving him a general power of disposal of the property. *See* **1 C. W. N. 561** and **30 C. 690.**

2. Section applies to all cases where there has been no inquiry or trial.—*See* Note 10 to s. 517. Section 523 contains a general provision applicable to all cases where there has been no inquiry or trial. If, therefore, there are grounds for suspecting that the property seized was used for fabricating false evidence against the accused in the case, the Magistrate must be held to have jurisdiction to pass an order directing its restoration, **24 M. L. J. 1 = 14 Cr. L. J. 27.**

3. Magistrate's power to deal with property seized under a search-warrant.—This section does not apply to property which is produced before a Court in the course of an inquiry or trial under a search-warrant issued by itself under s. 97. To such property s. 517 alone would apply. The scope of this section must be confined to property seized by Police of their own motion in the exercise of their powers conferred on them by law, *e.g.*, ss. 51, 54, 164 and 165. The power of disposal of such property is conferred upon the Magistrate, **17 B. 748.** But the correctness of this Ruling has been doubted by FULTON, J., in **26 B. 552,** who was of opinion that the words "seized by the Police," apply equally, whether the seizure is made by a Magistrate's warrant or without such a warrant.

4. Standing crops not covered by this section.—Standing crops are not such property as are referred to in this section, **23 B. 974.**

5. Discretion given by the words 'make such order as it thinks fit,' must be exercised judicially.—The discretion given by these words must be judicially exercised, and in the absence of anything to show the title to the property, it should be ordered to be delivered to the person in whose possession it had been at the time of attachment, **5 Bom. L. R. 25; 8 S. L. R. 141 = 16 Cr. L. J. 138; 17 Bom. L. R. 79 = 3 Bom. Cr. Ca. 12 = 16 Cr. L. J. 207.** *See* also **4 L. B. R. 14 = 6 Cr. L. J. 126.** The Rulings in **1 B. 630** and **14 C. 834,** to the effect that when the High Court finds that property has been disposed of without exercising a sound judicial discretion in the matter, the High Court has no power to order restitution, seem to be of doubtful value when s. 439 is read with s. 423 (1) (*d*). A Magistrate, after discharging the accused, passed an order in respect of the property before him to the effect that part of it should be given to the accused on his furnishing security for Rs. 100, and the rest to be kept in the custody of the Police: *held*, that this section was not applicable, and the order was (*vide* **1 B. 630**) wrong, and the property must be restored to the accused, *B. H. C. Cr. Rul.*, *24th April*, 1884. But the fact that the accused had been in possession of the property when the charge was made is not conclusive. A Magistrate is competent in the exercise of his discretion to order the property which was in the possession of the Police to be made over to the complainant. The Magistrate had to apply his mind to the question as to who was entitled to the possession of the property and if on such materials as were placed before him he comes to the conclusion that the complainant was, a Court of Revision will not interfere, **12 Bom. L. R. 232 = 11 Cr. L. J. 339.** It is open to a Magistrate to disbelieve the evidence of the claimant and proceed under sub-sec (2), **16 Cr. L. J. 254 (M.).** *See* Note 1 to s. 524.

6. Is Magistrate not competent to attach conditions to delivery of property?—A Magistrate has no jurisdiction under this section to make an order in favour of a party conditioned on his furnishing security. If the Magistrate did not think fit to take the proper steps under the law to secure the production of property before the Court, the only course that was open to him when he referred the complaint to the Civil Court, was to leave it to the Civil Court to take such steps as it might think fit for the production of the property in question, **7 C. W. N. 522.** In **Weir II, 676,** a Sessions Judge on appeal acquitted the accused who had been convicted by a Deputy Magistrate of the offence of theft of money, alleged to belong to a Railway Company and directed that the money found on their person be handed over to the Deputy Magistrate to be dealt with under this section. The Deputy Magistrate rejected the claim of the accused and directed the sum to be paid to the Agent of the Railway Company on his executing a bond binding himself to produce the money before any Court when required, *held* that the order of the Deputy Magistrate must be set aside as the procedure laid down in this section was not followed. But in connection with a case of theft, certain property alleged to have been stolen was seized by the Police, but the case completely broke down upon investigation and a counter-case of rioting was brought. Before final orders could be passed in the counter-case both the parties pressed

the Magistrate to pass an immediate orrder to save the property from possible loss or decay and the Magistrate thereupon ordered that the property should be delivered to one of the parties on certain terms *Held*, that the Magistrate had jurisdiction to make the order under this section, **5 C. W. N. 415.**

7. Magistrate must confine inquiry to right to possession and not decide title.—*See* Note 9

8. Does disposal of property include destruction or forfeiture of property?—The Code has under ss 517 and 523 given a general power to the Court to direct the destruction or forfeiture of any property used for the commission of any offence The Court would, no doubt, be slow to pass an order for forfeiture in cases of mere suspicion under s 523, but it would have less hesitation in refusing to restore property to the owner who is suspected to have used it for the commission of an offence. The power to order restoration is discretionary and the Court is not bound to exercise it. If the offence be one relating to property, the proper order would, of course, be to return it to the owner or person in possession But this cannot be the proper order when the offence suspected is one committed by the person who is the owner or possessor of the property and who has used it for the commission of the offence The right order in such a case must be to direct the destruction or forfeiture of the property according to its nature, **24 M. L. J. 1 = 14 M. L. T. 431 = 1913 M. W. N. 851 = 14 Cr. L. J. 27.** *See*, however, Note 13 to s 517

9. Court may direct forfeiture in first instance even when claimant may be ascertained.—Certain money and other articles were seized by the Police in consequence of a complaint of theft preferred by one *R* against one *V* The Police after a preliminary investigation, came to the conclusion that the case was false and that the articles seized were probably foisted by or his men into *V's* house Thereupon *R* made a complaint before the second-class Magistrate The Magistrate dismissed the complaint under s 203, and directed under s 517, that the articles seized by the Police should be forfeited to Government, as they were used for concocting a false case against *V* *Held*, that the order of forfeiture was valid although the Magistrate had no jurisdiction to pass the order under s 517, he had power under s 523 to pass an order regarding the disposal of property seized by a Police-officer, which was 'alleged or suspected to have been stolen or found under circumtances which create suspicion of the commission of any offence.' It was argued that it is only if the person entitled to possession cannot be ascertained and no one establishes his title to possession after notice given by the Magistrate, that an order can be passed that the property should be at the disposal of Government. *Held*, the contention could not be accepted Section 523, cl. (1) gives the Magistrate power either to deliver the property to the person entitled to its possession, or to pass such order as he deems fit respecting its disposal If he adopts the first alternative, he has to find out the person entitled to possession, and, if no one succeeds in establishing his title to possession, the property would be at the disposal of Government If he adopts the second alternative the section does not specifically state what the nature of the order regarding the disposal should be If an order that the property should be at the disposal of Government would be proper in the circumstances of the case there is nothing in the section which prevents him from passing such order, **24 M. L. J. 1 = 14 M. L. T. 431 = 1913 M. W. N. 851 = 14 Cr. L. J. 27.** *See*, however, Note 13 to s 517

10. Is Magistrate bound in every case to hold an inquiry?—*See* Note 5 Where a person charged with criminal breach of trust in respect of certain jewels died before trial, and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge-sheet, applied to be put in possession of them either under this section or s 517, after inquiry as to their ownership, *held* that s 517 did not apply to the case and further, as there was no evidence or finding about ownership, this section did not apply, and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels, **29 M. 375** Clause (2) of this section does not require a Magistrate to make any inquiry at all He proceeds on such materials as are available before him and he has to decide the question, not who was in possession at the time the property was seized by the Police but who was entitled to possession. [illegible]

section before making any order touching the right not of property, but of possession to the property seized by Police The Magistrate does not decide the question of title, but merely decides the question of possession, **12 Bom. L. R. 232.** Where things are produced before a Magistrate under a search warrant he is bound to proceed and satisfy himself whether the things produced are the things which it is necessary or desirable should be kept in custody, and when a third party appears before him and alleges that the things are his, the Magistrate is bound to hear the party and restore the thing to the owner There is a power inherent in every

Court to satisfy itself that the things produced before it under a search-warrant, are the things which it is necessary or desirable should be kept in custody. When the Magistrate has not made such an inquiry about the things brought before him under a search-warrant issued by him, the High Court cannot, however, cancel the warrant and order restoration of property, 26 B. 552.

Disposal of property without taking evidence is legal.—Where certain property was alleged to be stolen and its seizure by the Police was reported to the Magistrate, and there was no question as to the property having been taken from the complainant's possession, *held* that the Magistrate's order delivering the property to the complainant without any enquiry was legal under this section, and that such order did not conclude the right of any person, **Ratanlal 365.** *See* **4 Lah. 33** in which case it was *held*, that it is not incumbent on a Magistrate to hold a judicial inquiry on oath before passing an order under s. 523. Such an order can be passed on Police reports and papers alone without any independent inquiry regarding the ownership of the property, **4 Lah. 33.**

11. Evidence of ownership—Confession made to Police-officer.—Statements made to the Police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under this section, **9 B. 131.**

12. Magistrate not bound to take evidence till after lapse of six months from date of proclamation.—It is not intended that any final steps should be taken by a Magistrate acting under this section, or that he is bound to take any final steps, to ascertain whether the property belongs to the person in whose possession it was found, until after expiry of the six months mentioned in the sections; but when the proclamation has been issued and the six months have expired, then the provisions of s. 524 come in, and the person in whose possession it was found can come forward and show that it is his own, **22 C. 761.** But this Ruling was *distinguished* in **3 L. B. R. 197 = 4 Cr. L. J. 203,** where it was *held* that in disposing of property seized by the Police, if the Magistrate finds that the person entitled to possession is known, he can lawfully adjudicate on the claims of that person without issuing any proclamation. If he has issued proclamation, that need not invalidate his order for immediate delivery of the property to such a known person. When the Magistrate finds that a claim which has been made is proved, provided no other claimants appear, he should before pronouncing final orders, wait until the expiry of the six months specified in the proclamation. A Sub-Divisional Magistrate on appeal acquitted the accused of an offence under s. 414, I.P.C., but made no order for the disposal of the sum of Rs. 61 produced in the case. On reference it was *held* that proceedings might be taken under this section, **Ratanlal 536.** *See* also **26 B. 552.**

13. Magistrate bound to summon claimant's witnesses.—The petitioner was charged with the theft of certain money found in his house and acquitted. Proclamation having been made for claimants to come in and claim the property, no one appeared; whereupon the petitioner preferred his claim and asked the Magistrate to summon certain witnesses, but the Magistrate refused to do so and disallowed his claim; *held*, that the Magistrate was bound to summon the witnesses named by the petitioner, **18 W. R. 5; 2 A. 276.**

14. No order can be made as to property already restored.—A District Magistrate cannot treat property already restored or which ought to have been restored by a Subordinate Magistrate as subject to an order under this section, **8 B. 575.**

15. No power to review an order already made.—Where once a Magistrate passes an order restoring possession of property, he has no authority to set aside his previous order subsequently, but an order under this section is subject to revision under s. 439 by the High Court, **4 Bom. L. R. 12.**

16. Remedy of real owner is to sue the holder of property.—The Magistrate may in the inquiry proceed on such evidence as is available and make an order for handing the property to the person he thinks entitled. This does not conclude the right of any person. The real owner may proceed against the holder of articles for damages as for conversion. Where the Magistrate made an order for the delivery of property upon the mere evidence of a confession of the accused to the Police, that the property was stolen from the adjudged owner, the High Court declined to interfere with the Magistrate's order, **9 B. 139; Ratanlal 365.** *See* also *Bullock* v. *Dunlop*, **L. R. 2 Ex. Div. 43;** *Drover* v. *Child*, **L. R. 1 Ex. Div. 172.** In **40 B. 200 = 17 Bom. L. R. 979** the case in **9 B. 131** was *followed.* **5 Pat. L. J. 321.**

17. Appeal and Revision.—*See* s. 524 (2) and Note 50 to s. 439.

Procedure where no claimant appears within six months

524. (1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate, or of a Magistrate of the first class empowered by the Local Government in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie

Notes.—1. Construction of 'unable to show it was legally acquired by him.'—*See* Note 5 to s 523 The burden imposed on the possessor by this section, is discharged by the general presumption in favour of every man s innocence and the special presumption enunciated in s. 110, *Indian Evidence Act*, when such person adduces evidence of possession and no claimant appears There must be some reasonable ground for the "allegation or suspicion' and the mere fact the person in possession belongs to a criminal tribe, cannot be regarded as a sufficient ground —*Sind Sadar Rev* 52 *of* 1904 Although there may be a reasonable doubt as to the property having been honestly acquired by the person from whose possession it was seized, unless the evidence clearly shows that that person s claim is a false one or that his witnesses have conspired to support a false claim the proper and safest course is to follow the presumption laid down in s. 110 of *the Evidence Act* and to hold that the person in possession is the owner, in the absence of proof to the contrary The words 'unable to show that it was legally acquired by him, in this section do not reverse this presumption In the absence of proof of title to the property produced it was ordered to be delivered to the person in whose [illegible] **J. 138.** In **17 Bom. L. R. 79 = 8** [illegible] setting aside the order directing [illegible] e principal ground on which the [illegible] ured his wealth, which seemed to [illegible] and its provisions both indicate [illegible] *any person are not to be made,* except possibly in rare instances, unless there is something specific against that person The circumstance that *K* gave an account of how he had acquired his property, which did not satisfy the Magistrate is no good reason for maintaining the order which he has made.

2 **Confiscation by Government.**—The procedure prescribed by this and the preceding sections must [illegible] **W. R 13.** In **19 B. 668** a bag of money was [illegible] n to the owner Close by another bag of [illegible] a proclamation under s 523, whereupon a person claimed it as owner of the soil in which it was found The claim was rejected and an order under this section was passed placing it at the disposal of Government He then sued the Secretary of State to recover this property on the ground that it was treasure trove, but on appeal the suit was dismissed

3. **Magistrate empowered by the Local Government in this behalf.**—*See* s 529 (*h*) as to validity of sale by Magistrate not duly empowered In Madras (*Gaz*, 1873, p 598) all Magistrates of the first class have been empowered to act under this section; also in the United Provinces (*All Man*, 202), so too in the Punjab (*Punj Gaz*, 1883, Pt. I, p 52), Bombay (*Bom Gaz*, 1873, p 16), provided that they are not Honorary Magistrates, when a special order is required in each case

4. **Appeal under this section is a regular appeal on the merits.**—The appeal allowed by sub-sec. (2) is an appeal in the full sense of Chapter XXXI and must be governed by its provisions, when an appeal to the Court of Session from an order passed under this section by a District Magistrate, was treated as a sort of miscellaneous application and was summarily disposed of in favour of the appellant, the claimant to the property concerned, in an *ex-parte* manner by the Sessions Judge, neither notice of the appeal having been served on the Government, nor the procedure of Chapter XXXI followed in any respect, the order of the Sessions Judge was set aside and the case sent for re trial, **1881 A. W. N. 150.**

Power to sell perishable property.

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay,* "or if the Magistrate" to whom its seizure is reported, is of opinion that its sale would be for the benefit of the owner, † "or that the value of such property is less than 10 rupees" the Magistrate may, at any time, direct it to be sold; and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

Note.—Proceedings of Magistrates not empowered.—If any Magistrate not being empowered by law to sell property under s. 524 or s. 525 erroneously in good faith sells it, his proceedings shall not be set aside on the ground of his not being so empowered, s. 529, cl. (*h*).

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

High Court may transfer case or itself try it.

526. (1) Whenever it is made to appear to the High Court—

(*a*) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(*b*) that some question of law of unusual difficulty is likely to arise, or

(*c*) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or

(*d*) that an order under this section will tend to the general convenience of the parties or witnesses, or

(*e*) that such an order is expedient for the ends of justice, or is required by any provision of this Code;

it may order—

(i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to inquiry into or try such offence;

(ii) that any ‡ particular case or appeal, or class of § cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any ‡ particular case or appeal be transferred to and tried before itself; or

(iv) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed, if the case had not been so withdrawn.

(3) The High Court may act either on the report of the Lower Court, or on the apr... tion of a party interested or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be... by motion, which shall, except when the applicant is the Advocate-General, be suppor... affidavit or affirmation.

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* The words "—" were substituted for the words "or the Magistrate" by Act XVIII of 1923.

† The words "—" were inserted by *ibid.*

‡ The word "such" was omitted by *ibid*

§ The word "criminal" was omitted by Act XVII of 1923.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties conditioned that he will, if * "so ordered" pay † "any amount which the High Court has power under this section to abide by way of costs to the person opposing the application"

Notice to Public Prosecutor of application under this section.

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application, unless at least twenty four hours have elapsed between the giving of such notice and the hearing of the application

"(6-A) ‡ Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application"

(7) Nothing in this section shall be deemed to affect any order made under section 197

"(8) § If, in the course of any inquiry or trial, or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon"

"(9) § Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it"

Referring to the amendment of this section, the Select Committee say—

"We have found s. 526 somewhat difficult to deal with. One class of opinions presses for greater safeguards against frivolous vexatious or dilatory applications for transfer Another class deprecates any measure which makes a transfer more difficult to obtain We think it is unavoidable to retain in the Code some provision for the compulsory adjournment of a case when an intention to apply for a transfer has been notified But we recognise that the provisions of the section, as they stand have lent themselves to gross abuse, and therefore we feel that greater safeguards are necessary For these reasons in the first place, we maintain the principle of the new sub-sec (6 A) which enables the High Court to award costs in dismissing an application. We have however, modified it to this extent that it will enable the High Court in cases where it is of opinion that the application was frivolous or vexatious to award such amount by way of reasonable costs in the High Court and the Court below as it thinks fit. We think the last sentence of new sub-sec. (6-A) was superfluous in view of the provisions of s 547

We consider that the new sub-sec. (8) proposed by the Bill was unsatisfactory in several respects. The opening words of the sub-section contemplated notification at any stage of the case provided *that it was made before the comm*[illegible] ...ing later to the sub-section indicated that ... was called upon to enter *on his defence* ... transfer formed after the *accused had* ...appeared on his defence was not a true proviso to the sub-section We considered whether sub-sec. (8) should

* The words "so ordered" were substituted for the word "convicted" by *ibid*

† The words — were substituted for the words "the costs of the prosecutor" by *ibid*

‡ (6 A) was inserted by Act XIII of 1923

§ Sub sections (8) and (9) were substituted for sub section (8)

not refer to an application made at any stage and whether in such case discretion as to an adjournment should not be left with the Court except when the applicant gave security in which case the adjournment should be compulsory. On the whole, however, we have decided in favour of rejecting the proposal to provide for a bond. Apart from other objections we think it was calculated to enhance the delays already involved by s. 526. Our amendment of the Bill therefore provides for a compulsory adjournment at any stage of the case except that a Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed.

It was suggested to us that we should add a new clause to s. 526 providing for transfer of a case when the accused has reasonable ground for apprehending that he will not get a fair and impartial trial. We think, however, that the Rulings of the High Courts are quite clear on the point and that it would be a mistake to amend the section.

Note.—Amendments.—The word "criminal" is now omitted from sub-sec. (2) of cl. (*e*) in order to make it clear that the power to transfer is not only limited to criminal cases, but it also extends to other miscellaneous proceedings under the Code.

The new sub-sec. (6-A) confers on the High Court the power to award costs to any person who opposes the application to transfer if in the opinion of the Court, the application is frivolous or vexatious.

Under the amended section, sub-sec. (8) an application for transfer may be made in the course of any inquiry or trial whereupon "the Court shall adjourn the case." Under the old law it was necessary that an application for transfer should be made before the commencement of the hearing of a criminal case.

Under the new sub-sec. (9) an exception to the compulsory adjournment at any stage of the case is provided for, and under that sub-section, a Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed.

Notes.—1. Other sections dealing with transfer.—Under s. 29 of *the Letters Patent* a High Court has power to direct the transfer of any criminal case, *see* p. vii of the appendix and *see* also s. 15 of *the Indian High Courts Act*, 1861, at p. i of the appendix. *See* s. 192 for power of the District Magistrate or Sub-Divisional Magistrate to transfer a case of which he has taken cognisance. Under s. 267 the High Court may direct that a case transferred to itself be by jury. S. 197 empowers the Government to direct a prosecution of a Judge or other public servant to be conducted by a particular person or Court. *See* also ss. 178, 191, 346, 407 (2), 487, 528 and 556.

Analysis of Notes.

I. Extraordinary powers of the Chartered High Courts. Notes 2—4.
II. Conditions precedent to exercise of jurisdiction. Notes 5—8.
III. Proceedings liable to be transferred. Notes 9—14.
IV. Grounds for transfer. Notes 15—35.
V. Sub-sections (2) to (7)—Practice. Notes 36—47.
VI. Adjournment of hearing on notification of intention to move the High Court. Notes 48—53.

I.—EXTRAORDINARY POWERS OF THE CHARTERED HIGH COURTS.

2. Power of transfer under the Letters Patent.—The High Court has power under cl. 29 of *the Letters Patent* to transfer any criminal case from one Court to another, **Weir II, 680; I, 788 (b)**; and under this extraordinary jurisdiction, it was *held* the Bombay High Court has the power to transfer a criminal case from the Court of the Resident at Aden to the Original Side of the Bombay High Court, and that a single Judge of the High Court has power to order such a transfer, **7 Bom. L. R. 104.** *See* p. vii of the appendix.

3. Special jurisdiction of High Courts—

(*i*) *District Magistrate and Sessions Judge of Bangalore subordinate to Madras High Court.*—The District Magistrate and the Civil and Sessions Judge of the Civil and Military Station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of this section, **9 M. 356.**

(*ii*) *Jurisdiction of the Calcutta High Court over Sonthal Purgannas.—See* **18 C. 247.**

(*iii*) *Jurisdiction of Bombay High Court at Secunderabad and Perim.*—The High Court of Bombay having been vested by notification of the Governor-General of India in Council, No. 178 of 23rd September, 1874, with original and appellate criminal jurisdiction over European British subjects being Christians, resident

amongst other places at Secunderabad, outside the Presidency of Bombay and within the territories of His Highness the Nizam of Hyderabad, the Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of this section, and the High Court possesses, by virtue of the appellate jurisdiction so vested in it, the power of transferring a criminal case pending in the Cantonment Magistrate's Court either to itself or to any Criminal Court of equal or superior jurisdiction **9 B. 333.** In **5 Bom. L. R. 669** it was *held* that by virtue of 28 and 29 Vict, Chap 15, s 3, and the notification above referred to, the High Court of Bombay has jurisdiction to transfer a criminal case against an European British subject from the Court of the District Magistrate and Superintendent, Residency Bazaar, Hyderabad, Deccan As to Perim, *see* Notification No 823 of 1886 and **10 B. 274.**

4. Transfer of cases from the file of Village Magistrates in Madras.—Though a Village Munsiff is not a Magistrate under this Code the High Court alone has the power under s 29 of *the Letters Patent* to transfer a case from the file of a Village Magistrate to that of any other Magistrate, **26 M. 394.** Where a Village Magistrate refused to adjourn a case to allow the accused to move the High Court for a transfer and convicted the accused, *held* the conviction was illegal and the case was transferred to the file of another Magistrate for re trial, **21 M. L. J. 765 = 12 Cr. L. J. 407.**

II.—CONDITIONS PRECEDENT TO EXERCISE OF JURISDICTION.

5. Subordinate Court should be properly seized of the case.—The High Court cannot under this section transfer a case which is not properly before a Subordinate Court of competent jurisdiction to receive and try it *per* BIRDWOOD, J, in **10 B. 274.** *See* also **9 A. 191 = L. R. 13 I. A. 134 at p. 144; 9 M. 358, 8 C. 30, 8 B 312** may be *distinguished*, nor where the Magistrate apparently has no jurisdiction **7 Bom. L. R. 104.** The High Court cannot transfer a case taken up by Magistrate who had no jurisdiction, **3 Bom. L R. 121.** The Magistrate should inform the complainant that he has no jurisdiction, and take bail from the accused for appearance before the proper Court The High Court cannot transfer a case committed to a wrong Sessions Court, **36 M. 387.** *See* Notes 7 and 8 at p 446

6 Transfer cannot be made after disposal of case.—This section contemplates the transfer of a case before disposal, or interference on behalf of persons aggrieved or injured by an order of the Magistrate It is not intended to give power to interfere in order to set aside an acquittal, **2 C 290 at p. 292.** An order of transfer cannot operate as cancelling an order of discharge, **1 Bom. L. R. 782** In **19 M 375** an order of transfer made by the High Court on December 4, did not in fact reach the Judge till after December 5 when judgment was pronounced convicting the accused, the conviction was upheld

7. Order for transfer of appeals to be filed in future is bad.—A District Magistrate having sanctioned the prosecution of certain accused persons for having escaped from a quarantine camp the Sessions Judge asked the High Court to pass an order that all appeals arising out of the proceedings in which the District Magistrate had sanctioned the prosecution should not be heard by him, but transferred to some other Court *Held,* that it was doubtful whether the High Court had jurisdiction to make such an order It could transfer actually existing appeals only, but could not direct that appeals that might be filed in future should when filed not be heard by the authority to which they might be presented, **Ratanlal 973.**

8. District authorities to be moved before approaching the High Court—Ordinarily the High Court does not transfer a case pending before a Subordinate Magistrate unless the party applying for the transfer has moved the District Magistrate before going to the High Court **6 Bom. L. R. 487, 11 A. L. J. 741 = 14 Cr. L. J. 553**

III.—PROCEEDINGS LIABLE TO BE TRANSFERRED.

9. "Criminal Case," what it means—Under the old law there was a conflict of decisions as to the meaning of the words criminal case appearing in sub sections (ii) and (iii) of clause (*e*) And it was doubted, for instance, whether a case under Chap VIII could be called a criminal case But under the present amendment the word criminal' has been deleted from sub-section (2) of cl (*e*) and now s. 526 would include all proceedings under the Code For instance, in the following cases it was held that the term criminal case' may be understood as distinguished from a civil case or in other words a *criminal case* is one over which a Criminal Court exercises jurisdiction—*Per* GHOSE, J, in **28 C 709; 34 A. 533.** In **28 C. 709,** TAYLOR, J, remarked 'I am of opinion that '*case* and '*criminal case* as used in the Code of Criminal Procedure are not

co-extensive. '*Criminal case*' is intended to be used in a limited sense and does not apply to every case cognisable by a Criminal Court." *See* **25 B. 179** and Note 12 below. In **4 M. H. C. R. Appx. XL.**, the Madras High Court *held* that the term '*criminal case*' meant 'any case *prima facie* criminal.' In the new Bill it is proposed to omit the word 'criminal.' A Division Bench of the Chief Court followed the judgment of TAYLOR, J., and *held* that a proceeding under s. 110 is not a 'criminal case' inasmuch as a criminal case is not the same as a case cognisable by a Criminal Court, and in every criminal case there must be a person charged with the commission of an offence, **5 P. R. 1914 = 154 P. L. R. 1914 = 15 Cr. L. J. 563.** In **8 S. L. R. 215 = 16 Cr. L. J. 249**, the Judges while following **24 B. 527** were of opinion that the words 'criminal case' should not be restricted to cases arising out of and dealing with some crime already committed and referred to the interpretation put on the words 'criminal cause or matter' in s. 47 of the Judicature Act by the English Courts. 'The general rule of construction adopted is either that the subject-matter of the proceeding is of a criminal nature or the proceeding is one in which a penalty by way of punishment is sought or can be enforced in case of disobedience.'

In the Calcutta High Court there has been vacillation. In **33 C. 152**, doubts were expressed whether a proceeding under s. 145 was a criminal case. In **2 C. L. J. 614 = 3 Cr. L. J. 83** it was *held* that a proceeding under s. 145 is a criminal proceeding and a Magistrate has power to transfer the same under ss. 192 and 215. In **28 C. 709** the power of the High Court to transfer under s. 526 was doubted but the case was transferred under s. 15 of the Charter Act. In **18 C. W. N. 393 = 15 Cr. L. J. 359** it was held that s. 526 has no application to proceedings under Chap. XII while the same Bench held in **41 C. 719** that s. 526 applied to proceedings under s. 107. *See* Note 9 above.

10. Cases under Chap. VIII.—In **19 A. 291**, it was *held* the High Court could not transfer, when the Magistrate had acted under s. 117, but s. 117, has now been amended. That the Magistrate acted on private information in calling upon a person to show cause under s. 110 is no good ground for the transfer of the case from his file. There is no limit to the nature or the source of information on which a Magistrate initiates proceedings under that section, **27 A. 172.** *See* Note 9 above.

(*i*) *Cases under s.* 107 *may be transferred.*—The High Court has power under this section to transfer proceedings under s. 107 from one district to another, **32 A. 642.** It is true that every case that is governed by the Code need not necessarily be a 'criminal case' but it does not from that follow that only such cases are criminal as relate to offences already committed or said to have been committed. Cases under s. 107 are subject to cl. (8) and a Magistrate errs in refusing an adjournment, **41 C. 719.** In **8 S. L. R. 215 = 16 Cr. L. J. 249**, the Judges stated they were disposed to agree with **41 C. 719** rather than with **5 P. R. 1914.** But, as a rule, it would not be proper to transfer any preventive proceeding from one district to another. It must be an extremely exceptional case that would justify the interference of the High Court with the jurisdiction of the Magistrate of the District taking preventive action within his boundaries and imposing such foreign and extraneous duty on the Magistrate of another District, **17 C. W. N. 536 = 14 Cr. L. J. 382.** *See* also **31 C. 350.** *See* Note 9 above.

(*ii*) *Transfer of good behaviour cases.*—It may now be taken as settled that proceedings under s. 110 are liable to be transferred from one district to another, **28 C. 709; 32 A. 642; 1 S. L. R. 98 = 8 Cr. L. J. 356; 11 C. W. N. 231; 1 P. R. 1913; 12 A. L. J. 262 = 15 Cr. L. J. 363.**

(*iii*) *Cannot such proceedings be transferred to another District?*—It was *held* in **16 A. 9** and **30 A. 57** that though under this section, a criminal case may be transferred to a Magistrate not having local jurisdiction, but otherwise competent to inquire into or try the case, yet proceedings under s. 110 cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. The reasoning in these cases was followed in **34 M. 186.**

Contra.—The Punjab Chief Court *held* that it had no jurisdiction either under s. 526 or under s 33 of *the Punjab Courts Act* to transfer proceedings under s. 110 from the Court of one Magistrate to the Court of another Magistrate, **5 P. R. 1914 = 154 P. L. R. 1914 = 15 Cr. L. J. 563.** The case in **25 B. 179** and the judgment of TAYLOR, J., in **28 C. 709** *followed. See* also the referring judgment of RATTIGAN, J., reported as a footnote to **15 Cr. L. J. 563**, where it was pointed out that in the case in **1 P. R. 1913 = 13 Cr. L. J. 746**, it was assumed without any argument that s. 526 applied to a case under s. 110. *See* Note 9 above.

11. Proceedings under s. 145.—Under the old law there was a conflict of opinion as to whether proceedings under s. 145 were criminal proceedings, but now under the new amendment by the omission of the word "criminal," proceedings under s. 145 are liable to be transferred under this section. (*See* Note 9, *supra*)

The Madras, Allahabad and Oudh Courts have held that proceedings under s 145 may be transferred, **26 M. 188; 34 A. 533, 11 O. C. 61 = 7 Cr. L. J. 423.** The Bombay High Court has, however, held that it has no power under this section to direct the transfer of proceedings instituted under s 145 as they do not come under the provisions of this section, **25 B. 179.** The case proceeds on a strict construction of the language of the section "*any criminal case or appeal*" The word '*criminal*' governs the word "*appeal*" as well as the word "*case*" A criminal case, like a criminal appeal must arise out of and deal with some crime already committed Hence this section does not confer any power to transfer proceedings under s **145**, which neither contemplates an inquiry or trial into an offence nor does it deal with a crime committed, but is concerned only with the prevention of offences The Bombay view was followed in **8 S. L. R. 215 = 16 Cr L. J. 249.** *See* also **5 P. R. 1914 = 15 Cr. L. J. 563.** For the Calcutta view *see* Note 9

11-A. An Inquiry under Act XIII of 1859 (Workman s Breach of Contract Act) is not outside the purview of s 526 of the Code (*See* preliminary note to s 526) **43 A. 700.**

12. No power to transfer case under the Legal Practitioners Act —The Chief Court has no power to order the transfer of a proceeding under s 14 of *the Legal Practitioners Act* (XVIII of 1879) from one Court to another, such proceeding being neither a civil proceeding nor a criminal proceeding though it partakes of the latter character, as being penal, neither s 25 of *the Civil Procedure Code*, 1882 nor s 526 is applicable to proceedings of this kind, **41 P. R. 1888.** But it is submitted that this is not good law in view of the omission of the word "criminal" from section 526 *See* Note 9, *supra*

13. High Court not competent to transfer inquiry under s. 3 of Extradition Act 1903.—*See* **38 C. 550** (footnote) = **15 C W. N. 733,** Note 11 at appendix, p xvi

14 Power to transfer case from one Presidency Magistrate to another.—The power conferred by this section is only to transfer from one Criminal Court to another, and consequently the High Court, under this section, has no power to transfer a case pending before one Presidency Magistrate to the file of another Presidency Magistrate, both being Judges presiding over the same Court, **13 M L J. 69.** In **38 M. 739,** it is however, laid down that the High Court is competent to transfer a case from the file of the Chief Presidency Magistrate to the file of another Presidency Magistrate as they are Courts of equal jurisdiction In **10 Bom. L. R. 201,** the point was not raised, but the High Court transferred a case on the ground that the Presidency Magistrate was biased

IV.—GROUNDS FOR TRANSFER.*

15. Duty of the High Court to create and maintain confidence in the administration of justice.—It seems to be generally supposed that when allegation of bias is made, the transfer is granted under sub sec (*a*) of s 526, cl (1) but except in those very rare cases when the Court itself is convinced that a fair and impartial inquiry cannot be had, the transfer is made under sub-sec. (*e*) One of the most important duties of a High Court is to create and maintain confidence in the administration of justice and this can only be done by giving to every citizen an assurance that so far as practicable he will never be forced to undergo a trial by a Judge or Magistrate, when he has reasonable apprehensions of the litigant, and not because the judicial officer is adjudged to be incapable of properly performing his duty Magistrates should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from bias which is incumbent on all judicial officers and that if they allow their executive zeal to appear to outrun their judicial discretion, their action is certain to attract the delay consequent on an application to this Court, **1 S. L R 8 = 9 Cr. L J. 251.** *C* was arrested on a warrant charged with an indictable offence, and brought before *E*, a Justice of the Peace who had been asked by the Crown Solicitor to take the depositions *E* sat in a room in the Police-station, and on the request of the Crown Solicitor made an order excluding all persons except representatives of the accused Several other Justices for the county endeavoured to enter the room but were refused admission. *C's* solicitor applied to *E* to admit the other Magistrates, but *E* refused to do so, giving as a reason that he was guided by the Crown and directed by the Crown not to allow the other Magistrates to be present *C* having applied for a writ of prohibition to prohibit *E* from proceeding further in the matter on the ground of bias —*Held* while entirely [illegible]

* [illegible] *Emerson*, (1913) 2 Ir. R. 377—K. B. D. *See* also *R* v *O Grady*, **7 Cox. C. 247.**

16. If otherwise transfer is necessary, the High Court cannot take into consideration—

(*i*) *The effect its order would have on the reputation and authority of the Magistrate.*—In dealing with an application under this section the High Court has only to determine whether good grounds for transfer have been made out to its satisfaction. While making an order, it cannot take into consideration, the effect its order would have on the reputation and authority of the Magistrate concerned. When the application for transfer is based on the ground that the applicant will not have a fair and impartial trial, the apprehension, to justify the transfer, must be shown to be reasonable, and if there be not sufficient grounds for the apprehension, the High Court will not transfer the case, merely in deference to the susceptibilities of the accused, **10 C. W. N. 441 = 3 Cr. L. J. 379.**

(*ii*) *Accused getting benefit of trial by jury.*—In transferring a case, no consideration should be had to the fact that by the transfer to a particular district, the accused will have the benefit of the trial by jury, where previously he had none. The real question is that of convenience of parties—*Per* WOODROFFE and COXE, JJ., **8 C. L. J. 59 = 8 Cr. L. J. 121.**

17. It is the duty of the Magistrates to conduct themselves properly so as to inspire confidence in parties that nothing but justice will be done.—Next to the importance of deciding a case fairly and impartially, is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done to them, and if by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him, in the mind of the officer concerned, it would be expedient for the ends of justice to transfer the case from his file, though there may not be actual bias, **28 C. 709,** which *follows* **25 C. 727 ; 8 C. W. N. 75.**

18. Reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial is the proper test.—In dealing with applications for transfer, what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the accused, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any *real* bias in the mind of the Judge are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. Of course, it is not every apprehension of this sort that should be taken into consideration; but where the apprehension is of a reasonable character, then notwithstanding that there may be no real bias in the matter, the fact of the incidents having taken place being calculated to raise such reasonable apprehension, ought to be a ground for allowing transfer. Where a Magistrate after releasing the accused on bail, still required him to report himself to the authorities at a certain place, and when he applied for leave to go to *Calcutta* and *Chaibassa,* he was allowed to go only to the *latter place,* an order of transfer was held justifiable, **23 C. 495** *followed* in **19 A. 64,** *approved* in **25 B. 179.** *See* also **10 C. W. N. 441 = 3 Cr. L. J. 779 ; 9 C. W. N. 619 ; 36 C. 904 ; 18 C. 247 ; 25 C. 727 ; 128 C. 297 ; 28 C. 709 ; 8 C. W. N. 75.** What has to be considered is whether the circumstances alleged would create in the mind of the applicant a reasonable apprehension of not getting a fair and impartial trial in the Court of the Magistrate. The position of an accused person is always one of great anxiety and suspense, and incidents, though susceptible of an explanation, and which would perhaps pass unnoticed, but for the trial he is undergoing, alarm him and lead him to think that his guilt is already believed and that his conviction is a foregone conclusion, (**19 A. 64** *followed.*) In this case it was alleged by the accused who was a Mahant and of some standing that the District Magistrate had cancelled his license for arms and refused to see him when he called to pay his respects, it was *held* that these incidents were likely to lead the accused to believe and to infer that the District Magistrate was displeased with him and the case was transferred, **35 A. 5.** In this case it was noted that **19 A. 64** had been followed in various other cases by the Allahabad High Court. In both these cases there were some incidents which had taken place from which it appeared that the Magistrate trying the case might be biassed against the accused. Where no such incidents have been put forward, the transfer of a case should not necessarily be ordered, simply because an accused person thinks that he would not get an impartial trial, but the real question to be considered is whether on the facts disclosed in the application for transfer there arises a reasonable inference that the Magistrate who is seized of the case may be prejudiced, willingly or unwillingly, against the accused, **12 A. L. J. 33 = 14 Cr. L. J. 666 ; 15 Cr. L. J. 368 (A.).** In **4 P. W. R. 1913 = 14 Cr. L. J. 286,** however, the case was transferred as the accused was under the *bonâ fide* impression that he may not have an impartial trial before the District Magistrate though the Chief Court held there were no good grounds for transfer and the suggestions made against the District Magistrate were held to be groundless and without justification.

19. It is not necessary to prove actual bias on the part of the Magistrate.—When the application is grounded on bias on the part of the Magistrate, it is not necessary to prove actual bias, but it is sufficient to show circumstances which may raise a reasonable apprehension in the mind of an accused person, that he will not have a fair and impartial trial and this, though the circumstances susceptible of explanation, have happened without any real bias in the mind of the Magistrate, **Weir II, 678; 21 M. L. J. (Sh. N.) 59.** Where there is fear in the minds of the parties that they would not receive a fair and unprejudiced trial, and that fear is reasonable and founded upon distinct incidents which would really give rise to reasonable apprehension, there is good ground for transfer, although there is really no bias in the mind of the Court from which the transfer is sought, **28 C. 297,** where **23 C. 495** and **18 C. 247** are *followed*

20. But apprehension must be reasonable and based on actual incidents—*It is not sufficient for* the accused merely to allege that he will not get a fair trial, but he must lay before the High Court the facts which give rise to this belief in his mind, and if these facts are found such that they will reasonably give rise to this belief, a transfer ought to be made **10 O. C. 165 = 6 Cr. L. J. 254,** where **23 C. 495** is *referred to*, **29 Cr. L. J. 620 (1) and 229** In **36 A. 239,** SIR GEORGE KNOX considered the case in **6 C. 491, 19 A. 64,** and *Sergeant* v *Dale* and *held* following **12 A. L. J. 33 = 14 Cr. L. J. 666,** that a transfer of cases should not be ordered simply because an accused person thinks that he would not get an impartial trial, but the real question is whether on the facts disclosed in the application and affidavits there arises a reasonable apprehension that the Magistrate who is seized of the case may be prejudiced willingly or unwillingly against the accused and referred to *Leeson* v *Medical Council* **43 Ch. D. 366 at p. 384,** *Reg* v *Myer*, **(1875) 1 Q B. D. 173—177,** *R* v *Hindsley*, **(1882) 8 Q B. D. 383** and *Allinson* v *General Council of Medical Education and Registration*, **(1894) 1 Q. B 750—758** and was of opinion that *Sergeant* v *Dale* was a peculiar case and stood quite by itself Where the incidents suggested are incidents in accordance with law and seem to be a judicious exercise of the discretion vested in the Court and the Judge was apparently upholding the order and dignity of the Court it cannot be inferred from them that there is any danger of the inquiry being unfair or partial.

21. Reasonableness must be viewed from the standard of the accused—Abstract reasonableness is not the standard—On an application being made for adjournment to enable the accused to move the High Court under this section, the Magistrate gave out that he could go on till the accused were called on to enter on their defence, and so, he continued the examination of certain prosecution witnesses, and further in his explanation to the High Court stated, that his reason for examining these witnesses before allowing the application for adjournment, was that he was apprehensive that the case might be settled amicably out of Court, and that the witnesses might not afterwards be available, and if available, might not speak the truth against the accused *Held per* MITRA, J, (HOLMWOOD, J, *contra*,) that inasmuch as the order of the Magistrate, on the petition for postponement, and his explanation to the High Court, displayed an anxiety on his part that the accused is really guilty, should not escape punishment they were calculated to raise not unnaturally, in the mind of the accused an apprehension that they might not have a fair and impartial trial before him and as such apprehension was not in the peculiar circumstances of the case foolish or unfounded, the case should be transferred to some other Magistrate for trial. What is a reasonable apprehension should be decided in each *case with reference to the incidents of the case and surrounding circumstances, and in determining whether* an application is reasonable, it is the duty of the Court, by placing itself in the position of the accused, to consider the fact and circumstances attending his position. Abstract reasonableness ought not to be the standard **33 C. 1183,** where **10 C. W. N. 441** is *referred to* and *explained* and **15 C. 455 29 C. 211** and **8 C. W. N. 77** *followed* If the words used by and the actions of a judicial officer though susceptible of explanation and traceable to a superior sense of duty, are calculated to create in the mind of the accused a reasonable apprehension, the case should be transferred, **33 C. 1153,** where **31 C. 715** is *followed*, confidence in the administration of justice is an essential element in good Government, and a reasonable apprehension of a failure of justice in the mind of the accused should be taken into consideration on an application for transfer *See* **1 S. R. 8 = 9 Cr. L. J. 251,** Note 17 above. In matters like these, to use the word of LUSH, J, in *Sergeant* v *Dale*, **(1877) 2 Q B. D. 555,** "the law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feelings of confidence in the administration of justice which is essential to social order and security" It has therefore to be seen whether there is anything in the case likely to create in the mind of the accused a reasonable apprehension that they may not have a fair and impartial trial. To decide that, regard must be had to the degree of their

intelligence and their standard of honesty and impartiality, both probably fairly low. Though the facts alleged may be insufficient to raise in the mind of the Court even the shadow of an apprehension that the accused would not get a fair and impartial trial in the Court of the particular Magistrate, yet if they have raised a very real fear of injustice in the minds of the accused, which is not unreasonable having regard to their standard of honesty and fair dealing the case ought to be transferred, **10 N. L. R. 15 = 15 Cr. L. J. 196; 6 Lah. 396.**

22. That Magistrate is personally interested in case is good ground for transfer.—*See* s. 487 and s. 556 and Notes thereto.

(*i*) *Magistrate taking keen interest in the case.*—Where the District Magistrate's letter showed that he had taken a keen personal interest in the matters which had led up to proceedings being taken under s. 107 and that he had even taken part in the inquiry and had himself instituted the proceedings and was more or less convinced of the accused's guilt, *held* that the proceedings ought to be transferred to another district, **7 A. L. J. 813 = 11 Cr. L. J. 412; 20 C. 857.** Though transfer ought to be granted where there is reason to suppose that the accused will not have a fair trial, yet in **2 W. R. 58,** the High Court refused the application although they remarked that the Magistrate had shown a great want of temper and discretion in dealing with the petitioner's written statement, and failed to give a satisfactory explanation. Where a District Magistrate admitted in his reply to an application for transfer of a case that he has taken a keen personal interest in the case and was satisfied of the applicant's guilt, *held* sufficient ground for transfer, **32 A. 642.**

(*ii*) *Complainant or his Mukhtyar being servant or relation of Magistrate.*—Where the trying Magistrate is the master of the complainant, it is expedient that the complaint should be referred to another Magistrate, though the fact of such relationship may not deprive the Magistrate of jurisdiction, **9 B. 172; (1911) 2 M. W. N. Jour. 110; 21 M. L. J. 755 = 12 Cr. L. J. 407.** *See*, however, the remarks of LUSH, J., in *Sergeant* v. *Dale*, **L. R. 2 Q. B. D. 588** and **20 C. 857.** In **28 C. 297,** the fact that the Magistrate is a relative of the Sub-Inspector of the Police or that he is in private life guardian of a person who has a claim to the estate whose manager or servant instituted the prosecution, was held to be no valid ground for transfer. That the Magistrate is a friend or a remote relative of the complainant is no ground for transfer, **4 P. W. R. 1912 = 13 Cr. L. J. 474.** In **13 C. W. N. 50** that the prosecution witness was a relation of the Magistrate and was interested in the result of the case, was held to be a sufficient ground for transfer, **29 C. W. N. 648.**

(*iii*) *Magistrate being in another capacity interested in result of case.*—In **8 C. W. N. 77,** an application was made by the complainant on the ground that the accused were interested in the *Bettia Raj*, an estate under the management of the District Magistrate, as Collector and Agent to the Court of Wards. The application was granted in order to prevent persons from having an apprehension that there might be some bias in the mind of the Magistrate inclining him to look with favour upon the interests of any party. *See* also the remarks of PHEAR, J., in **7 B. L. R. 240** at **p. 269 = 15 W. R. 69.** Where the only officers in the district, competent to hear an appeal were or had been members of the Road Cess Committee, whose money formed the subject of the charge preferred, the appeal which lay to the District Magistrate was transferred to the Sessions Judge, **6 C. L. R. 279.** *See* also **7 C. 322 = 9 C. L. R. 193.** But, the mere fact that the District Magistrate, in his capacity as Collector, is concerned in the management of an estate under the Court of Wards is no ground for asking for a transfer from the district of a case instituted by a servant of the estate against the tenants of the estate and pending before a Subordinate Magistrate in the district, especially where there was not even a suggestion that the Collector as such Manager, knew of the institution of the proceedings, **28 C. 297.**

(*iv*) *That the Magistrate has acted as arbitrator previously is ground for transfer.*—Where a Magistrate has dealt with the dispute in an informal manner as private arbitrator, it is desirable that the case should be transferred as his previous informal knowledge would necessarily hamper him at every turn, **18 C. L. J. 150 = 14 Cr. L. J. 602.**

(*v*) *But interest must be substantial enough to make it likely that he has a bias.*—A Magistrate having surrendered some goods which had been seized in a case pending before him, was served with a notice of action, and the party apprehending that his conduct had created a bias in the mind of the Magistrate applied for a transfer of his case. *Held*, that before such application could be granted, it must be established that the Magistrate had such substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter, **Ratanlal 685.**

23. That Magistrate is to be summoned as a witness may be ground for transfer.—The mere fact that a Magistrate trying a criminal case may be summoned as a witness for the defence is not of itself a reason for

the transfer of the case from the Court of such Magistrate, but it may be a reason for such Magistrate committing the case to the Court of Session instead of (in the case of a conviction passing final order himself, **1897 A. W. N. 17.** The fact that the evidence of the Magistrate is necessary and material to the defence, must be supported by affidavit to that effect, **1886 A. W. N. 257.** *See* also **3 C. W. N. 278.** In an application for transfer of a criminal case the petitioner alleged that the evidence of the trying Magistrate would be required by the accused touching certain matters connected with the case *Held*, that inasmuch as the Magistrate was bound under s. 257 to issue a summons, unless he considered that the application for summons was made for the purpose of vexation or delaying or defeating the ends of justice, it was not proper to leave the decision of the case to the Magistrate whose evidence was required and the case was accordingly transferred, **26 A. 586.** In **5 C W. N. 864,** it appeared that the Magistrate was present on the occasion when the Police made a search and in that connection probably became aware of some of the facts connected with the case, and it also appeared that the Police brought up before him one of the accused for the purpose of his examination being recorded, it was *held* that it was expedient to transfer the case *See* also **15 Cr L J. 543 (O)** But it is not expedient to order a transfer, unless it is clearly shown that the evidence of the Magistrate is really essential for the accused defence, and that there is likelihood that he can give evidence which would aid the accused in his defence An application for transfer of a case pending before the Magistrate on the grounds that the Magistrate is a necessary witness for the defence must be strictly scrutinised as otherwise it would be open to any accused person to obtain a transfer of a case from a Magistrate whom he did not want to try the case merely on this particular ground **8 S L R. 170 = 16 Cr. L. J. 222** In **15 Cr. L. J. 368 (A.)** KNOX J refused an application for transfer based on the allegation that the Magistrate may be called as a witness as the objection was not put forward at the earliest date of the case

24. Onus of proving necessity for transfer.—(i) *Onus of showing improper motive of Magistrate* — In order to support an application for transfer of a case the applicant must show that he has reason to believe that the Magistrate is likely to be prejudiced or influenced by any improper motive in the decision of the case If this is not done, the High Court will support the Magistrate It is highly improper to throw gratuitously a slight on the Magistrate by the transfer of a case from his Court **Ratanlal 323** *See* also **6 B H C R. Cr Ca 69; 1887 A. W. N. 139** Ordinarily, where there are grounds for *suspecting* bias though there may not be actual bias, the accused is entitled to a transfer; but when he attempts to procure that transfer by making false charges of corruption etc, against the Magistrate he loses the right, **2 L. B. R 220**

(ii) *When application is opposed by accused, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district*—Before the transfer of a case from one Criminal Court to another can be made in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable, **6 C. 491.** Having regard to sub-sec (5) a complainant very often makes an application without any notice to the Public Prosecutor In such cases the High Court should direct notice to the accused, even where the clearest case for a transfer is made out

25. Incidents held to create reasonable apprehension that fair trial cannot be had—

(i) *Cumulative effect of incidents to be taken into account*—Though none of the circumstances alleged by the accused as grounds of a transfer, taken by itself shows that there is any bias on the part of a Magistrate, yet, if having regard to all the various matters alleged, [taken together, the accused may, not unreasonably apprehend that he may not have a fair trial, the case should be transferred **9 C. W. N 619 = 2 Cr. L. J 339; 23 Cr. L. J. 750, 110 I. C. 686.** That the accused was arrested without a warrant, that his medical certificates were not accepted, that he was not informed of the charge for many days, that his request to reserve cross examination was disallowed that his prayer as to production of certain documents was rejected and that the names of some of his witnesses were struck out *held* though these facts by themselves did not show bias or prejudice in the mind of the Magistrate yet these taken with the fact of several criminal proceedings prior to the present proceedings would be likely to give rise to an apprehension in the accused s mind that he is not likely to have a fair and impartial trial and the case was transferred, **12 A. L J. 736 = 16 Cr. L. J. 56, 20 A. L. J. 911.** For a similar case, *see* **9 Lah. 537 = 29 Cr L J. 815.**

(ii) *Local inspection with partisan of complainant*—Where during the pendency of a case against the accused for the alleged cutting of a *bund* the Magistrate went to the scene of occurrence accompanied by the *partisan* of the complainant and held a local inquiry into a matter which, though not the subject of complaint against the accused could nevertheless be imagined by the accused to be such, **12 C. W. N. 748 = 7 Cr. L. J. 510.**

(*iii*) *Magistrate conducting inquiry not making entries daily as required by the rules.*—It appeared that during the course of an inquiry preliminary to commitment some entries in the order sheet were not made by the Magistrate, as required by the rules of the High Court, daily, and certain orders were not recorded either on the particular day or possibly even on the following day, and in one instance the Magistrate did not record the order with reference to the order of the proceedings then before him. It further appeared that the Magistrate, after the receipt of the order of the High Court staying all further proceeding in the case, placed on the record a letter received from a medical officer. *Held*, that the Magistrate had acted with impropriety and showed some bias against the accused, that further proceedings should not, therefore, be taken before the said Magistrate and the case should be transferred to another Magistrate, **2 C. W. N. 639.**

(*iv*) *Persistence in going on with case after communication of the issue of a rule.*—A refusal to adjourn to enable the accused to apply to the High Court and persistence in going on with the case in spite of the communication of the issue of a *rule nisi* for transfer by telegram are sufficient to justify a transfer, **11 C. W. N. 507 = 5 Cr. L. J. 291; 1 S. L. R. 37 = 9 Cr. L. J. 275; 16 C. W. N. 1031 = 13 Cr. L. J. 766.** Where the zeal of the executive officer had outstripped the judicial impartiality of the trying Magistrate, and where he hurried on the inquiry preliminary to commitment in spite of his knowledge that a rule has been granted by the High Court to stay proceedings, *held* that this haste to press the inquiry on, coupled with his action in the earlier investigation of the case, suggested that the mind of the trying Magistrate was not free from some bias in the matter, and that he did not approach the case with judicial impartiality so essential to the administration of justice. Consequently, the ends of justice required that the case should be transferred to some other Magistrate, **2 C. W. N. 498.** *See* also **1 S. L. R. 89 = 9 Cr. L. J. 251; 11 C. W. N. 507 = 5 Cr. L. J. 291; 5 C. W. N. 110;** but *see* **19 M. 375.** *See* Notes 54-55.

(*v*) *Making a witness a co-accused.*—In **7 Bom. L. R. 472,** a person whose name appeared as an accused in the complaint, was examined as a witness against the other accused, and after he had given evidence to a certain extent, he was made a co-accused and tried along with the others; *held*, the procedure adopted was highly calculated to intimidate the other witnesses and the action of the Magistrate was improper.

(*vi*) *Issuing non-bailable warrants in a petty case and exacting heavy bail.*—Where a Subordinate Magistrate in a case of petty theft of four bamboos, worth one rupee, issued non-bailable warrants in the first instance and afterwards exacted very heavy bail from the accused: these were held to be sufficient grounds for transfer as the accused had been given occasion reasonably to apprehend that they would not have a fair trial before the Magistrate. The accused were, however, directed to pay the costs of the complainant before the trying Magistrate, **8 C. W. N. 589;** but where a Magistrate acted *bonâ fide* from a mistaken view of the law, it was held to be no sufficient ground for transfer, **8 C. W. N. 838.**

(*vii*) *Issuing a warrant in a summons-case unnecessarily.*—In **18 C. 247,** it was *held* that if there are circumstances shown which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him and will in consequence be prejudiced against him, there ought to be a transfer and a transfer was granted where in a summons-case the Magistrate had issued a warrant without any apparent reason, and there was reason to believe that in other proceedings connected with the case, the Magistrate had formed an opinion unfavourable to the accused. *See* also **14 C. W. N. 246.**

(*viii*) *Not allowing the accused to re-call and cross-examine prosecution witnesses.*—In **7 C. L. J. 240 = 7 Cr. L. J. 313,** the fact the Magistrate did not allow the accused to re-call and further cross-examine under s. 256 the witnesses for the prosecution, was held to be sufficient ground, not only for annulling the conviction, but also for ordering the re-trial by another Magistrate. *See* also s. 256 and Notes thereunder.

(*ix*) *Taking proceedings under s.* 107 *against one party alone.*—In **11 C. W. N. 121 = 4 Cr. L. J. 456,** two parties had both applied to the Land Registration Court for the registration of their names as proprietors of an estate, and pending these proceedings, a Magistrate instituted proceedings against one of the parties alone under s. 107, and it being represented that the proceedings under s. 107 against one party would prejudice that party in the Land Registration proceedings, and when further some of this party were appointed. Special Constables also, *held* that in consequence of the order the parties might have a reasonable apprehension that they would not have a fair and impartial trial and the High Court therefore transferred the case, **10 C. W. N. 82.**

(*x*) *Dismissing a complaint even without hearing the prosecution witnesses.*—Where a Magistrate followed the unusual and illegal procedure of acquitting the accused on a consideration of the complainant's statement alone and without examining his witnesses, although they had been summoned, the High Court

set aside the order of acquittal and, having regard to the fact that the Magistrate had formed a decided opinion before hearing the evidence for the prosecution directed the District Magistrate to transfer the case for trial to another Magistrate, **20 M. 383**

(*xi*) *Insisting on the appearance of pardanashin accused*—The case was transferred from the Magistrate who had refused to dispense with the personal appearance of pardanashin ladies belonging to a respectable family The High Court gave them the permission and transferred the case, **15 Cr. L. J. 281 = 17 C. W. N. 1248.**

(*xii*) *Magistrate putting questions to witnesses prejudicial to accused.—See* **12 A. L. J. 50 = 15 Cr L. J 234,** in Note 31 or where the accused was examined at great length under section 342 and as many as 79 questions were put to him several of which appeared to be like those that would be put in cross-examination of an adverse witness **110 I. C. 801 = 29 Cr. L J 769.**

(*xiii*) *Reasonable apprehension in the mind of the petitioner that his movements were unduly restricted*—The High Court transferred the case having regard to the fact that on account of the order of the Superintendent of the Police ' that the petitioner was to be allowed facilities for instructing legal advisers only on application to him there might be a reasonable apprehension in the mind of the petitioner that his movements were unduly restricted, **23 C. W. N. 481.**

(*xiv*) *Fixing a single day for trial and then another day after an interval of some days, a good ground*—Ordinarily a Sessions trial once begun should be continued *de die in diem* until it is finished

Consequently where a Sessions Judge fixed one day for a Sessions case which could not be finished in a single day but the Judge was willing to grant an adjournment to another date, *held* that this constituted a ground for the transfer of the case **17 A. L J. 48.**

(*xv*) Where it appeared that the Civil Surgeon had been discussing the case at the Local Club with the officers of the station including the Sessions Judge, *held* that that fact by itself was sufficient to justify an order for transfer of the case, **19 A. L. J. 946.**

(*xvi*) Where in recording the evidence of a witness for the prosecution, the Magistrate made a note to the effect that the witness faltered and it appeared from his demeanour that he had not told the truth. Upon this the complainant moved the High Court for a transfer of the case *Held,* that it was desirable that the case should be transferred to some other Magistrate, **29 C W N. 316.**

(*xvii*) *Magistrate trying to persuade the parties to compromise*—Where a Magistrate has interested himself in a case pending before him in the way of obtaining the settlement by the parties, it is to the interest of both the parties and only fair to the Magistrate himself that he should not hear the case, **47 A. 411 = 23 A. L. J. 191.**

(*xviii*) Where a Magistrate orders the prosecution of a defence witness for perjury at the time the evidence of the witness is recorded it is bound to strike terror in the hearts of the defence witnesses A transfer of the case is therefore disirable, **29 Cr. L. J 40 = 106 I. C 456**

26 Incidents held not sufficient to prove any bias—(*i*) *That a Magistrate has in matters left to his discretion decided in a particular way*—Magistrate refusing to issue sommons to 200 witnesses **36 A. 239**; or disallowing a question, **Ibid.**, or increasing the bail when after proceeding in the inquiry the case becomes more serious **4 P. W. R. 1912 = 13 Cr. L. J. 474**; or refusing bail, **4 Bur. L. T. 113 = 12 Cr. L. J. 277**, or refusing to grant adjournment for moving the High Court for transfer when the application has been delayed for two months, **4 S L. R. 42 = 11 Cr L J. 500.**

(*ii*) *Bonâ fide mistake of law is no ground for transfer*—A Magistrate heard the evidence for the prosecution and, without disbelieving it, decided that it did not amount to the offence charged, *held* that assuming that an error of law had been committed the High Court has no power to issue a *mandamus* to the Magistrate to commit the defendants, it is not a case where the Magistrate has declined jurisdiction, **2 C. 278.** Where in certain proceedings under s 110 the accused applied for bail and the Magistrate refused the application on the ground that 'the accused is said to be a dangerous and violent man who might use his liberty for the purpose of intimidating witnesses.' *Held,* that the provisions of ss 190 (*c*) and 191 did not apply to proceedings under s. 110 and therefore there was not sufficient ground for transfer, **27 A. 172.**

(*iii*) *Complainant is a man of importance at the place of trial*—The mere fact that the complainant is a man of importance at the place where trial is taking place is not a sufficient reason to justify the transfer of a case to another Court, **Ratanlal 474.**

(*iv*) *Police activity.—See* **18 W. R. 69 = 7 B. L. R. 240.**

(*v*) *Allegation that justice more likely to be done if case heard by another officer who did not know the parties, no ground.*—Section 526 (*e*) of the Code is no authority for the transfer of a case from one Court to another when the ground alleged is that the transfer would be in the interest of justice if the trial were held by a Court which knew nothing about either party, **16 A. L. J. 490.**

27. That Magistrate expressed strong view in preliminary inquiry in a Sessions case is no ground for transfer.—Where a case is triable by a Court of Session, it will not be a good ground for the transfer of the case from the Court of the Magistrate holding an inquiry that the Magistrate expressed certain strong views against a party, or that he is going to be produced as a witness, **11 A. L. J. 741 = 14 Cr. L. J. 555.**

28. When is formation of a previous opinion in another case a ground for transfer?—*See* s. 487 and Notes under Heading XXXII. Where a Sessions Judge in his explanation to the High Court indicated that he had taken a very strong view of the case against the accused, and that he had in a great measure formed a very strong opinion of his guilt, and also in view of the fact that it might be desirable to examine the Sessions Judge as a witness at the trial of the accused, the High Court transferred the case to another Court, **3 C. W. N. 278.**

(*i*) *That sanction was given by the Judge is no ground for transfer of an appeal from conviction—See* **27 C. 452** and **15 Bom. L. R. 104 = 14 Cr. L. J. 190** and Notes 257 and 258.

(*ii*) *That in a counter-case between the same parties the Judge has formed a decisive opinion on the same evidence which is to be adduced in the pending case is a good ground for transfer.*—In **4 C. W. N. 824,** where the complainant applied for transfer of his case, on the ground that the complaint was regarding facts forming the substance of the defence in another case which had already been tried by the same Magistrate, *held* that the case should be transferred, as the Magistrate had necessarily been compelled to express his opinion on the evidence which formed the evidence for the defence in that case, and that was the evidence on which the complainant in the present case would rely. In two cases in which charges and counter-charges had been made, a Magistrate heard the prosecution evidence in one case and then without hearing the defence evidence in that case interposed the other case, heard the prosecution evidence in that case and on that evidence discharged the accused in that case. In his order of discharge, he expressed himself in decided terms as to the guilt of the prosecuting party in the latter case, who were the accused in the former case. *Held,* that the course adopted by the Magistrate was likely to prejudice the accused in the former case. Although the evidence which the accused in the former case addressed as prosecutors in the latter case may be substantially the same as that which would have been adduced in their behalf if the former case had proceeded in the ordinary way and the evidence for the defence in that case had been heard, it does not follow that evidence which when adduced on behalf of the prosecution is in sufficient to sustain a charge, will, if adduced on behalf of the defence with reference to the same charge, be also insufficient. Such prejudging of the accused's guilt is sufficient ground for transfer, **30 M. 233.** This Ruling was *followed* in **(1910) M. W. N. 743 = 11 Cr. L. J. 702,** where a case and a counter-case were filed before a Magistrate who, in giving judgment in one, prejudged the other, and the latter case was therefore taken away from his hands. Where, in a case of rioting, the question of possession was of all importance and the Magistrate had in two previous cases expressed rather a decisive opinion upon the question of possession, *held* that it was expedient for the ends of justice that the case should be transferred, **8 C. W. N. 641.** STEPHEN, J., doubted the correctness of this principle, but felt bound to follow the practice of the High Court.

(*iii*) *But opinion expressed in a judgment in another case based on evidence judicially recorded is not ipso facto a sufficient ground for transfer.*—The mere fact that in another case, on other evidence, the Judge may have come to a particular conclusion is not in itself a sufficient ground for transfer, **36 C. 904** *following* **1 C. W. N. 426,** where it was *held* that the fact that a strong opinion was expressed by the Sessions Judge in a counter-case of rioting is not a sufficient ground for transferring a case. So also in **33 A. 583** it was *held* following *Cr. Mis. Case No.* 141 *of* 1909 that the fact the Judge had already in a cross-case against the other party in an alleged riot come to the decision that the present applicants were the aggressors and the other party were acting in self-defence, was not a sufficient ground for transfer. But where certain remarks in a judgment in a counter-case were relied on as showing bias, *held* that when a judgment has been formed on evidence judicially recorded, it is impossible to take that judgment as an indication of extra-judicial bias and prejudice forming grounds for transfer, **18 C. W. N. 910.** The impressions recorded in the judgment are impressions derived from evidence and however erroneous, are not to be classed as instances of personal bias

which is regarded as disqualifying 6 Bom. L. R. 1077 Interest or bias is not to be inferred from the opinions formed on evidence judicially recorded 1 B. L. R. 37 = 9 Cr. L. J. 275, nor is the fact that the Magistrate has discharged a cross-case between the same parties *per se* is a sufficient ground but if the order of discharge is based on the evidence which he had heard in both the cases there will be a sufficient ground for transfer, 5 S. L. R. 264 = 13 Cr. R. L. J. 537

(iv) *That the Judge sitting on the civil side has in a case of perjury or forgery formed an opinion on the evidence is not by itself a sufficient ground for transfer*.—As a general rule, the High Court does not exercise its power of transfer in a case of forgery or perjury only on the ground that the Judge who is to try the case, has actually formed an opinion that the document is forged or the perjury was committed when sitting on the civil side of his Court. But when the transfer can be made without risk of any improper interference with the course of justice, and without much inconvenience to the parties and witnesses, it is not only a fair concession to the person charged, but is a means of relieving the Judge from a position which he would desire to avoid, 5 M. H. C. R. 212; 6 B. 479; 16 A. 334; 18 C. 746 (F B.) *overruling* 18 C. 121; 18 B. 350. *See* also s. 490

(v) *Trial and conviction of one batch no bar to same Magistrate trying another batch of accused under similar circumstances*.—The fact that the Magistrate had tried and convicted one set of persons does not disqualify such Magistrate from conducting a supplementary trial, where another batch of persons is put on their trial for identically the same set of circumstances, 31 C. 715. *See* also 11 C. W. N. 252; 12 A. L. J. 33 = 16 Cr. L. J. 668 and four others were put up for trial, the former under s. 411, I P C and the latter under s. 341, I P.C. The case of *N* was subsequently separated from that of the four others The Magistrate tried the others first and convicted them under s. 341, I P.C. On application being made by N for transfer of his case, *held* that there being nothing to find that the Magistrate would not try the case with perfect impartiality the case could not be transferred, 15 Cr. L. J. 253 (A). The fact that some of the accused have already been convicted on the same evidence by the Sessions Judge before the remaining accused were placed before him is no ground for transfer, 107 I. C. 783 = 29 Cr. L. J. 275.

(vi) *That the Judge himself directs the committal when dealing with an appeal*.—Where an Appellate Judge after hearing arguments came to the conclusion that the offence if one was committed at all was of a graver nature than the accused was convicted of, and setting aside the convictions, committed them for trial on charges of graver character, and the accused applied for transfer on the grounds of justice *Held* that the Judge was simply performing his duties as Sessions Judge and that there was nothing to show that the accused would not have a fair and impartial trial, 15 Cr. L. J. 637 (A.).

27. That Magistrate is influenced by extra-judicial information may be sufficient ground.—During the trial of the accused for an offence under *the Gambling Act*, incidentally in the course of the discussion as to the conduct of a witness, the Magistrate remarked that the name of the accused was notorious as that of a man who advertised for persons to join him in gambling, *held* on an application for transfer, *per* BATTY, J., —" that the case must be transferred That the impression given expression to by the Magistrate was based on materials which did not constitute part of the evidence in the case and the Magistrate's statement of the impression was calculated to give rise to reasonable apprehension on the part of the accused, and possible on the part of the witnesses that the conduct and result might in some measure be influenced by the pre-possession, unfavourable to the accused, instead of depending solely on the evidence adduced The position of an accused person must always be one of great anxiety and suspense and it is not right that the painfulness of such a position should be enhanced by anything that could suggest to him that his guilt is a foregone conclusion in the mind of the Magistrate who is to try him. The accused or his counsel should not be put to the necessity of removing any impression from the Court, which is not based on any evidence in the trial' *Per* ASTON, J —" It is important that parties should have confidence in the Court before which they appear It is also important that nothing should be done to encourage any want of confidence when there is no sufficient foundation for that want of confidence There was nothing in the incident referred to to suggest ground for such want of confidence, so as to give the accused cause to apprehend that he will not have a fair and impartial trial.' But the learned Judge concurred in the order of transfer, because he held that by the use of the expression " that it is undesirable that the Magistrate should proceed with the trial' in the judgment of BATTY, J., an incident giving cause for apprehension had been created, 6 Bom. L. R. 858. *See* also 11 C. W. N. 262 and 10 C. W. N. 16. Where a Magistrate was found to be acting on information got out of Court and that he permitted rumours relating to the accused in a pending case before him to reach him out of Court and allowed his mind to be influenced by such rumours, *held* the case should be transferred, 19 A. 64. Where a Magistrate

on the bare authority of a Police clerk asked a witness whether the accused had been challenged in any badmashi case *held*, that the question was improper and it gave a sufficient cause to the accused to apprehend that a fair and impartial trial will not be had and was a good ground for transfer, **12 A. L. J. 50 = 15 Cr. L. J. 234.** When the Magistrate has acted as a private arbitrator in the case he should not subsequently try the case, **18 C. L. J. 150 = 14 Cr. L. J. 602.** *See* also **35 A. 5.**

30. That case is causing considerable excitement in the district is not necessarily a ground for transfer.—In **6 C. 491** an application was made based on the affidavit of the District Magistrate, the Court held it was not a sufficient reason for transfer that the case was causing considerable excitement in the district and most of the inhabitants of the districts had their sympathies enlisted on the one side or the other. Clause (*e*) refers to the expediency of justice and not to any expediency from a political point of view. Therefore the fact, that certain classes of the inhabitants of a town or district are excitable people and have not much patience and that it is necessary to allay their irritation to prevent possible consequences is not a ground for transfer. It is no doubt the duty of the Court to have all due regard for the importance of securing the confidence of the public generally, and of every section of the community interested in the result, in particular in the fairness and impartiality of the trial that is going to be held, but it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public, from an apprehension of ulterior consequences. If that were done it would result in the obvious injustice of showing greater consideration to the less peaceful than to the more peaceful, **25 C. 727.** *See* also **15 W. R. 69 = 7 B. L. R. 240.** In **6 M. 32**, the High Court transferred an appeal to itself as the accused was an old public servant holding an important post and the case was causing considerable excitment. A District Magistrate on a letter sent to him containing allegations against a Deputy Collector of the same district directed the prosecution of the writer of the letter under s. 182, I.P.C. An application for transfer outside the district was granted on the allegations that one of the witnesses for the prosecution was a Deputy Magistrate of the same district, **15 Cr. L. J. 543 (O.).**

31. That a fair and impartial jury cannot be secured is a ground for transfer.—The jury in a case triable by jury constitute a part and an important part of the tribunal. It would not, therefore, be quite reasonable to say where doubt is entertained as to the fairness and impartiality of the jury, that the trial should nevertheless go on before such a jury, because an erroneous verdict may, in the end be set right by the High Court. The importance of having a fair and impartial jury ranks very much higher than the convenience of parties and witnesses and the convenience of the Court in having a local inspection. Where, therefore, to such officers, as the District Magistrate and the Sessions Judge emphatically express their belief that it will be next to impossible to expect a fair and impartial trial. if the case be heard before a jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof must shake the confidence of the parties. An order for transfer in such cases, is expedient for the ends of justice under cl. (*c*) of sub-sec. (1). *The importance of securing the confidence of parties in the fairness and impartiality of the tribunal is next only to the importance of securing a fair and impartial tribunal*, **25 C. 727.** But before an order is made for transfer against the wish of the accused, the Court ought to require the very best evidence that a fair trial cannot be had, in other words, that the jury cannot be trusted to do their duty impartially, **6 C. 491.** But *see* **7 B. L. R. 240.**

32. Other grounds for transfer.—(*i*) *Question of law of unusual difficulty—Sub-sec.* (1) (*b*).—As the Code allows appeals and revision applications from convictions and there are several exceptions even to the finality of a verdict of a jury, the rulings relating to the circumstances under which the writ of *certiorari* would be granted in England, are not applicable to the circumstances of this country. *See* the remarks of PHEAR, J., in **7 B. L. R. 240 at p. 269 = 15 W. R. 69.** *See* also **7 Bom. L. R. 637 at p. 639** on this point.

(*ii*) *When a view of the place is required.*—See *sub-sec.* (1) (*c*).—A personal inspection by a Magistrate of the locality, to test the correctness of evidence, does not disqualify him from deciding the case, by making him a witness. *See* s. 556, **13 P. R. 1901.** Though a local inspection may be highly desirable, the Magistrate should be careful, not to allow anyone on either side to say anything to him which might prejudice his mind one way or the other, **19 A. 302.** *See* **13 P. R. 1901; 21 C. 920; 19 M. 263; 37 C. 340**; as to the duties of a Magistrate in making a local investigation, *see* also **12 C. W. N. 748 = 7 Cr. L. J. 510**; and *see* Notes 19-20 to s. 556.

(*iii*) *Convenience of parties, transfer for—Sub-sec.* (1) (*d*).—On committal of the accused to the Court of Sessions at Ratnagiri, the Sessions Judge, holding that he had no jurisdiction to try the case without an order of the High Court as all the acts constituting the alleged offences with which the accused was charged, were committed, if at all, in Bombay, reported the case under this section. *Held*, that as the complainant chose to lay his complaint in the district, and as the accused wished to be tried there, the High Court might order that the trial should proceed before the Sessions Judge, **2 Bom. L. R. 304.** And so where the convenience

of numerous witnesses for the defence outweighed that of the prosecution witnesses who were few in number, the High Court made an order for the transfer of the case to itself, and directed under s. 267 that the trial before it be by jury under the circumstances of the case, **Ratanlal 927.**

(*iv*) *Expedient for ends of justice—Sub sec* (1) (*e*).—*See* Note 17 *et seq*.—It is desirable that a case relating to a mosque between Hindus and Muhammadans should be tried by the District Magistrate or some other Europen Magistrate **1 P. W. R. 1915 = 127 P. L. R. 1915 = 16 Cr. L. J. 213.**

(*v*) *But a Magistrate's ignorance of the vernacular in which the exhibits are written is no ground for transfer*.—That a Magistrate does not possess the amount of scholarship in Telugu and Sanskrit which is necessary to understand correctly without the aid of translation the book in respect of which the charge is lodged and others to which it may be necessary to refer for comparison, is not a ground for transfer as it is a difficulty which is necessarily of common occurrence, **(1911) 2 M. W. N. 50 = 10 M. L. M. T 518 = 12 Cr L. J. 431.** In **16 Cr. L. J. 73 (A)** a case was transferred as the Magistrate before whom the case was pending did not know English and there was good deal of evidence, oral and documentary, in English to be adduced in the case

(*vi*) *Unnecessary delay on the part of the Magistrate, good ground for transfer*.—Unnecessary delay in the disposal of a simple case is a good ground for transferring it, **Weir II, 679** In **8 M. L. T. 222 = 11 Cr. L. J. 533,** the High Court characterised the delay as scandalous and upheld the transfer even though made without notice. In **12 A. L. J. 262 = 15 Cr. L. J. 363,** a case under s. 110 was transferred as it was much to be feared that if it remained in the hands of that Magistrate it would be some months before the case would be brought to a close.

(*vii*) *That all the pleaders have been engaged*.—The opposite party engaging all lawyers available at the place is a good ground for transfer, **7 A. L. J. (Sh. N) 80.** *See* also **1 C. W. N. 426** and **25 C. 727** where the difficulty in procuring legal aid was referred to

(*viii*) *That the Magistrate is lenient to the accused*.—A transfer is not justified on the ground that the Magistrate's action in releasing an accused person on bail shows a tendency to treat the accused with undue leniency, **22 B. 549.**

33. When transfer is required by some provision of law.—*See, e g*, ss. 191, 449 (2), 487 and 556

34 Grounds for transfer of appeals under Letters Patent.—As to the reasons which will sometimes induce the High Court to transfer a case under *Letters Patent see* **6 M. 32.** *See* also **1 B. L R. O. Cr. 15** and **9 C. 397.**

35. Defamatory statements in application for transfer whether absolutely privileged.—It was held that a defamatory statement made in bad faith in an application for the transfer of a case is not privileged. The Engligh Common Law doctrine of absolute privilege has no application to the Indian mofussil, **40 C. 433,** where **36 M. 216** was *dissented from* But *see* **17 C. W. N. 449 = 14 Cr. L. J. 61** as also **38 C. 880 at p. 888** and **37 M. 110.**

V.—SUB-SECTIONS (2) TO (7)—PRACTICE.

36. Delay in applying for transfer strongly condemned.—"The impression appears to have got abroad that the processes and orders of mofussil Courts can be ignored if the parties chance to telegraph to their legal advisers either that an order has been passed by this Court or that they are ill We must protest against this practice which has become common in this Court to file these petitions of transfer on the last day when the parties are given a fortnight or three weeks to more It is the absolute duty of parties to come to us as soon as possible and we shall be in future unable to stay proceedings ordinarily unless sufficient time is given to issue a rule and obtain an explanation, **17 C. W. N. 536 = 14 Cr. L. J. 382.** An application for transfer ought to be put forward at the earliest possible opportunity after the occurrence of whatever facts or circumstances are alleged as affording reasonable basis for such application, ***15 Cr. L. J. 556 (A.)***, **15 Cr. L. J. 368.**

37. Commitment under sub sec. (1) (iv) not liable to be quashed.—When a case has been committed under the orders of the High Court under this section to a Court of Session the Sessions Judge should dispose of the case according to law Such an order is not subject to revision and Sessions Judge cannot refer the case under s. 215 to the High Court. Section 215 does not apply to a [illegible] ction or s. 436, and an order under sub-sec. (1) (iv) made by the High Court itself it is not subj [illegible] **. 54.**

38. **To whom the case may be transferred.**—(*i*) *Case must be transferred to a competent Court.*—The High Court transferred a case under s. 110 to a District Magistrate with instructions to make it over to some other Magistrate and the District Magistrate made over the case to a second-class Magistrate who was not competent to conduct proceedings under ss. 110 to 119. The second-class Magistrate made an order directing security. *Held*, the order was bad. The High Court under s. 526 had power to transfer the case to another Criminal Court of equal or superior jurisdiction and could not have transferred the case to the second-class Magistrate and what the High Court cannot do the District Magistrate to whom the selection of the Magistrate was left could not do. In **24 A. 151,** the transfer was made to a first class Magistrate who was competent to complete the proceedings, **37 A. 20.**

(*ii*) *To a special Magistrate.*—The High Court may ask the Local Government to appoint a special Magistrate, *see* **4 B. L. R. Ap. I; 20 W. R. 23 = 11 B. L. R. Ap. VIII.**

(*iii*) *Interpretation of order of transfer of criminal case by High Court to District Magistrate.*—When a criminal case is transferred by an order of the High Court from a Court subordinate to a District Magistrate, to the Court of a District Magistrate, if it is intended that the District Magistrate shall have power to transfer the case to a Subordinate Court, that intention will be expressed in the order of the High Court. If no such intention is expressed, it will be understood that, in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court, is expected to try the case itself; but when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood that, unless the contrary is directly expressed, the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply s. 192 and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it, **19 A. 249.**

39. **Scope of sub-sec. (3).**—Sub-section (3) "will enable a High Court to pass an order for the transfer of a case on a reference made by an inferior Court with the consent of the parties concerned without a formal motion or affidavit, and will generally in such cases extend the powers of a High Court."—*Statement of Objects and Reasons.*

39-A. **Party interested.**—The expression "party interested" in section 526 (3) of this Code does not necessarily mean only a complainant but may include a Police informant. Where, however, the conduct of the case is in the hands of the Public Prosecutor and there is a conflict between him and the "Party interested" the right of the former must prevail, **57 M. L. J. 547 = A. I. R. 1929 Mad. 8443,** *see* also **6 Lah. 541.**

40. **Notice to accused and complainant of proposed transfer.**—When a Court reports a case to the High Court for transfer under sub-sec. (3), it shall give notice to the accused and the complainant (if any) of the application and forward along with its report any objections that may be made to the proposed transfer.—Para. 78, *Bom. H. C. Cr. Cir.*, p. 50.

41. **Procedure—Application for transfer by Government.**—Application by the Government or by a Sessions Judge or District Magistrate for the exercise by the High Court of its power of transferring criminal cases under s. 526 (3) must be made to the Court, through the Government Pleader or some other qualified person specially empowered in that behalf. Before granting such application, the High Court will require to be satisfied that the person against whom the criminal case is pending has received such notice of the intention to apply as would enable him to appear and be heard on the application.—*Bom. H. C. Cr. Cir.*, p. 50. *See* also **1894 A. W. N. 154.**

42. **Any party interested.**—A person alleging himself to be a complainant, but who in fact is not the complainant and from whose hands the prosecution has been taken away by order of the Magistrate, is not a party interested within the meaning of sub-sec. (3), **5 Bom. L. R. 869.**

43. **Sub-section (4).—Manner of moving the High Court.**—The provision of sub-sec. (4) as to the manner in which an application shall be made by a private party, follows the Ruling in **1 C. 219 (F.B.) = 25 W. R. 27.** *See* also **8 C. 63.**

44. **Practice—Affidavit by District Magistrate as regards impartiality of Subordinate Magistrate when improper.—In 25 B. 179** the petitioner moved the High Court to transfer the case under s. 145 to some other Magistrate. Among the grounds on which the impartiality of the trying Magistrate was impugned were (1) that he had already inquired into and reported (unfavourably it would seem to the present applicant) on the subject of the dispute in question, and also that he is hereditary *Yajman*, of one of the parties concerned in the

d spute The Magistrate of the District made an affidavit setting forth his opinion to the effect that the Magistrate whose impartiality is impugned will not be influenced by the relations in which he admittedly stands to one of the parties interested On this the Court remarked It is somewhat difficult to unde stand on what grounds it could l ave been supposed that such an expression of opinion could have formed the basis for any decision of this Court as to the advisability of directing the transfer appl ed for And it s by no means re-assuring to find that the head of the Magistracy of the District in a document of so solemn a nature as an affidavit under the sanction of an oath should have felt no hesitation in making a statement which is not one as to facts but as to his personal opinion which in the circumstances can only rest upon conjecture as to the mental attitude of another officer

45 **Affidavit not to be made by accused** —An application for tansfer by the accused in a criminal case is a criminal proceeding within the meaning of s 5 of *the Indian Oaths Act* X of 1873 **Weir II, 686, I, 176** Where an affirmation was wrongly administered to the accused and an affidavit was sworn to by him in support of such application for transfer *held* that the affidavit was a nullity and that the accused co ld not be pun shed under s 193 or s 199 I P C for making any false statement in that affidavit *See* sub-sec (4) of s 342 and Notes thereto and also **28 A 331**

46 **Costs of the complainant** —In **8 C. W N 589,** where the case was transferred at the instance of the accused he was ordered to pay all the costs incurred by the complainant before the Magistrate from whom the case was transferred In **8 P W R 1911 = 12 Cr L J 274** an order directing the accused to pay costs was held to be improper and unjustifiable and was set aside on revision But when an order for transfer was made at the instance of the accused and the complainant alleged that he was poor and the transfer would subject him to expenses which he could not afford an order was made that the Crown should pay the expenses of the witnesses **8 C W N 75**

47 **Power of High Court to re entertain application for transfer** —A judgment of a Division Bench of the High Court refusing to transfer a criminal case whether signed or not is in the nature of an i iterlocutory order and is not final but may be reviewed or re-considered or the Court may entertain another application for the same purpose as often as it may in its discretion think proper **8 C 63**, also **19 A 64**

VI —ADJOURNMENT OF HEARING ON NOTIFICATION OF INTENTION TO MOVE THE HIGH COURT—SUB SEC (8)

48. **Application can be made at any time of the hearing** —Under the old law it was necessary that the application for adjournment had to be made before the commencement of the hearing But now under the present amendment in the case of an inquiry or trial an application for adjournment can be made at any time It is only in the case of an appeal that an application for adjournment must be made before the commencement of the hearing even under the section as amended

49 **Accused is entitled to have a reasonable time to apply to the High Court for transfer** —Under the old section it was doubtful whether the Court was bound to adjourn after an application for transfer was made under s 526 but now it is made clear that the Court shall adjourn the case or postpone the appeal on an applicat on for adjournment under sub sec (8) (*See* prelimi ary note to this section and the Report of the Select Committee *supra*) It is only under sub-sec (9) that the Sessions Court may under circumstances refuse an adjournment The words *The Court shall exercise the power of postponei ent etc* are no doubt obligatory **15 C. 455** but the obligation is not necessarily and under all circumstances to grant a postponement but only to give the party a reasonable time for obtaining the orders of the High Court The postponement is no part of the essence of the obligation By itself a postponement m ght be either useless if it were far too short a time or superfluous if there was sufficient time without any postponement The essence of the obl gation is that the party should have a reasonable time to move the High Court and obtain its orders If he has such reaso iable time when the applicat on is made there is no obligation to grant any further time Also the Sess ons Judge is not wrong in refusing to adjourn a case on the strength of a telegram said to have been received by accused s vakil to the effect the High Court had transferred the case **19 M 375**, *contra see* Note 54 below In **Weir II 686** an adjournment for six days was held to be not a reasonable time to allow for making an appl cation to the High Court and obtaining an order thereon. The effect of the Rulings in **15 C**

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might have notified to the Lower Court at an earlier date and made his application to the High Court before. But the Lower Court is not bound to make a special order of adjournment for the sole purpose of enabling the accused to make the application for transfer, if he has a sufficient opportunity of so doing between the time when he notifies his intention and the time he is called on to enter on his defence, **6 C. W. N. 715.** Where an appellant applied at the earliest possible moment for an adjournment to enable him to move the High Court for a transfer of his appeal, but the Magistrate disregarded the same and dismissed his appeal, *held* the refusal of an adjournment was most unreasonable and *following* **19 M. 375,** the appellate order was set aside, **16 Cr. L. J. 244 (M.).** Where an application under sub-sec. (8) was made and refused, but the Judge after examining some prosecution witnesses adjourned the case to a subsequent date, *held* that the proceedings subsequent to the refusal were not bad, inasmuch as the accused had ample opportunity to move the High Court between the date of their application and the date of their being called on to enter on their defence. The Magistrate can, therefore, well examine the complainant's witnesses even after a notifiaction has been made under sub-sec (8), **6 C. W. N. 717.** But *see contra* **9 Lah. 537 and 29 Cr. L. J. 671 and 536.**

49-A. In a proceeding under section 145 of this Code the Magistrate was not bound to postpone the case because the accused stated that they desired to move the High Court for a transfer, such proceedings are of a *quasi* civil nature and do not require the exercise of the very summary powers which clause (8) confers, **6 Pat. 553.**

50. Magistrate ought to act on telegram informing him of issue of rule for transfer—Bias.—After framing charges against the accused, the accused applied to the Magistrate to postpone the proceedings in order to enable them to move the High Court to transfer the case. The Magistrate not only refused the application but cancelled their bail and ordered them to be kept in confinement. Against this order a rule was granted by the High Court and the Magistrate was shown the telegram to that effect by the *mukhtyar* of the accused who asked for postponement. The Magistrate refused the application, examined another witness and committed the accused, though he was not present. *Held,* that it was most injudicious of the Magistrate to proceed with the case after he had been credibly informed that a rule was issued by the High Court, and his precipitate action indicated his bias against the accused; therefore the case should be transferred to some other Magistrate, **5 C. W. N. 110,** and that the commitment made should be quashed. If the Court entertained any reasonable doubt as to the genuineness of the telegram, it could easily satisfy itself by telegraphing to the Registrar of the High Court or the Court may ask the pleader making the application to verify the telegram and satisfy the Court as to whether the vakil in the High Court was acting under instructions in the case. *See* also **2 C. W. N. 496; 11 C. W. N. 507; 16 C. W. N. 1031 = 13 Cr. L. J. 766.** But in **Ratanlal 46,** the High Court ordered the transfer of a case on the 26th January, 1871, and on the 27th a telegram was shown to the Magistrate, and he adjourned the further proceedings till the 30th, to allow the order of the High Court to reach him. The order was despatched on the 27th, but reached the Magistrate only on the 31st January. On the 30th the Magistrate disposed of the case by convicting the accused. *Held,* that though the Magistrate did not act discreetly in not waiting sufficiently for the order of the High Court there was no illegality in his proceedings. *See* also **19 M. 375; 15 C. 455.** Where, upon the High Court having issued a rule staying further proceedings, the petitioner sent a telegram which was laid before the trying Magistrate, but the petitioner having failed to appear on the date previously fixed, the Magistrate issued a warrant upon the petitioner. *Held,* that the sending of the telegram did not in any way absolve the obligation of the petitioner to appear before the Court on the date fixed, and the issue of the warrant upon the petitioner was no ground for transfer of the case, **17 C. W. N. 536 = 14 Cr. L. J. 382.**

51. Proceedings after application for adjournment whether void.—As it is the duty of a Magistrate to grant an adjournment when an application is made to him under this section, and as he has no power to proceed with the hearing of the case until a reasonable postponement has been granted, all the subsequent proceedings after his refusal are unwarranted by law and ought to be set aside, **8 C. W. N. 77; 1 S. L. R. 35 = 9 Cr. L. J. 274; 3 S. L. R. 155 = 10 Cr. L. J. 570; 24 P. L. R. 1904 = 1 Cr. L. J. 109; 42 P. W. R. 1912 = 254 P. L. R. 1912 = 13 Cr. L. J. 746; 57 M. L. J. 763.** Where a Magistrate, in spite of an application under sub-sec. (8) proceeded with the case and committed the accused to the Court of Session, the commitment was quashed, as the Magistrate disregarded the express direction contained in sub-sec. (8) of this section, **Weir II, 685; 21 M. L. J. 755 = 12 Cr. L. J. 407.** The Oudh Chief Court in **15 Cr. L. J. 507** set aside a conviction and directed a re-trial before another Magistrate where the trial Judge disregarded the application of the accused under sub-sec. (8) and tried and convicted the accused. In **16 Cr. L. J. 24 (M.)** when an appeal was heard and dismissed without giving the applicant an opportunity to move for a transfer the dismissal was set aside. But *see* **31 C. 715** where it was

held, disapproving of **15 C. 455, 29 C. 211** and **6 C. W. N. 717** on this point, that a mere refusal to grant an adjournment, does not render subsequent proceedings necessarily illegal Otherwise, it would be in the power of every accused person to delay and thereby possibly to defeat justice, by making an application, no matter how frivolous, groundless or illusory it might be *See* also **35 M. 701** where the Judges said that they should find much difficulty in agreeing with **29 C. 211** if it were necessary to decide the question It is at least competent to the Magistrate to proceed with the trial up to the point at which the accused would be called upon for their defence, **6 C. W. N. 717,** where a conviction was sought to be set aside on the ground of non compliance with sub-sec (8) it was *held* that subsequent proceedings were not void, if the application was not *bonâ fide*, the accused having had sufficient time to move the High Court if he cared to without the adjournment applied for But see now sub sec. (8) as amended, and it is now compulsory to adjourn on an application under that section *See* Note 49, *supra*

51-A. "Trial" whether includes stage of judgment.—A "Trial" as that word is used in this Code is over before the judgment is pronounced and the pronouncement of the judgment is not a part of the trial Where the Vakil for the accused intimated to the Court his intention of making an application to the High Court for transfer after the arguments were heard but before judgment was delivered, *held* that the Magistrate in refusing to adjourn the case did not contravene the provisions of s 526 (8), **52 Mad. 355.**

52. Impropriety of application for stay of proceedings on pretence of moving High Court for transfer.—In **3 C. W. N. 758,** an application was made on the 23rd May to the trying Magistrate to stay proceedings on the ground that the petitioner was about to apply to the High Court to transfer his case to another Magistrate. The proceedings were accordingly stayed, and an application was made to the High Court on the 12th June but it contained no reference to the application of transfer, nor was the Court asked to transfer the case to another Magistrate Where legal advisers of the accused obtained an order from the Magistrate staying proceedings which otherwise they could never have obtained, except on misrepresentation the High Court strongly condemned such proceedings An application for transfer should be made with due diligence or at the earliest possible moment, **8 C. W. N. 77, 19 M. 375; 31 C. 715; 8 C. W. N. 910.**

53. Magistrate not bound to adjourn, pending application for transfer to superior Magistrate.—There is no duty cast on a Magistrate to adjourn a case because an application is being made to a superior Magistrate for transfer That duty is confined to cases where the application is to be to the High Court, **(1912) M. W. N. 1121 = 13 Cr. L. J. 828.**

High Court to transfer for trial to itself in certain cases

***526-A.** (1) Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (*a*) to section 41 of the Army Act, the Advocate-General shall, if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury

(2) The Governor General in Council may, by Notification in the *Gazette of India*, declare any officer to be the competent authority for the purpose of issuing instructions under sub-sec (1) in regard to any class of cases specified in the notification

Power of Governor General in Council to transfer criminal cases and appeals.

527. (1) The Governor General in Council may, by Notification in the *Gazette of India*, direct the transfer of any particular criminal case or appeal from one High Court to another High Court, or, from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses

(2) The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court

* Section 526 A was inserted by Act XII of 1923

Notes.—1. For the power of the Government to specify any Court for the trial of a public servant irrespective of jurisdiction, *see* s. 197 (2) and Notes 25 and 26 at p. 560 and *see* s. 178 for power of Local Government to order cases to be tried in different Sessions divisions.

2. **Refusal of the Governor-General under this section, no violation of the principles of natural justice.**—In a criminal case pending before the High Court at Bombay, certain comments were made in the Bombay local press against the prisoners at the bar and consequently an application was made to the Governor-General for the transfer of the case to some other High Court, but which application was refused and the accused were tried with a special jury before the High Court at Bombay. *Held*, by the Privy Council that such refusal of the Governor-General who had the advantage of being in the country and judging of the real state of public feeling, did not constitute "any violation of the principles of natural justice" to enable the Privy Council to entertain a petition for special leave to appeal. **28 Bom. L. R. = 49 M. L. J. 834.**

Sessions Judge may withdraw cases from Assistant Sessions Judge.

*528. "(1) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him."

District or Sub-Divisional Magistrate may withdraw or refer cases.

† (2) Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may withdraw any case from, or recall any case which he has made over to any Magistrate subordinate to him and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

Power to authorise District Magistrate to withdraw classes of cases.

† (3) The Local Government may authorise the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

‡ (4) Any Magistrate may recall any case made over by him under s. 192, sub-sec. (2), to any other Magistrate and may inquire into or try such case himself.

† (5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

§ "(6) The head of a village under the Madras Village Police Regulation, 1816, or the Madras Village Police Regulation, 1821, is a Magistrate for the purposes of this section."

Notes.—1. *See* s. 192 for powers of a District Magistrate, etc., to transfer cases which he has taken cognisance of, s. 346 (2) for power to transfer cases referred to him, s. 476 (2) for power of a Magistrate of the first class to transfer cases sent to him by civil, etc., Courts, under sub-sec. (1) and s. 407 for transfer of appeals.

2. **Concurrent jurisdiction of the District and Sub-Divisional Magistrates.**—Where a District Magistrate cancelling the order of a Sub-Divisional Magistrate which directed the transfer of a case, from the file of one Sub-Magistrate, to that of another Sub-Magistrate, directed its re-transfer; *held*, that the action of the District Magistrate in entertaining virtually an appeal against an order of the Sub-Divisional Magistrate passed under this section, was clearly illegal. In the matter of a transfer under this section, the District and Sub Divisional Magistrates have co-ordinate authority over Magistrates subordinate to the Sub-Divisional Magistrate, and the order passed by the latter Magistrate, cannot be appealed against to the District Magistrate. If the District Magistrate thought that the order of the Sub-Divisional Magistrate was not legal or proper he can act under ss. 435 and 438 or he may, on application made for that purpose withdraw the case from the file of the Magistrate to whom it had been transferred, and either try it himself or refer it for trial to another Magistrate, **26 M. 130; 13 Cr. L. J. 782 (A.).** He has no power to re-transfer, merely on the ground that the reasons which induced the Sub-Magistrate to transfer the case, are in his opinion insufficient. *Contra, see* **14 M. 399.** A Magistrate who is subordinate to a Sub-Divisional Magistrate is also *subordinate* within the

* This section was substituted by Act XVIII of 1923.

† Original sub-secs. (1), (2) and (3) where re-numbered (2), (3) and (5) respectively by *ibid.*

‡ This sub-section was inserted by *ibid.*

§ This sub-section was substituted for original sub-sec. (4) after it was re-numbered as sub-sec. (6) by *ibid.*

meaning of this section to the District Magistrate, **14 M. 399.** But *see* **40 M. 791** where **14 M. 399** is followed and **26 M. 130** is dissented from

2-A. Additional Chief Presidency Magistrate subordinate to the Chief Presidency Magistrate.—In **28 C. W. N. 903** it is held that the Additional Chief Presidency Magistrate is subordinate to the Chief Presidency Magistrate and that the latter had power under s 528 to make the order which he did withdrawing the case to his file

2-B. Whether in a case transferred by a District Magistrate, the Sub-Divisional Magistrate can re-transfer it to his own file.—Where the District Magistrate has transferred the case to a Magistrate subordinate to himself, but also subordinate to the Sub-Divisional Magistrate, it is no longer competent for the latter Magistrate to take the case on to his own file, **147 A. 288 = 23 A. L. J. 133.**

3. To what proceedings, section applies.—The provisions of this section are applicable to cases under ss 107, 110, 117, 133, 144, 145, 147 and 488 —**8 C. 851; 22 C. 898; 28 C 709; 5 C. W. N. 686; 28 P. R. 1902; 26 M. 188; 31 C. 350; 35 C. 243; 24 A. 151; 1 S. L. R. 2 = 9 Cr. L. J. 246** and **37 C. 91 at p. 100.** Under the very general terms of sub-sec (1) a District Magistrate has jurisdiction to transfer to his own Court proceedings under s 488 pending before a Magistrate subordinate to him, **5 P. R. 1905.** Also a proceeding under s. 145 is a criminal case and a District Magistrate has power to transfer it both under this section and s 192 (1) Even if he had no power, s 529 (*f*) will cure the defect, **2 C. L. J. 614 = 3 Cr. L. J. 83;** where **25 B. 179** is *disapproved* of and *see* Notes 163 to 165 at p 306 and Note 3 at p 485

Complaint may be transferred—The term 'case' includes a proceeding upon a complaint as soon as the complaint has been received by the Magi trate who takes the cognisance of the offence complained of A person who apprehends that a complaint made against him will not be impartially tested by the Magistrate is entitled to have the case transferred even before the Magistrate decides to issue process, **7 N. L. R. 97 = 12 Cr. L. J. 437.**

4. Transfer must be to Magistrate competent to inquiry into or try the case—A District Magistrate is not competent to transfer a case under s 107 to a Magistrate of the second class who has no jurisdiction to hear the case **37 A. 20,** *see* Note 127 at p 212 A District Magistrate cannot transfer a case to a Magistrate who is gazetted to the Office of the Chairman of a Municipal Board and takes charge of that office as he is thereby divested of his territorial jurisdiction as Magistrate and he is no longer subordinate to the District Magistrate, **36 A. 513.**

5. Power to call for proceedings at any stage—Limitations on power of transfer.—A District Magistrate has authority to call up to his own Court any criminal case without limitation as to the stage of proceeding at which it may be called If the District Magistrate having, in the exercise of his authority, withdrawn any case, finds that it did not come within the jurisdiction of his magistracy, he would not merely be competent, but bound to refuse to proceed further with the case, **24 W. R 4.**

(*i*) *When Sessions Court directs further inquiry by particular Magistrate, District Magistrate has no power to transfer*—Where a Sessions Judge remands a case dismissed under s 203 by a Deputy Magistrate and directs him to hold further inquiry, the case cannot after remand be transferred by the District Magistrate from the file of the Deputy Magistrate, **11 C. W. N. 316 = 5 Cr. L. J. 112.** *See* also **8 C. L. J. 241 = 8 Cr. L. J. 385.**

(*ii*) *Can case sent up under s 349 be transferred?*—A Taluk Magistrate in convicting the accused, submitted the records and forwarded the accused to the Head Assistant Magistrate for enhancement of sentence, but the District Magistrate at that stage transferred the case to the Joint Magistrate *Held*, that the transfer by the District Magistrate was not irregular, **Weir II, 690.** In **38 B. 719** it was held that a Sub-Divisional Magistrate to whom a case is sent under s 349 has no power to transfer it. *See* Note 9 (*a*) at p 899

(*iii*) *Section has no application to case disposed of*—When a case has been disposed of by a competent authority it could not be withdrawn by the District Magistrate, to his own file under s. 528, **17 C. W. N. 451 = 17 C. L. J. 603 = 14 Cr. L. J. 123.**

(*iv*) *Magistrate to whom case is transferred, cannot re transfer it*—Where a District Magistrate has referred a case for trial to a Sub-Divisional Magistrate, the latter has no power to transfer it, **36 A. 166; 12 A. L. J. 277 = 15 Cr. L. J. 357.**

6. Highly inexpedient to transfer a case at a late stage.—Where a number of witnesses had been examined in a case and the case was at a stage, when apparently all that remained to be done was for the

Magistrate either to commit or discharge the accused, *held* that a transfer at that stage could not be made, **Weir II, 691.** It is highly inexpedient to transfer a case after the prosecution has closed and the defence has begun without giving notice to the complainant, or recording any reason for such transfer.

7. Order of transfer bad when opinion unfavourable to prosecution is expressed.—Where a District Magistrate transferred a case to another Magistrate, after the Magistrate, before whom it was, had taken the evidence for the prosecution and had expressed an opinion that the evidence for the prosecution was not sufficient to support the charge, the High Court set aside the order of transfer, remarking that the District Magistrate did not exercise proper discretion in this matter and replaced the case on the file of the original Magistrate, **5 B. L. R. Appx. XLV = 14 W. R. 12.** The Police sent up some only of several persons charged with rioting and these were tried and convicted. On the complainant applying for process against the others, the trying Magistrate refused process, but the District Magistrate transferred the case to his own file and issued warrants against these. It was contended that after the trying Magistrate refused process, there was no case pending in respect of with any order of transfer could be made. *Held following* **4 C. W. N. 239,** that the order of the Deputy Magistrate refusing to issue warrants against persons not sent up by the Police, did not finally dispose of the case, so as to remove it from his file altogether, but it was still a pending case and even if it be not considered still pending, the District Magistrate could take cognisance of it afresh under s. 190, **5 C. W. N. 488.** *See* Note 7 at p. 471 and Notes 4—6 at pp. 580-581.

8. Good reasons to be recorded for transfer.—The powers conferred by this section as regards a District Magistrate's authority to withdraw cases from Subordinate Magistrates are very wide and undefined, the section merely requiring the Magistrate making an order of transfer to record his reasons, but it is not intended that the power should be exercised without due discretion and really good reasons when the interests of justice demand a transfer, **13 P. R. 1899 ; 28 A. 421 ; 34 C. 918 ; Ratanlal 590.** In a case against some policemen before a Deputy Magistrate, the Deputy Magistrate was about to frame charges, when the District Magistrate withdrew the case to his file and dismissed it, because he thought the Police were protected by their warrants. *Held,* as no grounds existed for taking the case away from the Deputy Magistrate, it ought to have been left with him to be disposed of and it was for the Deputy Magistrate to determine whether the Police were protected by the warrants or not, **30 C. 693.** Where a District Magistrate made an order of transfer without any reason and without giving notice to the opposite party : *held,* that he did not exercise his discretion in a reasonable and proper manner, and the High Court, in revision, set aside his order, **Weir II, 686 ; 16 Cr. L. J. 626 (M.).**

(*i*) *Transfer—Magistrate collecting evidence in local investigation.*—In a case arising out of disputed boundaries of land, the accused were charged with rioting, mischief, trespass and theft. In the course of his investigation the trying Magistrate held a local inquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious local investigation of the locality such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which by reason of the way in which it was acquired, he could not properly or legally consider, in arriving at an ultimate decision of the case. It was also suggested that the notes so made should be put on the record and the Magistrate tender himself, while trying the case, as witness, to be cross-examined by either the prosecution or the defence. *Held,* that such a course could not be allowed, and that the Magistrate ought not to try the case, but that it must be transferred to some other first-class Magistrate for disposal, **21 C. 920.** *See* **20 W. R. 76.** *See* also Notes 19—26 to s. 556.

(*ii*) *Personal allegations against Magistrates must be strictly proved.*—When personal allegations are made against a trying Magistrate in support of an application to transfer a case to another Court, a District Magistrate should not interfere unless such allegations are clearly established, **Ratanlal 590,** and the Magistrate afforded an opportunity to explain, **5 Bom. L. R. 28.**

9. Effect of omission to record reasons.—A complaint originally filed before a Deputy Magistrate was transferred to the Court of the District Magistrate. No notice was served on the complainant of the transfer and no reasons were stated for such transfer. The District Magistrate called for a private report from the accused, who was a Sub-Inspector of Police. *Held,* (*i*) that by virtue of a Government Order, the District Magistrate having been directed to withdraw all cases in which complaints have been made against a Police-officer, the omission to record reasons therefor, was a mere irregularity and did not vitiate the subsequent proceedings ; (*ii*) that no notice to the complainant was necessary ; (*iii*) the Magistrate having placed the private

without jurisdiction. When no reservation is made in the order transferring a case to another Magistrate, it should be concluded that the whole case had been made over **32 C. 783.** A Police Sub-Inspector filed a complaint before a Sub-Divisional Magistrate of an offence under s 397, I P C. The facts also disclosed an offence under s 4 (*b*) of *the Explosives Act* VI of 1908 but for want of Government sanction under s 7 of that Act the Magistrate could not take cognisance of the offence Subsequently after obtaining sanction the Police Superintendent filed a complaint before the Additional District Magistrate, *held* the latter had jurisdiction to take cognisance of the offence and issue process in spite of the fact that he did not withdraw the original case to his own file, and the proceedings of the District Magistrate cannot be set aside unless they had occasioned a failure of justice, having regard to ss. 529 (*e*) 530 (*k*) and 531 **39 C. 119.**

22. Magistrates not to act on so-called affidavits of accused persons—When an accused person applies for the transfer of the case pending against him to some other Court, supporting the application by his own affidavit he cannot or at least ought not to be prosecuted under s 193 I P C, in respect of statements made therein **28 A 331, 19 A. 200** *followed* *See* s 342 (4) and Note 47 to s 526

23 Revision—The High Court cannot revise an order made by the District Magistrate dismissing an application under s 528, **1 Rang 632**

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*CHAPTER XLIV-A.

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS

Procedure of claim of person to be dealt with as European or Indian British subject or as European or American.

528-A. (1) Where in any case to which the provisions of Chapter XXXIII do not apply, any person claims to be dealt with as an European or Indian British subject or where any person claims to be dealt with as an European (other than an European British subject) or an American, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial, and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall deal with him accordingly

(2) When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such Court, such Court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly

(3) When any Court before which any person is tried rejects any such claim as aforesaid, the decision shall form a ground of appeal from the sentence or order passed in such trial

Note.—This section corresponds to the old s 458 with certain modifications

Preliminary Note.—The scope of ss 528-A and 528-B is lucidly interpreted in a judgment of MUKERJI, J., ... 980 Sub-sec (1) of s. 528-A applies to all cases before all Magistrates either in Presidency towns or in mofussil to which the special provisions of Chapter XXXIII do not apply Sub-sec. (2) contemplates such ... only in which the Magistrate commits the claimant to trial to the Court of Session after rejection of ... claim.

A Court of Session is distinct from the High Court in the exercise of its ordinary original criminal jurisdiction and s. 528-B relates to any case to which s. 528 A (1) is applicable, *i e*, to all cases before all Magistrates in Presidency towns or in the mofussil to which the special provisions of Chapter XXXIII do not apply

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* This chapter was inserted by Act XII of 1923.

Magistrate has no powers under this section to withdraw a case from his file and transfer it for disposal to a second class Magistrate. But the expression " head of a village, under Madras Regulation IV of 1821," means the Village Magistrate acting under that regulation, and therefore the power of transfer conferred by sub sec. (4) applies only to cases of petty theft, etc., covered by that regulation and the district authorities have no jurisdiction to transfer a complaint of insult or using abusive language preferred to a village headman under Regulation XI of 1816 **26 M. 394.** The High Court alone has the power under s. 29 of its *Letters Patent* to transfer a case under this regulation from the file of a Village Magistrate to that of any other Magistrate. *Cf.* **10 Bom. L. R. 630 = 8 Cr. L. J. 141** (Bombay Village Police Patel).

15. Power of a District Magistrate to transfer to an Additional District Magistrate.—S. 12 does not make an Additional District Magistrate appointed under s. 10 (2) subordinate to the District Magistrate, who therefore, has no power under this section to transfer cases to the former, **34 C. 918.**

16. District Magistrate specially authorised.—In Bengal (*Calcutta Gazette*, 1873, p. 63) and Assam (*Man.*, p. 184) District Magistrates have been specially authorised to act under sub-sec. (2) of this section. So also in the United Provinces (*N.-W. P. Gazette*, 1873, p. 3), in the Punjab (*Gazette*, 1873, p. 75, *Gazette*, 1883, p. 53) and in British Burma (*Gazette*, 1873, Pt. II, p. 5).

17. Proceedings of Magistrate not empowered to transfer.—Where a Magistrate transfers erroneously and in good faith when he is not so empowered his proceedings are not void—s. 529, cl. (*f*), **35 C. 243.** If any Magistrate who is not empowered by law to withdraw a case and try it, does so erroneously in good faith, his proceedings shall not be set aside merely on the ground of his not being so empowered—s. 529, cl. (*i*).

18. On transfer of case, proceedings need not be re-commenced.—S. 350 applies to all cases transferred from the file of one Magistrate to another. A Magistrate may therefore act upon the evidence already recorded and proceedings need not be re-commenced. *See* Note 3 at p. 901. An order of commitment for trial by the Magistrate to whose Court the case has been transferred on the evidence recorded by the Magistrate from whose Court the case was transferred should not be interfered with, **36 A. 316.**

19. Magistrate to whom case is transferred must proceed from the stage at which the proceedings were.—(*i*) *Not entitled to dismiss under s.* 203.—After he has withdrawn a case the Magistrate is bound to proceed from the stage at which the proceedings were. He cannot summarily dismiss the complaint under s. 203, when process has been issued for the attendance of the accused after examination of the complainant, **10 B. L. R. Appx. XXIX = 19 W. R. 28.** *See* Note 12 at p. 903, (*ii*) *cannot cancel charge already framed—See* Note 13-A at p. 903.

20. After transferring case, District Magistrate cannot take part in it.—When a case has been once made over by a District Magistrate to a Subordinate Magistrate for trial, he has no jurisdiction to do anything more in the matter so long as transfer to the Sub-Magistrate is in existence. He may withdraw the case from the file of the Sub-Magistrate if he thinks fit, **3 B. L. R. Appx. C. L. 1 = 12 W. R. 53**; also **16 W. R. 40 = 7 B. L. R. 513.** On a case being transferred to a Subordinate Magistrate, the District Magistrate has no power to dismiss it, nor to grant sanction for prosecution of complainant, **3 C. W. N. 490,** nor to issue proceedings for the apprehension of the absconding accused, **27 C. 979.** When once a District Magistrate makes over a case for disposal to a Subordinate Magistrate, it is out of his hands and he is not competent to pass any order relating to it other than an order such as may be made by him under (Revision) Chapter XXXII. Therefore it is not competent to him in such as a case to direct the trial of certain persons complained against, **30 C. 449.** Nor can he take proceedings under s. 476, *see* Note 23 at p. 1146; but he may re-transfer the case to his own file, **9 Cr. L. J. 310 (M.).** *See* Note 6 at p. 486, Note 7 at p. 471, Notes 63-64 at pp. 508-509.

21. Limitations to District Magistrate's power of interference with cases pending before Subordinate Magistracy.—Where upon a Police report, cognisance was taken of an offence and the case made over to a Subordinate Magistrate, who discharged the only person who was apprehended and brought to trial out of several accused, and the District Magistrate upon the representation of the District Superintendent of Police issued warrants against the other persons, so that they might be tried, it was *held* that the warrants were issued without jurisdiction, for, as long as the case connected with that offence remained with the Subordinate Magistrate, no other Magistrate was competent to deal with it. The District Magistrate, if he thought fit to issue the warrants himself ought to have withdrawn the case from the Magistrate, **27 C. 979.** In another case, the Police sent up a charge-sheet against certain persons and they were convicted by a Deputy Magistrate. An application for process against others in a referred charge-sheet, was refused by the trying Magistrate as unnecessary. *Held*, that a subsequent order by the Joint Magistrate for the issue of process against these persons was

without jurisdiction When no reservation is made in the order transferring a case to another Magistrate it should be concluded that the whole case had been made over **32 C 783** A Police Sub-Inspector filed a complaint before a Sub-Divisional Magistrate of an offence under s 397 I P C The facts also disclosed an offence under s 4 (*b*) of *the Explosives Act* VI of 1908 but for want of Government sanction under s 7 of that Act the Magistrate could not take cognisance of the offence. Subsequently after obtaining sanction the Police Superintendent filed a complaint before the Additional District Magistrate *held* the latter had jurisdiction to take cognisance of the offence and issue process in spite of the fact that he did not withdraw the original case to his own file and the proceedings of the District Magistrate cannot be set aside unless they had occasioned a failure of justice having regard to ss 529 (*e*) 530 (*k*) and 531 **39 C 119**

22 **Magistrates not to act on so called affidavits of accused persons**—When an accused person applies for the transfer of the case pending against him to some other Court, supporting the application by his own affidavit he cannot or at least ought not to be prosecuted under s. 193 I P C in respect of statements made therein **28 A 331, 19 A 200** *followed* *See* s 342 (4) and Note 47 to s. 526.

23 **Revision**—The High Court cannot revise an order made by the District Magistrate dismissing an application under s 528 **1 Rang 632**

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*CHAPTER XLIV A

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS

Procedure of claim of a person to be dealt with as European or Indian British subject or as European or American.

528-A. (1) Where in any case to which the provisions of Chapter XXXIII do not apply any person claims to be dealt with as an European or Indian British subject or where any person claims to be dealt with as an European (other than an European British subject) or an American he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject or an European or an American as the case may be and shall deal with him accordingly

(2) When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session and such person repeats the claim before such Court such Court shall, after such further inquiry if any, as it thinks fit, decide the claim, and shall deal with such person accordingly

(3) When any Court before which any person is tried rejects any such claim as aforesaid, the decision shall form a ground of appeal from the sentence or order passed in such trial

Note.—This section corresponds to the old s 458 with certain modifications

Preliminary Note—The scope of ss 528-A and 528 B is lucidly interpreted in a judgment of MUKERJI, J., in **51 C 980** Sub-sec. (1) of s. 528-A applies to all cases before all Magistrates either in Presidency towns or in the mofussil to which the special provisions of Chapter XXXIII do not apply Sub-sec. (2) contemplates such cases only in which the Magistrate commits the claimant to trial to the Court of Session after rejection of the claim

528-C. When a person, not being an European British subject, is dealt with as an European British subject or, not being an Indian British subject, is dealt with as an Indian British subject or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commitment, trial or sentence, as the case may be, shall not, by reason of such dealing be invalid.

Trial of person as belonging to class to which he does not belong.

Note.—This is the old section 455 with certain modifications.

528-D. (1) Unless there is something repugnant in the context, all enactments made by the Governor-General in Council or the Indian Legislature which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.

Application of Acts conferring jurisdiction on Magistrates or Courts of Session.

(2) Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects.

CHAPTER XLV.

OF IRREGULAR PROCEEDINGS.

Notes.—1. Consent or waiver cannot cure material irregularities—It is the duty of all Criminal Courts to follow the procedure prescribed by law.—"Criminal proceedings are bad unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner. When the irregularities are all unfavourable to the prisoner, it is impossible for any Court to consider a waiver or consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure, and then attempting to protect themselves against the consequences of such departure by getting the accused to say he consents to it. In the mofussil, most prisoners not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end of all procedure, if such an assent were held to warrant material and important irregularities," **2 C. 28** *approved* in **6 C. 96.** *See* also **12 C. W. N. 140 = 6 Cr. L. J. 434; 35 C. 674,** *per* BEACHCROFT, J., in **19 C. W. N. 972 = 16 Cr. L. J. 641** and Note 13 at p. 1080. **4 Lah. 376; 46 M. 117.**

2. Privy Council view of the remedying of illegalities.—*See* **L. R. 28 I. A. 257 = 25 M. 61,** Note 3 to *s. 537. See* Note 10 to *s. 439* and Note 20 to *s. 233.*

Irregularities which do not vitiate proceedings.

529. If any Magistrate not empowered by law to do any of the following things, *viz.* :—

(*a*) to issue a search-warrant under section 98;

(*b*) to order, under section 155, the Police to investigate an offence;

(*c*) to hold an inquest under section 176;

(*d*) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;

(*e*) to take cognisance of an offence under section 190, sub-section (1), clause (*a*) or clause (*b*);

(*f*) to transfer a case under section 192;

(*g*) to tender a pardon under section 337 or section 338;

(*h*) to sell property under section 524 or section 525; or

(*i*) to withdraw a case and try it himself; under section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Notes —1. Good faith —" A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not," s 3 (20) of *the General Clauses Act*, 1897 'Nothing is said to be done or believed in good faith which is done or believed without due care and attention," s. 52, I P C., and *see* also s 76, I P C

Clause (a)

2. Illegal issue of warrant under s 96 cannot be validated —A warrant illegally issued under s. 96 cannot be treated as valid under s 98 by reason of s 537, **35 C 1076; 11 C W. N. 836 = 6 C. L. J. 127 = 6 Cr. L. J. 33.** But *see* Note 16 at p 140 and Note 6 at p. 143

Clause (b)

3 Irregular order to investigate —Where a Magistrate after duly taking cognisance of a case under s 200 makes an order to investigate, which is not authorised by law, such irregularity is cured under this section and does not vitiate subsequent proceedings **32 M. 3. at p. 11.** *See* also Note 4 at p 340

Clause (e)

4. Absence of complaint—Irregularity vitiating trial —Where an accused is sent up on a Police report for trial for an offence of having been found under suspicious circumstances between sunset and sunrise punishable under s 122 of the Bombay City Police Act, 1902 it is permissible to the trying Magistrate to alter the charge and convict him of an offence punishable under s. 352, I P C., **28 Bom. L. R. 291.**

Clause (f)

5. 'Transfer' of case—Scope of the terms.—*Transfer of security cases, Chap VIII*—*See* Notes at p. 485, Note 2, at p 212 and Note 4 to s 528 Where a Magistrate, having no power to transfer a case under s. 110, transfers the case erroneously and in good faith to another Magistrate, the proceeding before the latter Magistrate would not be void as such transfer would only amount to an irregularity which could be cured under cl. (*f*) of this section, **35 C. 243.** *Transfer of proceedings under Chap XII*—*See* Note 2 at p 485 and Notes 163—167 at pp 306-307 A Magistrate empowered only to transfer an inquiry or trial relating to accusation or charge of an offence, erroneously and in good faith transferred a case under s 145 to another Magistrate by name *Held*, that the proceedings (of the latter Magistrate) under the transfer were not invalid merely on the ground of the Magistrate not being so empowered **4 C. W. N. 621.** A Subordinate Magistrate cannot be empowered under s 192 (2) to transfer a case under s 145, but if he transfers the defect is cured by this section, [illegible]

12 Cr. L. J 383, Note 10 at p 29

6. Transfer by Magistrate not empowered under s. 192 (2) —The irregularity of transferring a case when the Magistrate is not empowered under s 192 to do so, is cured by s 529, **36 C 869; 36 C 370; 30 Bom. L R. 653.** A Deputy Magistrate in charge of the District Magistrate's office has no power as such after taking cognisance of a complaint to send the case under s 202 for local investigation by the Sub-Divisional Magistrate to whom he is by law subordinate, nor after receiving the report to direct the prosecution of the complainant under s 476 after dismissing the complaint. S 529 (*f*) could only give the Sub Divisional Magistrate jurisdiction over the case but cannot empower the Magistrate to dismiss the complaint and direct the prosecution of the complainant, **16 C. W. N. 885 = 13 Cr. L. J. 484.**

7. Magistrate to whom case is transferred cannot again transfer —*See* Note 3 (*c*) at p 485

Clause (g)

8. Effect of tender of pardon by District Magistrate not having local jurisdiction to inquire into the case.—This section deals with acts done by a Magistrate in no way empowered by law to do those acts, it has no reference to a Magistrate empowered otherwise under the Code to tender pardon but not possessing jurisdiction over the particular offence Therefore the District Magistrate of *E*, although he has authority to tender pardon in respect of offences inquired into in that district, has no authority to tender pardon in respect of offences inquired into in another district, **20 A. 40.**

Irregularities which vitiate proceedings

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things *viz* —

(*a*) attaches and sells property under section 88,

(*b*) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department;

(*c*) demands security to keep the peace;

(*d*) demands security for good behaviour;

(*e*) discharges a person lawfully bound to be of good behaviour;

(*f*) cancels a bond to keep the peace;

(*g*) makes an order under section 133, as to a local nuisance;

(*h*) prohibits, under section 142, the repetition or continuance of a public nuisance;

(*i*) issues an order under section 144;

(*j*) makes an order under Chapter XII;

(*k*) takes cognisance, under section 190, sub-section (1), clause (*c*), of an offence;

(*l*) passes a sentence, under section 349, on proceedings recorded by another Magistrate;

(*m*) calls, under section 435, for proceedings;

(*n*) makes an order for maintenance;

(*o*) revises, under section 515, an order passed under section 514;

(*p*) tries an offender;

(*q*) tries an offender summarily;

(*r*) decides an appeal; or

his proceedings shall be void.

Clauses (c) and (d)

Notes.—1. Does transfer of case give jurisdiction to a Magistrate not empowered to demand security?—*See* Note 127 at p. 212.

2. Magistrate is incompetent to demand security from persons outside his local jurisdiction.—*See* Notes 23—29 at pp. 160-161 and Notes 6—9 at pp. 166-167.

Clause (j)

3. On transfer, Magistrate not having local jurisdiction may deal with proceedings under s. 145.—*See* Note 165 at p. 306.

Clause (k)

4. When Magistrate may be said to take cognisance of offence "suo motu."—*See* Notes 5—7 to s. 190 at pp. 468—470 and Notes 26—36 at pp. 478—480.

Clause (p)

5. Proceedings by a Court without jurisdiction void "ab initio."—A third-class Magistrate trying an offender under s. 2 of Bombay Act VI of 1863 (*Public Conveyances*) when not specially empowered by the Local Government, acts without jurisdiction and his proceedings are consequently void, **Ratanlal 921.** Where an offence is tried by a Court without jurisdiction, the proceedings are void *ab initio* under this section and no order of a superior Court is necessary to set them aside; and a re-trial of the accused by a competent Court is not barred by s. 403, **8 B. 807; 7 P. R. 1910.** *See* Note 22 at p. 968. *See* **29 C. 412,** where it was *held* that the terms *re-trial* cannot properly be applied to the new trial. "No trial having taken place, there could not possibly be a re-trial." *See* also **12 C. W. N. 246 = 7 C. L. J. 70 = 7 Cr. L. J. 103.** Note 47 at p. 1014 and **21 W. R. 37.** Where part of the evidence in a case is recorded by a Magistrate who has no jurisdiction and a part by a Magistrate who has jurisdiction conviction is illegal and re-frial is necessary, **55 Cal. 65.**

Clause (q)

Tries an offender summarily, where the offence cannot be so tried, **46 A. 446.**

(*i*) *Trial of accused by incompetent Magistrate is a defect not cured by s.* 537.—The trial of the accused by a second-class Magistrate of an offence under s. 409 under a mistaken notion that it fell within s. 406, I.P.C., being an act by a Magistrate not empowered by law in that behalf, is void under cl. (*l*) of this section, and there is no provision in the Code which cures such a defect, for even s. 537 is to be construed subject to the provisions therein before contained and s. 529 deals with nine acts only, and the trial of an

is not included therein, **1 Bom. L. R. 27.** Where a Magistrate issued process under sections 147 and 3 and after a summary trial convicted the accused under section 323 I P C, *held* (1) that the Magistrate urisdiction to try the accused summarily for an offence under s 147, I P C, and that the conviction al (2) That the failure to frame a charge under s 147, I P C, was not a mere irregularity to be cured of this Code, **30 Bom. L. R. 371 = 52 Bom 254**

6 Proceedings not void under cl (1), because some facts disclose a more serious offence not within ite's jurisdiction where trial confined to an offence within Magistrate's jurisdiction —*See* Note 7 at d Notes 2 and 3 at p 892 If a Magistrate convicts an accused person of an offence falling within his ion though the facts found would also constitute a more serious offence not within his jurisdiction, edings are not void *ab initio,* and the High Court will not ordinarily interfere unless the sentence inadequate or unless the accused has been deprived of the right of appeal —*Per* CANDY, J, **13 B. 502.** first class Magistrate tried persons for an offence under s 193, I P C, though the facts disclosed an nder s 194 as well his proceedings are not void **24 M. 675.** In **4 Bom. L. R 267,** a first-class Magistrate convicted the accused alternately under s 363 or s 498, I P C The District Magistrate referred the the High Court on the grounds that the offence was one under s 366 which was triable exclusively by t of Session and that the trial by the Magistrate being beyond his jurisdiction, was void. *Held,* that egard to **13 B. 502,** the trial could not be regarded as illegal and the sentence of one year's rigorous ment was not so entirely inadequate as to call for a fresh trial

The evidence on which the accused was convicted amounted to an offence under s. 330, I P C., which usively triable by the Court of Session, but the Magistrate convicted the accused under ss 323, 342 and f which he was empowered to try *Held,* that the proceedings of the Magistrate were not void under he Code there being no rule of law which had been disregarded by the Magistrate. **2 Rang 455 (13 B. ved)**

7. Effect of summary trial for minor offence when graver offence disclosed by the evidence.—*See* —17 at pp 734—736 When a Magistrate deliberately disregards the offence actually complained of, *the case summarily,* there is no question of irregularity, but his proceedings are entirely void under ions of this section, **5 C. W. N. 252.** A Magistrate is bound to proceed and regulate his proceedings l as for the offence made up of the acts complained of, if on the examination of the complainant there n to believe that the complaint is exaggerated or false, and process is issued for the attendance used *See* also **36 C. 67, 29 C. 409; 27 C. 983, 4 C. 18 = 3 C. L. R. 44, 25 W. R. 19, 1 C. L. R 434** The making a distinction between the classes of cases dealt with in clauses (*p*) and (*q*) seems obvious. ar trial a Court of Revision would be able to judge whether on the evidence on record, the sentence the minor offences was sufficient in the ends of justice, but the evidence as recorded in a summary g brief may not show the entire case On the other hand the accused if convicted in a summary t lose the right of appeal Also encouragement would be given to a careless Magistrate to adopt and less formal mode of trial and thus avoid the proper supervision of a Court of Appeal or of *See,* however, **24 M. 675** and Note 6 Though the conviction on a summary trial, of an offence not imarily is void *ab initio* yet the Magistrate cannot *suo motu* re-try the case regularly treating the ial as a nullity, until the previous conviction is quashed by a competent authority, the Magistrate has no power to re-try the case, **4 Bur. L. T. 271 = 13 Cr. L. J. 58.** A summary trial of an European British subject by the District Magistrate of Bangalore as a Justice of the Peace must be set aside as such a power is not conferred on him **29 M. L. J. 758 = 16 Cr. L J. 773.**

8. High Court not bound to interfere merely because Judge admits an appeal where law allows none and reverses a conviction —When a Sessions Judge deals with a petition for revision, as if it were an appeal, and reverses without jurisdiction a conviction of the petitioner, by a first-class Magistrate, the order of reversal, though void for want of jurisdiction is not to be treated as a nullity A comparison of the language of this section with that of s. 529 leads us to infer that the Legislature did not intend that a proceeding of a duly constituted Criminal Court, which is void for want of jurisdiction, should be treated as a nullity and disregarded unless and until it is set aside by a Court of competent jurisdiction When an accused person is acquitted or discharged in appeal or revision by a Court which had no jurisdiction to make such an order, it is not imperative on the High Court to interfere in every case, **4 L. B. R. 49 = 6 Cr. L. J. 287,** where **11 C. L. R. 55** is *dissented from* and **21 W. R 37** *referred to* *See* also **4 Bur. L. T. 271 = 13 Cr. L. J. 58.**

Proceedings in wrong place.

531. No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

Notes.—1. Section refers only to local areas governed by this Code.—This section only refers to [illegible] Procedure, **16 C. 657** and not to [illegible] apply, **5 C. 985; 24 B. 257.** *See* [illegible] in Punjab [illegible] tried the charge had [illegible] jurisdiction [illegible], **5 M. 23.** [illegible]

2. Error is not confined to the same province or High Court.—The introduction of the words "*other local area*" provides for [illegible] to the same province or High Court, a defect [illegible] **13 B. L. R. Appx. IV = 21 W. R. 66.**

3. Section not limited to cases where offence within jurisdiction and trial outside.—This section shows that [illegible] whether a trial or inquiry ought to have been held in some other local area in British India [illegible] was held, **44 P. R. 1895** *followed* in **2 P. R. 1902.** *See* also **18 P. W. R. 1907 = 8 Cr. L. J. 73.** The section is not confined to cases where the Court had local jurisdiction over the offence, but the trial was held outside its local limits, **30 M. 94; 2 P. R. 1902.** *See* **24 P. R. 1901; 32 A. 377.**

(i) *Trial of appeal outside jurisdiction of Sessions Court* [illegible].—A criminal appeal was presented within the sessions division of *B*, but was tried outside such division at *M*, where the Judge had only civil jurisdiction. *Held*, that the trial at *M* was an irregularity, but no failure of justice having been shown, the case was covered by this section and did not render the trial of the appeal a nullity, **17 A. 35 (F.B.).**

4. Section applies to offences committed outside local jurisdiction of trying Magistrate.—No order of a Criminal Court should be set aside merely on the ground that the proceeding on which it was passed took place in a wrong sub-division unless such error has occasioned a failure of justice, **34 A. 203, Note 4** at p. 2. There is nothing in the language of this section to confine its operation to cases where offences committed within the jurisdiction of a Court are tried by such Court, outside the limits of the local area of its jurisdiction. Where an offence was committed within the limits of the Negapatam Magistrate in the Tanjore District, but a Trichinopoly Magistrate tried the case, *held* that ss. 177, 179, 180, 181 and 183 must be read together with this section and that a finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area, cannot be set side when no failure of justice has taken place, **30 M. 94,** where **13 B. L. R. Appx. IV; 17 M. 402; 16 B. 200; 5 M. 23 at p. 25** and **26 M. 640** are *followed*. *See* **24 P. R. 1901; 12 Cr. L. J. 25; Bur. 33 C. 788.** *See* **3 Pat. 417.**

5. Irregular commitments.—Distinction between ss. 531 and 532.—Section 531 applies solely to cases in which there is no jurisdiction by which reason of the inquiry, trial or other proceeding being held in the wrong local area; but s. 532 seems to refer to cases in the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction but has no power to commit for some reason other than that of local jurisdiction, **16 B. 200.**

6. Can commitment to wrong Sessions Court be validated?—The order of a Magistrate committing a case to the Court of Session is an order of a Criminal Court within the meaning of this section. If such order, contrary to the requirements of s. 177, directs the commitment to be made to a Court of Session which has no territorial jurisdiction it is not to be set aside, unless it appears that there has been a failure of justice, **8 B. 312** *followed* in **16 B. 200; 17 M. 402; 18 A. 350; 10 B. 274; 2 Bom. L. R. 394.** The Madras High Court has, however, *held* following *Ledgard* v. *Bull*, **9 A. 191 = 13 I. A. 134,** that the commitment to a wrong Sessions Court which has no jurisdiction is an illegality which cannot be rendered legal by directing the transfer of the case to the Sessions Court which has jurisdiction, **36 M. 387.** *See* Note 6 at p. 594 and Note 8 to s. 177.

7. Section applies to commitments by competent Magistrate not having local jurisdiction.—An order of commitment is an order within the meaning of this section, **17 M. 402; 18 A. 350; 8 B. 312; 16 B. 200; 36 M. 387; 7 Bur. L. T. 26 = 15 Cr. L. J. 270.** A first-class Magistrate made an order under s. 476, sending the

case to the nearest first-class Magistrate who committed the accused to the Sessions The Magistrate to whom the case was sent had not territorial jurisdiction over the place in which the offence was said to have been committed It was argued that the commitment by a Magistrate who could not take cognisance of the offence was invalid *Held* that the committal was valid as no failure of justice had in fact been occasioned This section applies to a case where the Magistrate has authority to commit but has not territorial jurisdiction in the place where the offence is committed, **26 M. 640.** In **11 C L. R. 55** a Magistrate who had no jurisdiction to commit made a commitment which was held to be void, *see* also **21 W. R. 37, 8 C. 985 (F B.) 8 B. 312; 17 A 36; 10 B. 274** and Note 5 at p 594

8. Where only particular Court is specially empowered to deal with a particular matter, section does not validate proceedings of other Courts—S 531 only relates to proceedings in a wrong place and cures defects as to local jurisdiction It does not touch a case of the kind where under the specific provisions of s 514 only a particular Court is empowered to make the order, but some other Court not so empowered makes the order Such an order is not included in s 529, nor is it mentioned in s 530 In the absence of any provision which would cure such a defect of jurisdiction the order cannot stand S 537 does not apply as the order is not made by a Court of competent jurisdiction Where, therefore, a Magistrate not competent to order forfeiture of a bond does so his order is bad **16 Bom. L. R. 84 = 2 Bom Cr. Ca. 183 = 15 Cr. L. J. 295.** *See* also **38 B. 719.** Note 9 to s 349

9. Must have occasioned failure of justice—If it appears that the constitution and procedure of the Court in which the trial ought to have taken place, are different from the constitution and procedure of the wrong Court in which the trial was had, the accused would necessarily be prejudiced, **13 B. L R Appx IV.** Where objection as to the jurisdiction of a Court was not seriously taken and the petitioner failed to show that he had been in any way prejudiced, the High Court declined to interfere **21 W. R. 88.**

When irregular commitments may be validated

532. (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate

Notes.—1. *See* s 206 as to power to commit S 215 as to quashing of commitments and s. 436 for powers of Sessions Judge or District Magistrate

1-A. Scope.—This section has no reference to a case in which a Magistrate commits a person over whom he has no jurisdiction or commits him for an offence which upon true construction of the Code is not triable by a Court of Sessions or High Court **A. I. R. 1929; Cal. 756 (F.B).**

2 Section applies to proceedings of such Magistrates only as are not empowered to commit.—*See* s. 206 as to who may commit This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested with the powers under which he assumed to make the commitment, *i.e.*, [illegible]
and that the sectı [illegible]
1890. The Magist [illegible]
commit for some reason other than that of want of local jurisdiction **16 B. 200.** In **2 L. B. R. 209**, the question arose whether a commitment which was bad owing to a disqualification of the Magistrate (who was also the District Superintendent of Police, and who as such, conducted the Police investigation), under s 556, could be quashed by the Sessions Judge himself and a fresh [illegible]
the same should be reported to the High Court [illegible]
fall within the scope of this section, which refers [illegible]
powers duly conferred, which were not so conferred,' and that if this section does not apply, the case must apparently be dealt with under the revisional power of the High Court. Similarly, commitment made to the Sessions Court by a Magistrate acting under the powers conferred by s 346, is not illegal, simply because he

has not examined *de novo* the witnesses who were examined by the Magistrate who submitted the case under the provisions of that section. To the case of an accused thus committed, this section has no sort of application, **12 C. W. M. N. 136 = 6 Cr. L. J. 423; 43 B. 147.**

3. **Commitment under s. 436.**—*See* Notes 9—11 at pp. 1053-1054 as to limitations on power of Sessions Judge or District Magistrate to commit. Where a commitment was made under s. 436, by a Sessions Judge in a case in which he had no power to make such a commitment, the High Court set it aside as made without jurisdiction, **21 W. R. 37**; *see* also **11 C. L. R. 55** and **10 B. 274.**

4. **Section does not remedy the want of certificate of Political Agent.**—*See* **13 M. 423** and Note 9 at p. 466.

5. **Effect on commitment where previous sanction is necessary for initiation of proceedings.**—Does this section apply to such defects as want of sanction or of a complaint by a specified party? *See* Note 2 above. (*i*) Sanction under s. 195, *see* Notes 22-23 at p. 496. (*ii*) Absence of complaint under s. 196, *see* Notes 4-5 at p. 550. (*iii*) Absence of complaint under s. 197, *see* Notes 19-20 at p. 559. A conviction under s. 19 (*f*) of *the Arms Act*, XI of 1878, is illegal where no previous sanction of the District Magistrate has been obtained (s. 29). A sanction obtained after commitment cannot cure the omission either under s. 532 or s. 537. **5 M. L. T. 162 = 11 Cr. L. J. 190.** But *see* **4 L. B. R. 247 = 8 Cr. L. J. 65** and Note 6 to s. 535.

6. **Trial not necessarily bad, even if objection is taken in time.**—The facts that the committing Magistrate who was empowered to commit had no territorial jurisdiction over the place in which the offence was alleged to have been committed, and that the Sessions Judge did not quash under this section the commitment, the objection to which was duly taken on that ground before the committing Magistrate, were *held* to be no ground for setting aside the conviction of the Sessions Court, **17 M. 402** and Note 22 at p. 496 also **18 A. 350; 8 B. 312** and **16 B. 200.** But *see* **39 B. 310; 37 A. 107; 37 A. 110; 37 A. 283; 40 B. 97; 7 Bur. L. T. 28 = 15 Cr. L. J. 270.** In **7 C. 662 = 10 C. L. R. 8**, the High Court on appeal refused to set aside a conviction of an improper commitment on the ground that their had been no actual failure of justice, though there had been grave irregularities which, if brought to the notice of the High Court before the trial, would have justified the commitment being quashed. *See* also **12 C. L. R. 120.**

7. **Scope of sub-sec. (2)—commitments transferred cannot be quashed.**—The High Court transferred a Sessions case from one Sessions division to another. The Sessions Judge of the latter division purporting to act under sub-sec. (2) quashed the commitment and directed a further inquiry to be made by the District Magistrate of the former division or by any Magistrate subordinate to him; *held*, the Sessions Judge had no power to quash the commitment or direct an inquiry by the District Magistrate of another Sessions division, **Cr. R. Case 42 of 1904 (Madras).**

Non-compliance with provisions of s. 164 or s. 364.

533. (1) If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds, that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in *the Indian Evidence Act*, 1872, section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

Notes.—1. Alteration.—The word '*fully*' after the words 'have not been' appearing in the 1882 Code has been omitted.

2. **Does section apply to all and every infraction of the provisions of s. 164 and s. 364?**—The Bombay and Allahabad High Courts apply the sections to all infractions. The Madras and Calcutta High Courts seem to limit the scope of the section to inadvertent omissions and not to infractions. Note 7 below. The scope of this section is not limited to any particular kind of non-compliance with s. 361.—*Per* STRACHEY, J., **21 B. 495.** This section is intended to apply to all cases in which the directions of law have not been fully complied with, **23 B. 221.** The object of the section is to prevent justice being frustrated by reason of a Magistrate having neglected to comply strictly with the terms of s. 164 or s. 364 in regard to the examination of an accused person, **1892 A. W. N. 60.** *See* **3 C. W. N. 387** as to the scope of this section. This section is

intended to apply to all cases in which the directions of the law have not been fully complied with and applies to omissions to comply with the law as well as to infractions of the law The expression "such statement in this section refers to the statement recorded regarding which the Magistrate is called to give evidence. The statement can therefore be acted upon as a statement duly made by the accused to the Magistrate **31 Bom. L R. 565.**

3. Scope of section.—This section will not render a confession admissible where no attempt has been made to conform to the provisions of s 164 or s 364, **9 M. 224, 15 C. 595; 17 C 862.** "This section, as I understand it, means only this—that where a confession or other statement of an accused person is duly made *i e*, made in accordance with the provisions of the law, but in recording it, those provisions have not been complied with oral evidence is admissible to prove that the confession or other statement was duly made, or, in other words, when the defect in recording the *confession or other statement of an accused person is one not of substance*, but of form only, as for instance, when the Magistrate had through inadvertence omitted to state in the certificate that the statement was taken in his hearing though it was so taken, or when he has omitted to sign the certificate through mere inadvertence, oral evidence may be taken to remedy the defect by proving that the statement recorded was duly made"—*Per* BANERJEE, J, **2 C. W. N. 702 at p. 714** 'The policy of the law is clear Certain rules are laid down the observance of which enables the Court dealing with a confession to be *prima facie assured that it was voluntarily made, but well knowing that in the hurry of* work the formal recording of what has been said and done is not always perfect, the Legislature, to prevent miscarriages of justice and to ensure that evidence of value shall not be lost, has enacted under s 533 that the important thing is not the formal writing down of this or that but that it should be made clear to a Court using a confession as evidence that the recording Magistrate applied his mind to the question whether it was being voluntarily made and decided that question in the affirmative, **17 P. R. 1915 = 11 P. W. R 1915 = 16 Cr. L. J. 354.**

4. What irregularity may be cured?—(*a*) *Not informing accused that recording officer was a Magistrate*—A confession recorded under s. 164 by a Magistrate who does not inform the accused that he is a Magistrate is not inadmissible in evidence when the circumstances show that the accused was fully aware and understood that the officer who took his statement was a Magistrate, **9 C. L. J. 55 = 10 Cr. L. J 325.**

(*b*) *Recording in narrative form*—*See* Note 48 at p 372 and Notes 9 and 10 at p 918

(*c*) *Recording confession in a different language*—*See* Note 39 at p 371 and Notes 11—15 at pp 918-919 The statement or confession of the accused must be recorded in the language in which he is examined, and only when that is not practicable it may be recorded in the language of the Court or in English (s 364) So where a Magistrate who took down a confession stated in evidence that he could not record the confession in the language of the accused as he had no clerk who could do so the confession was held admissible, **9 C. L J 55 = 10 Cr. L. J. 325.** Unless it is shown that it was impracticable to take down the statement of the accused in the language in which it was made there would be a grave doubt whether such a defect could be cured by this section **15 C. 595,** *dissented from* in **8 C. P. Cr. 21.** The Ruling in **15 C. 595** is an *obiter dictum* not necessary for the decision of the case and not going beyond the expression of "very grave doubts —*Per* STRACHEY, J, in **21 B 495.**

Recording confession in a language different from that of the accused—When a Magistrate proceeded to record a confession in English and translated it to the accused who admitted it to be correct *held* that the confession was admissible, any defects in the mode of recording it being cured by s 533 **45 A. 166**

(*d*) *Omission to take signature of the accused*—Where the record of a confession does not bear the signature of the accused it is not admissible in evidence, **32 C. 550** and *see* Notes 16—24 to s 364 at pp 919-920 But the signature is taken as a voucher of the authenticity of the statement, not as an admission of its correctness, therefore where the omission of the signature is supplied by the accused without objection the next day after the confession was made and the Magistrate himself has sworn to the authenticity of the statement, the confession is admissible, **9 C. L. J. 55 = 10 Cr. L. J. 325** and *see* Notes 43 and 44 at p 371

(*e*) *Magistrate must satisfy himself that confession was made voluntarily*—S 164 (3).—*See* Notes 19-20 at p 366 Where though the Magistrate fails *before* making the record to satisfy himself, but after recording the statement questions the accused and attaches the certificate that it was voluntarily made, after satisfying himself and the accused did not object at the trial to the admission of the confession, the confession is admissible, **9 C. L. J. 55 = 10 Cr. L. J. 325.**

(*f*) *Omission to examine the accused at the trial—ss.* 342 *and* 289.—The purpose of the examination under s 342 is to enable the accused to explain the circumstances appearing in the evidence against him Where, therefore, the accused has pleaded guilty and has been examined in the preliminary inquiry, the omission by the Sessions Judge to examine the accused at the trial does not constitute an illegality which would vitiate the trial, **9 C. L. J. 55 = 10 Cr. L. J. 325** and *see* Note 3 at p. 779 and Notes 5 and 12 at pp. 872-873.

(*g*) *Recording of confession by Magistrate's clerk.—See* Note 4 at p. 371 and Note 8 at p. 917.

(*h*) *Want of certificate under s.* 164.—*See* Notes 46—49 at pp. 371-372. Ten persons were committed to the Sessions on charges under ss. 395 and 396, and some of them were also charged under s. 412, I.P.C. One of the accused had made a confessional statement before the Magistrate who recorded it, but did not make on it a memorandum to the effect stated in s. 164 of the Code, and did not admit it in evidence for the reason that the accused was produced from the custody of the Police in which he had been detained for five days and there was a proposal on the part of the Police to treat him as an approver. The confessional statement was not admitted in evidence in the Sessions trial. *Held*, on reference under s. 307 that the Judge should have inquired under this section whether the confessional statement had been duly made, **22 M. 15.**

(*i*) *Failure of the Magistrate to warn and to ask the accused if he had made the statements voluntarily.*—The record of a confession taken down by a Magistrate did not show that the accused had been warned by the Magistrate that he was not bound to make a confession and did not in clear terms show that the accused had been asked whether the statement was made voluntarily. The Magistrate was examined and deposed that he had cautioned the accused and explained to him that he was not bound to make a statement, but that if he did so it might be used in evidence against him. *Held*, that the confession was admissible, **3 Pat. 872 (2 Lah. 325** *dissented from*). In **6 Lah. 415** all the authorities on the point were exhaustively considered and the decision in **2 Lah. 325** was referred to with approval. It was laid down that under **s. 533** a defect in form is curable, but a defect in substance is not so curable. So if, as a matter of fact, the statement was duly recorded, that is to say, after the required explanation has been given but the Magistrate has failed to embody that fact in the certificate, such a defect would be curable. If the explanation has not in fact been made, the statement could not be held to have been " duly made" and s. 533 could not be appealed to.

5. When Magistrate recording statement should be examined?—*See* Note 27 at p. 921. (*i*) *To ascertain that the accused duly made the statement recorded.*—The point upon which evidence is to be taken under this section is, that the accused duly made the statement recorded under s. 164 or s. 364 as the case may be This seems to mean evidence that the accused did actually make the statement recorded as his statement, and it seems sufficient proof of this to show that the statement recorded though not recorded in exact conformity with the provisions of s. 364 as to the mode of recording the statement, which provision apply equally to confession under s. 164 and examination under s. 342, does accurately represent in substance the statement of the accused person. If no error injurious to the accused in his defence on the merits is disclosed, the document becomes admissible nowithstanding the irregularity in its preparation, subject to all just exceptions as to its admissibility under *the Evidence Act*, except under s. 91, **52 P. R. 1887.** This section does not authorise the Court to proceed as if there had been no recorded confession, or to treat such a confession, non-existent, it clearly means that the evidence which is to be taken shall be evidence that the accused person duly made the particular confession which was recorded and tendered, **17 C. 862 at p. 868,** *doubted in* **18 C. 549.** When the accused denies having made the statement, it is the duty of the Sessions Judge to take the evidence of the Magistrate who examined the accused, **23 B. 221.**

(*ii*) *For explanation of defects by the examining Magistrate.*—In a statement made by the accused to the trying Deputy Magistrate on the 12th of January and 6th February, respectively, the certificate required by s. 364, appeared on the first page of the record only. The record of the examination of the 12th January alone extended over two pages, and that of the 6th February was written entirely on the second page. *Held*, that this defect is cured by the evidence of the Deputy Magistrate, **8 C. W. N. 22.**

6. No "prima facie" presumption that confession was duly recorded.—The Sessions Judge who tried a case of dacoity admitted in evidence statements in the nature of confessions recorded in English by a Joint Magistrate under the provisions of s. 164. There was no evidence that it was not practicable to record them in the language in which they were made, and the Joint Magistrate was not examined as a witness, nor was evidence taken that the accused duly made the statements so recorded. *Held*, that as it could not be presumed without some evidence, that the statements had to be recorded in English because they could not be recorded in the language in which they were made, there was no justification for their being recorded in

English and no presumption under s 80 of *the Indian Evidence Act* could be made in respect of the record made in English and as no evidence was taken to prove that the accused had actually made those statements the Sessions Judge was wrong in admitting such record of the statements against the accused **10 O C 112 = 6 Cr L J 94,** where **18 C. 549** and **21 B 495** are *referred to*

7 Injury to the accused a question of fact in each particular case —The proposition that the accused is not injured in his defence involves a question which has to be determined on the merits of each particular case and it is impossible to lay down any rule on the subject **23 B 221**

8 Section not intended to override the law of evidence —*See* Notes 6—10 at pp 321—323 It is not easy to interpret this section in relation to s. 164 but they are sections which relate primarily to criminal procedure while this section relates also to proceeding under s 364 This section occurs in a chapter relating to irregular proceedings and their effect, and is presumably not intended to override the law of evidence but to leave the law of evidence in full operation when not expressly mentioned Thus when it is enacted that such statement (*i e* the recorded statement) shall be admitted the meaning is that the document shall not be excluded merely by reason of the error of the recording Magistrate but shall be admitted as a matter of a criminal procedure subject to any just exceptions under *the Evidence Act* other than an objection under s. 91 of that Act **32 P R 1887** The expression notwithstanding anything contained in *the Indian Evidence Act* 1872 s 91 may be intended to apply only to examination under s 364 to which it seems applicable **32 P R 1887**

8 A Statement by an accused to a Magistrate, repetition of previous incriminating statement made to Police —Where the statement of an accused person to a Magistrate amounted to a repetition practically without comment of a previous incriminating conversation between himself and the Police-officer *held* that it was inadmissible in evidence by reason of s 25 of *the Evidence Act* **49 B 642**

9 If record of confession be inadmissible in evidence, can it be proved by parol evidence?—The accused retracted his confession before the Sessions Court The *Karkun* who wrote it in *Marathi* deposed
its correctness he made it over to one
Sessions Judge *held* that the omission
lefence on the merits as it might have
deprived the accused of the opportunity given him by law of denying the accuracy of his statement For this reason he *held* that the confession was inadmissible and could not be treated as evidence against the accused and as there was no other evidence he acquitted the accused *Held* reversing the order of acquittal that although the record of confession was not admissible in evidence for want of signature yet the terms of the confession were capable of being proved by parol evidence under this section and if proved might be admitted and used as evidence in the case This section expressly allows oral evidence to be given in any case that the accused duly made the statement recorded **23 B 221, 3 C W N 103** From the terms of this section it would seem that even oral evidence of the terms of the confession would be admissible but this would not be necessary if it was shown that the record though formally imperfect was a true and full account of the confession **2 L B R 317** *See* however Note 7 at p 363

10 Oral evidence inadmissible, if confession not reduced to writing at all —*See* Note 31 at p 921

Omission to give information under section 447

* **534.** An omission to inform under section 447 any person of his rights under Chapter XXXIII shall not affect the validity of any proceedings

Note — "Shall not affect the validity"—If however a Magistrate having reasons to believe that an accused is an European British subject omits to ask him whether he is such and proceeds to try him as if he were not one he may lay himself open to an action for trespass **2 M I A 293.** *See* Notes to s 454

Effect of omission to prepare charge

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed unless in the opinion of the Court of Appeal or Revision a failure of justice has *in fact* been occasioned thereby

(2) If the Court of Appeal or Revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed and that the trial be re-commenced from the point immediately after the framing of the charge

* This section was substituted by Act XII of 1923.

Notes.—1. As to the meaning of the word 'charge,' *see* s. 4 (*c*) at p. 6 and Note 2 at p. 546 *See* also s. 226 for procedure on commitment without charge, s. 225 for effect of errors in charge and s. 232 for effect of material error in charge.

2. Does section apply where charge has been framed for one offence and conviction had for another?—Where the charge was for rioting under s. 147, I.P.C., with the common object of causing hurt to *A* and the accused were convicted under s 323, I.P.C., of causing hurt to *B* and it was contended that the omission to frame a charge was immaterial because there was no prejudice, inasmuch as evidence was produced on both sides as to the responsibility caused for the injuries done to *B* and even if a charge had been framed under s. 323 the matter could not have been more fully investigated, *held* that the conviction was not merely irregular but illegal. S. 233 is mandatory; for every distinct offence of which any person is accused, there shall be a separate charge except in the cases mentioned in ss. 234, 235, 236 and 239. The words "*merely on the ground that no charge was framed*" in s. 535 must mean a case where the offence being a petty one and the evidence, being fairly taken, the Court framed no charge at all. But where a charge has been framed, then it cannot be said that the conviction is invalid merely on the ground that no charge was framed It is clear that the accused could raise no objection as he could have had no idea that he was going to be tried upon this particular charge, there being a specific charge against him for a different offence, **40 C. 168.** *See* Note 1 at p. 563, Note 2 at p. 557 and Note 7 at p. 597.

3. Does omission to frame separate charge for each offence invalidate trial?—*See* Note 7 at p 644

4. Omission to frame charge does not invalidate order of acquittal.—A Magistrate tried and acquitted a person accused of an offence without preparing in writing a charge against him. Such omission did not occasion a failure of justice. *Held,* that such omission did not invalidate the order of acquittal of such person and render such order equivalent to an order of discharge, and such order was a bar to the revival of the prosecution of such person for the same offence, **3 A. 129; 10 W. R. 7.**

5. Effect of omission to set out previous conviction in charge.—*See* Notes 11—13 at pp. 625 626

6. Does the section remedy the defect of obtaining sanction after charge framed.—Where a Magistrate framed a charge under s. 19 (*f*) of *the Arms Act,* XI of 1878, but finding that no sanction of the District Magistrate had been obtained, applied to the District Magistrate and got sanction and then proceeded with the case without framing the charge afresh after sanction, *held* that the omission was cured under this section, **4 L. B. R. 247 = 8 Cr. L. J. 65**; but see *contra* **5 M. L. T. 162 = 11 Cr. L. J. 190,** Note 5 to s. 532.

Trial by jury of offence triable with assessors.

536. (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

Trial with assessors of offence triable by jury.

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

Notes.—1. *See* Chap. XXIII for procedure in cases triable by jury or with assessors.

2. Difference in the modes of trials by jury, and with the aid of assessors.—*See* Note 2 to s. 268 The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at the crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain, **33 B. 423.**

3. Procedure when some of the charges are triable by jury and some with assessors.—*See* Notes 4 and 5 to s. 269 at p. 747.

4. Trial by jury of case triable with assessors is legal.—*See* Note 7 at p. 748. Where the accused was on trial on charges of murder (jury case) and rioting, grievous hurt (assessors case), and the Judge erroneously treated the trial as though it was a trial by jury on all counts and erroneously treated their verdict on all the counts as the verdict of a jury contrary to s. 269 and the Judge accepting the verdict sentenced the accused for the offences triable with assessors, *held* as no objection was taken at the trial, it was too late to

contend an appeal that the Judge's action was wrong **33 B 423** *See* also the critical Notes on **33 B 423** at **p 465**, *Cf* **19 M L Journal, 27 Bom L R 1416**

5 Jury case tried with assessors is legal if no objection is taken before recording finding—An objection to the trial of a case with the aid of assessors when it is triable by a Judge and jury should be taken at the trial before the Court of Session and an omission so to take it is fatal to such a contention when raised in appeal, though the accused had been materially prejudiced thereby as *e g* where the assessors found him not guilty, while the Judge, dissenting from their opinion convicted him **23 M 632.**

6 Reference when case triable with assessors is tried by jury—*See* s 307 and Notes 6—8 thereto at pp 829-830 *See* also **22 M 15** and **9 M 42**

7 Where case triable with assessors is tried by jury, does an appeal lie on matter of fact?—*See* s 418 and Note 1 at p 993 Where an offence triable by assessors is tried by jury the trial is not on that ground invalid but the Judge's charge to the jury is to be treated as his judgment in the case and the prisoner's appeal to be heard on the facts **24 W R 30, 3 C 763, Ratanlal 961, 26 M 243**—*Per* BENSON J *Contra see* **25 B 680** and **33 B 423,** where it was held that no appeal lay on the facts where the trial which ought to have been with assessors was a matter of fact held by jury In **26 M 243**, BASHYAM AYYANGAR J also *held* that an appeal lay only on a point of law under s 418 *See* also **18 W R 59, 18 P R 1888** In an earlier Madras case **Weir I, 432, II, 709 = 26 M 243** (footnote) COLLINS C.J and PARKER J had *held* that when a case triable with the aid of assessors has been wrongly tried by a Judge and jury the proper course for the Appellate Court is to hear the appeal by treating the charge as the judgment in the case and the verdict of the jury as the opinion of the assessors or to order a re trial if there is a possibility of the jury having gone wrong on the facts

Finding or sentence when reversible by reason of error or omission in charge or other proceedings

537 Subject to the provisions hereinbefore contained no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(*a*) of any error omission or irregularity in the complaint summons warrant charge proclamation order judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code or

*(*b*) * * * * *

(*c*) of the omission to revise any list of jurors or assessors in accordance with section 324 or

(*d*) of any misdirection in any charge to a jury

Unless such error omission irregularity † or misdirection has *in fact* occasioned a failure of justice

Explanation—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings

‡ * * * * *

Note—Amendment.—Clause (*b*) of the old section referring to the want of sanction under s. 195 and to any irregularity in proceedings under s. 476 has been now deleted by the Amendment. It is therefore submitted that the effect of the omission is to make the special procedure required by ss 195 and 476 imperative and not merely a matter of form.

The illustration ‡ to the section is also omitted as it was found to be out of place

* Clause (*b*) was omitted by Act XVIII of 1923
† The word want was omitted by *ibid*
‡ The illustration was omitted by Act XVIII of 1923

I.—GENERAL SCOPE OF THE SECTION.

Notes.—1. Analogous law.—Compare s. 285, N. Y. Cr. P. C., where it is enacted that "no indictment is insufficient nor can the trial, judgment or other proceedings thereon be affected by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." This section is general in its application, and is intended to cure defects in form under the general rule of pleading.—*People* v. *Williams*, **18 State Rep. 405.** *See also* **7 Edw. VII, C. 23, s. 4,** where under the Court of Appeal, even in the case of an error in law or fact, is free to dismiss the appeal if satisfied that on the whole of the case, there was no substantial miscarriage of justice, *R.* v. *Syres*, **4 Cr. App. R. 42.** *Cf.* the Summary Jurisdiction Act, 1847-48, 11 and 12 Vict., Chap. 43, s. 9; *see* also **5 Rang. 53.**

In Upper Burma, in British Baluchistan and in the Sonthal Purgannas, orders are not reversible on appeal or revision on technical grounds alone. *See*, respectively, *the Upper Burma Criminal Justice Regulation*, VIII of 1882, Schedule, s. 15, *the British Baluchistan Criminal Justice Regulation*, VIII of 1898, Schedule, s. 19, and the *Sonthal Purgannas Regulations*, V of 1893, s. 4 (VII) = **29 Bom. L. R. 813** where the Privy Council held that the passage "unless such error" does not qualify sub-section (*d*) only but all the sub-sections of this section. This section applies only to mere errors of procedure arising out of inadvertence and not to substantive errors of law or to cases of disregard to or disobedience of mandatory provisions of the Code, **49 All. 475.**

2. Privy Council view as to the scope of the section.—In **L. R. 28 I. A. 257 = 25 M. 61,** where a person was tried for 41 separate offences in direct contravention of the provisions of s. 234, their Lordships observed that the mischief sought to be avoided by the section having been committed "the effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury. It would in the first place leave to the Court the functions of the jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court. Their Lordships cannot regard this as cured by s. 537. Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial, as a mere irregularity. Such a phrase as an irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself, sufficiently shows what was meant. The remedying of irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity. Some pertinent observations are made on the subject by LORD HERSCHELL and LORD RUSSELL OF KILLOWEN in *Smurthwaite* v. *Hannay*, **L. R. (1894) A. C. 494.** Where, in a civil case several causes of action were joined, LORD HERSCHELL says that if unwarranted by any enactment or rule it is much more than an irregularity, and LORD RUSSELL OF KILLOWEN in the same case says 'such a joinder of plaintiffs is more than an irregularity, it is the constitution of a suit in a way not authorised by law and the rules applicable to procedure.' With all respect to SIR FRANCIS MACLEAN and the other Judges who agree with him in **27 C. 839,** he appears to have fallen into a very mainifest logical error in arguing that because all irregularities are illegal as he says in a sense and this trial was illegal, that therefore all things that may in his view be called illegal, are therefore by one adjective applied to them become equal in importance and are susceptible of being treated alike. But this trial was prohibited in the mode in which it was conducted.

3. Limitations to the applicability of the Privy Council ruling.—*See* Note 22 at p. 570. This ruling simply deals with the effect of disobedience to an express provision of law as to the mode of trial and in no way touches on the effect of an error of procedure antecedent to the trial or the jurisdiction of the Court **36 M. 275.** If the jurisdiction of a Magistrate to take action under the Code is destroyed by failure to comply with any provision of the Code as to his preliminary procedure, then it would have to be held, *e.g.*, that failure to sign the complainant's statement on oath as required by s. 200 rendered any subsequent trial and conviction null and void and without jurisdiction, **36 M. 275** (*distinguishing* **6 M. I. A. 134**). 'Though in the light of **25 M. 61,** it must be *held* that a trial which is not warranted by the provisions of this Code is altogether illegal and void and not merely irregular, yet it will be entirely inconsistent with the letter and scope of s. 439 to hold that in every case of illegal trial, the High Court is necessarily obliged to interfere without due regard to the circumstances of the particular case. The illegality of a trial is no doubt, *prima facie* good and strong ground for the exercise of revisional jurisdiction, but it is not imperative on the Court to take such action in every case

however small or scant may be the necessity or reason for adopting such course, so as to interfere with the conviction in every such case, especially when no prejudice is shown to have been caused by such illegality, **8 P. R. 1906 = 4 Cr. L. J. 75.** There is a distinction between a case, as the above one dealt with by the Privy Council in which the trial is held in a manner prohibited by law and consequently it is no trial under the Code, and a case in which the trial is one within the jurisdiction of the Magistrate and irregularities occur in the method of conducting it In the latter case, the provisions of this section are applicable and the finding can only be reversed if the irregularity has, in fact, occasioned a failure of justice Thus in **26 B. 533,** allowing a Police-officer, contrary to the provisions of s 495 (4) to conduct the prosecution, while he had taken part in the investigation, was *held* to be a mere irregularity which in no way invalidated the trial But at the same time several illegalities which were taken to be cured by this section, would no longer be so treated having regard to the ruling in **25 M. 61.**

The general observation that their Lordships are unable to disregard the disobedience to an express observation as to mode of trial as a mere irregularity must be read with the sentence immediately following it which limits its application to the case where the charges are tried together which the law expressly says shall not be tried in the same trial The words 'mode of trial' in the general observation cannot have reference to the formal defect of drawing up one charge instead of two The drawing up of the charge is part of the trial but the words mode of trial have reference to the constitution of the trial *per* BEACHCROFT J, in **19 C. W. N. 972 = 16 Cr. L J. 641.** SHARFUDDIN, J, was also of the same opinion that the illegality referred to by their Lordships of the Privy Council was an utter disobedience of the law as contained in s 234 and not that the provisions of s 233 were contravened, and therefore a disobedience to the first portion of s 233 was not an illegality which vitiates the trial FLETCHER, J, was however of opinion that a neglect of the provisions of s 233 was not cured by s 537

"I do not, however, think that the decision of the Privy Council compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of s 537," *per* NAPIER, J, in **29 M. L. J. 101 = 18 M. L. T. 95 = 16 Cr. L. J. 593 (F.B.), 19 A. L. J. 915, 815.**

Section 537 of the Code does not in terms apply to a reference under s 307 but the limitation contained therein applies to such a reference In the case, therefore, of a reference under that section it is not competent to the High Court to take any action in the form of an order quashing the whole of the proceedings on the ground of want of sanction if such want of sanction has in fact not occasioned a failure of justice, **47 B. 31.**

4. "Subject to the provisions hereinbefore contained"—meaning of.—The question has been raised though not expressly decided whether the provision referred to, are the provisions of the entire Code preceding this section or only the provisions of Chapter XLV, wherein this section finds a place The former view was adopted in **22 C 176; 23 C. 983 at p. 990,** and FLETCHER, J, in **19 C. W N. 972 = 16 Cr. L. J 641,** and the latter view was put forward by the referring Judges in **27 C. 839,** but the Full Bench did not decide the question *See* the subject discussed at length in **6 C. W. N. 46.** SHARFUDDIN and BEACHCROFT, JJ, in **19 C. W N. 972 = 16 Cr. L. J. 641** were of opinion that the qualifying words do not refer to the entire Code that precedes this section, because if those qualifying words referred to all the sections of the Code preceding s 537, cl (*b*) of the section would become meaningless or inoperative but they only referred to ss 529—536 of Chap. XLV, where the section occurs, FLETCHER, J, was however of opinion that the qualifying words refer to the whole of the previous part of the Code Anyhow the subjection of this section cannot be construed in such a way as to nullify the express language of cl (*b*) which enacts that no sentence passed by a Court of competent jurisdiction shall be reversed on appeal *for want* of any sanction required by s 195 Hence though s 195 in imperative terms prohibits Courts from taking cognisance of cases without previous sanction, yet the want of such a sanction is not in itself a good ground for setting aside a conviction and hence it would appear the language employed by the Privy Council in **25 M. 61** is unnecessarily wide and open to criticism Sections 132, 196, 197 and 339 (2) which require sanction to be obtained in criminal cases are not however affected by cl (*b*) of this section, **31 M. 80,** where **29 M. 149** is *followed* and **22 C. 176** *discussed*, and *see* Note 3

5. Section refers to errors of procedure and not to substantive errors of law.—*See* **8 B 200**; the intention of the section is to remedy defects of a mere formal character arising from inadvertence and not in any way prejudicing the accused, **11 B. H. C. R. 237; 13 M. I. A. 77 = 12 W. R. P. C. 32.** A Magistrate passed a conditional order under s 133 of the Code When the party appeared to show cause the Magistrate with the consent of the parties sent the case to another Magistrate for inquiry and report, and on receipt of the

report so submitted made the final order. *Held*, that the procedure followed was irregular and was in complete disregard of the imperative provisions of s. 137 and therefore it was not possible to uphold the order by invoking s. 537 of the Code, **47 B. 89 ; 5 Pat. L. J. 61.**

6. **Section not intended to apply to a case which has not been finally disposed of.**—The test prescribed (*viz.*, whether such error, etc., has occasioned a failure of justice), for determining whether such error, omission or irregularity should be a ground for setting aside an order is thus one which can be properly applied only after the final result of the case is known. When an objection is taken on the ground of there being a material error, etc., before a case is finally disposed of, and while there is time to correct the same, it would be unreasonable to hold that s. 537 intends the error, etc., to be allowed to remain uncorrected. To hold that would be to give to s. 537 the effect, not only of curing mere formal defects of procedure when discovered too late, but of practically subverting all procedure. *Per* BANERJEE, J., **23 C. 983.** In this case a defect in granting the sanction was held to be cured when the Magistrate after holding the inquiry had committed the case to the Sessions. Section 537 cannot be applied at an intermediate stage of the case so as to allow, the error to remain uncorrected, **6 S. L. R. 260 = 14 Cr. L. J. 298.** Section 537 was clearly never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding. When however as *e.g.*, the want of sanction is at once brought to the attention of the Court, it is clearly the duty of the Magistrate to refuse to take cognisance of the complaint on the ground that he could not do so by reason of the terms of s. 195, **37 A. 283.**

If, however, the inquiry has proceeded far enough to enable the test required by the section to be applied, this section may be involved to cure the error, omission or irregularity, **12 Cr. L. J. 320 (Sindh).**

7. **Principles laid down by s. 537 must guide Court in dealing with applications under s. 215.**—No doubt s. 537 applies in terms to orders made on appeal or revision, but the principles therein laid down must guide the Court in dealing with an application under s. 215, otherwise a committal order would be liable to be quashed because the Magistrate had initialed the deposition of the witnesses instead of signing them, **12 Cr. L. J. 320 (Sindh).** *Cf.* **7 Bur. L. T. 26.** Where a Magistrate has committed the accused to the Sessions after making a local investigation without recording the result. *Held*, there was no irregularity inasmuch as the Magistrate might be called as a witness at the Sessions and that the accused was not prejudiced thereby, **16 C. L. J. 45 = 13 Cr. L. J. 688.**

7-A. **Whether s. 537 applies to a reference under s. 307.**—*See* last para. Note 3 above, **47 B. 31.**

7-B. **Illegality of procedure in putting the defence counsel into the witness box.**—Where the prosecution put the defence counsel in the witness box on the day he appeared to conduct the defence of the accused thereby suddenly depriving the accused of the services of their counsel, *held* that the method adopted by the prosecution vitiated the trial and that it was unnecessary to consider whether the accused had been prejudiced or not.

It is against the etiquette of the Bar that counsel should give evidence in the case in which he is engaged as counsel and a counsel will not conduct a case for the defence after having been called as a witness by the prosecution, **49 M. L. J. 95.**

7-C. **Witness for prosecution acting as interpreter.**—In a trial on a charge of murder one of the witnesses for the prosecution acted as interpreter and interpreted the evidence of the witnesses including his own evidence to the accused. *Held*, that it was a procedure which was absurd from the very outset and opposed to elementary ideas of justice, **30 C. W. N. 696.**

8. **Consent or waiver of accused will not cure defects, in proceedings substantially bad.**—*See* Note 21 at p. 570 and Note 1 at the beginning of this Chapter.

II.—SECTION APPLIES ONLY TO IRREGULAR PROCEEDINGS OF COMPETENT COURTS.

9. **Plea as to want of jurisdiction may be taken at any time, even in revision.**—Neither ignorance of the parties nor silence on their part, can vest a Magistrate with powers which the law does not give, **26 B. 50; 23 W. R. 59.** A plea as to want of jurisdiction (which, however, is not an irregularity and this section deals only with orders of competent Courts) may be taken at any time even in the High Court on revision though not taken in the Courts below, **16 W. R. [79] 69.**

10. "Court of competent jurisdiction."—These words must be taken to mean "a Court of competent jurisdiction in respect of the particular offence charged," **10 B. 819.** The saving provisions of this section extend only to the orders and so forth of Courts of competent jurisdiction, and a Magistrate who in consequence of personal disqualification is forbidden by law to try a particular case though he may be authorised generally to try cases of the same class cannot be said with respect to that case to be a 'Court of competent jurisdiction," **23 C. 328** and **442.** So is a Magistrate, who in spite of the objection of the accused, takes cognisance of a case under s. 190 (1) (*c*) and tries it, disregarding the provisions of s 191, **13 A. 345; 143 P. L. R. 1905.** A prosecution is not legally instituted under s 190 (1) when the Police report under s 173 does not set forth the nature of the information, and the first information report is equally defective, **37 C. 49.** When a Magistrate who was not *competent to order the forfeiture of a bond under s 514, directed the bond to be forfeited, held that the order* was illegal and s. 537 did not apply as the order was not made by a Court of competent jurisdiction, **16 Bom. L. R. 84 = 15 Cr. L. J. 295.**

11. Magistrate omitting to inform accused of his rights under s. 191 is incompetent to try the case.—*See* Note 3 at p 483

12. Jury not properly selected is not a competent tribunal.—*See* Note 2 at p 666 and Note 2 at p 668 Under the old Code it was *held* that irregularities in the selection of the jurors, and in the admission of the deposition of a medical witness, it not being shown that the prisoner had been thereby prejudiced, are not sufficient to set aside the verdict of the jury, regard being had to the provisions of this section and s 167 of *the Evidence Act*—*Per* FIELD, J, **8 C. 739 = 12 C. L. R. 233,** but this ruling must be distinguished on the ground that no objection was taken at the time to the selection of the jurors *See* the *explanation* which is new

13. Trial by Court with assessors not properly chosen, bad—*See* Note 7 at p 673

14. Interestedness of Judge may render Court incompetent.—*See* **2 C. 23,** Note 7 at p 29, interestedness of assessor, **(1912) M. W. N. 378,** Note 5 at p 675 *See*, however, **9 B. 172; 7 C. 322** and Notes 19—27 to s. 556

15. Trial by Court not constituted as by law required must be set aside.—(*i*) A Court of Session, commencing a trial with only one assessor is not a properly constituted Court, and a conviction by such a Court, not being legal, must be set aside, **25 B. 694** *following* **15 B. 514; 21 A. 106.** The defect is not one curable under this section. *See* Note 5 at p 672. (*ii*) Similarly, where a trial was held by a jury consisting of more persons than ordained by the Local Government under s 274, the defect was considered to be too grave to be cured by this section, **26 A. 211.** Note 1 to s 274 at p 665 (*iii*) Allowing assessor who has been absent to resume his functions may render the Court incompetent. *See* Notes 3 and 4 at p 674. (*iv*) So also judgment by Bench not duly constituted is illegal *See* Notes 2—7 at pp 28-29, **19 A. L. J. 1.**

16. Sessions Judge is incompetent to continue trial begun by his predecessor.—*See* s 350 and Note 10 Note even the consent of the accused can cure such an illegality, **6 C. 96 = 6 C. L. R. 521; 12 W. R. 3.**

III.—Cl. (a).—ERROR, OMISSION OR IRREGULARITY IN THE COMPLAINT.

17. Entire absence of complaint vitiates trial and conviction.—Cl (*a*) does not deal with the entire absence of a complaint A conviction under s. 41 of *the Excise Act* without any complaint as required by s 47 of that Act, was held to be bad, the absence of the complaint not being a mere irregularity, **28 P. R. 1883.** *See* also **1904 A. W. N. 266,** when a conviction was set aside for want of a complaint and Note 4 at p. 482 Note 2 to s 198 and Note 3 to s 199, *see* also **56 Cal. 824** where it is held that this section provides for an error omission or irregularity in the complaint and not the entire absence of a complaint.

18. Omission to examine the complainant is a mere irregularity.—*See* s 200 and Note 11 (*iv*) at p 499 and *see* **Cr. R. C. 398 of 1908 (Madras)** and **(1911) 2 M. W. N. 356 = 10 M. L. T. 573 = 12 Cr. L. J. 550** and also **11 A. L. J. 921; 4 L. 359; 1 Rang. 517.**

19. Effect of omission to record reasons for distrusting truth of complaint.—*See* s 203. An *omission* on the part of the Magistrate to record his reasons for distrusting a complaint and ... after having examined the complainant is a... tion dismissing the complaint, unless it can ... Notes 14 15 at p 511

20. Effect of defective complaint.—Even if a complaint of an offence under s 124-A, I P C is defective in that, it does not set out the dates of speeches and the nature of the alleged seditious matter, it is at the

most an irregularity within s. 537 (*a*) and a conviction cannot be reversed unless the irregularity has occasioned a failure of justice, **32 M. 3 at p. 11.** *See* Notes 5 and 6 at p. 483, Note 2 (i) to s. 198, Note 4 to s. 196-A.

21. Effect of omission to take the signature of the complainant.—*See* s. 200 and Note 9 (ii) at p. 500. The mere omission to reduce a complaint into writing would not justify an Appellate Court in reversing the judgment or sentence, **7 M. H. C. R. Appx. XXV.**

IV.—Cl. (a).—ERROR, OMISSION OR IRREGULARITY IN SUMMONS OR WARRANT.

22. Form and contents of summons or warrant.—*See* s. 68 and Note 7 at p. 103 for formalities and contents of summons and s. 75 and Notes 3—10 at pp. 109—111. An omission to affix the seal to a warrant is a mere irregularity cured by this section, **23 P. R. 1910 = 11 Cr. L. J. 570.**

23. Irregular issue of warrant does not vitiate proceedings.—The error of a Magistrate in proceeding by warrant instead of by summons, furnishes no ground for quashing the proceedings, **1 W. R. 16.** Similarly, the issue of a search-warrant to a Sub-Inspector of Police instead of to the Inspector, under *the Public Gambling Act* is an irregularity covered by the section, **1884 A. W. N. 287** and **291; 6 N. L. R. 168; 12 Cr. L. J. 28.**

23-A. Issuing a warrant under s. 90 without recording reasons is illegal.—Recording of reasons is a necessary preliminary to the issue of a warrant under s. 90 and the failure to do so vitiates the warrant and s. 537 cannot be applied to cure such illegality, **38 M. 1088.**

24. Illegality of search without warrant does not vitiate the conviction.—The illegality of a search without warrant is no bar to the conviction of the accused under *the Excise Act*, **35 A. 358** and **575.** The absence of a search-warrant does not affect the legality of the trial, **11 A. L. J. 933 = 15 Cr. L. J. 19.** *See* also **47 A. 676; 46 A. 86.**

25. Irregularities in warrants under ss. 96, 98 and 100.—*See* Note 25 at p. 136, Note 6 at p. 138 and Notes 5 and 6 at p. 140. If a Magistrate issuing a warrant under s. 96 (1) gives no reasons whatever for believing that the accused would not produce the articles in question if a summons was issued to him for their production, the requirements of sub-sec. (1) of s. 96 are not complied with and consequently the order of the Magistrate issuing the warrant would be illegal, **12 P. W. R. 1916.**

26. Effect of material defects in warrants.—(1) Where a distress warrant issued under *the Public Demands Recovery Act* (Bengal I of 1895) has been extended beyond the original date of return, but does not bear on its face, the extended date as required by Order XXI, Rule 24, Civ. P. C., 1908, it is an illegal warrant resistance to which is no offence, **37 C. 122.** *See* also **10 C. 18; 31 C. 424.** (2) A warrant issued under s. 45 of *the Chowkidari Act*, Bengal (VI of 1870) must contain the name of the person who is to execute it and it is only the person named in the warrant who can lawfully execute the warrant. The person named in the warrant cannot delegate the execution of the process to his subordinates, **37 C. 122.** Cases in **22 C. 596** and **759** were decided with reference to the Civil Procedure Code.

27. Effect of the issue of fresh summons without fresh information.—Where on an information, a summons is issued to the accused, and owing to its disclosing no offence, a fresh summons is issued without any fresh or supplemental information, the error, omission or irregularity in the first summons is not sufficient under this section to upset the finding and sentence, unless it has in fact occasioned "a failure of justice," *i.e.*, it has unfairly affected the accused's defence on the merits, **31 B. 611.**

28. Effect of omission of material particulars in order accompanying summons or warrant issued under s. 114.—*See* Notes 20 and 21 at p. 178 and Note 2 to s. 115.

29. Illegal warrant cannot be validated.—*See* **11 P. R. 1895.** A warrant signed by the Magistrate outside the limits of his jurisdiction is illegal, **23 P. R. 1910 = 11 Cr. L. J. 570; 1 B. 340** *referred to. See* Note 1 at p. 415.

V.—Cl. (a).—ERROR, OMISSION OR IRREGULARITY IN CHARGE.

30. Sections bearing on framing and contents of charges.—*See* ss. 221—223 as to particulars in charge, s. 225 for effect of errors, s. 226 for procedure on commitment without proper charge and s. 232 for powers of Appellate Court, ss. 233—239 for joinder of charges, s. 535 for curing irregularities in the framing of charges.

31. Omission of charge—does section validate conviction for offence other than one charged?—*See* Note 2 to s. 535; Notes 2 and 5 to s. 232 and Note 1 at p. 556. Where a person was charged with having

caused hurt to one person but was convicted of having hurt another person, *held* that the conviction was illegal, **14 C W. N. 299.** Where a Magistrate omitted to draw up a charge but gave accused clearly to understand the nature of the charges made against him *held* that the irregularity did not occasion a failure of justice, **10 W. R. 7, 3 C. L. R. 131; 3 A 129.** Where the charge was house-breaking with intention to commit theft, the Magistrate convicted him, finding that the intention was to commit adultery, *held* the conviction was bad. Where the charges framed broke down, it was the bounden duty of the Magistrate to have drawn up a fresh charge, **41 C. 743.** A charge was framed for an offence under ss 149 and 326 but the jurors acquitted the accused of rioting but found them guilty under s 326 without the aid of s 149 for which there was no charge and the accused were accordingly convicted, *held* the conviction in the absence of a charge was illegal, **18 C W. N. 658 = 15 Cr. L. J. 155; 34 C. 698** and **16 C. W. N. 1077** *relied on* The accused were charged under s 147 with the common object of taking forcible possession of complainant s land and assaulting him and were convicted under s. 449, I P C., *held* the conviction was bad If the common object constituting the unlawful assembly had been to commit criminal trespass a conviction under s. 449 may be legal under s 238 (2) **23 W. R. 59** *followed.* On the trial of the accused for dacoity he was convicted by jury of receiving stolen property though no charge had been framed against him to that effect. The principal evidence against him was equally relevant to prove both the offences, *held* that in the circumstances, the accused was not materially prejudiced by the manner in which the trial was conducted —*M H C Pro*, 10*th January*, 1885

In a recent Madras decision the above noted Calcutta cases were considered and as a result the Full Bench of the Madras High Court disagrees with the general statement "that it is now settled law that when a person is charged by implication under s 149, he cannot be convicted of the substantive offence' and it was *held* by the Full Bench that when a charge has been framed under ss 326 and 149 I P C., conviction under s 326 above is not necessarily bad, s 149, I P C., creates no offence Person cannot be tried and sentenced under s 149 I.P C alone The omission of s 149 from a charge does not create an illegality by reason of s 233 of the Code' It is only an irregularity coming under s 537 of the Code **47 M. 746 = 47 M. L. J. 221.**

32. Errors and omission in charges —(*i*) *Omission of the word 'dishonestly' in charge under s* 41 *I P C*—The omission of the word 'dishonestly' in the charge and record of conviction is not a ground fc reversing the conviction and sentence, where the accused person has fully understood the nature of the offenc with which he is charged and has not been prejudiced by the omission, **10 B. H. C. R. 378** (*ii*) *Omission* ι *mention place of offence in charge under Madras Forest Act V of* 1882.—Omission to state in a charge under s 2 of *the Madras Forest Act* that the place from where the accused cuts a tree, is a reserved forest is a material defec and vitiates the trial, **13 Cr. L. J. 504 (M.)** (*iii*) *Omission to specify passages or speeches in charge under ss* 124-A *and* 153 A, *I P C*—*See* Notes 4 and 5 at pp 553 554 (*iv*) *Particulars in charge of perjury*—*See* Note 2 at p 553 (*v*) *Omission in charge of rioting, etc* *See* Note 1 at p 552 and Notes 1—3 at pp 556-557 The Punjab Chief Court in **16 P. R 1915 = 16 Cr. L. J. 689,** *dissented* from **39 C. 781** and declined to hold that the specific common object of a riot must be set out in a charge under s 149 and declined to interfere as the omission in the charge had not in fact occasioned a failure of justice and s 537 covered the omission. (*vi*) *Where necessary the intention must be set out in the charge*—*See* Note 3 at p 550 (*vii*) *Omission to set out previous conviction for passing an order under s.* 565 *See* **9 N. L R. 88 = 14 Cr. L. J 390,** Note 6 to s 595

33. Errors and irregularities in adding or altering charges at trial.—*See* ss 226—232 and Notes thereto at pp 557—562 Upon a single charge of wrongful confinement the accused raised a defence justifying the confinement, on the ground that the persons confined had been caught under circumstances which led to the belief that they had committed house-breaking by night with intent to commit theft, and the Magistrate disbel the defence, committed the accused to the Sessions, not only for the wrongful confinement, but for fabric [illegible]

[illegible] the evidence adduced at the hearing the Magistrate being satisfied that the offence could not have been committed on that date altered the date of occurrence to 27th December, 1908 The very same prosecution witnesses who had supported the previous charge were examined again in support of the altered charge and the accused was convicted and sentenced and the conviction was confirmed on appeal [illegible] the conviction was set aside as it was considered unsafe to uphold the conviction based on such [illegible] evidence. It was not as though there had been a mistake of date due to clerical error [illegible] closed by the evidence in the course of the hearing it was an alteration of date made [illegible] and this new theory was established by the evidence of witnesses who had

commission of an offence on a different date, **13 C. W. N. 273.** The accused was charged with and convicted of committing criminal breach of trust in respect of a large sum of money between August, 1909 and August, 1910; there was evidence to prove that in February and May, 1911 he misappropriated a part of the sum but the evidence did not disclose the commission of any offence before August, 1910, *held* that it was not enough to show that there was embezzlement at some time before, during or after that period; that the charge being framed under s. 222 (2), it is at any rate necessary to show an act or acts of the embezzlement within the space of one year and the discrepancy in the dates could not be held to be cured under this section, (**25 M. 61** *followed*); **17 C. W. N. 479 = 14 Cr. L. J. 219.**

34. **Commitment of acquitted prisoner on fresh charge without further inquiry.**—A prisoner, originally charged with an offence under one section (s. 302, I.P.C.) and acquitted of that charge, was committed, the day following that on which she was acquitted, for trial under another section (s. 307) without any witness being examined on the new charge under s. 307 and without having any opportunity of cross-examining the witnesses on the first charge with respect to the second charge; *held*, that the irregularity was one which was not covered by this section, and that the prisoner had been prejudiced thereby in her defence, **22 W. R. 14 = 14 B. L. R. 54.**

35. **Omission to read out and explain fresh charge is mere irregularity.**—*See* s. 227 and Note 5 at p. 560 and **5 C. 826.**

36. **Misleading charge vitiates conviction.**—Where two distinct actions were alleged against the accused, but he was charged with only one offence and it was impossible to understand from the charge of which of the two actions alleged the accused was charged, the conviction was set aside, **13 C. W. N. 167.** If the charge for dacoity does not set out or indicate which particular dacoity an accused is tried for, the conviction must be set aside, **(1912) M. W. N. 49 = 13 Cr. L. J. 125.** *See* also Note 4 at p. 563.

VI.—Cl. (a).—ERROR, OMISSION OR IRREGULARITY DURING TRIAL.

37. **Cross-cases between contending parties ought not to be tried simultaneously.**—There had been a riot and fight between two factories and some members of one party *A* were charged with the murder of the leader of the other party *B* and some members of the *B* party were charged with causing grievous hurt to the leader of the *A* party; *held*, that the members of each party should have been committed for trial separately and the Magistrate was wrong in committing the members of both the parties for trial all together upon joint charges as if they had one common object; the trial and conviction were however not set aside by the High Court, **8 W. R. 47; 12 W. R. 75.** In **6 C. 96** the last case was distinguished as it was tried with the aid of assessors. In this case the members of two opposing parties in a riot, were under two distinct committals, sent up for trial before the Sessions Judge and a jury. After the close of the case for the prosecution in one of these cases, the Sessions Judge with the consent of the pleaders representing the accused, postponed the taking of the evidence for the defence, and proceeded to examine the witnesses for the prosecution in the counter-case before the same jury and then took the evidence of the witnesses for the defence in the first and in the counter-case, in the order named, and after hearing the address of the various pleaders for the defence and the reply of the Government, proceeded to sum up the facts in both cases to the jury, who returned a verdict in respect of all the accused. Both the sets of accused appealed alleging that they had been prejudiced by the manner in which the two cases had been virtually tried together. *Held*, that the procedure resorted to by the Judge was a practical violation of the salutary rule which necessitated the keeping of trials in such cases distinctly separate; and that this proceeding in parallel lines in both the cases having materially prejudiced the interest of the accused, the convictions should be set aside. When a similar procedure was adopted and the Magistrate discharged one set of accused in one case, and called upon the accused in the other to go into his defence, it was *held* that the trial held on what are termed "parallel lines" was open to strong objections, and that it should therefore never be adopted. Each case should be seperately tried, and the guilt or innocence of the accused determined on evidence recorded in it. In this case the case was transferred to the file of another Magistrate, **13 C. L. R. 275. 14 C. 358** such a procedure was strongly condemned by SIR W. COMER PETHERAM, C.J., "I think this is a course which is to be deprecated to the last degree. I think it a very great pity that Magistrate should ever adopt it. There is no doubt, to my mind, that it constitutes a very great irregularity, and the reason why it is so very objectionable is, that you call a man as a witness whose conduct has been inquired into, but the decision in whose case has not been pronounced, and you hear his statement of the case given before the very person who is to decide upon his guilt or innocence; and by doing that you introduce an element into the question whether or not he will tell the truth, which ought not to be there, because he has a personal interest in the inquiry; his liberty or life may be at stake on what will be the verdict in his own case

and it is not in human nature to suppose that he would under such circumstances, give his evidence in the very impartial way that it ought to be given in a Court of Justice Therefore it seems to me that it is not only an irregularity but an irregularity of a grave kind" But the conviction was not set aside as it had not been shown that the accused had been prejudiced and the irregularity was held to be cured under s 537 In **20 C. 537**, a Bench consisting of three Judges re-affirmed that such a trial of the two parties to a riot was opposed to the law but it was not necessary to set aside the conviction in all cases following the distinction pointed out in **6 C. 96** as the trial was not by a jury The observations noted above in **15 C. 358** were however disapproved. In a trial of two cross-cases of rioting one case was taken up first and some witnesses for the prosecution were examined, the other case was taken up next day and certain witnesses for the prosecution in that case were examined. The order sheets showed that on certain days, certain witnesses were examined in both the cases while on other days witnesses in the one or the other case were alone examined, and in some instances some of the accused in the one case were examined as witnesses for the prosecution in the other The charges in the two cases were framed at an interval of four days, but the evidence was completed and arguments were heard on one and the same day, and two days after, both the cases were disposed of by separate judgments *Held*, that the trial was not vitiated by reason of the procedure adopted by the Magistrate, nor were the accused in any way prejudiced thereby It was an advantage to the accused rather than a disadvantage that the Magistrate had before him the evidence in both the cases before he made up his mind as to which case was true and which untrue, **8 C. W. N. 344** where **13 C. L. R. 275** is *distinguished* In **5 P. R. 1906 = 4 Cr. L. J. 75** it was *held following* **15 P. R. 1882** and **20 C. 537** that the joint trial of the opposite factions in a riot was not merely irregular, but illegal In **9 A 452** at **p 462** the inconvenience and impropriety of trying several persons jointly for rioting were pointed out and **(1881) A. W. N. 28, 6 C. 96** were *followed* and applied to inquiries under s **107.** Where a Magistrate rightly enough framed separate charges and numbered the cases as two calendar cases, but when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges *held* that the trial offended against the provisions of s 233 and was illegal and was not covered by this section **29 M. L. J. 101 = 18 M. L. T. 95 = 16 Cr. L. J. 593.** *See* also **4 Lah. 376.**

Cross-complaints were filed The Magistrate heard the evidence for the prosecution in each of the cases Then without framing a charge formally as required by s 254 and without following the provision of ss 255 256, 257 in the first case he dealt with it as if a charge had been framed and treated the evidence in the other case as defence evidence in the first On that understanding, both cases were argued before him without any further evidence being taken and both were decided. In doing this the Magistrate followed a practice which had grown up in his Court. *Held* that it was impossible to hold that a trial conducted in a mode so materially different from that prescribed by law was a proper trial. Magistrates are not at liberty to substitute for the procedure of the Code a procedure which has arisen by usage however convenient that may be, **17 Bom. L. R. 498 = 16 Cr. L. J. 530.** Two parties were charged for their attacks on each other in the same occurrence and the charges were tried separately at two distinct trials The evidence given for the prosecution was similar to a substantial extent in each case Each party was a witness against the other but there was also independent evidence

The High Court treated the two cases as separate but gave only one judgment There was however, a body of separate evidence which was applicable to each case and that in itself was enough for conviction The Privy Council held that although technically it might have been better to keep the evidence entirely distinct and to have delivered two separate judgments No injustice has followed from what was done **31 C. W. N. 393 = 8 Lah. 193 = 29 Bom. L. R 784.**

38 **Can rival factions be called upon to furnish security to keep the peace or for good behaviour in one proceeding?**—*See* Notes 38—43 at pp 176-177 In **14 A. L. J. 268 = 17 Cr. R. L. J. 165** the joint trial of two contending factions was held not to be justified by s 117 (4)

39. **Effect of misjoinder of charges.**—*See* Note 3 and Notes 20—23 at pp 564, 570, 571

40. **Effect of multiplicity in the charge.**—*See* s 234 and Notes thereto A series of alterations in accounts made to cover a defalcation might all be charged in one charge under s 477 A I P C, as there are not three distinct offences committed by an accused person merely by reason of the fact that he makes more than one false entry to cover one defalcation. But it is impossible to take a series of false entries referring to three different defalcations in the same trial, although it might be possible to try three different defalcations in one trial or to try a whole series of falsified account in one charge, **41 C. 722.** *See* **30 M. 328, 26 C. 560** and

Note 7 at p. 573. In **35 C. 161**, the charging of an accused person with two offences under s. 178, I.P.C., and two offences under s. 179, I.P.C., was *held* to be not subject to s. 234 and consequently there was no misjoinder of charges. All facts being admitted and the sentence being only for one of the offences, the accused was not prejudiced, and the irregularity, if any, was covered by this section. If an accused is charged at one trial with three separate offences under the same section, and the complainant is a different person in each case, it is an irregularity, as for the purpose of s. 234 offences are not of the same kind when the complainants are different, and it is also an irregularity to pass one sentence for three separate offences. Usually such irregularity would be treated as falling under this section and it would be for the superior Court to find whether taking into consideration the facts that no objection to the charge had been taken in the Lower Courts, the accused had been prejudiced in his defence, **1904 K. L. R. 21.** Where, at the same trial, the accused was charged with having cheated *A* on two occasions and *B* on another occasion, and was convicted on all these charges, the conviction was upheld, **4 A. 147**. But in **15 B. 491** a re-trial was ordered on the ground of prejudice to the accused. Where two separate offences which should have been tried separately were tried together, *held following* **14 A. 502,** this did not amount to more than a mere irregularity which, as it did not appear that the accused were in any way prejudiced, was covered by this section, **1907 A. W. N. 208 = 6 Cr. L. J. 215.**

41. Effect of misjoinder of parties.—*See* s. 239 and Notes 10—13, **18 O. C. 92 = 16 Cr. L. J. 270**; **28 M. L. J. 397 = 16 Cr. L. J. 323**; page 598, **26 A. L. J. 623** and **29 Cr. L. J. 619.**

(*i*) *Joint trial of thief and receiver of stolen property.—See* Notes 17, 18 and 35 to s. 239. In **14 A. L. J. 344 = 17 Cr. L. J. 159,** KNOX, J., pointed out that the practice in Allahabad has been the same as prevails in Bombay, *viz.*, that where practical, the thief and the person who receives stolen property are tried together and such trial has not been held to be in contravention of the provisions of s. 239. If the evidence showed that the act of guilty receipt was separated by a clean cut, so to speak from the act of theft, such an exception might be taken with success.

(*ii*) *Joint trial of receivers of stolen property.—See* Note 35 at p. 604. When the only evidence is that part of stolen property was with one and part with the other the two cannot be tried together, but if it is shown that the two were acting in concert and had joint possession of the property stolen, their joint trial is not illegal, **1 Pat. L. J. 64.**

42. Where the defect is one of duplicity and not misjoinder this section may be applied.—*See* Note 7 at p 564.

43. Delay in postponing final order in case of contempt.—*See* Note 8 to s. 480. Where a Magistrate in whose presence the contempt was committed, took cognisance of the offence immediately, but in order to give the accused an opportunity of showing cause, postponed his final order, *held*, that such action, though it might be irregular, was not illegal, and as the accused had not been in any way prejudiced; was covered by this section, **11 A. 361.**

44. Omission to record reasons for orders is irregular.—(*i*) *Reasons for rejecting sureties under s.* 122.—*See* Notes 91 and 96 at pp. 188-189. (*ii*) *Reasons for granting compensation under s.* 250.—*See* Note 28 at p. 621. (*iii*) *Reasons for tendering pardon under s.* 337.—*See* Note 14 to sec. 337. (*iv*) *Reasons for order of transfer under s.* 528 (3).—*See* Note 9 thereto. (*v*) *Reasons for ordering fresh evidence under s.* 428.—*See* Note 6 at p. 1036. (*vi*) *Omitting to record reasons as required by s.* 90 *renders the warrant invalid.—See* Note 3 to s. 90 and **38 M. 1088.** (*vii*) *Failure to record reasons for dismissing complaint.—See* Note 8 to s. 202.

45. Errors, etc., in judgments.—*See* Chap. XXVI—Omission to write a judgment is not an irregularity cured by s. 537 (*a*), **17 Bom. L. R. 1085 = 3 Bom. Cr. Ca. 161 = 16 Cr. L. J. 832.**

(*i*) *Pronouncing judgment in absence of accused is irregular.—See* Note 8 at p. 924.

(*ii*) *Pronouncing sentence before writing judgment is irregular.—See* Notes 11—13 to s. 367.

(*iii*) *Omission to record judgment in proper language is a mere irregularity.—See* Note 16 to s. 367.

(*iv*) *Omission to state grounds of decision.*—In a trial with the aid of assessors the Judge's omission to state the grounds of his decision is not an illegality which invalidates the conviction, **6 B. H. C. R. Cr. Ca. 65.** But reasons for conviction should be so recorded as to satisfy an Appellate or Revisional Court that there were sufficient materials to support the conviction. Where it is not shown that there is evidence on which the conviction was proper, it was set aside. It is impossible in such a case to say what the result of the error on

the part of the Magistrate may have been or that it has not occasioned a failure of justice, 6 C. 579; 13 C. 272. Where there was only a single point, as to the credibility or otherwise of the evidence of the prosecution witnesses, a judgment otherwise defective was upheld, 20 C. 353.

The omission to record reasons for conviction as required by cl. (*h*) of s. 263 on the part of a Bench of Magistrates amounts merely to an irregularity under s. 537 where the case is a non appealable and there is clear evidence justifying the conviction, 26 Bom. L. R. 1236.

(*v*) *Informal defective appellate judgments*—*See* Notes 30—33 to s 367 and Notes 6—9 to s. 424 *See* also 14 A. L. J. 279 = 17 Cr. L. J. 167 and 14 A. L. J. 445

(*vi*) *Summing up should not be embodied in his judgment.*—It is highly inconvenient and not to be approved, if a Judge should in his judgment embody his summing up to his assessors, but it is not illegal and the judgment is not invalid as containing no distinct statement or discussion of the evidence 9 C. L. J 55 = 10 Cr. L. J. 325. *See* Notes 34—37 to s. 367

(*vii*) *Pronouncing judgment without hearing accused's counsel*—Where a Magistrate delivered judgment without allowing accused's counsel to address the Court on behalf of the clients, *held* that the accused had been prejudiced by such material irregularity, 6 Bom. L. R. 663.

(*viii*) *Basing judgment on extra judicial information or inadmissible evidence*—Where the evidence actually on record did not bear out some of the observations of the Magistrate in his judgment and there was reasonable ground for a suspicion that the Magistrate incorporated into his judgment what he heard or was represented to him in a local inspection, the conviction was set aside, 14 C. W. N. 99. A Magistrate in trying a case against several accused persons confined his attention only to those whose names were mentioned before the Chief Constable during the Police inquiry He used the statements made to the Police Constable without complying with the provisions of s. 162, acquitted those whose names were not mentioned to the Police Constable but convicted the others. It was contended that though the procedure adopted by the Magistrate was irregular accused were not prejudiced thereby *Held*, that the prejudice to the accused was clear, when, as a result of the perusal of the statements made to the Chief Constable, some of the accused were acquitted, because their names did not appear in them, and the rest were convicted The necessary inference was that as to the latter the Magistrate was influenced by the fact that the statements of the witnesses examined before him was corroborated by the statements made to the Chief Constable, whereas the law directs that they cannot be used in evidence unless they are admitted in accordance with the provisions of *the Indian Evidence Act* and this Code. Having regard to the explanation to this section, the Court was bound to presume under the circumstances of the case, that there was a failure of justice, so far as the trial before the Magistrate was concerned, 9 Bom. L. R. 368 = 5 Cr. L. J. 353.

(*ix*) *Is it legal for Magistrate to pronounce judgment written by his predecessor when accused demands trial de novo?*—*See* s. 350 and 1916 M. W. N. 372 = 17 Cr. L. J. 166.

(*x*) **Holograph judgment not signed.**—Where a Magistrate has written a judgment entirely with his own hand forgot to sign and date it, it was held that this was an irregularity cured by s. 537, 47 A. 284.

45-A. Omission to record formal order under s. 494 is a mere irregularity.—When under s. 494, the prosecution withdraws charge and the Magistrate takes judicial notice of the withdrawal by examining the accused as a witness against the co-accused the omission to use the words 'I discharge you' would be utmost an irregularity curable by s. 537, 7 A. L. J. 86 = 11 Cr. L J. 21. *See* Note 26 to s 403

45-B—Where a Magistrate wrote out a judgment, signed, dated it but owing to physical incapacity had it read out by another Magistrate, *held* that the procedure was merely irregular and covered by s. 537, 21 A L. J. 137.

VIII.—Cl. (a).—ERROR, OMISSION OR IRREGULARITY IN OTHER PROCEEDINGS BEFORE OR DURING TRIAL.

46. In the absence of commitment, trial is illegal—*See* s 193 and Notes 1—3 As to the effect of commitment by a Magistrate having no local jurisdiction—*See* Note 6 to s 532

47. Errors in inquiry and commitment—

(*i*) *That the inquiring Magistrate had no territorial jurisdiction is a mere irregularity*—*See* Note 5 at p 522 and Note 6 to s 532

(*ii*) *Certificate of Political Agent received after commencement of preliminary inquiry but before commitment, effect of.—See* Note 9 at p. 419.

(*iii*) *Effect of irregularity in the conduct of inquiry.*—An irregularity in the conduct of an inquiry, even though sufficiently serious to induce the High Court to annul a commitment, is not sufficient to justify the annulment of the trial after the commitment has been made and a trial had upon it, unless the irregularity has caused a failure of justice by prejudicing the accused in his defence, **Ratanlal 177.**

(*iv*) *Effect of absence of notice under s.* 436 *to show cause why commitment should not be made.*—Where a trial, under a commitment made by an order of a Sessions Judge under s. 436, had been duly held without giving the accused an opportunity to show cause and no actual failure of justice had been caused by the error of the Sessions Judge, *held* that the conviction could not be annulled, regard being had to the provisions of this section, **7 C. 662 = 10 C. L. R. 8; 8 C. 435 = 10 C. L. R. 46; Ratanlal 899.** So also where proceedings were taken under s. 476, without a preliminary inquiry, **Ratanlal 701.**

(*v*) *Omitting to examine accused before committal is highly irregular.—See* s. 209 and Note 1 at p. 526.

48. Irregularities in compensation proceedings under s. 250.—

(*i*) *Effect of omission to record complainant's objection to Magistrate's order awarding compensation.* —Note 27 at p. 620. The Madras High Court in **Weir II, 711,** *held* that failure on the part of a Magistrate to make the record required by proviso (*a*) to s. 250 when passing an order for compensation, thereby giving no opportunity to the complainant to urge his objections to the order, was but an irregularity curable under this section.

(*ii*) *Reasons for granting compensation should be given.—See* Note 26 at p. 620.

(*iii*) *Order for compensation must form part of the order of discharge or acquittal. See* Note 39 at p. 621.

49. Irregularities in trial of warrant-cases—Chap. XXI—

(*i*) *Trial of a warrant-case as a summons-case is illegal.—See* Note 4 to s. 251 at p. 625. A Magistrate proceeded in the first instance as if the case fell under the first part of s. 100 of *the Railway Act* IX of 1890, and adopted the procedure for a summons-case. Eventually the accused was convicted of an offence under the latter part of s. 100 which contemplates a warrant-case. *Held*, that the action of the Magistrate was illegal and the conviction was set aside, **5 M. L. T. 204 = 11 Cr. L. J. 191.**

(*ii*) *Failure to recall prosecution witnesses for cross-examination.—See* s. 256 and Notes 5—13 at pp. 633—635.

(*iii*) *Failure to summon defence witnesses.—See* s. 257 and Note 4 at p. 637.

50. Irregularities in Sessions trials—Chap. XXIII—

(*i*) *Reading deposition of witnesses and cross-examining them thereon is very irregular.—See* Notes to s. 288 and Notes 6 and 7 to s. 353. In **8 Bom. L. R. 538 = 4 Cr. L. J. 89,** the accused was tried for abetment of murder and acquitted. He was again put up for trial for an offence under s. 201, I.P.C., with respect to the same offence. At the request of the pleader of the accused, and with the consent of the Government pleader, the evidence recorded by the Judge at the previous trial was accepted as evidence in the second case. *Held*, that the procedure adopted was irregular, but was covered by this section. *Per* RUSSELL, J. —The procedure which was adopted in this case, must never be followed under any circumstances whatever. The evidence of all the witnesses before the Judge and assessors must be *viva voce*, except in the case of evidence given by a medical officer which under certain circumstances need not be *viva voce. See* Notes 9 and 10 at pp. 678-679.

(*ii*) *Omission to call on the accused to enter upon his defence is a serious irregularity.—See* s. 289 and Note 8 at p. 684.

(*iii*) *Effect of illegality in directing jury to retire for further deliberation.—See* Note 4 to s. 303 and Note 4 at p. 719. Where a jury returns an ambiguous verdict, the Judge should proceed under s. 303, and not send the jury back again to consider further and return a second verdict; and the conviction and sentence on such an irregular second verdict must be set aside, as entirely illegal and in such a case s. 12 of *the Lower Burma Courts Act*, 1900, nearly corresponding with s. 26 of *the Letters Patent* of the Chartered High Courts

does not empower the Bench to go into the facts again and decide the case on the evidence —*Per* ADAMSON, C.J. and FOX, J But IRWIN, J, *held* the error was an irregularity curable by this section Anyhow the conviction and sentence might be set aside and a new trial ordered without the accused being acquitted, **3 L. B. R. 75 = 3 Cr. L. J. 1.**

(iv) *Pronouncing judgment without taking opinions of assessors is illegal —See* Notes 4 and 5 at p 730 Where a Sessions Court, after the close of the case for the prosecution and without consulting the assessors, records a finding of not guilty, because it considers the evidence for the prosecution to be unsatisfactory, untrustworthy or inconclusive it acts without jurisdiction, and its order discharging the accused is illegal Even if not illegal for want of jurisdiction such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of this section **10 A. 414; 16 B 414**

(v) *Irregularity in recording verdict of jury and opinions of assessors* —Each assessor s opinion must be recorded *See* Notes 6—9 at pp 730 731 Taking opinion of assessors in one joint statement instead of separately is an irregularity and unless it prejudices the accused, is covered by this section, **41 P. R. 1887.** It is improper to get the individual opinions of jurors *see* Note 2 to s 301

(vi) *Charge to jury should be made when all evidence has been taken —See* s 297 and Note 1 A at p 692

51. Examination of accused.—*See* ss. 209 and 342 and Notes thereto

(i) *Examination of accused is imperative —See* Notes 5—7 to section 342, **45 M. 820; 43 M. L. J. 710 = 43 M. L. J. 402.**

(ii) *Examination must not be inquisitorial nor to fill up gaps in prosecution evidence —See* Notes 12—16 to s 342.

52. Effect of evidence partly recorded by one Magistrate and partly by another.—*See* s. 350 and Notes.

(i) *Omission to inquire from accused whether he wishes to exercise his privilege under s* 350 (*a*) — *See* Notes 16 and 17 An omission to inquire from the accused whether he wishes to exercise the right reserved by s 350 (*a*) when there has been no prejudice to the accused and no miscarriage of justice is an irregularity curable under s 537, **U. B. R. (1912) 4th Qr. 152 = 14 Cr. L. J. 287.**

52-A. Effect of irregularities in local investigation—

(i) *Directing local investigation after close of defence is irregular* —Where a Subordinate Magistrate was sent to hold a local investigation after the defence was closed, *held*, that at the most it amounted to an irregularity and that it was in no sense an illegality and the conviction was not bad as it was not shown that the defence had been prejudiced **15 C. W. N. 414 = 12 Cr. L. J. 7.** But where a Magistrate makes a local enquiry and uses the same, not for the purpose of understanding the evidence, but for the purpose of obtaining information which does not appear from the evidence of witnesses, the Magistrate makes himself a witness in the case and the procedure vitiates the trial, **118 I. C 516 = 30 Cr. L. J. 491 (2).**

(ii) *Not placing a note of inspection on the record.*—An omission to place on the record the results of a local inspection is not a total error of jurisdiction apart from any prejudice which it may cause to the accused. [illegible] ted the result of the local investigation in [illegible] ill fresh in his memory (**9 C. 363 = 12 C. L. R. = 15 C. L J. 403 = 13 Cr. L. J. 156.**

But in a Bombay case where a Magistrate making during the course of a trial a local enquiry is not at liberty to question persons who have collected there at the time, without recording their evidence on oath and allowing the other side an opportunity for cross examination Such a defect cannot be cured by subsequently examining one of such persons as a witness **28 Bom. L R 302.** In this case **52 C. 148** was cited with approval. But in **53 C. 46, 52 C 148** was doubted and held that the omission to record a memorandum under s 539-B, in an inquiry under s 145 is not an illegality vitiating the proceeding but an irregularity which does not affect it in the absence of prejudice to the parties

53. Examination of witnesses and recording evidence—Chap XXV—

(i) *Reception of inadmissible evidence —See* s 167, *Indian Evidence Act,* and Notes 32—34 at pp 693 694 The misreception of evidence though an error or irregularity within the meaning of this section is not sufficient to reverse the conviction unless the prisoner has been prejudiced thereby or there has been a failure of justice, **7 W. R. 7.**

Where improper questions have been admitted at a trial it is for the Crown to show that their improper effect has been set right by the Court. Either the jury should be told at once to disregard the statements or the charge should contain a similar warning to them. If this cannot be done it is the duty of the Judge to discharge the jury and begin the case *de novo*, **28 Bom. L. R. 281.**

(*ii*) *Effect of commission to administer oath.—See* s. 13 of *the Oaths Act*, 1873, and Notes thereto at pp. cxx-cxxi of the Appendix.

(*iii*) *Examination of prosecution witness after close of defence is irregular.*—It is irregular to allow a witness to be examined on behalf of the prosecution after the accused has made his defence, when the witness is not a witness to contradict any new case set up by the prisoner. Where, however, the prisoner had full notice of the evidence which was to be given by such witness, and made his defence in allusion to the evidence of the witness, *held* that the irregularity was not sufficient to set aside the conviction having regard to the provisions of this section, **13 W. R. 36; 15 C. W. N. 414 = 12 Cr. L. J. 7; 20 A. L. J. 874.**

(*iv*) *It is illegal to examine witness behind back of accused.*—Where the witnesses on the strength of whose evidence the accused were convicted, were heard in the absence of the accused, *held* this was an illegality which could not be cured by this section.—*Crl. Rev.* 712 *of* 1905, *All. High Court.—See* Notes 1–5 to s. 353 and *Cf.* **Ratanlal 325.**

(*v*) *Recording substance of evidence in English, when not authorised is a mere irregularity.—See* s. 355 and Note 4 to s. 355.

(*vi*) *Omission to examine witness afresh, but putting in evidence given in previous trial is very irregular.—See* Notes 6 and 7 to s. 353 and Note 10 to s. 286. *See* also **9 N. L. R. 65 = 14 Cr. L. J. 290** and W. R. Sup. Vol. I, No. 38.

(*vii*) *Recording evidence in language other than English when not authorised to do so is an irregularity.—See* s. 357 and Note 1 thereto. Failure of a Magistrate to comply with the provisions of s. 357 is not such an irregularity as had occasioned a failure of justice or prejudiced the accused.—*M. H. C. Pro.*, 9*th March*, 1885.

(*viii*) *Recording evidence after discharge of assessors or jury is illegal.*—To record evidence after the close of the trial, and after discharge of assessors, is a material irregularity not covered by this section, **15 A. 136; 7 Bom. L. R. 978;** Note 3 at p. 654, **19 A. L. J. 1.**

(*ix*) Where there were strictly speaking two cases for riot which formed one controversy and the Magistrate who tried both treated the evidence in one as if it had been solemnly repeated all over again by the witnesses, in the second and the counsel consented to such a proceeding held that this was a mere irregularity curable by section 537, **50 All. 457.**

(*x*) A mere omission or irregularity to comply with the provisions of s. 360 if it has caused no failure of justice is not enough to warrant a quashing of the conviction, **5 Rang. 53 = 29 Bom. L. R. 813.**

54. Effect of passing separate sentences, when only one sentence is allowed by law.—*See* s. 35 and Notes under Heading II at pp. 63—65.

IX.—Cl. (a).—ERROR, OMISSION OR IRREGULARITY IN OTHER PROCEEDINGS.

55. Irregularity in publication of proclamation.—*See* **22 A. 216** and Note 10 to s. 88.

56. Irregularities in security proceedings.—(*a*) A Magistrate has no jurisdiction to act under s. 110 until he has such information before him as will suffice for his making an order in writing under s. 112, *see* Note 12 at p. 170. (*b*) Magistrate must make preliminary order, *see* Note 18 at p. 172. (*c*) Effect of omission or irregularity in preliminary order, *see* Notes 20 and 21 at p. 173. (*d*) To constitute a proper foundation for an order under s. 107, notice should be given to the party affected. A notice issued under s. 110 is not a sufficient notice, **30 M. 282.** But if summons was issued under s. 107 and proceedings taken under s. 110, but the proceedings were recorded at length and the accused had opportunities of cross-examination and there had been no failure of justice, the irregularities are cured by s. 537, **14 Cr. L. J. 65 (M.).** *See* Notes under Heading IX at pp. 183-184. (*e*) Irregularity in procedure and effect of holding a joint inquiry.—*See* Notes at pp. 173—175 and Note 37. It was held in **1 P. R. 1916** *following* **35 C. 243,** that persons against whom security proceedings are taken are not entitled to invoke the aid of s. 256 and recall witnesses who have given evidence against them.

In 14 A. L. J. 268, the joint trial of two hostile parties was held to be bad (*f*) Reasons for refusing sureties must be given, 13 C. W. N. 27; 37 C. 91; else they must be accepted Before rejecting sureties on grounds derived from private information, Magistrate should bring the grounds to the notice of the sureties and hear them, 14 C. W. N. 709. *See* Note 94 at p 139 (*g*) Inquiry into the fitness of the sureties cannot be delegated A Magistrate cannot decide the fitness of the sureties merely on the report of the Subordinate Magistrate or of a Police-officer —*Per* RYVES, J, in 37 C. 91 at p. 101. *Contra* COX, J, 20 A. L. J. 520.

57. Orders under s. 144.—(*a*) For the contents of an order under s 144 and the effect of irregularity therein, *see* Notes 12—16 to it. (*b*) It is illegal to extend the period of two months by successive orders, 13 C. W. N. 268; 20 C. W. N. 753 = 17 Cr. L. J. 200; 16 Cr. L. J. 767 (M.) (*c*) A Magistrate has no power under s. 144 to direct a Village Munsiff to be in possession of the property in dispute, 3 L. W. 498 = 17 Cr. L. J. 190 *following* 12 C. W. N. 1044 = 8 Cr. L. J. 230.

58. Orders under Chapter XII.—*See* Notes at pp 244—281 (*a*) Omission to set out in the preliminary order under s 145 the grounds of the Magistrate s opinion is covered by this section, 36 M. 275; 16 M. L. J. 148 = 3 Cr. L. J. 487; 30 M. 548; 33 C. 352 (F.B.). *Contra* 4 M. L. T. 213 = 8 Cr. L. J. 399, WALLIS, J, *dissenting* Omission to record a preliminary order before issue of summons to opposite party or to affix a copy of it to a conspicuous place are not fatal to the jurisdiction of the Court to proceed under s 145 where an order directing the parties to put in written statements, has been once recorded, 15 P. W. R. 1914 = 15 Cr. L. J. 279. (*b*) Any error or omission in the preliminary order will not vitiate the proceedings unless the parties are prejudiced, 30 M. 548; 33 C. 352; 32 A. 182; 12 O. C. 400 = 11 Cr. L. J. 69. (*c*) Though the Magistrate must ascertain the subject of dispute before passing an order, 11 C. W. N. 198 = 5 Cr. L. J. 32; 27 A. 296, yet, if the non-specification of the boundaries of the disputed lands has not misled any party, the proceedings are good, 5 C. W. N. 563. And if necessary the order may be amended by adding the boundaries, 14 C. W. N. 98. (*d*) Any omission or irregularity in publishing the copy of the initiatory order will not vitiate the proceedings unless any party has been materially prejudiced, 33 C. 68 (F.B.), 30 A. 41; 30 A. M. 548; 9 C. W. N. 1046; 12 O. C. 400 = 11 Cr. L. J. 69. (*e*) Non joinder or misjoinder of parties will not vitiate proceedings unless there is prejudice, 30 C. 155 (F.B), 10 C. W. N. 1095; 15 P. W. R. 1914. But *see* 37 C 285; 12 A. L. J. 162. (*f*) A joint hearing with respect to several plots of land with several persons though irregular will not vitiate the inquiry, if the parties had not been prejudiced, 6 C. W. N. 206; 5 C. W. N. 544; 15 C. 31; 16 C. 513; 30 C. 155 (F.B.). (*g*) Where a Magistrate institutes proceedings *suo motu* in order to prevent breaches of the peace it is necessary that he should have evidence on record of who was in actual possession on the date of his proceeding It is a defect of jurisdiction when he leaves the case on the record absolutely unproved 18 C. W. N. 700 = 19 C. L. J. 356 = 15 Cr. L. J. 202. (*h*) An order made without giving an opportunity of examining a material witness is illegal, 18 C. W. N. 94 = 15 Cr. L. J. 796; 17 Cr. L. J. 217 (M), 4 P. R. 1916 = 17 Cr. L. J. 129. (*i*) Under s 147 a Magistrate may pass an order with reference to a public street, 16 Cr. L. J. 77 (M.). Where a Sub-Divisional Magistrate bases his conclusion on the evidence taken at the local inquiry the procedure adopted by him is irregular but in the absence of any prejudice to the parties such defect or irregularity is cured by section 537 of the Code, 33 M. L. J. 78.

X.—Want of and irregularity in sanction which is required by law under the sections of the Code or any other law for the time being in force.

59. Initiation of proceedings without sanction as required by the sections of the Code void ab initio.—There are certain sections in the Code (*e g.*, ss. 339, 196, 196-A, 195, 197 and 476), under which either complaint or sanction is necessary for the cognisance of offences mentioned in those sections With regard to these sections a sanction or complaint is a condition precedent for the assumption of jurisdiction and the absence of such sanction or complaint is a defect which vitiates the proceedings *ab initio* and is not a mere irregularity curable under this section

It should, of course be noted that cl (*b*) regarding the want of sanction under the old s 195 is now omitted under the new amendment of s 537 Under the new s 195 no sanction is necessary The reference to the old s 195 and to cl (*b*) of s 537 (old) in the case quoted below would be relevant under the old law But the general principles regarding sanction as a condition precedent to the cognisance of offences even now holds good "The very enactment of cl (*b*) clearly shows that it is the want of sanction required by s. 195 alone which is curable under s. 537 and that the absence of sanction required by any other provision of law cannot be so remedied To take the contrary view, would render almost nugatory the requirements of the law regarding

sanction. The Legislature has enacted with respect to certain offences that no Court shall take cognisance of them or in the case of s. 29 of *the Arms Act* that no proceedings shall be instituted against any person in respect of them without the previous sanction of a specified authority. Without such sanction, a Court is not competent to take cognisance of, or to hold any proceedings in respect of such offences, and if it does so its proceedings unless covered by s. 537 (*b*) are entirely without jurisdiction and invalid," **17 Cr. L. J. 209 (Burma) (F.B.)**.

(*i*) *Want of sanction under s.* 339 *cannot be cured.—See* Note 13 to s. 339. The sanction under s. 339 is not a sanction under s. 195, and it belongs to the same class as sanctions under s. 196 and s. 197, **42 P. R. 1884.** *See* **1 U. B. R. 2; 1890 P. R. at p. 33; 5 C. W. N. 291; 27 C. 137; 8 P. R. 1908 = 7 Cr. L. J. 353.**

(*ii*) *Want of sanction under s.* 196 *cannot be cured.—See* Note 2 at p. 482 and Note 8 at p. 483.

(*iii*) *Want of previous sanction under s.* 197.—*See* Note 19 at p. 491. The saving provisions of this section will not avail to legalise a conviction, where the previous sanction required by s. 197 is wanting, **Weir II, 710; 31 M. 80**; but *see* as to commitment without sanction, **9 B. 288** noted at p. 491, Note 20 under s. 197.

(*iv*) *Want of sanction under the Arms Act XI of* 1878.—S. 537 (*b*) does not cure the want of sanction in any case except when the sanction is required under s. 195. It does not therefore cure the want of sanction under s. 29 of *the Arms Act*, **4 L. B. R. 247 = 8 Cr. L. J. 65; 5 M. L. T. 162 = 11 Cr. L. J. 190; 17 Cr. L. J. 209 (Bur.)**.

60. **Are irregularities in sanctions granted under sections other than s. 195 cured?**—" The omission to re-enact in s. 197 the permission given in s. 195 to grant a sanction in general terms, as also the exclusion of a sanction (irregularly) granted under s. 197 from the operation of s. 537, point to a deliberate intention on the part of the Legislature to throw upon the authority empowered to grant the sanction, the duty of designating the offence for which leave to prosecute is given and this duty cannot be delegated, **16 M. 468 at pp. 473-74.** In **35 C. 141** an omission in a sanction under s. 196 was *held*, cured by this section. *See* Note 8 at p. 550.

61. **Effect of the absence of Political Agent's certificate under s. 188.**—*See* Notes 6—9 to it.

62. **Effect of not sending a case under s. 476 (1) to the 'nearest' (old section) Magistrate of the first class.**—*See* Notes 52 and 53 to s. 476. Order merely directing prosecution but omitting to direct the accused to the nearest first-class Magistrate is at the most an irregularity, **37 M. 317**, *see* Note 51 to s. 476.

XI.—Cl. (d).—MISDIRECTION IN CHARGE TO JURY.

63. **Every defect in summing up would not amount to a misdirection.**—For cases on misdirection generally, *see* Notes to ss. 297, 298 and 299 and Notes under Heading XI to s. 423. In the appeal of MR. CHANNING ARNOLD, Editor of *the Burma Critic* against his conviction, on the ground that serious miscarriage of justice had taken place by reason of the nature of the Judge's charge to the jury, *the Privy Council*, while discountenancing the idea that in region of fact they will interfere, even if they were disposed to differ from the Presiding Judge, unless something gross amounting to a complete misdescription of the whole bearing of the evidence as occurred, observe as follows regarding the charge to the jury: " A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province," **41 C. 1023 (P.C)**. A conviction obtained on a trial by jury would not be bad merely because the charge to the jury was not perfectly expressed or there was misdirection in the charge, if otherwise there has been no failure of justice, **12 A. L. J. 33 = 14 Cr. L. J. 638.** In considering whether a judge has misdirected the jury, the tenor and general effect of the whole summing up should be looked at, and if, upon the whole summing up, the Court is of opinion that substantially the proper direction has been given to the jury, it will not interfere, though the Judge has omitted to direct the jury, expressly on some important point, **10 B. H. C. R. 75.** It would be a misplaced rule to apply to the direction of a Judge in a mofussil Court, the same criticisms, which would be applicable to the charge of a Judge in an English Court of Assize, **12 W. R. 80.** " If, however, every defect in summing up were to be regarded as a ground for setting aside a verdict of guilty, it is clear that the door of escape would be opened wide to criminals. This danger is, however, guarded against by *s. 426 (now this section)*, which enacts that no sentence shall be reversed, etc......unless in the judgment of the Appellate Court the accused person shall have been prejudiced, by such error or defect. There is, doubtless, some difficulty in saying

hen a prisoner is prejudiced, and it would not be safe to lay down any rule, although probably in most cases he ends of justice would be satisfied by considering whether if the case had been tried by a Judge and ssessors, the Court would set aside the finding *Per* SARGENT, J, 5 B H. C. R. Cr. Ca. 85 at p. 95; S. L. R. 102 = 11 Cr. L. J. 13. But in exceptional cases where the evidence is such that its real value cannot e properly appreciated except by the Court which had heard it given a new trial will be ordered 6 B. H. C. R. r. Ca. 47; 10 B. H. C. R. 497. The total absence of direction by the Presiding Judge as to the law as required y s 297 *cannot* be cured by s 537, 5 L. B. R. 149 = 11 Cr. L. J. 340, *see* Note 35 at p 799 In 8 L. B R. 125 = 7 Cr. L. J. 154, the Chief Court set aside a sentence of death as they held the charge was defective in law in not utting before the jury the alternative case that the accused may have caused the injuries which resulted in leath without the intention of causing death

64. Duty of Judge to direct the jury as to how far reliance may be placed on accomplice testimony. —*See Notes under Heading VII at pp 801—805* The omission to point out to the jury the danger of relying pon the uncorroborated testimony of an accomplice amounts to misdirection sufficient to set aside the verdict f the jury, 5 W. R. 80, 6 W. R. 17; 7 W. R. 2; 8 W. R. 19, 10 W. R. 17, 6 B H. C. R. Cr Ca. 57, 1 B. 475, 15 B. 15; 17 C. 642; Ratanlal 466. In a case of murder it was *held* that the Judge had not given a proper direction o the jury in telling them that it was for them to consider whether the evidence of the accomplice was strictly orroborated as to the prisoners, that it was not enough that the evidence should disclose a state of acts onsistent with the possibility of the truth of the accomplice's story, and that the Judge ought to have gone hrough the history of the crime as detailed by the accomplice to point out any independent evidence proving acts showing that the prisoners were or must have been present at or cognisant of the murder, 6 W. R. 54. *See* also 7 P. W. R. 1916.

XII.—THE EXPLANATION.

65. Significance of the words "in fact prejudiced."—The words 'in fact' were introduced appa ently in order to emphasise the duties of the Court to go into the merits before interfering in consequence of misdirection or other error, though the duty existed just the same, before those words were added —*Per* BENSON, J., 26 M. 1 at pp. 15-16. Now after conviction a breach even of a statutory provision can be emedied by the application of s. 537 unless a failure of justice has in fact been occasioned. The words in act' have at the last amendment been added to the section to emphasise the reality of the requirement, 8 C. 173. In this case exception was taken to the proceedings under s. 476 after conviction but the conviction was upheld through the proceedings under s. 476 were held to be illegal.

66. Explanation not applicable where defect affects jurisdiction.—Where a Municipal Secretary not authorised under s. 142 (2) of *the Bombay District Municipal Act* III of 1901, prosecuted certain persons and it was contended that the prosecution was illegal, *held* that the conviction was bad as the irregu arity was one of jurisdiction to which the explanation to s 537 did not apply, 3 S. L. R. 13 = 9 Cr. L. J. 449.

Distress not illegal nor distrainer a trespasser for defect or want of form in proceedings.

538. No attachment made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, *on account of any defect or want of form in the summons, conviction, writ* of * attachment or other proceedings relating thereto

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CHAPTER XLVI

MISCELLANEOUS

Courts and persons before whom affidavits may be sworn

539. Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland

* This word was substituted for the word distress by Act XVIII of 1923

Notes.—1. Scope of the section.—This section applies only to affidavits to be used in the High Court, *e.g.*, under s. 526 (4). The only provision in the Code for use of an affidavit in any Court subordinate to a High Court is s. 74, which provides for proof of service of summons outside the jurisdiction of the Court issuing it. In all other cases, inferior Courts are expected to act on direct oral testimony.

2. Affidavits not to be used to prove proceedings in Court below are wrong.—An affidavit cannot be used as affording materials for reviewing a Magistrate's decision. When the charge is such that, if true, it would give the Magistrate jurisdiction, his decision is final, **10 B. H. C. R. 102.**

3. Deputy Magistrate not competent to administer affidavit to be used in High Court.—In 14 C. 653 it was held a Deputy Magistrate has no power to administer an oath to a person making an affidavit under this section. In **8 C. W. N. 40,** an affidavit sworn to before a Magistrate was filed in support of an application under s. 195 for sanction to prosecute for perjury, committed before the High Court in its original civil jurisdiction and the affidavit was objected to on the strength of the above Ruling. *Held,* the objection was untenable, as the proceeding for sanction was a civil proceeding and as such the affidavit was duly sworn under s 197 of the *Code of Civil Procedure*, 1882 [now s. 139 of Act V of 1908].

A Magistrate is a Judge within the meaning of s. 19 of the Penal Code read with s. 4 (2) of the Code only when he is exercising jurisdiction in a suit or in a proceeding. Therefore an affidavit sworn before a Magistrate cannot be used in the High Court, **5 Pat. 110.**

4. By whom affidavits may be verified?—Any Court or Magistrate or the Clerk of a District Court, shall on application, take such affidavit or statement on solemn affirmation and authenticate same by signature. *Bombay Gazette*, 1879, pp. 471—475.

5. Duty of persons who administer affidavits and those who prepare them.—"I am afraid, however, that it may be the case that the care and precision with which affidavits are intended to be verified and sworn to by the persons who make them are not always observed by those who administer affidavits and those who prepare them. The intention of the law is and it cannot be too often repeated that an affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. Further, as it is for human beings to make a mistake in reciting a fact the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct." *Per* KNOX, J., in **36 A. 18.**

Affidavit in proof of conduct of public servant.

***539-A.** (1) When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate.

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief.

(2) The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended.

Local inspection.

***539-B.** (1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

* Sections 539-A and 539-B were inserted by Act VIII of 1923.

(2) Such memorandum shall form part of the record of the case If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under section 293

Referring to the enactment of these sections, the Sel. Com. say—

"We have omitted the proviso contained in sub-sec. (1) of the proposed new s 539 providing that an accused person shall not be compelled to make an affidavit, as in the first place it will be extremely difficult to say what the expression "accused person" means and, secondly, the proviso is in conflict with the provisions of sub-sec. (4) of s 526 In view, however, of the opposition manifested in certain quarters we think that sub-sec (3) of the proposed new s 539-A might be omitted

"We think it desirable to provide that the copy of the memorandum referred to in sub-sec. (2) of the new s 539-B shall be given free of cost."

Notes —1. Local Inspection.—A local inspection by a Magistrate is only permitted by s 539 (3) for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself, **49 All. 475.**

2. Omission to record a memorandum under s. 539-*B* —*See* Note 52-A to s. 537. *See* also **28 Bom. L. R. 302; 53 C. 46.**

It is very desirable that a judicial officer conducting a local investigation should place upon record the result of his inspection at once so that the parties may have an opportunity of seeing what the facts are which the judicial officer considered to be established by the local investigation and he should never deliver his judgment relying upon that investigation without giving an opportunity to the parties to rebut his opinion, **110 I. C. 463, 29 Cr. L. J. 719.**

Power to summon material witness, or examine person present

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or re call and re-examine any person already examined, and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case

Notes.—1. How discretion vested in Court ought to be exercised?—The right of the Court to exercise the powers given by this section is unrestricted, **2 C. W. N. 702.** This section confers very wide powers upon a Court. But the wider the powers, the greater the exercise of discretion required of the Magistrate, and read along with s 252, it will be seen that by this section, it was not intended that the Magistrate should exercise his powers at the bidding of any person, but that the powers are given to prevent any danger or miscarriage of justice, just because some particular witness has not been called *Per* KNOX, J, in **12 A. L. J. 15 = 14 Cr. L. J. 682.** The Judge ought to exercise his own discretion and ought not to allow himself to be guided by his superior, **7 S. L. R. 82 = 15 Cr. L. J. 378.** *See* also Note 14 at p 715

(i) *Section not intended to reverse order prescribed for Sessions trial*—It is not intended by this section that a Judge should have power to reverse the order of a Sessions trial and call the witnesses summoned for the defence before the case for the prosecution is closed **14 A. 242**

(ii) *Magistrate must not anticipate defence to prejudice accused person*—This section is a supplementary provision enabling, and in certain circumstances, imposing on the Court the duty of *summoning a* material or essential witness who would not otherwise be brought before the Court. A Magistrate misuses this section in using it to anticipate the defence of an accused person to his prejudice, and in using it after satisfying himself that he has a good defence to discharge instead of acquitting him A Magistrate cannot properly resort to this section in order to avoid the responsibility of making up his mind as to the value of the evidence for the prosecution, nor does the power herein conferred upon a Court to summon a witness extend to witnesses named for the prosecution or the defence, for such witnesses the Court is bound to summon unless there be cause to the contrary, **11 P. R. 1886.** It is not the province of the Court to examine any witness unless the

pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of *the Evidence Act.* *See* the remarks in **6 C. 279 = 7 C. L. R. 385.**

(*iii*) *Section not intended to fish for witnesses.*—This section does not empower a Sessions Judge to fish for witnesses or warrant an order for further inquiry to be made by a committing Magistrate after the trial has been concluded so far that no witnesses remain to be examined for either side, and the assessors have given their opinions, **4 P. R. 1892.**

2. Court bound to summon and examine any witness whose evidence is essential to just and proper decision of case.—Under this section the Court is bound to sommon and examine any witness whose evidence seems to be essential to the just and proper decision of the case, **6 C. W. N. 98.** In a case in which there is a matter necessitating inquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence, the Court should call him, but certainly not one on whose evidence it could not rely, at any rate in a case in which the prisoner is defended by Council, **14 C. 245.** *See* **14 A. 521.** And although an accused in a Sessions trial may, through his neglect, have lost his right to demand that a witness whom he had not named before, should be summoned and the trial adjourned for that purpose, still if he satisfies the Judge that such evidence is material, and his application is not merely to delay the trial, the Judge should take the necessary steps to procure his attendance, **19 A. 502.** Although an accused has exhausted the power of summoning witnesses for the defence, he is still enabled to examine witnesses not included in his list by moving the Magistrate to summon any other witnesses, for proper reasons, **36 A. 13.** *See* also **8 A. 668; 46 M. L. J. 325; 1 Rang. 308.**

3. No Magistrate other than trial Magistrate can summon witnesses.—A Magistrate who is not seized of the case has absolutely no power to issue summons on witnesses at the instance of any party. An order for summoning witnesses cannot be passed during the temporary absence of the trying Magistrate, by a Magistrate, who is not seized of the case, **36 A. 13.**

3-A. Court hearing appeal on transfer, not bound by opinion of Magistrate from whom the appeal was transferred.—*When a Sub-Divisional Magistrate, in hearing an appeal, had issued summonses for the* examination of certain witnesses as Court witnesses, it is not incumbent on the District Magistrate, who withdraws the part-heard appeal to his own file, to examine those witnesses. The Court to which an appeal is transferred for disposal, and on which the responsibility for its correct disposal rests, is not bound by any opinion as to the necessity for taking further evidence, formed by the Court from which the appeal was transferred, and which is no longer responsible for the decision of the appeal, **31 M. 277,** where **23 M. 314** and **L. R. 29 I. A. 196** are *referred to.*

4. Court may examine witnesses at any stage—

(*i*) *At any time before delivery of judgment.*—A Magistrate is strictly within his rights under this section in receiving fresh evidence after evidence of both sides had been taken and the case adjourned for judgment, inasmuch as the case was still a pending case when such evidence was taken, **24 C. 167.** But if he does so, he must give the accused an opportunity of rebutting the evidence so given. *See,* however, Note 1 (iii). In **15 C. W. N. 414 = 12 Cr. L. J. 7,** the practice of examining witnesses for the prosecution after the defence is closed to bolster up the prosecution was deprecated. *See* **4 C. W. N. 604.** *See* also **27 C. W. N. 675.**

(*ii*) *Prosecution witnesses may be interposed in midst of accused's case.*—It is entirely within the discretion of a Magistrate conducting a trial in a warrant case to admit evidence on behalf of either side at any stage of the trial; but in exercising the discretion conferred on him by this section, he ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused, **21 W. R. 61.** After the prosecution has closed its case, no further evidence can be admitted against the accused who has entered on his defence except under this section for which valid reasons must be recorded, **10 A. L. J. 383 = 13 Cr. L. J. 772.**

5. Who may be called as witnesses.—Any person may be summoned.

(*i*) *Right to summon any person.*—Magistrates are empowered by this section and other provisions of the Code to summon persons resident in another district as witnesses, **3 M. H. C. R. Appx. V.**

(*ii*) *Discharged person as witness for prosecution.*—There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution, **7 W. R. 44.**

(iii) *Apprehended person as a witness.*—A person apprehended by the Police and brought before the Magistrate with the accused is a competent witness, though not discharged by the Magistrate, provided he be not charged along with the accused, **5 B. H. C. R. Cr. Ca. 1.**

(iv) *When Court is bound to call medical witness*.—When the defence is based on s 84 I P C, the Sessions Judge may, acting under this section and s. 165 of *the Evidence Act*, ascertain the behaviour exhibited by the prisoner during the years of his life previous to the homicide, and, if the accused has been kept in a lunatic asylum, record medical evidence of the facts observed there, **Ratanlal 279.** Where there was no evidence regarding the nature of the injuries which formed the subject of the offence under trial, the Sessions Judge was bound under this section to summon the medical officer as a witness, **6 C. W. N. 98.**

(v) *Accused as a witness*.—This section does not seem to authorise the examination of the accused as a witness, not even at the stage of an appeal, as the appeal is but the continuation of the original case, **12 M. 451.** *See* Note 17 at p 982, **7 Lah. 143.**

6. Right of both parties to cross-examine Court witness on all matters.—The ordinary practice in properly constituted Courts is, that where a witness for the prosecution is not called on the part of the Crown he is placed in the witness box in order that the defence may have an opportunity of cross-examining him and *à fortiori* where the Judge thinks it necessary to call such a witness and examine him, the prisoner ought to be allowed to cross-examine him, **5 C. 614 = 5 C. L. R. 364** A complainant is entitled to cross examine a witness summoned by the Court **24 C. 288.** When a witness is called by the Court under this section, the prosecution and the accused are both equally entitled to a full cross-examination of the witness on all matters relevant to the inquiry The cross-examination by the parties cannot under the law be restricted to the points on which he has been examined by the Court The parties have the same right of unrestricted cross-examination, even where an Appellate Court calls a witness acting under this section, **35 C. 243; 47 A. 147.**

Note.—Under s 265 of *the Evidence Act* a party to a proceeding is not allowed to cross-examine a witness, upon an answer given by him to a question put by the Court without the permission of that Court, **24 C. 288**

7. Accused's right of cross-examination not taken away, when Court calls witness abandoned by defence.—In the course of a trial the accused obtained a process for the attendance of a Police-officer but before the witness appeared, the accused asked the Court to countermand the order for the attendance of that witness The Sessions Judge, however, examined the Police-officer as a Court witness but refused to allow the accused to cross-examine him *Held*, the accused was entitled to cross-examine him. The fact that he had attended as a witness for the defence and was not examined by the accused, is no sufficient reason to refuse cross-examination when he was afterwards examined by the Sessions Judge **29 C. 387.** *See* also **3 B L. R. Appx. Civ. CXLV.**

8. Public Prosecutor not entitled as of right to call witness not called before Magistrate.—The Public Prosecutor cannot demand, as of right that a witness not examined by the Magistrate should be called and examined It is entirely in the discretion of the Court, **14 A. 212.**

9 Discharging accused on evidence of Court witnesses, not illegal.—Where a Magistrate examined certain persons as Court witnesses and, relying on their evidence discredited the complainant s witnesses and discharged the accused, *held* that the procedure was not illegal **Weir II, 714.**

10 Failure to exercise discretion not error in point of law.—The High Court as a Court of Revision, cannot say that a Sessions Judge is wrong in point of law because he does not in the exercise of his discretion under this section postpone a case for the evidence of a witness, **12 W. R. 44**

Provision for inquiries and trial being held in the absence of accused in certain cases

*" **540-A.** (1) At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that anyone or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused

* This section was inserted by Act XVIII of 1923 s 151

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order, that the case of such accused be taken up or tried separately."

Note.—This section is added by Act XVIII of 1923 and provides for a case where there is a large number of accused persons and when one or more of them is incapable of remaining at the bar.

Sub-sec. (1) deals with the case of an accused represented by a pleader and whose presence can be dispensed with. Sub-sec. (2) deals with the case of an accused, not represented by a pleader and whose personal attendance is necessary. In such cases the Court may either adjourn the trial or order the accused to be tried separately.

Power to appoint place of imprisonment.

541. (1) Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place * any person liable to be imprisoned or committed to custody under this Code shall be confined.

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-sec. (2)† he shall, on being released therefrom, be sent back to the civil jail, unless either—

(*a*) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under s. 342 of the Code of Civil Procedure; or

(*b*) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under s. 341 of the Code of Civil Procedure.

Notes.—1. Sections 341 and 342 of the Code of 1882 correspond with s. 58 of the present *Code of Civil Procedure* V of 1908.

2. Jails for European British subjects.—(*i*) *Bengal.*—The Presidency jail, Hazaribagh, Penitentiary, the Jails at Bhagulpore, Midnapore, Rajshahi, Cachar, Dacca, Dharjeeling, Chittagong, Cuttack, Tejpore, Patna and the lock-up at Dinajpore.—*Calcutta Gazette*, 1873.

(*ii*) *Bombay.*—The jails at Poona, Yerowda, Karachi and Aden—*Bombay Gazette*, 1873. The jails at Ahmedabad, Surat and Satara where imprisonment does not exceed one month and Karwar where imprisonment does not exceed three months—*Bombay Gazette*, 1874, p. 297.

(*iii*) *Punjab.*—The jails at Lahore, Peshawar, Rawalpindi, Multan, Umbala and Delhi.—*Punjab Gazette*, 1873.

(*iv*) *Madras.*—The Madras Penitentiary and the jails at Ootacamund, Rajahmundry, Salem, Coimbatore, Trichinopoly, Vellore, Cannanore, Cuddalore, Cochin, Calicut, Berhampore, Bellary, Madura, Mangalore, Tellicherry, Vizagapatam, Chingleput.—*Madras Notifications*, 1872 and 1873.

3. Dividing imprisonment between different jails.—There is no law empowering a Criminal Court passing a sentence of imprisonment to divide the imprisonment between different jails. From this section and from s. 60, cl. (*l*) of Act IX of 1894 and Act No. V of 1870 it seems that this power belongs to the Local Government and the Inspector-General of Prison, **Ratanlal 827.**

4. Illegal to sentence prisoner to imprisonment in "Police lock-up" in the absence of notification.—In the absence of any direction under this section by the Local Government, declaring a 'Police lock-up' as a

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* A place so appointed is not a "prison" within the meaning of s. 3 (*b*) of *the Prisons Act* IX of 1894, printed in Appendix

† For the word and figure "sub-section (1)" the word and figure "sub section (2)" are substituted by Act VII of 1921

place where persons liable to be imprisoned may be confined it is illegal for a Magistrate to sentence a prisoner to suffer imprisonment in such a place The terms prison and jail do not include a Police lock up 7 L. B R 62 = 15 Cr L J 10

8 **Is it illegal to commit person to jail not appointed by Local Government?**—In 29 C 286 (F B) the question was raised whether committing an European British subject to a jail which had not been appointed by the Local Government for custody of European British subjects was without jurisdiction or was only an irregularity which was to be rectified not by an applicat on under ss. 491 and 456 but by a transfer of the peti tioner to a proper jail under s. 29 of *the Prisoners Act* and the question was however not decided as the particular jail in the case was found to have been appointed. Two of the Judges were of opinion that no question of jurisdiction was involved.

Power of Presidency Magistrate to order prisoner in jail to be brought up for examin ation

542. (1) Notwithstanding anything contained in *the Prisoners Testimony Act* 1869 any Presidency Magistrate desirous of examining as a witness or an accused person in any case pending before him any person confined in any jail within the local limits of his jurisdiction may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody at a time to be therein named to the Magistrate for examination

(2) The officer so in charge on receipt of such order shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid

Note —*The Prisoners Testimony Act* 1869 is repealed by *the Prisoners Act* III of 1900 printed in Appendix. S 37 of the Act provides for taking the evidence of a prisoner by other Courts *See* also ss 39 and 42 S 39 practically repeals the section of the Code

Interpreter to be bound to interpret truthfully

543. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement he shall be bound to state the true interpretation of such evidence or statement

Note —As to interpretation of evidence to the accused or his pleader *see* s 361 and *the Indian Oaths Act* X of 1873 s. 5 printed in Appendix. Notwithstanding the provisions of s 364 when an interpreter is employed the language in which the statement of the accused is conveyed to the Court by the interpreter is the language in which it should be recorded 5 C. 826; 21 C. 642 Failure to administer oath by the interpreter does not make the deposition inadmissible 35 C 808

Expenses of com plainants & witnesses

544. Subject to any rules made by the Local Government * any Criminal Court may if it thinks fit order payment on the part of Government of the reason able expenses of any complainant or witness attending for the purposes of any inquiry trial or other proceeding before such a Court under this Code

Notes —1. **Courts discretion to determine the expenses to be paid to witness must be exercised reasonably** —The rules framed by the Government for payment of expenses etc invest the Magistrate trying a warrant-case with a discretionary power exercisable by him within the limits specified in the rule itself Such discretion however must be exercised according to sound judicial principles and reasonably 9 Bom L R. 333 = 5 Cr L J 329 In this case the Magistrate at the close of the prosecution and before the commencement of the defence removed his Court to a distance on account of other official business it was *held* that the accused should not be made to suffer and the expenses of his witnesses ought to be paid by Government

2 **Accused not to be called upon to pay expenses when witnesses re summoned under s 340** —*See* 8 Bur L T 43 = 15 Cr L J 687

3 **Rules made by various Local Governments for payment of expenses of complainants and witnesses**—

* The words w h the prev ous sanc on of the Governor Gene al in Counc l we e om ted by *he Devo ution A t* XXXVII of 1920

BENGAL RULES.

1. The Criminal Courts are authorised to pay at the rates specified below the expenses (*a*) of complainants or witnesses whether for the prosecution or for the defence (i) in cases in which the prosecution is instituted, or carried on by, or under the orders or with the sanction of the Government, or any Judge, Magistrate or other public officer, or in which it shall appear to the presiding officer, to be directly in furtherance of the interests of the public service; and (ii) in all cases entered in column 5 of the Schedule II appended to the Criminal Procedure Code as not bailable; and (*b*) of witnesses in all cases in which they are compelled by the Magistrate of his own motion to attend under the provisions of s. 540 of the Code.

2. If a witness is summoned at the instance of the complainant or accused under s. 244, his expenses shall not be withheld from him except on the ground of failure to do his duty as a witness when summoned

3. As a general rule, the allowances to be paid to complainants and witnesses shall be a diet allowance calculated at the following rates:—

(*a*) For the ordinary labouring class of natives, 2 annas per diem.

(*b*) For natives of higher rank in life, 4 annas per diem.

(*c*) For Europeans and natives of superior rank, a diet allowance according to circumstances up to a limit of Rs. 3 per diem.

4. In addition to the above charges for toll at ferries will be allowed at the authorised rates to the extent to which they may have been actually incurred.

5. Other travelling expenses will be given only when the journey could not have been performed on foot, or in the case of persons whose age, position and habits of life render it impossible for them to walk In such cases, in addition to diet allowance and ferry tolls travelling allowance shall be given at the following rates:—

(1) When the journey is by rapid dâk by road, the actual expenses incurred up to maximum limit of 4 annas a mile.

(2) When the journey is wholly or partly by rail—

(*a*) For the ordinary class of natives, third-class railway fare.

(*b*) For natives of higher rank in life, intermediate class railway fare, except in the case of Darjeeling-Himalayam Railway where second-class railway fare may be allowed.

(*c*) For Europeans and natives of superior rank, second-class railway fare.

(3) In the Eastern Districts of Bengal, where the only mode of travelling is by water the actual expenses incurred for boat-hire up to limit of Rs. 2 per diem.

6. Notwithstanding the above rules.—(1) Government servants when summoned to give evidence in their *public* capacity shall receive nothing from the Court. In this case they are entitled to travelling allowance under the Civil Service Regulations. Government servants when summoned to give evidence in their *private* capacity may be paid by the Court and may retain any travelling allowance due to persons of corresponding rank under these rules, but no diet allowance, and they shall not be entitled to any travelling allowance under the Civil Service Regulations.—(2) To witnesses following any profession, such as medicine or law, a special allowance shall be given according to circumstances.

7. Officers will be held responsible that parties or witnesses are brought to Court together as far as possible, so as to save expense. The hire of more than one boat shall not be allowed in one case unless the presiding officer is satisfied that the witnesses could not have arranged to come together.

8. The number of days for which diet allowance should be granted will be determined by the officer ordering payment in each case.

9. For this purpose and for regulating the reinbursement of tolls paid, a table shall be prepared and kept in each Court, showing the distance of each thana from the sudder station and subordinate stations, the number of intermediate ferries to be crossed, and the authorised rates of charges for tolls at each of these ferries, the existence or absence of roads or waterways being also noted in the table.

The above rules are issued in supersession of all existing rules —*Cal Gaz, Part I, July 3rd*, 1895, *page* 648

BOMBAY RULES

1 Payment of the expenses of complainants and witnesses on the part of Government, may be ordered—

(1) *by Courts of Sessions* in any case which comes before such Courts,

(2) *by Magistrates* (*a*) in every case in which the offence, or any of the offences charged against the accused, is a non bailable offence, and (*b*) in cases in which the offence or all of the offences charged against the accused is, or are, bailable, only if the prosecution has been instituted or is being carried on by or under the orders of, or with the sanction of Government, or of any Judge, Magistrate or other public officer, or if the Magistrate thinks that the prosecution is directly in furtherance of the interests of the public service, or that the person to whom payment is to be made is in indigent circumstances

Provided always that no such payment shall be made to any witness on the part of Government when the expenses of the attendance of such witness have been deposited in Court under ss 216, 244 or 257 of *the Criminal Procedure Code*

2 Payment as aforesaid may be made at the rates specified below, *viz* —

(*a*) In the Mofussil European and East Indian witnesses when summoned to give evidence are to be allowed their actual expenses for carriage, when the same are not in excess of 6 annas a mile They are also to be allowed a sum not exceeding Rs 2-8 a day for subsistence, if they demand the same

(*b*) European and East Indian witnesses coming from the Mofussil to attend trials at the High Court are to be remunerated as follows —

1st class —Each person coming under this class to be allowed 4 annas a mile as travelling expenses for himself and a servant if a railway be available and 8 annas per mile if the only means of communication is an ordinary road 5 rupees a day as hotel charges while in Bombay, and 2 rupees for carriage-hire for each day he may have to attend the High Court.

2nd class —Persons under this class to have their actual travelling expenses 3 rupees a day as board expenses in Bombay and 1 rupee conveyance hire for each day of attendance at the High Court

3rd class —Persons of this class to have their actual travelling expenses and 1 rupee 8 annas a day as board allowance

Note.—The Magistrate or other authority who sends a witness to the High Court shall determine to which of the above classes he belongs.

(*c*) As a general rule native witnesses of the better class as *patels, pandharpeshas, merchants, vakils*, and persons of corresponding rank, as well as all witnesses who are in no way concerned in the case in which their evidence is given but whose evidence is required for furthering the ends of justice (such as attesting witnesses to depositions and inquest reports, provided they can read and write) are to be allowed 6 annas a day as subsistence money, and they are also to receive railway and other travelling expenses that have been actually incurred by them, provided they be reasonable.

(*d*) Native witnesses of the class of cultivators and menials who would not under ordinary circumstances voluntarily incur any expense on account of special lodging when away from home are to be allowed subsistence money at the rate of 4 annas a day and are also to receive railway and other travelling expenses actually incurred by them provided the same be reasonable.

Note.—*See* **9 Bom L. R 353 = 5 Cr. L. J. 329** in Note 1

3 Peculiar cases *i e*, cases not coming under the operation of clauses (*a*) (*b*) (*c*) and (*d*) of Rule 2, are to be dealt with according to their own merits and at the discretion of the Court from which subsistence or travelling allowance is demanded

4 When a witness lives in the same town or village in which the Court before which he is required to give evidence, is situated the Court may award him such sum, not exceeding 4 annas a day, as may

compensate him for any loss he may have incurred by attendance upon the Court. Subsistence allowance should be paid to witnesses day by day as it may become due; payment should not be deferred until the conclusion of the trial.—*Bombay Gazette*, 1884, Pt. I, p. 204; *Man.*, p. 394.

MADRAS RULES.

(*a*) *In the City of Madras.*

1. Subject to the provisions hereinafter contained, the expenses of witnesses will be paid on behalf of Government in the following classes of cases, *viz.*:—

(*a*) Cases shown in the second Schedule of the Code of Criminal Procedure as not bailable

(*b*) Cases in which the prosecution is instituted or carried on under the orders or with the sanction of the Governor-in-Council or of any public servant acting as such.

(*c*) Where the witness in question has been compelled to attend by a process issued under section 540 of the Code.

(*d*) Cases in which the Court certifies that the attendance of such witness was directly in furtherance of the interest of public justice.

2. For the purposes of these rules, Europeans, Eurasians and Natives shall be divided into three classes, and the Magistrate before whom they are required to appear, or the Commissioner of Police, or, in the case of witnesses from the Mofussil, the Magistrate of the district from which they come, shall fix the class with due regard to the station in life of each individual.

Note.—For the purposes of this rule, the Magistrate of the district may delegate his powers to any Subordinate Magistrate.

3. The following are the maximum rates which may be awarded to the several classes of witnesses and no expenses in excess of, or other than, those here provided for, shall be allowed:—

Witness.	Class.	Subsistence allowance.	Carriage-hire allowable for days of actual attendance.	Travelling expenses, if any, incurred		
				By rail.	By road.	By sea or canal
Europeans and Eurasians ...	1st class	5 Rs per day.	3 Rs. per day.	1st class fare.	8 As., per mile.	Actual expense of passage.
	2nd ,,	3 ,, ,,	2 ,, ,,	2nd ,,	6 ,, ,,	
	3rd ,,	1½ ,, ,,	1 Re. ,,	3rd ,,	4 ,, ,,	
Natives	1st ,,	2 ,, ,,	2 Rs. ,,	1st ,,	6 ,, ,,	
	2nd ,,	1 Re. ,,	1 Re. ,,	2nd ,,	2 ,, ,,	
	3rd ,,	5 As. ,,	*Nil.*	3rd ,,	2 ,, per 10 miles.	

4. All disbursements under these rules shall be made by the Commissioner of Police, to whom witnesses coming from the Mofussil should report themselves on arrival at Madras.

5. Witnesses resident in the Presidency town will be entitled only to such actual expenses as they may show to the satisfaction of the Commissioner of Police that they have been obliged to incur in obedience to the process or order of the Courts.

6. Witnesses sent from the Mofussil will be furnished with a certificate by the despatching Magistrate showing the class to which they belong, the date of their departure, and the correct distance (if any) to be travelled by road; and unless such certificate is produced before the *Commissioner of Police*, that officer may disallow all or any of the expenses claimed.

7. Mofussil Magistrates may make reasonable advances to witnesses summoned by the High Court or Presidency Magistrates and requiring such advances to enable them to reach Madras, but shall in every such case note the same on the certificate referred to in Rule 73. The Commissioner of Police should also be advised of such advances and he will refund the amount to the officer making the advance.

8. Whenever it is practicable for witnesses to travel by rail or steamer they shall be allowed no more than the rates prescribed for those modes of conveyance

9 Subsistence allowance may be paid for the days occupied in travelling to Madras as well as in the return journey The subsistence allowance at Madras will cease as soon after the conclusion of the inquiry or trial as the means of quitting the town become available

10 The expenses of witnesses will be paid on production of a certificate signed by the presiding Magistrate or in the case of the High Court by the Clerk of the Crown setting forth the inquiry or trial in which their attendance was required and the days on which they attended.

11 It shall be competent to the Court before which a witness appears to disallow payment of any expenses on behalf of Government if for any cause such Court thinks fit to do so.

12. The Commissioner of Police will disallow the whole or part of the expenses of any witness for the defence whose evidence may not seem to him to have been material unless he is satisfied that such witness has been brought down to Madras against his will and that no compensation for his expenses has been paid or deposited by the defendant This power does not extend to the case of a witness who has been examined and certified by the Court or Magistrate to have been material.

13 In applying the foregoing rules to public servants to whom the Civil Service Regulations are applicable the following additional rules shall be observed —

(1) When a public servant appears in any case under Rule 68 to give evidence in his official capacity that is evidence of facts within his knowledge as an official no payment shall be made to him, but the Court will give him a certificate setting forth that he appeared to give evidence of what had come to his knowledge or of matters with which he had to deal in his official capacity the dates on which he appeared, and the period for which he was detained so as to enable him to draw travelling allowance and batta under Article 1133 of the Civil Service Regulations.

(2) When a public servant appears in his official capacity as a witness in a case which does not come under Rule 68 (*e g* In a case in which s. 244 (3) or s. 257 Code of Criminal Procedure, is applied), or when a public servant appears to give evidence in any case as a private person travelling allowance and batta may [illegible] of all such payments made to him to [illegible] paid as batta and the period during [illegible]

(3) When an official of the Court of Wards appears in his official capacity as a witness *in a case* connected with an estate under the superintendence of the Court of Wards, the Judge or *Magistrate before* whom the trial takes place will furnish such official with a certificate showing the days on which *he attended* to give evidence and the amount of batta and travelling allowance paid to him on that account.

* (4) When a public servant whose emoluments are governed by the *Army Regulations, India*, appears in any case under Rule (1) to give evidence in his official capacity *he shall be paid the travelling* allowance and batta admissible under these rules and shall be furnished with a *certificate showing in detail the* amount paid. If the amount paid is less than the amount admissible to him under the [illegible] to which he is subject the difference will be paid to him by the military authorities on *production of the* [illegible]

14 Medical subordinates in Local Fund or Municipal employ (including *Government* [illegible] lent to, and paid by local bodies) when attending Court to give evidence in *their public* [illegible] be paid the same rates of travelling allowance and batta as would be admissible to Governme [illegible] similar grades under the Civil Service Regulations

15 Subjects of the French Government who are *in the official* [illegible] in the French Dependencies in India appearing as witnesses before *Criminal* [illegible] may, if such claims be *made* be paid their expenses at the rates to which they [illegible] Regulations of their

* Added by G O No 943 *Judicial dated* [illegible]

own Government in like case. Magistrates are required to refer any doubtful claim for scrutiny to the Collector of South Arcot, who is the Special Political Agent for the French Dependencies in India.

16. Officials of the Government of Ceylon appearing as witnesses before Courts in Madras City may, if such claim be made, be paid their expenses at the rates to which they are entitled under the Regulations of their own Government in like case. The claim should be submitted through the head of the department to which the official belongs.

(b) In Mofussil Courts.

1. The Criminal Courts are authorised to pay at the rates specified in Rule 87, the expenses of complainants and witnesses in cases in which the prosecution is instituted or carried on by, or under the orders, or with the sanction of the Government, or of any Judge, Magistrate, or other Public officer, or when it shall appear to the Judge or Magistrate presiding over such Courts to be directly in furtherance of the interests of public justice; also in cases entered in col. 5 of the Schedule II, appended to the Code of Criminal procedure, as not bailable; and in all cases in which the witnesses are compelled to attend by a Magistrate under the provisions of Chapter XLVI of the Code.

2. (1) For the purpose of these rules, witnesses are divided into two classes, namely, officials and non-officials. Official witnesses, that is to say, public servants to whom the Civil Service Regulations are applicable, summoned to give evidence as officials, are entitled to receive for their journeys to and from the Court and for the days spent by them in attendance at the Court to give evidence in cases coming under Rule 84, travelling allowances, at the rates prescribed by the Civil Service Regulations for the time being in force. The Court shall not, however, make any payment to official witnesses in such cases, but shall grant them certificates setting forth that they appeared to give evidence of what had come to their knowledge, or of matters with which they had to deal, in their official capacity, the date on which they appeared and the period for which they were detained, so as to enable them to draw travelling allowances and batta under Article 1133 of the Civil Service Regulations.

(2) When a public servant appears in his official capacity as a witness in other cases (*e.g.*, in cases in which s. 244 (3) or 257, Code of Criminal Procedure, is applied), or when a public servant appears to give evidence in any case as a private person, travelling allowance and batta may be paid to him in the ordinary manner, but the Court shall send an advice of all such payments made to him to the head of the office in which he is employed. In this advice the amount paid as batta and the period during which the attendance of the witness in Court was necessary shall be stated.

(3) When an official of the Court of Wards appears in his official capacity as a witness in a case connected with an estate under the superintendence of the Court of Wards, the Judge or Magistrate before whom the trial takes place will furnish such official with a certificate showing the days on which he attended to give evidence and the amount of batta and travelling allowance paid to him on that account.

* (4) When a public servant whose emoluments are governed by the Army Regulations, India, appears in any case under rule (1) to give evidence in his official capacity, he shall be paid the travelling allowance and batta admissible under these rules, and shall be furnished with a certificate showing in detail the amount paid. If the amount paid is less than the amount admissible to him under the military rules to which he is subject, the difference will be paid to him by the military authorities on production of the certificate.

3. Medical subordinates in Local Fund or Municipality (including Government servants lent to, and paid by, local bodies) when attending Court to give evidence in their public capacity, shall be paid the same rates of travelling allowance and batta as would be admissible to Government servants of similar grades under the Civil Service Regulations.

4. Non-official witnesses are entitled to travelling allowances under two different scales as shown below, according as they are (1) Europeans or East Indians, or (2) Natives. Persons falling under either of these descriptions are, for the purposes of these rules, divided into three classes; and the Judge or Magistrate before whom they are required to appear either as complainants or as witnesses shall be careful to fix the class with due regard to the station in life which they occupy:

* Added by G O No. 943, Judicial, dated 18th June, 1910

(*b*) for Natives of higher rank in life, and for Europeans and Eurasians not coming under the next rule, the actual cost of conveyance (not exceeding 6 annas a mile) or second-class railway fare, *plus* one rupee a day for subsistence;

(*c*) for Europeans and Eurasians following any profession, such as law or medicine, indigo planters and the like, actual expenses for conveyance (not exceeding 8 annas a mile), or first-class railway fare, *plus* an allowance not exceeding Rs. 5 per diem, the amount of the allowance to be fixed by order of the Court before which they appear;

(*d*) for Government servants, actual travelling expenses only.

The number of days which should be allowed for the passage to and from will be determined by the officer ordering the payment in each case. For this purpose a table should be prepared and kept in each Court, showing the distance of each thana from the sudder station and subordinate stations, the number of intermediate ferries to be crossed, and the existence or absence of roads or waterways.—*N.-W. P. Gaz.*, 1875, p. 106.

(i) Payment of travelling and dieting allowance to prosecutors and witnesses for the Crown attending the High Court in trials coming before it, in its original criminal jurisdiction will be made by the Registrar (Clerk of the Crown), to whom such prosecutors and witnesses shall report themselves on arrival at Allahabad.

(ii) Europeans and Eurasians shall be divided into three classes. The committing Magistrate shall carefully classify such persons according to their station in life and shall inform the Registrar.

The rates of payment of each class shall be as follows :—

Travelling Expenses—

	1st class.	2nd class.	3rd class.
By dâk	... As. 8 per mile. }	*Bonâ fide* expenses.	*Bonâ fide* expenses
" rail	... 1st-class fare. }		
Conveyance hire	... Rs. 3 per diem.	Rs. 2 per diem.	Re. 1 per diem.

Boarding Expenses—

In Allahabad ...	... Rs. 5 per diem.	Rs. 3 per diem.	Rs. 1-8 per diem.
On the journey ...	... " 4 "	" 2 "	Re. 1 "

Conveyance hire shall be paid only for the days of actual attendance at the Court.

(iii) The committing Magistrate shall inform the Registrar of the station in life of each native prosecutor and witness for the Crown, and every such person shall be paid his *bona fide* travelling charges and boarding expenses by the way and during his stay in Allahabad, according to such information.

(iv) Boarding allowance at Allahabad shall cease as soon as the means of quitting the station become available.

(v) The committing Magistrate may make a reasonable advance to any person desiring it to enable him to reach Allahabad. Such advance shall not be refunded by the Registrar, but shall be adjusted under the direction of the Accountant-General; but the commiting Magistrate shall inform the Registrar of such advance, so that he may be able to pay the rest of the due allowances.

(vi) The commiting Magistrate shall report to the Registrar the date of departure of every such prosecutor and witness, and shall instruct each to report himself as directed in class (1).

OUDH RULES.

Rules. (1) The Criminal Courts may pay, at the rates specified below, the expenses,

(*a*) of complainants and witnesses summoned to attend the Courts in all Sessions cases and inquiries into cases triable by the Court of Session or High Court (subject to the provisions of s. 216 of the Code of Criminal Procedure in respect of necessary witnesses for the defence);

(*b*) of complainants and witnesses for the prosecution in all warrant-cases;

(*c*) of witnesses for the defence in those warrant-cases only in which the Magistrate does not consider it necessary to act on the discretionary power granted him by s. 257 of requiring deposit of the expenses of a witness before summoning him.

Scale of rates at which expenses may be paid

Class I—Rupees 3 per diem All Europeans and Eurasians of the higher and middle classes and Natives of the higher classes

Class II—Rupee 1 per diem. Other Europeans and Eurasians and Natives of respectability generally, such as zemindars and tradesmen of the better sort

Class III—Annas 4 per diem Natives below the preceding class, but with some *status*, such as inferior zemindars, petty tradesmen, etc

Class IV—Annas 2 per diem. All Natives not included in the above classes, such as day labourers etc

Government servants only entitled to travelling expenses

(2) Nothing beyond actual travelling expenses shall be paid to Government servants

By Government Notification No 1513 dated 28th August 1883, published in *the North Western Provinces & Oudh Gazette*, 1st September, 1883 *patwaris* and *chaukidars* in the North Western Provinces & Oudh summoned as witnesses in Criminal Courts shall receive their expenses at the same rate as persons of their rank of life who are not Government servants'

Court s discretion

(3) The Court shall have absolute discretion to determine for the purposes of these rules, to what class any person belongs

Witnesses coming in from the country

(4) All persons residing within six miles of the Court may be considered as able to come in and return on the same day and should therefore be held entitled to one day s subsistence Those residing from 6 to 12 miles may come in one day and return the next, they should therefore draw two days subsistence, and so on, an extra day for every six miles or, in other words every witness may be allowed a day s allowance for every 12 miles or part of 12 miles, he has to travel

Witnesses coming in from the country

(5) These instructions have reference only to the time occupied by witnesses in going and coming, and they are to receive the expenses due to their class for each additional day that they may be kept in attendance by the Court. In some cases it may be found necessary to order witnesses to appear a second time It will then be for the Court to determine whether they are justified in remaining at the place where the Court sits, or should return to their homes for the time preceding the second date of hearing in the former case they may be allowed subsistence for every day they are detained, in the latter may be paid a second time for the journey to and from Court

Allowance payable to Nepalese subjects

Note.—As great difficulty is experienced in the disposal of cases of dacoity in which Nepalese subjects have to attend British Courts, the Lieutenant Governor has with a view of securing the attendance of witnesses in such cases from Nepal, been pleased to sanction the payment of the enhanced rates of subsistence allowance as noted below, to Nepalese subjects in all such cases.—

	Per diem Rs A. P	
For Class II	1 8 0	To be given at the discretion of the presiding officer of the Court.
" III	0 8 0	
" IV	0 4 0	

When travelling expenses by rail or dâk may be charged

(6) Travelling expenses by railway or by rapid dâk by road will be given only when the journey could not with reasonable care and expedition have been performed on foot or in the case of persons whose age, position and habits of life render it impossible for them to walk In such cases, in addition to expenses for subsistence expenses for travelling shall be given at the following rates —

Scale of travelling expenses

(*a*) when the journey is by rapid dâk by road, the actual expenses incurred up to a maximum limit of 4 annas a mile,

(*b*) where the journey is wholly or partly by rail,

For Natives generally

(1) for Natives generally, railway fare by the lowest class,

Europeans Eurasians and Natives of superior rank

Diet-money to be paid in addition.

Provided that, in cases where railway fare is paid, diet-money will be paid in addition to railway fare only for the number of days the complainant or witness is actually absent from his home.

CENTRAL PROVINCES RULES.

1. Subject to the following rules, the Criminal Courts are authorised to pay, at the rates specified below, the expenses of complainants or witnesses (1) in cases in which the prosecution is instituted or carried on by, or under the orders, or with the sanction of, the Government, or any Judge, Magistrate or other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of public justice; (2) in all cases entered in column 5 of the schedule appended to the Criminal Procedure Code as not bailable, and (3) of witnesses in all cases in which they are compelled by the Magistrate of his own motion to attend under the provisions of s. 540 of the Code.

Rate of Payment.

(*a*) For the ordinary labouring class of Natives, 2 annas per diem, together with actual railway fare by the lowest class;

(*b*) For Natives of higher rank in life, third-class railway fare and 4 annas per diem for subsistence;

(*c*) For Europeans and Natives of superior rank, second-class railway fare and a sum not exceeding 2 rupees per diem for subsistence;

(*d*) For witnesses following any profession, such as medicine or law, a special allowance according to circumstances;

(*e*) Government servants required to attend a Crimimal Court in their public capacity, will receive no travelling or subsistence allowance under these rules, but shall be entitled to draw travelling allowance under the rules in Chapter IV of the Travelling Allowance Code on an ordinary travelling allowance bill debitable to the department to which they belong. A Government servant attending Court in his private capacity, has no higher claim to allowances under these rules than any other private individual, and is only entitled to such railway and road travelling expenses as appear to the Court to be reasonable with reference to his *status*, provided that the amount paid shall in no case exceed the travelling expenses actually incurred.

(*f*) When there is no railway and a person is obliged to travel by dâk by road, the actual expenses up to a maximum limit of 4 annas a mile for travelling by road may be paid, subject to the proviso that the travelling allowance is only to be given where the journey could not have been performed on foot, or in case of persons whose age, position and habits of life render it impossible for them to walk.

2. The Court ordering the payment under these rules of the expenses of a complainant or witness shall decide—

(*a*) the class to which he belongs and the rate at which he is to be paid;

(*b*) the number of days necessary for his journey to and from the Court.

3. The Court shall exercise its discretion in ordering or refusing to order payment of expenses within the limits laid down in the foregoing rules whether an application for payment be made or not.—*C. P. Gaz. Notification No.* 1917, *dated 5th April,* 1888; *Ibid. Cr. Cir., Part II, No.* 58.

PUNJAB RULES.

1. All disbursements on account of the expenses of complainants and witnesses attending criminal trials before the Chief Court will be made by the committing Magistrate and will be adjusted by him. The committing Magistrate will determine the class to which each complainant and witness belongs.

2. Except for any special reason in any particular case, complainants and witnesses travelling at public expense will only be allowed to travel by road and charge accordingly, unless the journey can be accomplished more cheaply and expeditiously by rail.

3. The committing Magistrate, when despatching complainants and witnesses to the Chief Court, will instruct them to report themselves to the Registrar of the Court on their arrival at Lahore, and will, at the same time, report to that officer—

(*a*) the name of each complainant and witness;

(*b*) the class to which he belongs,

(*c*) the date of his departure to attend the Chief Court

(*d*) whether any, and, if so, what advances have been made to such complainant or witness to enable him to reach Lahore

4 When the trial in which the complainant and witnesses have appeared in the Chief Court is concluded, the Registrar of that Court will intimate to the committing Magistrate the date of the arrival of the complainants and witnesses at Lahore, and the date on which it was possible for them to quit the station The subsistence at Lahore will cease as soon after the conclusion of this trial as the means of quitting the station becomes available

5 The committing Magistrate may make reasonable advances to complainants and witnesses to enable them to reach Lahore, and, when necessary, the Registrar of the Chief Court will make advances to them at Lahore to enable them to return to their homes Care should be taken in making these advances that a larger sum is not paid to any complainant or witness than he is entitled to receive under these rules and before making advances to witnesses for the defence, the committing Magistrate should satisfy himself that such witnesses are material

6 Advances made by the Registrar of the Chief Court under the preceding rule will be recovered at once from the committing Magistrate who will include the amount of such advance in his bill.

7 When all the expenses to which complainants and witnesses are entitled under these rules have been paid, the committing Magistrate will submit a bill for the same supported by the necessary vouchers, to the Registar of the Chief Court for counter-signature The Registrar s counter-signature will be sufficient authority to support such charges in the public accounts.

BURMA RULES

1 The Criminal Courts may at their discretion pay, according to the scale set forth in Rule 3, the expenses of complainants and witnesses either for the prosecution or for the defence (1) in all cases which are cognisable by the Police, (2) in all cases entered in col. 5 of Schedule II appended to the Code of Criminal Procedure as not bailable, (3) in all cases in which witnesses are compelled to attend the Court, under ss. 94, 103, 208 217, 257 and 540 Code of Criminal Procedure, and (4) in all cases where the prosecution is instituted or carried on by, or under the orders, or with the sanction of Government, or any Judge Magistrate or public officer or in which the presiding officer thinks the prosecution to be directly in furtherance of the interests of public justice

2 Expenses of complainants and witnesses shall be payable according to the scale set forth in Rule 3 on account of their journey to and from the Court and for the days during which they have been absent from their homes for the purposes of the trial proceedings etc Provided that (1) Government officers who are entitled to travelling allowance under the Civil Travelling Allowance Code, shall not receive their expenses under these rules and that (2) in cases in which the Magistrate acquits the accused under s 245 or s 247, Code of Criminal Procedure and is of opinion that the complaint was frivolous or vexatious the expenses of the complainant shall not be paid.

3 The scale of expenses payable shall be as follows —

(1) *Ordinary labouring class of Natives*—The actual railway or steam boat fare to and from the Court by the lowest class or, where the journey could not have been performed by rail or steam boat actual travelling expenses up to a limit of Rs 2 a day by boat and of four annas a mile by road, and the allowance for each day s absence from home of 6 annas to those who are residents of places other than the place where the Court is held and of four annas to those who are residents of the place where the Court is held

(2) *Petty village officers*—Double the above rates of daily allowance, same rates as above for railway or steam boat fare or actual travelling expenses by boat or road up to the limit of Rs 2 a day by boat and of four annas a mile by road

(3) *Persons of higher ranks of life, such as clerks tradespeople, ywathugyis and circle thugyis*—Second-class railway or steam boat fare to and from the Court, or, where the journey could not have been performed by rail or steam boat actual travelling expenses up to a limit of Rs 4 a day by boat and of six annas a

mile by road; an allowance not to exceed, except in special cases, Rs. 3 for each day's absence from home to Europeans or Eurasians and Re. 1 to Natives.

(4) *Persons of superior ranks.*—The actual sum spent in travelling to and from the Court with an allowance, according to circumstances, not to exceed, except in very special cases, Rs. 5 for each day's absence from home to Europeans and Eurasians and Rs. 2 to Native gentlemen.

(5) *Witness following any profession, such as medicine or law.*—A special allowance according to circumstances.

[**Note.**—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and mileage or boat allowance in respect of the latter part of the journey.]

4. Allowances shall be paid under the orders of the Court and in the presence of the presiding officer and ordinarily at the conclusion of the trial, inquiry or other proceeding. The presiding officer of the Court shall check the statement of charges and will be responsible that unauthorised charges are not allowed.

5. In cases committed to the Court of Session or to the High Court, the Magistrate who commits the case shall note in the list of witnesses the class to which, in his opinion, each belongs.—*Burma Gazette*, No. 182, April 14th, 1894, Part I, p. 284.

Special rule for Lower Burma.—A Criminal Court shall not order payment on the part of Government of the expenses of any complainant or witness whose evidence the presiding officer may consider to be wilfully false.—*Gaz.*, 12th May, 1894, Part IV, p. 456.

Special rule for Upper Burma.—It is left to the discretion of the Courts to pay the expenses of such witnesses for the defence as they see fit. In exercising this discretion it is for the Courts to satisfy themselves that the expenses are paid of all witnesses for the defence who are properly entitled to them, that is, of all witnesses, whatever be the nature of their evidence, who attended Court on *subpœna* in good faith and without collusion with the accused.

The Court should not pay the expenses of witnesses who give evidence that appear to be wilfully false, or who have been brought to Court with their own convenience, not because they know anything about the case, but because their presence there is desired by the accused or themselves.—*Burma Gazette*, 12th May, 1894, Part IV, p. 456.

Assam Rules.—*See* Assam Manual of Local Rules and Orders, 1893 Edition, p. 188.

Power of Court to pay expenses or compensation out of fine.

545.* (1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(*a*) in defraying expenses properly incurred in the prosecution;

†(*b*) in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

‡(*c*) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

* In Upper Burma, the Court imposing a fine or confirming a sentence of an officer under s. 9 (4) of *the Burma Ruby Regulation* XII of 1887, may presume, for the purpose of s. 545, that injury has been caused by the offence and that substantial compensation in recoverable by civil suit in respect to the injury. *See* s. (5) of that Regulation.

† This clause was substituted by Act XVIII of 1923.

‡ This clause was added by *ibid.*

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decison of the appeal.

Note.—Amendment.—Before the amendment of this section it was held in **46 B. 893** that an order for the payment of compensation to the pledgee was beyond the scope of s. 545 of the Code

But now by the insertion of cl (*c*) to sub-sec. (1) compensation can be awarded to any *bonâ fide* purchaser of property when it is restored to the possession of the person entitled thereto It is submitted that the term *bonâ fide* purchaser in cl. (*c*) includes a mortgagee or pledgee

Notes.—1. *See* s 386 as to how fine may be recovered, and s. 140 (2) as to the power of a Magistrate to abate a public nuisance and recover the expenses

2. Analogous provisions.—Under *Indian Forest Act* VIII of 1878, compensation in addition to fine can be awarded when the conviction is under s 25, but when the conviction is under rules 21 and 26 framed under s 41, the compensation can be awarded only out of the fine, **5 Bom. L. R. 126.** *See* also Note 20 Under s 31 of *the Court fees Act* VII of 1870, the Court is bound to order the accused to repay to the complainant the Court fees Such repayment is quite independent of s. 545 and is imperative and an order for repayment of such fees in addition to fine is a proper order, **24 M. 305, 5 Bom. L. R. 126.** *See* also *Cattle Trespass Act*, 1871, s 22

3. Police Patel cannot award compensation.—A Police *patel's* Court is not a Criminal Court within the enumeration contained in s 5, therefore he has no power to make an order under this section, **Ratanlal 317.** The same rule would govern village headmen in Madras

WHEN ORDER FOR COMPENSATION MAY BE MADE.

4. Payment of compensation when part only of fine realised.—An order imposing a fine of Rs 4 000 directed as follows —'Out of the fine if recovered from the accused, I direct that Rs 3 000 be paid to prosecution witness No 1' A portion only of the Rs 4 000 was realised and the Judge thereupon passed an order that the Government had a prior claim to the extent of Rs 1,000 and it was only in the event of there being a balance that the prosecution witness No 1 had any claim to the compensation *Held*, that it was open to the Judge when imposing the sentence to provide for the proportionate distribution of the amount realised In the absence of any such direction the order could not be construed to mean that nothing should be payable to the prosecution witness until the full amount of the fine was realised, **2 M. L. W. 22 = 16 Cr. L. J. 88.**

5. Compensation cannot be awarded on acquittal or discharge—This section does not give power to a Court to award compensation for alleged offences other than those which form the subject of inquiry in the case in which the order is made, still less for offences of which the accused has been acquitted, **Ratanlal 407.** Nor where the accused is discharged and no fine is imposed, **22 B. 717; 4 Mad. H. C. Rep. App. XXVIII.**

6. Order for compensation should be part of judgment.—The award of compensation should be a part of the sentence or order made upon a conviction for an offence of the nature specified therein and should be founded upon a statement of loss, damage, or expenses as the case may be, ascertained at the trial, **11 W. R. 53** It cannot be made afterwards An award of compensation, after judgment has been pronounced and the fine credited to Government, is illegal—*M H C Pro*, *13th March*, 1878 *See* also **24 M. 305, 5 Bom. L. R. 976** The Court in ordering a portion of the fines inflicted on prisoners to be paid to the complainant should record under what section or on what grounds it so orders, **2 W. R. 58.**

7. Separate order for payment of expenses in addition to fine improper.—Expenses should be paid out of the amount of the fine imposed and a separate order for such expenses is improper **Ratanlal 341; 4 Bom L. R. 877.** An order directing the payment of compensation in addition to fine is illegal, **5 Bom. L. R. 126; Ratanlal 186.** In **24 M. 305,** the accused was convicted of having caused hurt and fined Rs 15 and was also ordered to pay compensation of Rs 12-4 or Rs 2 4 being Court fees paid by the complainant, and Rs. 10 being damages for other expenses incurred *Held* that the levy of Court fees Rs 2-4 was warranted by s 31 of *the Court fees Act* [illegible]

is imperative But

it must be taken to

than Court-fees incurred in the prosecution, can only be awarded to the complainant out of the fine levied from the accused and cannot be levied from the accused in addition to the fine. In making an order under this section the precise amount of fees directed to be paid to complainant under s. 31, *Court-fees Act*, and the amount of compensation to be paid under this section out of the fine, should be distinctly specified, **1 Bur. S. R. 616.**

OUT OF WHAT FUNDS COMPENSATION MAY BE GIVEN.

8. **Compensation may be ordered only out of fine imposed.**—A Magistrate cannot, without imposing a substantive sentence of fine, order payment of compensation by an accused person to a complainant, **Weir II, 715 ; 22 B. 717 ; 24 M. 305.** The proper course is to impose a fine, and out of the fine realised direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of the section, **3 C. L. R. 404.** It is inexpedient to order the payment of expenses of a suit under *the Workmen's Breach of Contract Act*, 1859, because no fine can be imposed under that Act, **Ratanlal 625.** Compensation can be ordered only out of the fine recovered, **5 Bom. L. R. 976.**

9. **Cannot be paid out of profits of forfeited property.**—This section has no application to amounts realised by forfeiture of property. When a person was sentenced to undergo a term of transportation and adjudged to forfeit the rents and profits of his property during that term ; *held*, that it was not competent to the Court, before which he was tried and convicted, to award any portion of the said rents and profits as compensation to complainant, **Ratanlal 146.** The provisions of this section for the payment of expenses or compensation do not apply to sums realised by forfeiture of bonds under s. 514, **1 Bur. S. R. 412.**

10. **Cannot be paid out of the proceeds of sale under s. 517.**—This section only justifies the order of compensation out of and to the extent of fine imposed and recovered. A person was convicted under s. 14 of *the Bombay Public Ferries Act*, 1868, and the Magistrate ordered the sale of his boat, illegally under s. 517, and directed compensation to be paid to the complainant out of the sale-proceeds. *Held*, the order was altogether illegal, **Ratanlal 688.**

FOR WHAT EXPENSES AND INJURIES COMPENSATION MAY BE ORDERED.

11. **All legitimate costs can be awarded under this section.**—This section is not always applied in cases suitable for its application. All legitimate costs (such as medical officer's fees, **24 M. 305**) and not only process-fees may be awarded under this section as well as compensation for the injury caused, **1 Bur. S. R. 409.**

12. **Compensation in excess of the loss suffered should not be awarded.**—The accused was convicted of illegally demanding and receiving money under s. 21 (*e*) of *the Fisheries Act* and was fined three times the amount of the illegal receipts ; the Magistrate directed the whole of the fine to be paid to the persons from whom the accused had taken money. *Held*, that s. 545 did not support the order as the prosecution was instituted without complaint on the report of an official, and the aggrieved persons did not appear to have incurred any expenses in the prosecution [cl. (*a*)] except in attending the Court as witnesses for which they would have been paid by the Magistrate, and that there was nothing to show that they had suffered any injury beyond the loss of the sums paid to the accused, **5 L. B. R. 50 = 10 Cr. L. J. 78.** But in this case the order was not set aside as no application to revise the order was made by the executive Government. *See* also **40 P. W. R. 1913 = 14 Cr. L. J. 659.**

13. **Refund of Court-fees to complainant.**—Court-fees ordered to be repaid to a complainant under s. 31 of *the Court-fees Act*, 1870, shall be regarded as a fine and be subject to the provisions of this section—*Bom. H. C. Cr. Cir.*, p. 53 ; **5 M. H. C. R. App. XXVIII ; 24 M. 305.** If the fine be awarded by a Court, whose decision is subject to appeal or revision, the refund must not be made until the period prescribed for the presentation of an appeal has elapsed or if an appeal be presented, till after the decision of the appeal.—Cf. *M. H. Cr. Cir. Dis. No.* 807, *dated 18th September*, 1902. *See* also **1 Bur. S. R. 616** and Note 8 above. *See* proposed new section 546-A, by which it is intended to repeal s. 31 of *the Court-fees Act*.

14. **Court-fees may be awarded as compensation when accused convicted of cognisable offence.**—When a person, accused of a non-cognisable offence is convicted of a cognisable one, the Court cannot legally direct him to pay the expenses incurred by the complainant under s. 31 of *the Court-fees Act*, as that section applies only to cases where the accused has been convicted of a non-cognisable offence. The expenses so incurred can, however, be awarded to the complainant as compensation under this section, **Ratanlal 397.**

15. Compensation in petty cases improper.—It is improper to award compensation to complainant in petty cases where no damage of a kind to occasion pecuniary loss has been sustained **1 Bur. S. R. 538.** But where compensation was awarded to a complainant who was beaten without any provocation, and was thereby prevented from attending the market to dispose of his wares, the award of compensation was set aside on appeal on the ground apparently that it was undesirable to encourage frivolous complaints by the grant of compensation, the High Court in revision set aside the order of the Appellate Court and upheld the order granting compensation, on the ground that the law intends that compensation should be awarded, where there is substantial cause for it, **Weir II, 717.**

16. No compensation for loss of time.—Compensation for loss caused by the inability of the complainant to attend to field work on account of his time being taken up with the prosecution of the accused cannot be ordered to be paid under this section, which deals with expenses incurred in the prosecution and with compensation for the injury only, **22 B, 438.**

17. Expenses incurred in bringing offender to justice cannot be paid.—This section does not apply to such expenses as are incurred in bringing the person of the offender before the Magistrate, **Ratanlal 608.**

18. Expenses to Ameen for restoring land-marks cannot be paid.—A Magistrate is not competent to direct that a portion of the fine be paid to an *Ameen* for the purpose of paying the expense of his deputation to restore the land marks which had been destroyed by the opposite party, **6 W. R. 93; 2 P. R. 1870.**

19. Compensation not awardable under Act XVI of 1881 where case dealt with under I.P.C.—The accused was ordered by the Superintendent of the Coast Guard Service to remove certain fishing stakes, and on his failing to comply with that order, was convicted under s 283 I.P.C., and sentenced to pay a fine of Rs 20, of which Rs 15 were ordered by the Magistrate to be paid to the complainant, the Guard to cover the expenses of removing the stakes, *held*, that the case not having been dealt with under Act XVI of 1881, the order of compensation was illegal, the same not coming within the terms of this section, **Ratanlal 241.**

20. Reward cannot be awarded where conviction is under I.P.C.—The accused were convicted under s 379, I P C., for cutting teak trees in their field, knowing that the *right* over the trees was reserved by Government, and out of the sentence of fine ordered Rs 5 to be paid to complainant, a forest servant for detecting the offence *Held*, that as the conviction was for an offence under the I P C, and not under *the Forest Act*, the order of reward was illegal, **Ratanlal 873.**

21. No power to order compensation for abating public nuisance.—When a Subordinate Magistrate issued a notice calling upon the accused to make certain repairs to a well and upon his failure to comply with the order, tried and convicted him under s. 188, I P C, for disobedience of the order and fined him Rs 100 and directed under s. 44 of the 1861 Code (corresponding to this section) that the repairs to the well should be made and paid for out of the fine *Held*, the order was bad, **Ratanlal 50.** *See* s 140 (2)

22. Compensation to Municipality in plague prosecutions cannot be made. The accused took his sister who was suffering from plague into a town without informing the authorities about it. He was thereupon convicted of an offence under s. 188, I P C., and fined Rs 20 The Magistrate further ordered that out of the fine so recovered, Rs 10 should be paid to the Municipality as damages on account of the expenses incurred by the Municipality *Held* that the order of compensation was illegal **Ratanlal 958.**

WHO IS ENTITLED TO COMPENSATION.

23. Compensation to the heirs of the deceased under the old Codes.—S 44 of the Cr P C, XXV of 1861, was as follows — "order that the fine or any part thereof, not exceeding the loss appearing to be caused to the person who has suffered by such offence, and any special damage of a pecuniary nature that may have resulted to such person by such offence . . . be paid to or for the benefit of such person the amount awarded to the person injured." The words "the person' not "any person" indicate that that section had in view only the person primarily injured by the offence. It was therefore *held* that compensation could not be awarded to anyone excepting the person who directly suffered by the offence It could not be given to the heirs of a person who had been killed, **10 W. R. 39.** The same view was held upon the Code of 1861 as amended by Act VII of 1869 notwithstanding the change of language, **7 Bom. H. C. R. Cr. Ca. 73.** The same view was held on the Code of 1882, **12 M. 352.** *See* also the referring judgment in **21 M. 74** and **7 P. R. 1877.**

24. Can compensation be paid to relations of the deceased whose death was brought about by the offence?—A Full Bench of the Madras High Court *held* that out of the fine imposed on a man convicted under

s. 304-A, I.P.C., compensation cannot be given to the widow of the person whose death was brought about by the prisoner's rash and negligent act; and that no change of intention on the part of the Legislature could be inferred from the change of language in the Code of 1882 (same as the present section). To render cl. (*b*) of s. 545 applicable, it must appear that an "*injury caused by the offence committed*" has been suffered, and, further, that the inquiry is one for which substantial compensation might be given in a civil suit. The term '*injury*' is defined in the I.P.C., s. 44, as follows:—"The word denotes any harm whatever illegally caused to any person in body, mind, reputation or property:" and this definition holds good for the interpretation of this Code, s. 4 (2). The widow of a man whose death has been brought about by the criminal act of another cannot be said to have suffered an injury in that sense of the word, **21 M. 74**, *following* **12 M. 382.** *See* also **Ratanlal 763** and **958.**

25. But a Bench of the Calcutta High Court in **36 C. 302** preferred to follow the opinion of BENSON, J., in his order of reference to the Full Bench in **21 M. 74,** dissenting from the opinion of the Full Bench. BENSON, J., was of opinion that there has been a deliberate change in the language of the section which has been expressly framed so as to provide for compensation being given in cases where it is recoverable under Act XIII of 1855, and to the person indicated in that Act, namely, the "wife, husband, parent and child, if any" of the deceased. The word '*where*' in cl. (*b*) means "in cases in which, and by persons by whom" compensation is recoverable. The Calcutta High Court in the case abovementioned convicted the accused of an offence under s. 304-A, I.P.C., and made an order as follows: "we direct that the fines, if paid, be handed over to the widow of the deceased or such other person, whom the District Magistrate on inquiry may find entitled to it under the provisions of s. 545." The Punjab Chief Court also in **17 P. R. 1898 (F.B.)** *held* that it was competent to a Court to award part of the fine imposed under s. 304, I.P.C., for the offence of culpable homicide not amounting to murder, to the widow of the person killed, in compensation for the injury caused by the offence committed, the loss of her husband's support affecting a widow prejudicially is a legal right, and being therefore "an injury" as defined by s. 44, I.P.C., for which substantial compensation can be awarded by a Civil Court.

Compensation cannot be given to the widow and child of a person accidentally killed as they were not complainants or persons injured within the meaning of s. 545 (*b*), **5 C. P. Cr. 45**; nor can compensation be awarded to a widow where the accused though convicted under s. 323, I.P.C., is acquitted of all responsibility for the subsequent death of her husband, **6 P. R. 1890.**

26. Compensation cannot be paid to bribe-giver out of fine levied from bribe-taker.—The accused *N* was convicted of the offence of accepting a gratification for inducing a public servant by corrupt means to show favour in his official functions and sentenced to imprisonment and fine of Rs. 250. Of the fine, if paid, Rs. 95, the amount of the bribe paid, and Rs. 10 as compensation for the trouble and expenses for prosecution, were directed to be paid to *Adivewa*, mother of the complainant; *held*, that the Magistrate's order directing that Rs. 95, the amount of bribe paid by *Adivewa* should be repaid to her, was opposed to cl. (*b*) of this section. The Magistrate cannot order the payment of the sum to the complainant which he might have given to the accused for bribing others, **Ratanlal 373.**

27. Compensation may be given to husband in case of abduction.—Compensation may be given in a case of enticing away a wife for injury done to the honour of the husband, **10** and **14 P. R. 1878.**

28. Compensation can now be paid to innocent purchaser (bona fide) of stolen property.—Under the old section where a person has been convicted and sentenced to a fine, a Magistrate was not authorised to award part of the fine as compensation to a person who has innocently purchased the stolen property. The sale to such purchaser is not the offence complained of within the meaning of this section, **6 M. 286; 7 M. H. C. R. App. XIII; 4 M. H. C. R. App. XXVIII; 6 M. L. T. 241 = 10 Cr. L. J. 290.** The injury to such purchaser is not the consequences of theft or misappropriation, but of the sale without title to pass the property, **Weir II, 716; 3 Bom. L. R. 449** and **764.** The return of the stolen goods to the owner should be ordered unconditionally. It ought not to be made conditional upon the payment of compensatation directed to be paid to the purchaser. But under s. 519 an innocent purchaser may be compensated out of any moneys found on the person of the accused. Accused was convicted of theft and sentenced to rigorous imprisonment and fine, and further imprisonment in default of payment of fine, and the property recovered was ordered to be restored to the complainant and Rs. 28 out of the fine to be paid to one *Bhau*, an innocent mortgagee, who had advanced money to the accused on the stolen property. *Held*, that s. 519 and this section were not applicable to the case,

as no injury was caused to the mortgagee by the offence committed **Ratánlal 631, 46 B. 893.** *See* the preliminary note to this section above and mark the change introduced by the insertion of sub-cl. (*c*) to sub-sec. (1).

29. Compensation to be awarded only to the person actually found to be injured.—When the accused were charged with causing hurt to *B* and *C* and they were convicted and fined for the injuries caused to *B*, the order awarding compensation to *C*, out of the fines inflicted on the accused for the injuries caused to *B*, was held illegal **Weir II, 718.** A person who by falsely pretending to be the winner of a lottery prize dishonestly induces the lottery officials to pay the prize to him does not cause 'wrongful loss' to the rightful winner of the prize and where therefore on the complaint of the rightful winner the person pretending to be the winner is convicted under s 420 I P C, of cheating the lottery holder, no compensation can be awarded to the complainant under sub-sec. (*b*) as he cannot recover any compensation in a Civil Court **15 Cr. L. J. 355 (Bur.)**

REFUND OF COMPENSATION.

30. Summary order for refund of compensation cannot be made.—There is no provision in the Code under which an accused person can obtain a summary order for refund of a fine which has been paid as compensation, **2 P. R. 1889.** The Appellate or Revisional Court may now under s 423 (1) (*d*) pass an order for refund. Sub sec (*d*) did not exist in the old Codes The order may be executed under s 547 *See* Note 3 to s 547 *See* also **12 P. R. 1888** and **29 P. R. 1903.** S 547 may not govern the case, as that section deals only with money "*payable*" and not money "*recoverable*, as for instance under s 140 (2).

31. Remedy when order of refund cannot be enforced.—When the order for compensation is reversed in revision by the High Court and the order of refund becomes unenforceable by reason of the money having been paid over to the complainant before the result of the revision application to the High Court was known, and the complainant refused to refund, the only remedy open to the person who has paid the money and is entitled to its refund lies in a civil suit—*M H C Pro 23rd March*, 1879, **Weir II, 717.** But in **19 A. 112** it was *held* that when the High Court in revision quashed the conviction and directed the fine to be refunded to the accused, the accused need not sue the complainant for the amount he had received but the same was recoverable by process under s. 547

32. Practice—Remittance of compensation.—When the order awarding compensation has become final and the amount has been recovered, it may be at once remitted (less the cost of remittance) to the person who is entitled to receive it by money order—*Pun Cir* 4-646 *G of* 1896

Payments to be taken into account in subsequent suit

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under s 545

Order of payment of certain fees paid by complainant in non cognisable cases

* **546-A.** (1) Whenever any complaint of a non cognisable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

(*a*) the fee (if any) paid on the petition of complaint for or the examination of the complainant, and

(*b*) any fees paid by the complainant for serving processes on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days

(2) An order under this section may also be made by an Appellate Court, or by the High Court when exercising its powers of revision

Note.—"Taken into account."—This expression means that the compensation awarded is to be taken into consideration by the Court in a subsequent civil suit at the time of awarding damages and not that it is to be afterwards deducted from the damages awarded in the suit **22 W. R. (Cir.) 336.**

* Section 546 A was inserted by Act XVIII of 1923 s 153

Moneys ordered to be paid recoverable as fines.

547. Any money (other than a fine) payable by virtue of any order made under this Code* "and the method of recovery of which is not otherwise expressly provided for" shall be recoverable as if it were fine.

Notes.—1. Any money payable, *e.g.*, under s. 488 or s. 148 (3) such amount is recoverable by process under this section and not by a suit in a Civil Court, **5 P. L. R. 1904.** *See* Madras G. O. No. 936, J., dated 14th June, 1904.

2. Recovery of compensation from the complainant when the amount of fine is reduced on re-trial.—The accused were tried by a first-class Magistrate and fined Rs. 25 each. Of the fine, half was paid to the complainant. Upon a re-trial order by the High Court, the second-class Magistrate fined each of the accused Rs. 10 and said that "as they had already paid a fine of Rs. 25 each, the result of the sentence will be that Rs. 15 will have to be returned to each of them." The complainant, on being called upon, stated that he had spent the money and was unable to repay. On reference as to how the compensation could legally be recovered, it was *held*, that the decision of the second-class Magistrate amounted to an order to the complainant to refund the sum of Rs. 15, and was, therefore, enforceable under this section, **Ratanlal 213.**

3. High Court has power to order refund of money paid under illegal order.—The power of the High Court as a Court of Revision to set aside illegal orders awarding compensation to an accused person must be taken to include the power to direct repayment of the money paid as compensation under such orders, **12 P. R. 1885.** *See* s. 423 (1) (*d*) and **29 P. R. 1903.** Such power is wide enough to cover a case where a Magistrate directed that a portion of the fine should be paid as compensation and it was so paid, but on the Magistrate's order being set aside in revision, it was *held* the sum was recoverable by process under this section and not by a suit in a Civil Court, **19 A. 112; 7 M. 563; 6 A. 95; 14 P. R. 1884.**

Copies of proceedings.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith :

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it *free of cost.*

Notes.—1. *See* s. 371 for right of accused to get copy of judgment free of cost, s. 210 for copy of charge free of cost and s. 219 for copy of the evidence of supplementary witnesses after commitment.

2. Copies of public 'documents.'—*See* ss. 74 and 76 of *the Evidence Act* and *see* **20 M. 189 (F.B.)** and **30 M. 466.**

3. Complainant is a person affected by an order of discharge.—The complainant applied for a copy of the order of discharge (under s. 253) which the Magistrate refused to give. In his opinion the complainant was not affected by the order, as the case was sent up by the Police on the information of the complainant who was a witness in the case, and was not permitted, under s. 495, to conduct the prosecution. *Held*, that everyone complaining of an offence by which he has been injured, is affected by the disposal of his complaint, whether the case has been sent up by a Police-officer or not. Such a person is therefore, entitled to ask for a copy of the Magistrate's order of discharge, **Ratanlal 305; 8 C. 166 = 10 C. L. R. 190.** *See* Note 4 to s. 371 at p. 939.

4. Is accused entitled to copies before final judgment or order?—An accused claimed a right to have copies on the ground that an order for his trial, namely, a charge had been passed. *Held*, that a charge is not an order and s. 548 did not apply. 'It is indeed clear otherwise from the words of that section that it has reference to a case which has reached the term indicated by a judgment or a judicial order,' **1892 A. W. N. 140.** *See* also the referring judgment in **20 M. 189.**

5. Prisoner entitled to copies of any part of the record.—A prisoner is entitled to have copies of all documents for which he asks and which he thinks necessary for his defence; and a Magistrate acts contrary to law, in determining whether such copies are necessary or not, **14 W. R. 77.** When the Judge's notes form the only record of the case, the parties should be allowed to have copies of such notes on paying the authorised

* The words "—" were inserted by *ibid.*

charge for making the same, **1 M. H. C. R. 138.** *See* also **1898 A. W. N. 154** which deals with a copy of a report called for by a Magistrate from a Tahsildar as to sureties under Chapter VIII and **9 P. R. 1909** with a copy of the proceedings in the Summary Register kept under the Cantonment Code

(*i*) *Copy of ' occurrence report,' s* 157 —An occurrence report which the officer in charge of a Police station is bound under s 157 to send to the Magistrate is not a public document within the meaning of s. 74, *Evidence Act*, and the accused is not entitled to a copy of it before commencement of trial, **20 M. 189 (F.B.)**, SUBRAMANIA AIYAR, J, *dissenting*

(*ii*) *Statements of witnsses examined by Police, s* 161 —*See* Note 14 to s 162 at p 356

(*iii*) *Copy of ' remand report,' s* 161 —' It was, I understand, conceded that a copy of the Station-house Officer s report made under s 167 could not be demanded, inasmuch as it is an extract from the Police diary which is specially indicated by s 172.' *Per* BENSON, J in **20 M. 189 at 203.**

(*iv*) *Copy of report of Subordinate Police-officer to Station house Officer, s* 168 —The report which the Subordinate Police-officer has to send under s. 168 is not a public document within the meaning of s 74 and the accused is not entitled to copy of same before trial **20 M. 189 (F.B.)** SUBRAMANIA AIYAR, J, *dissenting*

(*v*) *Copy of charge sheet, s* 174 —The report which the officer in-charge of a Police station has to forward under s 174 to a Magistrate after investigation of a case is not a public document which the accused can get copy of under ss 74 and 76 of *the Evidence Act* *Per* COLLINS, C J, and BENSON J, *contra* SHEPHARD and SUBRAMANIA AIYAR, JJ, in **20 M. 189 (F.B.)** ' We should here observe that apart from general principles, if in any case an order has been made on a Police occurrence report or charge sheet affecting the person accused, such an order for his arrest or for his remand to custsdy, he is *ipso facto* entitled to a copy of that document under the express terms of s 548." The referring judgment of DAVIES and SUBRAMANIA AIYAR JJ, but this question was not before the Full Bench, **20 M. 189.**

6. Remission and reduction of Court-fees.—Under s 35 of *the Court fees Act* VII of 1870, and in supersession of all previous notifications under that section, the Government of India have been pleased to make the reductions and remissions hereinafter set forth, namely —

A —General, for the whole of British India

To remit the fees chargeable on security bonds for the keeping of the peace by, or good behaviour of persons other than executants

To remit the fees chargeable under Articles 6, 7 and 9 of the first schedule on copies furnished by Civil or Criminal Courts or Revenue Courts or officers for the private use of persons applying for them, provided that nothing in this clause shall apply to copies when filed, exhibited or recorded in any Court of Justice or received by any public officer

To remit the fees chargeable on the following documents, namely —

(*a*) Copy of a charge framed under s 210 of the Code of Criminal Procedure or of a translation thereof when the copy is given to an accused person,

(*b*) Copy of the evidence of supplementary witnesses after commitment, when the copy is given under s 219 of the said Code to an accused person,

(*c*) Copy or translation of a judgment in a case other than a summons-case, and copy of the heads of the Judge s charge to the jury, when the copy or translation is given under s 371 of the said Code to an accused person,

(*d*) Copy or translation of a judgment in a summons case, when the accused person to whom the copy or translation is given under s. 371 of the said Code is in jail,

(*e*) Copy of an order of maintenance when the copy is given under s. 490 of the said Code to the person in whose favour the order is made or to his guardian, if any, or to the person to whom the allowance is to be paid,

(*f*) Copy furnished to any person affected by a judgment or order passed by a Criminal Court, of the Judge s charge to the jury or of any order, deposition or other part of the record when the copy is not a copy which may be granted under any of the preceding sub-clauses without the payment of a fee, but is a copy

which, on its being applied for under s. 548 of the said Code, the Judge or Magistrate, for some special reason to be recorded by him of the copy, thinks fit to furnish without such payment;

(g) Copies of all documents furnished under the orders of any Court or Magistrate to any Government Advocate, Pleader or other person specially empowered in that behalf for the purpose of conducting any trial or investigation on the part of the Government before any Criminal Court;

(h) Copies of all documents which any such Advocate, Pleader or other person is required to take in connection with any such trial or investigation, for the use of any Court or Magistrate, or may consider necessary for the purpose of advising the Government in connection with any criminal proceedings;

(i) Copies of judgments of depositions required by officers of the Police Department in the course of their duties.

To remit the fee chargeable on an application presented by any person for the return of a document filed by him in any Court or public office. Government of India Notification No. 4650, dated 10th September, 1889—S. K. Chariar's *Criminal Rules of Practice*, pp. 72-73.

Delivery to military authorities of persons liable to be tried by Court-martial.

549. (1) The Governor-General in Council may make * rules, consistent with this Code and the Army Act † or any similar law for the time being in force, as to the cases in which persons subject to military law shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, section 41, to be tried by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military station for the purpose of being tried by Court-martial.

Apprehension of such persons.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

Notes.—1. Rules respecting delivery of offenders to Military authorities.—The following rules have been made by the Governor-General in Council under this section respecting the delivery to the military authorities of persons charged with offences under s. 41 of *the Army Act* (44 and 45 Vict., Chap. 58) for which they are liable to be tried by Court-martial held under that Act:—

I. (1) When a prisoner subject to military law is accused of an offence for which he is liable under *the Army Act*, 1881, s. 41, to be tried by Court-martial a Magistrate shall not proceed to try him, or to issue an order for his trial by jury, or to hold an inquiry into the case as a case triable by the Court of Session or High Court, unless he is moved to do so by the military authorities, or, is of opinion, for reasons to be recorded in writing, that he ought so to proceed without being moved thereto by these authorities.

(2) When the Magistrate is of opinion that he ought so to proceed without being moved thereto by the military authorities, he shall give notice of his intention to do so to an officer to whose command the accused person is subject, and shall not, till the expiration of fifteen days from the date of the service of notice on the officer—

(a) in a summons-case, acquit or convict the accused under ss. 243, 245, 247 or 248 of the Criminal Procedure Code, or hear him in his defence under s. 244 of the Code; or

(b) in a warrant-case, frame a charge against the accused under s. 254 of Code; or

(c) issue an order for the trial of the accused by a jury under s. 451-A, sub-sec. (2) of the Code; or

(d) make an order committing the accused for trial by the Court of Session or the High Court under 213 or 214 of the Code.

* For notification making rules as to cases in which person subject to military law shall be tried by a Court to which this Code applies, or by a Court-martial, see *Gazette of India*, 1902, Part I, p. 383, and the rules printed below

† 44 and 45 Vict., Chap. 58.

(3) If, within the fifteen days or at any time thereafter, before the Magistrate has done or made an act or order specified in cl (2) sub-cls (*a*), (*b*) (*c*) or (*d*), of this rule an officer to whose command the accused is subject notifies to the Magistrate that, in the opinion of the military authorities the accused should be tried by a Court martial the Magistrate shall stay the proceedings before himself, and, if the accused is in his power deliver him, together with the statement mentioned in s 549 of the Code, to the authority prescribed in that section.

II If after a Magistrate has been moved by the military authorities to proceed against a person subject to military law for an offence for which that person is liable, under *the Army Act*, 1881, s 41, to be tried by Court martial, an officer to whose command the person is subject notifies to the Magistrate that, in the opinion of the military authorities, the accused should be tried by a Court martial the Magistrate if he has not before receiving the notice done or made an act or order specified in cl (2), sub-cls (*a*), (*b*) (*c*) or (*d*) or Rule I, shall stay the proceedings before himself, and if the accused is in his power, deliver him, together with the statement mentioned in s 549 of the Code, to the authority prescribed in that section

III If a person who has been delivered by a Magistrate to a commanding officer, under Rule I, clause (3) or under Rule II, for the purpose of being tried by a Court martial, is not brought to trial before Court martial for the offence of which he is accused or effectual proceedings have not been taken or have not been ordered to be taken against him, the Magistrate shall report the circumstance—

(1) in cases occurring within the territories administered by the Governor of Fort St George in Council or by the Governor of Bombay in Council, for the information and orders of the Governor in-Council of Fort St. George or of Bombay as the case may be, and

(2) in other cases, through the Local Government, for the information and orders of the Governor General in Council —*Notification of the Government of India, Home Department, No* 1222 *dated 27th July* 1887, *Gazette of India*, 1886 *Pt. I p* 387 Similar rules have been made in reference to the Civil and Military Stations of Bangalore 1902 *Gazette of India, Pt I p* 260

The above rules are applicable only to persons who are subject to the Army Act and not to persons subject to the Indian Articles of War Act V of 1886 —*Punjab Cir*, p 333

IV. These rules have been supplemented by the following orders —

When on the other hand, the accused in such a case is in civil custody the Magistrate should not proceed to investigate the charge until he has communicated with the prescribed military authority and ascertained that officer's decision under Article 174 If dissatisfied with the decision of that officer in favour of a Court martial the Magistrate should take action under Article 175, but in the meantime the accused should be delivered into military custody Thus, if the civil Police have information of a theft or other offence alleged to have been committed by *A*, a person subject to the Indian Articles of War, and the case is one in which both a Criminal Court and a Court martial have jurisdiction and if in consequence *A* is arrested by such Police, *A* must be at once placed in civil custody, wherever the arrest may have been effected and will remain in such custody unless and until the officer commanding the troops to which he belongs decides that he shall be tried by a Court martial, and directs that he shall be detained in military custody To that officer an intimation of the fact of *A*s arrest should be communicated by the Magistrate who has concurrent jurisdiction, and if the decision under Article 174 is in favour of a Court-martial and is communicated within a reasonable time to the Magistrate, the Magistrate should at once cause *A* to be handed over to the military authorities under a proper escort, to be provided by the latter, reserving to himself the right of, if necessary, compelling a reference to the Governor General in Council under Article 175

V In case of doubt as to whether an accused person in civil custody is liable to be tried by Court martial, the Magistrate concerned should, before beginning any investigation into the charge, communicate with the officer commanding the troops to which such accused person belongs, and proceed as directed in the latter part of pragraph III above In similar case of doubt, if the accused is in military custody, the Magistrate would do well to communicate first with the officer commanding the troops to which the accused belongs before taking formal action under Article 175

VI Where a Criminal Court and Court martial have concurrent jurisdiction it is as a rule, desirable that the accused should be tried by the latter, but in cases of thefts of arms, ammunition or other property belonging to the Government, if there is reason to suspect that persons, other than the accused, who are not subject to the Indian Articles of War, are directly or indirectly implicated, it may often be expedient for the

which, on its being applied for under s. 548 of the said Code, the Judge or Magistrate, for some reason to be recorded by him of the copy, thinks fit to furnish without such payment;

(g) Copies of all documents furnished under the orders of any Court or Magistrate to any Gov... Advocate, Pleader or other person specially empowered in that behalf for the purpose of conducting any ... or investigation on the part of the Government before any Criminal Court;

(h) Copies of all documents which any such Advocate, Pleader or other person is required to ... in connection with any such trial or investigation, for the use of any Court or Magistrate, or may ... necessary for the purpose of advising the Government in connection with any criminal proceedings;

(i) Copies of judgments of depositions required by officers of the Police Department in the course ... their duties.

To remit the fee chargeable on an application presented by any person for the return of a ... filed by him in any Court or public office. Government of India Notification No. 4650, dated 10th September 1889—S. K. Chariar's *Criminal Rules of Practice*, pp. 72-73.

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Delivery to military authorities of persons liable to be tried by Court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

Apprehension of such persons.

Notes.—1. Rules respecting delivery of offenders to Military authorities.—The following rules have been made by the Governor-General in Council under this section respecting the delivery to the military authorities of persons charged with offences under s. 41 of *the Army Act* (44 and 45 Vict., Chap. 58) for which they are liable to be tried by Court-martial held under that Act:—

I. (1) When a prisoner subject to military law is accused of an offence for which he is liable under *the Army Act*, 1881, s. 41, to be tried by Court-martial a Magistrate shall not proceed to try him, or to issue an order for his trial by jury, or to hold an inquiry into the case as a case triable by the Court of Session or High Court, unless he is moved to do so by the military authorities, or, is of opinion, for reasons to be recorded in writing, that he ought so to proceed without being moved thereto by these authorities.

(2) When the Magistrate is of opinion that he ought so to proceed without being moved thereto by the military authorities, he shall give notice of his intention to do so to an officer to whose command the accused person is subject, and shall not, till the expiration of fifteen days from the date of the service of notice on the officer—

(a) in a summons-case, acquit or convict the accused under ss. 243, 245, 247 or 248 of the Criminal Procedure Code, or hear him in his defence under s. 244 of the Code; or

(b) in a warrant-case, frame a charge against the accused under s. 254 of Code; or

(c) issue an order for the trial of the accused by a jury under s. 451-A, sub-sec. (2) of the Code; or

(d) make an order committing the accused for trial by the Court of Session or the High Court under s. 213 or 214 of the Code.

* For notification making rules as to cases in which person subject to military law shall be tried by a Court to which this Code applies, or by a Court-martial, see *Gazette of India*, 1902, Part I, p. 383, and the rules printed below

† 44 and 45 Vict., Chap. 58.

(3) If, within the fifteen days, or at any time thereafter, before the Magistrate has done or made an act or order specified in cl (2), sub-cls (*a*), (*b*) (*c*) or (*d*), of this rule, an officer, to whose command the accused is subject, notifies to the Magistrate that, in the opinion of the military authorities the accused should be tried by a Court martial, the Magistrate shall stay the proceedings before himself, and, if the accused is in his power, deliver him, together with the statement mentioned in s 549 of the Code, to the authority prescribed in that section.

II If after a Magistrate has been moved by the military authorities to proceed against a person subject to military law for an offence for which that person is liable, under *the Army Act*, 1881, s 41, to be tried by Court-martial, an officer to whose command the person is subject notifies to the Magistrate that, in the opinion of the military authorities, the accused should be tried by a Court martial, the Magistrate, if he has not before receiving the notice, done or made an act or order specified in cl (2), sub-cls (*a*), (*b*), (*c*) or (*d*), or Rule I, shall stay the proceedings before himself, and if the accused is in his power, deliver him, together with the statement mentioned in s 549 of the Code, to the authority prescribed in that section

III If a person, who has been delivered by a Magistrate to a commanding officer, under Rule I, clause (3) or under Rule II, for the purpose of being tried by a Court martial, is not brought to trial before Court martial for the offence of which he is accused, or effectual proceedings have not been taken or have not been ordered to be taken against him, the Magistrate shall report the circumstance—

(1) in cases occurring within the territories administered by the Governor of Fort St. George in Council or by the Governor of Bombay in Council, for the information and orders of the Governor in Council of Fort St. George or of Bombay as the case may be, and

(2) in other cases, through the Local Government, for the information and orders of the Governor General in Council —*Notification of the Government of India, Home Department, No* 1222, *dated* 27*th July*, 1887, *Gazette of India*, 1886, *Pt I*, *p* 387 Similar rules have been made in reference to the Civil and Military Stations of Bangalore, 1902 *Gazette of India, Pt I*, *p* 260

The above rules are applicable only to persons who are subject to the Army Act, and not to persons subject to the Indian Articles of War, Act V of 1886 —*Punjab Cir*, p 333

IV. These rules have been supplemented by the following orders —

When, on the other hand, the accused in such a case is in civil custody, the Magistrate should not proceed to investigate the charge until he has communicated with the prescribed military authority and ascertained that officer's decision under Article 174 If dissatisfied with the decision of that officer in favour of a Court martial, the Magistrate should take action under Article 175 but in the meantime the accused should be delivered into military custody Thus, if the civil Police have information of a theft or other offence alleged to have been committed by *A*, a person subject to the Indian Articles of War, and the case is one in which both a Criminal Court and a Court martial have jurisdiction, and if in consequence, *A* is arrested by such Police, *A* must be at once placed in civil custody, wherever the arrest may have been effected and will remain in such custody unless and until the officer commanding the troops to which he belongs decides that he shall be tried by a Court martial, and directs that he shall be detained in military custody To that officer an intimation of the fact of *A*'s arrest should be communicated by the Magistrate who has concurrent jurisdiction, and if the decision under Article 174 is in favour of a Court-martial and is communicated within a reasonable time to the Magistrate, the Magistrate should at once cause *A* to be handed over to the military authorities under a proper escort, to be provided by the latter, reserving to himself the right of, if necessary, compelling a reference to the Governor General in Council under Article 175

V In case of doubt as to whether an accused person in civil custody is liable to be tried by Court martial, the Magistrate concerned should, before beginning any investigation into the charge, communicate with the officer command[illegible]
latter part of pragraph I[illegible]
would do well to com[illegible]
before taking formal action under Article 175

VI Where a Criminal Court and Court martial have concurrent jurisdiction, it is, as a rule, desirable that the accused should be tried by the latter, but in cases of thefts of arms, ammunition or other property belonging to the Government, if there is reason to suspect that persons, other than the accused, who are not subject to the Indian Articles of War, are directly or indirectly implicated, it may often be expedient for the

Note.—As to powers and duties of an officer-in-charge of a Police station, *see* Notes under s. 4 (*p*) and s. 127 and also **7 B. 52.**

Power to compel restoration of abducted females.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of * sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

Notes.—1. Procedure.—There is necessarily no offence alleged in an application under this section and consequently the provisions of ss. 200 and 203 which relate to the procedure to be employed by a Magistrate taking cognisance of an offence do not apply to proceedings under this section, **4 Bom. L. R. 609.** But when a Magistrate passed an order under this section in general terms, that a woman be restored to liberty without finding that she was unlawfully detained by anyone or without ordering any person to restore her to liberty, *held* that the order was not one contemplated by this section. Where a Magistrate has reason to believe that a woman is being unlawfully detained, but cannot find who so detains her, the proper course for the Magistrate is to issue an order to have the woman brought before him, and to examine her, **Weir II, 724.** Where a complaint is made by the husband that the father is wrongfully detaining his wife, the Magistrate should hold an inquiry into the matter of the complaint, examine witnesses as to the age of the girl or as to the reason why the father does not think it fit to send the girl to her husband. The High Court in revision set aside the order of a Magistrate made without any such inquiry especially as the complaint did not state that the girl was being detained contrary to her own wish, **15 Cr. L. J. 712 (C.).**

2. 'Unlawful detention' means detention against the will of those entitled to minor's custody.—Obviously the Magistrate is empowered to act only when the detention and purpose are both unlawful. A Hindu girl, under the age of 14 years, went of her own accord to a Mission House where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under this section. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the circumitances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother. *Held*, upon the facts, as found by the Magistrate, that, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, *as the girl was kept against the will of those who were lawfully entitled to have charge of her*, **16 C. 487.**

3. "Unlawful purpose" means 'immoral purpose.'—Under this section the purpose whether entertained towards a woman or a female child, must in itself be unlawful, and applying the section only as it does to women and female children, it must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child, in opposition to the wishes of its guardian. Consequently, where a Hindu girl, under 14 years of age, went to a Mission House of her own free will and was allowed to remain there, *held* that there was no detention for an unlawful purpose, and a Magistrate has no power to order the restoration of the girl to her legal guardians. The case would be the same if a Christian child were to leave its parents and being received and detained against their will in a Muhammadan institution in order that it may become a Muhammadan, **16 C. 487.** The purpose contemplated by this section must be in itself unlawful and must not be construed, so as to make it include purposes, which although not unlawful in themselves, might become so when entertained towards a child in opposition to the wishes of its guardian, **4 Bom. L. R. 609.** Thus, a detention for the purpose of persuading a girl to become a Christian, contrary to the wishes of her guardian, would not be unlawful within the terms of this section. A girl of 16 has a right to choose her own residence. The true principle by which the Court should be guided is that it should

* The word "sixteen" was substituted for the word "fourteen" by Act XVIII of 1924

judge from the circumstances of each particular case, and that the welfare of the infant irrespective of its age should be the main feature to be regarded 16 B. 307. *See* also 9 C. W. N 1030.

4. District Magistrate alone has jurisdiction to entertain complaint and make order.—He has no power to transfer such a case to a Sub-Magistrate, and that Magistrate would have no jurisdiction therein, **Ratanlal 953.**

5. Has High Court power when setting aside order of restoration to send minor back to custody in which she was?—In 16 C. 487, the Magistrate ordered certain Mission authorities to restore a minor girl to the custody of the husband and mother, but the High Court set aside the order as no unlawful purpose had been made and it was contended on the authority of *Rodger* v *The Comptoir D Escompte-de Paris*, L. R 3 P. C. 465 that in setting aside an illegal order, the High Court has power to restore the *status quo ante* *Held* that because the order was wrong it did not follow that the High Court should as a matter of course restore the state of things which existed before it was made '"It is very questionable whether we have the power to do this, but assuming we have the power, we could only with propriety exercise it if the proper guardian is shown to be in some way disqualified.'

Compensation to persons groundlessly given in charge in Presidency town.

553. (1) Whenever any person causes a Police-officer to arrest another person in a Presidency town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest the Magistrate may award such compensation, not exceeding fifty rupees to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid

Note.—This section supplements s 250 which applies to vexatious or frivolous complaints In Madras, vexatious or unnecessary seizure of property or arrest by a Forest officer or Police officer, is punishable under *Madras Act* V of 1882, s. 25, and under the Abkari law, by *Madras Act* I of 1886 s 59 In Bombay, by *Bombay Act* V of 1878 ss. 49 and 50. As to recovery of fine *see* ss 386—388

Power of Chartered High Courts to make rules for inspection of records of Subordinate Courts

554. (1) With the previous sanction of the Governor General in Council, the High Court at Fort William, and, with the previous sanction of *the Local Government any other High Court established by Royal Charter*, may, from time to time, make rules for the inspection of the records of Subordinate Courts

Power of other High Courts to make rules for other purposes

(2) Every High Court not established by Royal Charter, may, from time to time and with the previous sanction of the Local Government,—

(*a*) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts,

(*b*) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided,

(*c*) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it and

(*d*) make rules for regulating the execution of warrants issued under this Code or the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the Local Official *Gazette*.

Note.—Rules in Upper Burma, in the Sonthal Purgunnas and in British Baluchistan.—*See*, respectively, *the Upper Burma Criminal Justice Regulation* V of 1892, Sch. XVI; *the Sonthal Purgunnas Justice Regulation* V of 1899, s. 4 (VIII) as amended by Regulation III of 1899, and *the British Baluchistan Criminal Justice Regulation* VIII of 1896, Sch., s. 20.

Rules under s. 554, sub-sec. (2), cl. (*c*), may regulate (*a*) the fees for processes and (*b*) the fees to be paid for copies and inspection of records.

Forms.

555. Subject to the power conferred by section 554,* and by section †"107 of the Government of *India Act*, 1915" the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned and if used shall be sufficient.

Notes.—1. If used shall be sufficient.—Thus, where an order under s. 144 was issued in Form No. XXI of Schedule V, without specifying that it shall be inoperative only for two months, *held* by the Full Bench, the order was good, having regard to the provisions of this section, **34 C. 897 (F.B.)**. *See* also **10 C. 937** which deals with Form XXVIII (II) 4 and **26 M. 55**; **7 A. 45** *overruling* **6 A. 17.** In **36 C. 562**, Form XI was construed. In **22 P. R. 1914 = 15 Cr. L. J. 605** and **8 S. L. R. 173 = 16 Cr. L. J. 100,** Form X was construed.

2. Failure to comply with form.—Where the summonses issued under s. 107 were not in accordance with Form No. 12, Sch. V, and was not accompanied with the order under s. 112; *held*, proceedings bad, **9 Cr. L. J. 179 (All.)**, and *see* **15 C. W. N. 78 = 11 Cr. L. J. 26,** where an order under s. 145 was not drawn up in accordance with Form No. 22. In **39 C. 403,** the validity of issuing a warrant under s. 100 on a printed form for use under s. 98 was considered.

Case in which Judge or Magistrate is personally interested.

556. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Explanation.—A Judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration.

A as Collector, upon consideration of information furnished to him directs the prosecution of *B* for a breach of *the Excise Laws*. *A* is disqualified from trying this case as a Magistrate.

Notes.—1. *See* s. 191 for the duty of a Magistrate who takes cognisance of a case under s. 190 (1) (*c*) to inform the accused of his right to get the case transferred; s. 337 (4) for prohibition of Magistrate who has tendered a pardon from trying the case; s. 526 (1) (*a*) for the power of the High Court to transfer a case when a fair and impartial inquiry or trial cannot be had; and s. 487 for the disability of Judges and Magistrates except as provided by ss. 477, 480 and 485 to try offences committed in contempt of their authority or brought to their notice when acting as such Judge or Magistrate.

* These figures were substituted for the figures "553" by *the Repealing and Amending Act* II of 1903. *See* Part II of the Second Schedule.

† The word and figures in "—" were substituted for the words and figures "15 of the Indian High Courts Act, 1861," by Act XIII of 1916.

2. Reason of amendment.—'The last portion of the explanation and the illustration is amended to meet the objections raised in **23 C. 328** and **19 M. 263**."—*Statement of Objects and Reasons* The explanation follows **19 A. 302.**

3. Further exceptions.—A member of a District Board in the Punjab, *see* s 58 *Punjab District Boards Act* XX of 1883, or a member of a Municipal Committee in the Punjab, *see* s 188 of *the Punjab Municipal Act* XX of 1891, is not a party or personally interested within the scope of this section In Burma, see *the Burma Municipal Act* III of 1898, and in the Central Provinces, see *the Central Provinces Municipal Act* XVIII of 1889 s. 144 A Judge or Magistrate shall not be deemed within the meaning of this section, to be a party to or personally interested in any prosecution for an offence against the Cantonment Act or against any enactment extended, or rule made thereunder, because he is a member of the Cantonment Committee or where there is no such Committee, is the Commanding Officer of the Cantonment or, because he has ordered or approved the prosecutions, s 29 of *the Cantonment Act* XIII of 1889 *See* also **40 P. R. 1884**, **48 P. R 1887**, and **43 P. R. 1888**.

4. Principle on which section is based—The principle is that laid down in the maxim *Nemo sibi esse judex vel sui jus dicere debet*,' that is, 'no man can be his own Judge or give judgment concerning his own rights "It is one of the oldest and plainest rules of justice and of commonsense that no man shall sit as Judge in a case in which he has a substantial interest That is the law of this country as much as it is the Law of England," **2 C. 23.** Whenever there is a likelihood that the Judge would from kindred or any other cause, have a bias in favour of one of the parties, it would be wrong in him to act ' *Q* v *Rand* **L. R. 1 Q B 230.** No Judge can act in any matter in which he has any pecuniary interest nor where he has any interest though not a pecuniary one, sufficient to create a real bias In **2 C. W. N. 481** before the Calcutta High Court Sessions, RAMPINI, J, retired from the case after hearing evidence on the ground that he had a personal interest in the case A person who has a judicial duty to perform disqualifies himself if he has a pecuniary interest in the decision which he is about to give or a bias which renders him otherwise than an impartial Judge. In the latter case the question must be a question of substance and of fact whether he has been an accuser, *Reason* v *Medical Council*, **(1890) 43 Ch. D. 356 at p. 384.** The interest must be substantial, *R* v *Meyer*, **(1875) 1 Q. B. D. 173—177** so as to make it likely that the Judge has a real bias the mere possibility of bias not being sufficient to disqualify, *R* v *Handsley*, **(1882) 8 Q. B. D 383.** *See* also *Allinson* v *General Council of Medical Education*, **(1894) 1 Q. B. 750—758.** In the case of *Dimes* v *Grand Junction Canal*, **3 H. L. Cas. 793** the Lord Chancellor said "It is of the last importance that the maxim that no man is to be Judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but is to be applied to a cause in which he has an interest ' *See* also *Sergeant* v *Dale*, **L. R. 2 Q. B. D 558,** where it is laid down 'The law does not measure the amount of interest which a Judge possesses If he has any interest in the decision of the question one way he is disqualified, no matter how small the interest may be.

APPLICATION OF SECTION.

5. Section applies to Bench or tribunal any member of which is interested.—It is one of the oldest and plainest rules of justice and of commonsense that no man shall sit as Judge in a case in which he has a substantial interest Where, therefore, one of a Bench of Magistrates which convicts the accused has a substantial interest in the case which disqualifies him from acting as Judge, the conviction will be vacated and the defect will not be cured by any consent or waiver on the part of the accused, **2 C. 23.** [illegible] has such an interest as to give him a *real bias* in the matter, he ought not to sit on the [illegible] immaterial what part he really takes, although it may be he takes no part until the other Jus[illegible] mously determined to convict, *Q* v *Meyer*, **1 Q B. D. 173.** Before a Bench of Magistrates req[illegible] s of two members to form a *quorum*, a trial was commenced before four Magistrates *A*, *B*, *C* and *D* [illegible] in taken by the accused that *A* and *B* were related to the complainant the District Magistr[illegible] he trial should be concluded by *C* and *D* alone *Held*, that the trial was legal and that ther[illegible] t of the validity of the conviction, **3 N. L. R. 67 = 6 Cr. L. J. 43.** It is no answer to the objec[illegible] has majority in favour of the decision without reckoning the vote of the interested part[illegible] party withdrew before decision, if he appears to have joined in discussing the matter w[illegible] ficult *R* v *Hertfordshire, JJ*, **6 Q. B. 753.** The affidavit of the Justice stated that he did n[illegible] officer at the hearing or determination of the appeal nor conversing with any of the Magis[illegible] in the and that he did not converse with them on any matter relating to the appeal *B*[illegible] rest in present, he formed part of the Court and therefore the order was i[illegible] *R* v *S*[illegible] **A. 192**

5 W. R. 86. But a mere presence on the Bench of an interested Magistrate is not sufficient ground, if it is expressly shown that he took no part in the hearing, *R.* v. *London, JJ.*, 18 Q. B. 421. By the direction of a Linen Trade Association, and on the complaint of their Inspector, *V* was prosecuted before Justices for having purloined yarn. When the case come on, *V's* solicitor objected to any Magistrate taking part in the proceedings who was a member of the Association. *M*, who was one of the Justices and was presiding as Chairman, stated that he was a member of the Association, but that he had no personal interest and would adjudicate. At the close of the statement of the complainant's case, and before any evidence was given, *M* left the Chair and took his seat on the Bench some distance from the other Magistrates. After a short time he left the Bench and went into the Magistrate's room, and was there when the other Magistrates came in to consider their decision, but at once retied. He took no part in the adjudication. *V* was convicted of the offence charged. *Held*, that the conviction must be quashed with costs to be paid by *M. R.* v. *Armagh, JJ.*, (1913) 2 Ir. R. 510—K. B. D. *See* also *R.* v. *O'Grady*, 7 Cox. C. C. 247.

Assessor being interested.—In (1912) M. W. N. 378 = 13 Cr. L. J. 473 after the trial had begun, it was discovered that one of the assessors was interested and unfit to sit as an assessor and the Sessions Judge was asked to choose another assessor and proceed with trial *de novo*. In a jury trial, however, the parties have a right to challenge the jurors before commencement of the trial and it cannot be a ground for quashing the conviction that one of the jurors was disqualified.

6. Can the Crown or complainant apply for setting aside acquittal by reason of personal interest in Judge?—*See* 8 A. L. J. 1129 = 12 Cr. L. J. 575 and Note 24 at p. 841. Two persons were summoned before Justices under s. 74 of *the Coal Mines Act*, 1911, and were acquitted. It was afterwards discovered by the complainant that at least one of the Justices was disqualified by s. 104, sub-sec. (2) of the Act as being employed in a Mine. The Court discharged a rule *nisi* to quash the acquittals, (*i*) because the defendants had been in danger of conviction, and (*ii*) because, to quash the acquittals would prevent the defendants from pleading *autrefois acquit* on a subsequent occasion, *R. v. Simpson*, (1914) 1 K. B. 109 = 78 J. P. 45.

EFFECT OF DISQUALIFICATION.

7. Disqualification of Judge takes away jurisdiction—consent or waiver cannot cure the defect.—When a Magistrate is disqualified under this section, he is not a Court of competent jurisdiction and s. 537 would not apply. A case tried in disregard of the provisions of this section, must be regarded as if tried by a Court which, for want of jurisdiction, was incompetent to deal with it, 28 C. 328. Criminal proceedings are bad unless conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner, 2 C. 23. If a Magistrate is personally interested within the meaning of s. 256 and is debarred from trying the case, the consent of the accused cannot confer jurisdiction, 32 A. 635; 7 A. L. J. 749 = 11 Cr. L. J. 457; 9 N. L. R. 81 = 14 Cr. L. J. 385; 1 S. L. R. 98 = 8 Cr. L. J. 356.

8. He cannot 'try any case.'—The expression 'try any case' is wide enough to include any stage of the judicial proceeding in which the question of the guilt or innocence of the accused is finally adjudicated on. This construction does not force the words of the section and is in accord with the intention of the Legislature which was to enact the rule that no man can be Judge in his own cause, 5 S. L. R. 137 = 13 Cr. L. J. 30; 37 C. 221; 10 C. W. N. 775.

9. He cannot institute any proceedings.—The Magistrate cannot take proceedings under s. 133, 10 C. L. J. 484 = 11 Cr. L. J. 2; nor institute proceedings under s. 145, 9 C. W. N. 226. In 37 C. 221 it was *held* following, 10 C. W. N. 775 that a Magistrate who has received information in another public capacity, *e.g.*, as Manager of an encumbered estate, of an offence of mischief by cutting timber from the estate forest cannot act on it in his capacity of a Magistrate and initiate criminal proceedings under s. 190 (1) (*c*). But CARNDUFF, J., was of opinion that the Ruling in 10 C. W. N. 775 went beyond the terms of the Code in laying down that a Magistrate who is "personally interested" cannot even take cognisance of a crime. *See* Note 29 at p. 423 and also Note 19 (*v*) below. In 29 C. 392 it was *held* that the principle that no man ought to be a Judge in his own case, would apply, if a Magistrate instituting proceedings under Chapter VIII acts on his knowledge of the character of the party proceeded against; *see* also 4 P. R. 1898; 27 P. R. 1903, but *see* 27 A. 172.

10. He cannot commit.—This section disqualifies a Magistrate from dealing as a Magistrate with any case in the Police investigation of which he has taken more than a formal part and unless he obtains the permission of his Appellate Court, he is disqualified from committing the case for trial. A commitment by such a Magistrate may be quashed by the High Court under its revisional jurisdiction conferred by s. 439, though not under s. 532, 2 L. B. R. 209 = 1 Cr. L. J. 477.

11. He cannot hear an appeal—The words 'try any case' are comprehensive enough to include the hearing of an appeal BANERJEE, J., in 23 C. 44 at p. 47; 1899 A. W. N. 74; 9 N. L. R. 81 = 14 Cr. L. J. 385; 1 S. L. R. 98 = 8 Cr. L. J. 356. No permission can be granted to enable a Judge to hear an appeal. *See* Note 31 below, *see* also 12 C. W. N. 438 = 7 Cr. L. J. 224; 22 W. R. 75.

12. He cannot direct further inquiry under s. 437 or revise the proceedings.—A Magistrate disqualified under this section cannot set aside an order of discharge and pass an order for further inquiry 5 S. L. R. 137 = 13 Cr. L. J. 30 where 27 A. 25 is *distinguished*. In 1905 U. B. R. (Cr. P. C.) 37 = 2 Cr. L. J. 468 it was *held* if a Magistrate was disqualified from trying a case he was equally disqualified from interfering in revision to the prejudice of the accused. In that case a Collector sanctioned a prosecution under s. 62 of *the Stamp Act* after the deficient duty and penalty had been levied by a Civil Court. The Sub-Divisional Magistrate who tried the case, discharged the accused on the ground that the object of the accused was not evasion of duty but the District Magistrate in revision under s. 12 of *the Upper Burma Criminal Justice Regulation* convicted the accused and sentenced him to a fine. *Held* that the District Magistrate having as Collector directed the prosecution of the accused, was not competent to try him. 23 C. 44 *referred to*. In 27 A. 25, KNOX, J. raised a doubt whether the word 'try' can in any case be applied to proceedings taken under s. 435 of any other section of the Code in which the Judge is not empowered to pass any orders himself, but has only to report the case for the orders of the High Court.

13. Judge though disqualified may as Appellate Court grant permission.—There is nothing in this section to suggest that the interest which might disqualify a Judge or Magistrate from trying or committing for trial would prevent an Appellate Court from granting permission contemplated by this section, 20 A. 161.

"PERSONALLY INTERESTED," WHAT IT MEANS.

14. "Personally interested" should be liberally construed so as to include cases in which Judge or Magistrate may in any way be personally interested in the parties, or in the result of the case.—Whether a given case falls within the provisions of s. [illegible] each particular case: *24 M. 238; 9 N. L. R. 81 = 14 Cr. L. J. 385.*— [illegible] indebted to him or concerned either as com[illegible] ceed in such a case, the mere fact that such a relationship exists gives a handle to unfriendly suspicion, [illegible] it is essential in the interests of the administration of [illegible] district officials are prosecuted as such for offences the accusati[illegible]

[illegible] should be tried by an officer who is [illegible] Magistrate should not himself try a case arising out of matters in which he has an intimate concern so that he cannot feel confident of escaping the imputation of bias, nor should he try a case in which he has been personally concerned in bringing an offender to justice— [illegible] In 8 Bom. L. R. 947 it was stated that the word "*interest*" as used in this [illegible]

20 C. 857. That a disqualifying interest may result from a purely official con[illegible] criminal proceedings seems to be clear, 23 C. 328; 3 P. R. 1895. Personally interested [illegible] the interest. The least pecuniary interest will disqualify, 20 B. 502.

15. Interest sufficient for transfer, to be distinguished from disqualifying interest under [illegible] most [illegible] nicipal [illegible] under this section [illegible] the jurisdiction of the [illegible] 1 A. W. [illegible] W. R. [illegible] directed [illegible] District [illegible] ident of [illegible] the case a substantial interest in the result of the case' [illegible] Where the [illegible] ng made [illegible] ed under [illegible] s disquali[illegible]

16. That Magistrate is concerned in the case' [illegible] to define the meaning of this phrase 'personal [illegible] whose duty is to see that the law is obeyed is merely [illegible] prosecution and trial of an offender against the [illegible] jection to the matter, and must refer to some particular [illegible]

(F.B.). It is clear that in the illustration *A's* interest in the success of the prosecution is not pecuniary and very indirectly personal. It is as an official on behalf of Government, if it exists at all. It may only be a neutral interest, that is, a desire for the discovery of the truth, whether the accused prove to be guilty or innocent. In many cases, a Deputy Commissioner or other executive head of a District, or Department, who orders a prosecution, does so because the matter before him demands elucidation by judicial enquiry. Where such is clearly shown to be the case, this section would not be applicable. But in other cases, when the officer ordering a prosecution has satisfied his own mind that the accused is guilty, then, clearly he should not try the accused. **9 N. L. R. 81 = 14 Cr. L. J. 385** where **12 P. R. 1905** is *doubted*. *See*, however, **2 A. 806**; **6 C. L. R. 279**; **1886 A. W. N. 87**, cases under the Codes of 1872 and 1882. The principle ought not to be applied where the relation is by statute and Judges have a duty imposed upon them to investigate and decide, *Wildes* v. *Russell*, **L. R. 1 C. P. 723**; **17 W. R. 39** (F.B.). (*a*) *Magistrate in charge of Abkari administration.*—A Magistrate in charge of Abkari administration of a district is not "personally interested" in the observance of the provisions of Act I of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the abovementioned Act, **15 A. 192.** But now **15 A. 192** must be read in the light of the *illustration* added to this section. (*b*) *Under the Opium Act.*—A District Magistrate who is also a Collector is not debarred by the circumstances of his dual appointment from trying an offence under s. 9 of *the Opium Act*, I of 1878, the prosecution of which has not been instituted by himself as Collector, **1 Bur. S. R. 400.** (*c*) *Excise Officer as distinguished from Collector.*—*J.*, a licensee of a liquor shop was ordered by the Excise Officer to change the site of the shop. He disobeyed the order, was tried by the Excise Officer who was also the District Magistrate, and was convicted and fined for the disobedience of the order. The Sessions Judge referred the case to the High Court with the recommendation that the conviction was bad on the ground that s. 556 precluded the Excise Officer from trying the case. KNOX, J., upheld the conviction following **15 A. 102.** "The Collector and the Excise Officer in a district are two different persons and it is a sound rule of law that no illustration should be pressed further than the words warrant," **1908 A. W. N. 95 = 5 A. L. J. 357 = 7 Cr. L. J. 393.** This decision appears to be erroneous. (*d*) *District Magistrate as head of Police.*—A District Magistrate is not, on account of his being the head of the Police of the district, debarred from trying a person accused under s. 29 of Act V of 1861 of a breach of the orders of a Reserve Inspector of Police, **22 A. 330.** Nor is such Magistrate debarred from hearing the appeal against a conviction under s. 182, I.P.C., when sanction to prosecute is granted by him, provided the case does not fall under s. 487, **27 C. 452.** But the section does disqualify him from dealing as a Magistrate with any case in the Police investigation of which he has taken more than a formal part, **2 L. B. R. 209.** (*e*) *Mere Municipal Commissioner is not disqualified.*—*See* **24 W. R. 25** and Note 17 (*iii*) below.

(*i*) *The fact that he takes mere formal part in institution of proceedings does not disqualify him.*—Where the only connection which a Deputy Commissioner had with the proceedings was, that he ordered the *Akunwan* to make an inquiry and the only sense in which he may be said to have initiated the proceedings was in issuing a warrant when a complaint was made to him as a Magistrate, it was *held* that he was not barred from trying the case, **10 Bur. L. R. 150.** *See* **36 C. 869.** Where a Magistrate merely laid before an Inspector of Police certain information and directed him to make an inquiry on the basis of that information, it cannot be said that the Magistrate directed the prosecution and he had no jurisdiction, **11 A. L. J. 852 = 15 Cr. L. J. 17.** In **17 W. R. 39,** the proceedings of a Magistrate who tried the prisoners charged with having committed offences under ss. 93 and 95 of *the Registration Act*, XX of 1886, were *held* not illegal and without jurisdiction or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his official capacity as Sub-Registrar.

(*ii*) *Nor does mere authorising of prosecution disqualify.*—A Deputy Tahsildar made a report to the Tahsildar about certain embezzlements by the accused, a village officer. The Tahsildar in his turn reported the matter to the Divisional Officer, who authorised him to prosecute the accused on such charges as might be capable of being proved in a Criminal Court and the Tahsildar then lodged the complaint, the case was tried by the same Divisional Officer in his capacity as Deputy Magistrate, and the objection raised before him, that under this section he was disqualified, from trying the case, was overruled. *Held*, that the Deputy Magistrate was qualified on the ground that his act was an authorisation and not a direction that the accused should be prosecuted. The word '*directs*' in the illustration means institute or gives order for the institution of the prosecution, **24 M. 238** where **20 C. 857, 15 A. 192** and **22 A. 340** are *referred to*; **1 Rang. 517.**

(*iii*) *Mere forwarding the papers with his opinion does not disqualify.*—*See* **5 Bom. L. R. 542** and Note 17 (iv) below.

(i) *That he issued the warrant the execution of which was obstructed does not disqualify him* —A Cantonment Magistrate in his capacity as the Cantonment Small Cause Court Judge issued a warrant, the execution of which was obstructed and on the complaint of the bailiff tried and convicted the persons who accused the obstruction. It was contended that the Magistrate was personally interested inasmuch as he had issued the warrant. *Held* that issuing the warrant would not make the Magistrate personally interested and he was concerned in the matter in his public capacity only. And as he had not directed the prosecution he was not disqualified under s. 556 8 B L R. 41 = 15 Cr. L. J. 649; 26 A. L. J. R 863

17 If, in addition, the Magistrate has substantial interest or takes substantial part in the proceedings he is disqualified—Scope of explanation

(i) *Where he directs a prosecution, that is institutes or directs the institution of a prosecution* — Under the explanation a Magistrate is not deemed to be a party as personally interested in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity. But the illustration makes it clear that the effect of the explanation is only partially to relax the rule that no man is to be a judge in his own cause. A Collector who *qua* Collector is interested in the protection of the *fisc* may as Magistrate try an offence against the Excise Laws. He is not disqualified "by reason only that he is a Collector." But if in his capacity as Collector he has directed the prosecution he is disqualified from trying the case not by reason of the fact that he is the Collector, but by reason of the further fact that he has constituted himself the prosecutor. Where therefore, the Magistrate presided at a meeting of the Municipal Board which directed the prosecution *held* that he was disqualified from making an order for further inquiry against the accused under s. 437. It may be that the Magistrate did not speak or vote at the meeting—but the fact remains that he attended a meeting where the question was debated and the prosecution ordered and he had therefore placed himself [illegible] = 13 Cr L J. 30 where 32 A 635. *Q* v [illegible] R. 659, *Q* v *Lee* (1882) 9 Q B D 394 = [illegible] ordered the prosecution of the accused in his capacity as Tahsildar and further ordered the search of the accused's house not on the complaint or report of a Collector or Excise Officer, but on that of an opium contractor is incompetent to try the offence. The illustration to the section almost exactly covers such a case, 5 P. W R 1912 = 64 P L. R 1912 = 13 Cr L J 293. The illustration simply embodies the principle that a man cannot be both prosecutor and Judge in the same cause. What the section shows is that if a Magistrate or Judge is merely connected with a case by reason of his discharging some other public function or is connected with it in some public capacity outside his magisterial or judicial functions, and orders or directs a prosecution or is concerned with it in some public capacity, he is not on that ground alone, to be deemed personally interested in the case. But if in addition to a connection of that sort, he in some capacity outside his magisterial or judicial functions, orders or directs the prosecution of a person for an offence then he is to be deemed personally interested in the case and he cannot try it as Magistrate or Judge. The distinction is between having merely some public or official connection with a case and ordering or directing the prosecution in some extra judicial or extra magisterial capacity —*Per* STRACHEY C.J., 1899 A. W. N 74. The disqualifying interest must be one attaching to a Magistrate or Judge as an individual, and not one which he derives solely from his official position 1893 A W N 79. But *see* the illustration to this section which shows that a disqualifying interest may result from a purely official connection with the initiation of proceedings. *See* 23 C 44 and 328. In a Municipal prosecution the trial of the accused by a Magistrate who was Secretary to the Municipal Committee and had as such signed the Resolution of the Municipal Commissioners authorising the institution of the prosecution was very severely condemned as most objectionable 1883 A. W. N 181. A Joint Magistrate who has been verbally authorised by the Municipal Committee to institute Municipal cases cannot try a case which he has thus himself instituted 1891 A. W N. 81 *following* 1886 A. W. N. 291. Where a Collector on the report of an Excise Sub-Inspector directed the prosecution of the accused under *the Excise Act held* that the Collector should not as a District Magistrate hear the appeal 14 C. W. N. 83; 1896 A. W. N. 105. Where a Magistrate as President of the Octroi Sub-Committee orders a prosecution for evading the payment of octroi he cannot try the case himself, 7 A. L. J. 749 where 1899 A W. N 74 is *followed* 8 A. L. J. 1129 = 12 Cr. L J. 575. Where the Forest Officer asked a Deputy Commissioner to administer a warning to the [illegible] for having made a false report to that officer and the Deputy Commissioner directed the [illegible] the accused under s. 182, I P C. having satisfied himself that there was a clear case of a fa[illegible] he was disquali fied from hearing an appeal from the conviction. The mere fact that [illegible] o objection to the hearing of the appeal did not give the Magistrate jurisdiction

was consequently set aside, **9 N. L. R. 81 = 14 Cr. L. J. 385.** A District Magistrate who sanctions the institution of the proceedings under *the Arms Act* is disqualified from trying the case, **9 C. P. L. R. 26.** *See* also **8 S. L. R. 41 = 15 Cr. L. J. 649.** A Magistrate who issued process on his personal knowledge and suspicion that an offence against *Printing Presses and Books Act* XXV of 1867 had been committed, between whom and the accused correspondence had passed relating to the offence and who had ordered the Police to investigate was *held* to have a personal interest, **13 A. 345.** A Magistrate who has been authorised by the Collector under *the Stamp Act* to prosecute offenders against the stamp laws is not competent to try persons whom he prosecuted, **3 C. 622.** *See*, however, **8 B. L. R. 422 (F.B.).** After the close of a trial the trying Magistrate ordered the Police to send up a charge-sheet in respect of a witness for the prosecution. The Police did so. The Magistrate tried the accused and convicted him, *held* that the Magistrate having directed the prosecution of the accused was not competent to hold the trial by reason of s. 556 of the Code. The explanation to s. 556 does not apply when the Magistrate himself has directed the prosecution. For a Magistrate cannot be both prosecutor and a Judge, **23 Bom. L. R. 842.**

(*ii*) *Where he passed the order for disobedience of which accused is tried.*—**10 C. 1030** the District Magistrate was present as Chairman of the Municipal Commissioners when the order was passed, for the disobedience of which the accused was tried and convicted by the same District Magistrate. The conviction was set aside as illegal. PRINSEP, J., *remarked* : " It (the explanation) was rather intended to prevent an objection being raised that, from the mere fact that the Magistrate might happen to be a Municipal Commissioner, he was necessarily disqualified from holding a trial in which some Municipal matter was involved. It is a very different matter when, as in the present case, we find that Magistrate is practically one of the prosecutors and the Judge." " By the Common Law, a Judge, who has an interest in the result of a suit, is disqualified from acting except in cases of necessity, where no other Judge has jurisdiction. The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified, no matter how small the interest may be. The Law, in laying down this strict rule, has regard, not so much perhaps to the motives which might be supposed to bias the Judge as to susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security . . . We are anxious not to be misunderstood in using this language. No right-minded person does, or can, for a moment entertain the thought that the Reverend Prelate, who was called upon to act in this case, was or could be, influenced by any consideration of personal interest in the proceeding . . . The applicant stands upon his legal right, and calls upon us to give effect to it." *Sergeant* v. *Dale*, **L. R. 2 Q. B. D. 558,** *quoted.* Apart from the section, it is highly undesirable that a Magistrate should judicially act in a case which he has himself extra-judicially investigated, and in which, upon facts so investigated, he has come to conclusions of fact adverse to the party against whom he subsequently initiates proceedings under the Criminal Law. Therefore, where a Magistrate as a Chairman of a certain Local Board issued a notice calling upon the petitioner to remove a certain obstruction, and the petitioner submitted a representation, which proved infructuous, and subsequently the Magistrate initiated proceedings against the petitioner under s. 133. *Held*, that the concern of the Magistrate with the case was not merely in a public capacity so as to take the case out of s. 556, **10 C. L. J. 484 = 11 Cr. L. J. 2.** *See* also **3 P. R. 1895** and **5 P. R. 1896.** *See* Note 5 to s. 487 and Note 256 at p. 548 and also Note 65 at p. 265. In **8 P. R. 1905 = 2 Cr. L. J. 45,** a Cantonment Magistrate warned the accused that he must not tie his buffaloes in a certain spot. The accused persisted. Thinking the place to have been rendered insanitary, the Magistrate sent for the accused and fined him without taking any independent evidence. *Held*, the conviction and sentence were illegal, the Magistrate not having informed the accused that he was entitled to have the case tried by another Magistrate, the case being one taken cognisance of on his own personal knowledge. *Held*, also, though it was not incompetent for the Magistrate to take cognisance of the offence on the ground of his inspection of the locality, he ought to have acted on independent evidence. *See* also **1908 A. W. N. 95 = 5 A. L. J. 357.** *See*, however, **8 B. L. R. 41 = 15 Cr. L. J. 649** in Note 16 (iv).

(*iii*) *Where as Municipal Councillor he is personally interested.*—If a Municipal Commissioner took any part in promoting a prosecution by concurring in sanctioning it at a meeting of the Managing Committee, or otherwise, he is disqualified by reason of the existence of a personal interest over and above what may be supposed to be felt by every Municipal Commissioner in the affairs of the Municipality, **18 B. 442 ; 3 P. R. 1895 ; 5 S. L. R. 137 = 13 Cr. L. J. 30 ; 18 Cr. L. J. 1017 ; 10 Lah. 718.** If, as Vice-President, he had made a preliminary inquiry and recommended the prosecution of the accused he is disqualified, **5 P. R. 1896.** A mere Municipal

Commissioner is not disqualified, **24 W. R. 25.** In **Weir II, 728,** a Municipal Councillor reported to the Council an offence against a conservancy provision which came to his notice. The Council of which he was a member directed the prosecution. The Councillor also sat on the Bench of Magistrates who tried the offender and convicted him *Held*, that the Municipal Councillor was not interested in the matter, and that the proceedings were not illegal The words "or otherwise concerned in a public capacity" seem to have been intended to supersede the decision in **15 M. 83,** where it was said that the Chairman of a Municipality being an executive officer he would be the proper person to institute prosecutions for offences against the health or comfort of the town He is a very different person from a mere Municipal Commissioner, and is clearly disqualified to try cases against Municipal Act, **15 M. 83 at p. 83.** *See* also **23 C. 44.** In **27 A. 25,** it was *held* following *Q v Handsley*, **L. R. 8 Q. B. D. 383;** the fact that a Magistrate who had been a member of a Sub Committee of a Municipal Board which recommended the prosecution of the accused for obstructing a public thoroughfare would not in itself render the Magistrate personally interested in the case, so as to debar him under this section from trying the case initiated on the recommendation of such Sub-Committee In **1899 A. W. N. 44,** STRACHEY, C.J, *held* that it was quite clear from the explanation of s 556 that whatever may have been the law under the Code of 1882, the District Magistrate is not disqualified from hearing the appeal merely because he happens to be the Chairman of the Municipal Board, *see* also **26 A. 539.**

(iv) *Where he has taken active part in the departmental inquiry*—It is not usually expedient that a Magistrate who has supervised and given advice in a departmental inquiry against a subordinate should finally try and determine the criminal case against the same subordinate, **Ratanlal 631.** A Deputy Tahsildar who inquired into a matter as a revenue officer, was held disqualified from trying it as a Magistrate and a Deputy Magistrate who sanctioned the prosecution, was held disqualified from hearing and disposing of the appeal from the conviction by the Deputy Tahsildar, **Weir II, 729.** But if the Magistrate took no part in the departmental inquiry, but simply forwarded the papers to the Collector with his opinion that there was apparently sufficient evidence to justify a criminal prosecution. *Held*, he was not debarred under this section from trying the case, **5 Bom. L. R. 542.**

(v) *Where he has collected evidence for prosecution and otherwise taken active part in prosecution*—The words 'personally interested' do not merely mean "privately interested or 'interested as a private individual," but include such an interest as the Magistrate would have in getting the conviction of the accused Therefore where a District Magistrate, as prosecutor, initiated and directed the proceedings against certain accused persons who were charged by him under ss **143** and **150,** I P.C, and where he had taken an active part in causing the dispersion of the unlawful assembly and had pursued and directed the pursuit of the members thereof, and afterwards took plains to collect evidence showing the connection of the accused with the unlawful assembly, etc, *held* that he was disqualified from trying the case himself **20 C. 857** *followed* in **23 C. 325.** *See* also **14 Bur. L. R. 335 = 9 Cr. L. J. 66; 1 S. L. R. 98 = 8 Cr. L. J. 356.** Where a Magistrate took [illegible]

been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution, **2 C. 23 = 25 W. R. 57.** Where it appeared that a District Magistrate was not only actually concerned in the institution of proceedings against a person under Chap VIII, but that those proceedings originated in, and with him in the discharge of his duties as executive head of the district responsible for the maintenance of law and order, *held* that s 556 debarred him from entertaining an appeal under s 406 without the permission of the Sessions Court, and that the inherent [illegible] by any act of waiver on the part of the accused, **1 S. L. R. 98 =** [illegible] rocedure is not always desirable, and I am very clear, that as a [illegible] rate who, by local investigation while on tour having himself [illegible] it thereafter directs, [illegible] he supposed criminal. [illegible] ve responsibility, or of public morality, it is impossible that he should bring to the trial a [illegible] ceived impressions to the extent which is demanded from the President of every forum of justice by our system of jurisprudence When ever the circumstances are such as to indicate in a reasonable way that the Magistrate has formed even a

prima facie opinion on questions of fact which he would have to try, the subsequent trial of such matters by him becomes a mere form and a pretence, or it represents a mere revision of the prejudice of the Magistrate. This is a position which is as undesirable for the Magistrate as for the party against whom his *prima facie* opinion may have been formed, **20 W. R. 76** *referred to.* That regard for the susceptibilities of the accused was recognised as a principle in dealing with cases like this, *see* **15 C. P. L. R. 192.** The case was transferred, **8 N. L. R. 1 = 13 Cr. L. J. 236** and **22 W. R. 75** and **23 C. 328** were *referred to.* *See* Note 19 (iii).

18. How far does Magistrate's taking part in previous judicial proceedings disqualify him?—*See* Note 30 under s. 526. Where the impressions recorded in a judgment by a Magistrate, are derived from evidence, however erroneous they may be, they cannot be classed with instances of personal bias which is regarded as disqualifying the Magistrate from trying the case, **6 Bom. L. R. 1092,** where **1 C. W. N. 426** is *referred to.*

(*i*) *Magistrate holding inquiry under s.* 202 *is not disqualified.*—In a summons-case, a Magistrate before whom the complaint was made held under s. 202 an inquiry for the purpose of ascertaining the truth or falsehood of the complaint before issuing the process against the accused, after holding the preliminary inquiry he summoned the accused, tried and convicted him. *Held*, that there was nothing in the Code which disqualifies a Magistrate who holds a preliminary inquiry under s. 202 from trying the case himself; and the provisions of s. 556 have no application to the circumstances of such a case. The principle of **20 C. 857** and **23 C. 328** does not apply, **24 C. 167.** *See* also **13 C. W. N. 228.** The mere fact that the inquiry was made by the Magistrate is not to be regarded as a disqualifying ground under this section, **8 Bom. L. R. 947** where **2 Bom. L. R. 663** is *referred to.* *See* also **20 W. R. 76.** The District Magistrate referred a complaint to a Subordinate Magistrate for local investigation. The Sub-Magistrate after holding an *ex-parte* inquiry, reported to the District Magistrate that in his opinion the complaint was true, and the District Magistrate then made over the case to him. *Held*, that the Subordinate Magistrate was competent to hold the trial, **4 C. W. N. 604.**

(*ii*) *Magistrate merely issuing process without proceeding under s.* 190 (*c*) *or s.* 202 *competent to hear appeal.*—A Deputy Magistrate, who received a complaint referred the case to a Sub-Deputy Magistrate for local investigation and report. The Sub-Deputy Magistrate submitted a report recommending the dismissal of the complaint and the report came before the Joint Magistrate *W*, then in charge of the criminal business of the *sudder* Sub-Division *W*, without expressing any clear opinion hostile to the accused, directed summons to issue, as the reasons of the Sub-Deputy Magistrate were unsatisfactory. *W* subsequently transferred the case to another Magistrate who convicted the accused. The appeal of the accused was heard and dismissed by *W* without any objections; *held*, that a Magistrate who did not take cognisance of a complaint or order a local investigation, but acting as the officer-in-charge of the *sudder* Sub-Division directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint, without, however, expressing any clear opinion hostile to the accused, is not incompetent under s. 556, to hear the appeal on conviction of the accused, **36 C. 869.**

(*iii*) *Sessions Judge not disqualified to hear appeal, where prosecution ordered by him as District Judge.*—In a proceeding before a District Judge, a false statement was made. The District Judge sent the case down to the District Magistrate under s. 476, and the latter convicted the accused. From this conviction an appeal was preferred to the Sessions Judge, who was the same officer that took steps under s. 476, and the appeal was dismissed. In revision, it was contended that as the District Judge ordered the prosecution, he was disqualified to hear the appeal sitting as a Sessions Judge. *Held*, that the Sessions Judge was competent to hear the appeal as he could not be said to be personally interested in the case and that he did not hear an appeal from a judgment or order made by himself. The illustration to this section does not apply, as in that case the Collector is the prosecutor and has a certain pecuniary interest in the matter, **7 C. W. N. 708** which *follows* **16 C. 766; 15 Bom. L. R. 104 = 14 Cr. L. J. 190.** *See* Note 3 to s. 487. But see **28 Bom. L. R. 1302** wherein it was held that the Session Judge was not competent to hear the revisional application against the order of discharge passed by a Magistrate in a case in which the Sessions Judge had himself made a complaint under section 476 of this Code for an offence under section 194, I.P.C.

(*iv*) *Improper recording of confession no disqualification.*—A Magistrate heard the confessional statement made by the accused when he was brought before him on arrest, but did not record it in the manner provided by s. 364. *Held*, that this does not make the Magistrate a witness and thereby disqualify him to try the case, **24 C. 499.**

(*v*) *Trying counter-case, whether disqualification?*—A Judge is not incompetent to try a case of rioting simply because he has tried and decided a counter-rioting case and expressed a strong opinion therein, **1 C. W. N. 426.** *See* also **36 C. 904** and Note 33 to s. 526.

(*vi*) *But if he has held the preliminary inquiry he cannot try the accused after committal*—*See* 2 C. W. N. 639, Note 27 (iii) to s 526

(*vii*) *Where by gathering information he makes himself a witness, he is disqualified*—Where a Magistrate was present at a search by the Police during investigation, and in all probability he came to know of some facts in connection with the case, it is expedient that the case should not be tried by him, **5 C. W. N. 864**, and *see Note 17 (z), supra*

(*viii*) *Is a Judge who has granted sanction disqualified from trying the person or hear the appeal from the conviction?*—*See* Notes 256 to 259 at p 548 and Note 5 under s 478 and Note 3 under s 487 Sanction was given to prosecute petitioners for offences under ss. 463, 471, 219, 511, I P C, by a Munsiff On appeal the District Judge confirmed the order holding that the record established a strong *prima facie* case against the petitioner The petitioner was thereupon placed on his trial before a Sub-Divisional Magistrate and was convicted Against the conviction, this petitioner preferred an appeal to the Sessions Judge, who was the same Judge that had as District Judge disposed of petitioner's application for revocation of sanction The appeal was heard by him and was dismissed The explanation given by the District Judge for hearing the appeal was that no objection had been taken by the petitioner although he had warned him of his right to raise the plea *Held* that the Sessions Judge ought not to have heard the appeal, **17 C. W. N. 111.**

19. Instances of personal interest which have been held to disqualify a Magistrate.—It is hard to define exactly what is meant by 'personal interest' and it is difficult to reconcile the various decisions The question whether a given case falls within the provisions of s 556 must be a question of fact to be determined by the circumstances of the particular case, **24 M. 238; 9 N. L. R. 81 = 14 Cr. L. J. 385**

(*i*) *Magistrate is the prosecutor*—*See* Note 17 (i). A Magistrate who has been authorised by the Collector of a District under s 43 of *the Stamp Act* to prosecute offenders against the stamp laws is not competent also to try persons whom he prosecutes, **3 C. 622.** A Magistrate who is in charge of the treasury is prohibited from trying stamp cases, **1884 A. W. N. 37.** A Magistrate is not competent to try a person for contempt of his authority as a Settlement Officer in disobeying his order to appear before him **2 A. 405.** A Judge who has directed the prosecution should not hear the appeal under any circumstances He cannot get the permission of a superior Court, **39 P. R. 1884; 1898 U. B. R. 2** and *see* Note 30

(*ii*) *Magistrate is the servant or subordinate of the prosecutor*—*A* who was alleged to have carried on business in Calcutta without having taken out license under Bengal Act IV of 1876 was summoned at the instance of the Corporation by *B*, a servant of the Corporation and also a Justice of the Peace *A* was convicted and sentenced to pay a fine, although he denied his liability to take out a license and tendered evidence in support of his allegation, *held*, that the proceedings and the ultimate conviction of *A* were illegal inasmuch as *B* being a servant of the prosecutor, that is, the Corporation had such an interest as might give him a bias in the matter and that consequently he ought not to have sat as a Justice of the Peace either at the granting or upon the hearing of the summons, **7 C. 322 = 9 C. L. R. 193,** *citing* **4 B. L. R. Ap. Cr. 15; 8 B. L. R. 422 = 17 W. R. 39,** *Dimes* v *The Grand Junction Canal Co*, **3 H. L. Cas. 793.** *Q* v *Gibbon* **L. R. 6 Q B. D. 168.** *Q* v. *Lee*, **9 Q. B. D. 394,** *Q* v *Meyer*, **L. R. 1 Q. B. D. 173** *Q* v. *Miledge*, **L. R. 4 Q. B. D. 332,** *Rand* **1 Q. B. D. 230** and *Q* v *Hindsley*, **8 Q. B. D. 383.** Since the decision of the case in **7 C. 322,** two cases were decided by the Calcutta High Court, in both of which the conviction being by Municipal Commissioner Magistrates, for breach of Municipal laws, was set aside In **10 C. 194,** MITTER, J remarked 'The Legislature simply limited the explanation to the disqualification of a Commissioner in a case in which the Municipality or Corporation may be interested they did not include in the explanation the case of a salaried officer of a Municipality or a Corporation" FIELD, J, remarked "A gentleman who without remuneration, is merly discharging a public and honorary office, and who has no personal interest in the proceedings of the Municipality, may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested Such immediate and disqualifying interest does we think, exist in the case of a gentleman whose time and services are, in consideration of a salary, given to carry on the work of a Municipal [illegible] that such a person however upright and honourable his

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Magistrate to re-call and re-examine two of the prosecution witnesses and at the same time interviewed those witnesses and ordered them to give evidence. The Magistrate complied with the Assistant Collector's direction and acting on the evidence convicted the accused. *Held*, reversing the conviction, that when the Magistrate complied with the direction of the Assistant Collector, he virtually abdicated his Magisterial function and became a mere delegate of the Assistant Collector who had initiaed the prosecution and the trial was without jurisdiction, for a Magistrate cannot be both Judge and a delegate of the prosecution, **7 S. L. R. 82. = 15 Cr. L. J. 375.**

(*iii*) *Magistrate is interested as a witness* —A Magistrate cannot himself be a witness in a case in which he is the sole Judge of the law and fact. Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad, **2 C. 405; 20 C. 857.** Where a Judge is the sole judge both of law and fact in a case tried before himself, he cannot give evidence before himself, nor can he state anything against an accused person in his judgment which was not stated on oath in his presence, **19 M. 263.** *See* also Note 25 under s. 526 and Note below. But in **13 W. R. 60 = 4 B. L. R. 14**, a Judge who was also a witness, was *held* not disqualified, when such evidence was to be submitted to the independent judgment of others sitting with him. Where certain complainants made an oral complaint to a Magistrate, during the Christmas vacation, and after the vacation was over, filed a written complaint before the same Magistrate, who, during the trial of the case, without any objection being raised on behalf of the accused, made a statement on oath which he himself recorded, and permitted himself to be cross-examined and re-examined, and after the lapse of one month (during which interval no exception was taken to the procedure adopted) convicted the accused, *held* that no personal interest could be imputed to the Magistrate, so as to oust his jurisdiction and render the trial invalid. 'That which disqualifies a Magistrate in trying a case is substantial interest giving rise to a real bias and not merely the possibility of a bias; there having existed at the time of the trial, no suspicion in the mind of the accused that they would not have a fair and impartial trial at his hands and seeing that they did not raise any protest till the close of the case, and the objection having been put forward for the first time in appeal to escape from the conviction, it cannot be held there was any real bias, **27 A. 33,** where **15 A. 192** and **L. R. 8 Q. B. D. 383** are *followed* and **21 C. 920, 20 C. 857** and **L. R. 2 Q. B. D. 558** are *referred to*. *See* also **27 C. 172.**]

(*iv*) *Magistrate being shareholder of complainant company is "personally interested."*—These words are not intended to include pecuniary as distinguished from a personal interest. Where a Magistrate has pecuniary interest, however small, in the result of an accusation, as, for instance, his being a shareholder in a company which is a complainant in a case, in which the accused, a compounder employed by it, was charged with having stolen, or criminally misappropriated, Rs. 20 belonging to the company, he is disqualified from adjudicating on it. In such a case it is unnecessary to enquire whether there was any real or substantial ground for suspecting bias on his part. The least pecuniary interest will disqualify, **20 B. 502; 8 B. L. R. 422 (F.B.) = 17 W. R. 39.** In *R.* v. *Hammond*, **9 L. T. 423,** Justices who were shareholders in a railway company were held to be disqualified to try the accused for the offence of travelling on the railway with an improper ticket. Cf. *R.* v. *Burton*, **(1897) 2 Q. B. 468,** where a Justice being a member of the Incorporated Law Society was held not to preclude him from trying an unqualified person for acting as solicitor.

(*v*) *Interest as Manager of Estate under Court of Wards.*—Where the Manager of an Estate under the Court of Wards, who was appointed also as Sub-Divisional Officer, drew up proceedings under s. 145 as Magistrate against one who disputed the possession of a piece of land, in which the estate claimed an interest and about which he had reported to the then Sub-Divisional Officer and also refused an application for the transfer of the case, the Court observed that the Magistrate showed a striking lack of appreciation of the ordinary principles which should guide judicial officers in matters of this kind, **9 C. W. N. 226.** Where a Deputy Commissioner as the Manager of an encumbered estate ordered certain enquiries as to the cutting of certain trees in a forest to be made, and on the receipt of a report instituted criminal proceedings as Magistrate under s. 190 (1) (*c*), *held* following **10 C. W. N. 775,** that he had no authority to do so, **37 C. 221.** But where the District Magistrate in his capacity of Collector, is concerned in the management of an estate held by the Court of Wards, it is no ground for asking for a transfer from the district of a case brought by a servant of the estate and pending before a Subordinate Magistrate in the District, **28 C. 297.**

(*vi*) *Interest by being master of complainant.*—The mere circumstances that a trying Magistrate is the master of the complainant, does not deprive the Magistrate of his jurisdiction, but it is expedient that such a complaint should be referred to another Magistrate, **9 B. 172.** *See* **14 B. 572** and *see* Note 24 to s. 526.

(*vii*) *Accused committing offence and annoying Magistrate, a fellow-passenger.*—A Magistrate, while travelling in a railway carriage, requested the accused, who were fellow-passengers, to desist from smoking,

and on their contemptuously refusing to do so arrested them and subsequently tried and convicted them under s. 33 of *Railway Act* 1879 *Held* that in the circumstances of the case the Magistrate was legally and morally disqualified from exercising his judicial functions in relation to the offence imputed and that although s 64 gives to a Magistrate authority to arrest a person committing an offence in his presence yet that section was clearly not intended to trench upon the great principle embodied in this section that no Judge or Magistrate shall deal judicially with a case in which he is personally interested **Ratanlal 339**

(*viii*) *Accused obstructing trying Magistrate by driving on wrong side*—Accused was convicted under ss 28 and 29 of *Bombay Act* VII of 1867 for obstructing passengers (trying Magistrate including) by driving on the wrong side of the road *Held* reversing conviction and sentence that the Magistrate having been interested as one of those obstructed ought not to have tried the case **Ratanlal 321**

(*ix*) *Accused rashly driving and passing Magistrate s wife s carriage*—A Magistrate convicted the accused under s. 31 of *Bombay Act* VII of 1867 of rash and negligent driving for passing the Magistrate s wife s dog-cart, *held* that the Magistrate had no jurisdiction to try the case as he was personally interested in it, **14 B 572**

(*x*) *Magistrate obtaining sanction to prosecute the accused for another matter*—In **2 L B R 220**, the accused applied to the District Magistrate under s 528 to transfer a case from the Magistrate of the second class before whom he was being tried on the ground that the latter was corrupt and had demanded money from him The District Magistrate after inquiry found that the allegation was false and rejected the application The Magistrate then applied for leave to prosecute the accused and at the same time proceeded with the trial which had been stayed and convicted the accused *Held* that the Magistrate after he had sent in his application for leave to prosecute the accused should have taken the further orders of the District Magistrate as to whether he was to go on with the case

(*xi*) *Magistrate belonging to a community whose feelings have been outraged*—A Muhammadan Magistrate whose order for the closing of a shop was disobeyed by the accused ought not to try the complaint for disobedience of such order especially when the dispute has been magnified into one of a religious nature and the religious feelings of Muhammadans are supposed to be outraged **26 P W R 1912 = 13 Cr L J 601**

(*xii*) *Magistrate interested as a litigant in similar case*—At a special sessions for appeals against a poor rate the Chairman of the Magistrates who was himself the appellant in one of the cases for hearing took part in the decision of all the cases except his own. When his own case was called on he left the Bench and went to the body of the Court and conducted the case himself On objection *held* that the Chairman being a litigant similar to the other matters in Court was disqualified from acting as a Justice and that the orders were bad *R* v *Great Yarmouth JJ* **8 Q B D 525**

(*xiii*) *Magistrate in business or friendly relations with a party*—If a Magistrate is in close business or friendly relationship with a party it is on the whole undesirable that he should take part in hearing a case in which the interests of such a person are gravely affected **8 Pat 575**

(*xiv*) *Pecuniary interest*—Pecuniary interest even to a small degree is sufficient disqualification, independently of whether the Magistrate is really biased or likely to be biased *65 Bom 716*

20 Instances of personal interest which have been held not sufficient to disqualify a Magistrate—

(*i*) *Interest by being a guest*—The following despatch from *the Secretary of State for India* to the Government of Madras will be a guidance to all Judges and Magistrates on the subject — The memorialist was prosecuted by the Collector and he alleges that when the Sessions Judge came to try the case he resided at the Collector s house and was greatly prejudiced by the Collector against the memorialist. I have no doubt that the latter assertion is quite unfounded but I think it would be well if your Grace in Council would suggest to the Judges through the High Court to avoid as far as possible becoming the guests of those who are interested in cases civil or criminal which will eventually be submitted to the Judge s decision All possible imputation of prejudice against the weaker party must be avoided —*M H C C O No 7 dated 7th April* 1879

(*ii*) *Interest as having held briefs while at the Bar*—The Court cannot recognise the principle that a Judge because he has once *held* briefs for a certain company while at the Bar as a practising Barrister, will not decide the case of the company with fairness A man is quite capable of dissociating himself from such influence while acting in a judicial position *Q* v *Garrod see* **4 C W N 243**

(*iii*) *Magistrate being member of a society pledged to a certain course of conduct.*—The mere fact of belonging to a Temperance Society pledged to the principle of no "license in any form under any circumstances for the sale of liquors to be used as a beverage" does not operate as a disqualification for sitting as a member of a licensing Court, *M'Geehen* v. *Knox*, (1913) **S. C. 688—Court of Sessions.** *See*, however, *ex-parte Robinson*, **76 J. P. 233 (C.A.)**.

LOCAL INSPECTION.

21. Local inspection, power to make.—Ss. 148, 202 are the only sections expressly enabling anyone except a jury or assessors to view the place where the facts alleged to have taken place occurred. S. 293 provides for a local inspection by the jury or assessors. S. 526 (1) (*c*) enables the High Court to transfer a case when a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same. The explanation does not directly authorise a Magistrate to make a local inspection but it saves his jurisdiction to try a case notwithstanding that he may have made a local inspection or investigation, **37 C. 340.** There is therefore no provision of law which empowers trying Magistrates or Judges to view a place connected with a case before them. The defect is proposed to be remedied by the addition of a new section 539-B, *see* Addenda. But the case law and the practice of the Courts have established that a Magistrate may take a view of the scene of the alleged offence for certain purposes and with certain precautions, STEPHEN, J., in **37 C. 340** is of opinion that the Code is not exhaustive in dealing with the powers of a Magistrate and it cannot by omitting to justify a certain course of action on his part, deprive him of powers which he otherwise possesses. There are in effect three kinds of local inspections. (1) Those that are authorised or directed by this Code and which are governed by the rules and limitations imposed by the Code itself (2) those which are in the nature of a view by the jury laid down in s. 293 of the Code. Magistrates having the functions of both Judge and jury in cases decided by them may, in our opinion, view the place in any case, in order, as the rulings on the points say, to follow or understand the evidence, *see* **19 A. 302**; (3) local inspections referred to in **9 C. 363 = 12 C. L. R. 490.** There is express provision for this local investigations in the Civil Procedure Code, but there is nothing that can be deemed to prevent them in this Code. The personal observations of the Court cannot be excluded from consideration. **16 C.W. N. 426 = 15 C. L. J. 403 = 13 Cr. L. J. 156.**

22. Use and object of local inspection.—"From cases which have come under notice it would seem that many Magistrates misunderstand the use and object of an inspection of the spot in criminal cases. There are no doubt cases in which a Magistrate will be able to examine witnesses more effectually if he has seen the places where the events to which they depose are alleged to have occurred. There may be cases in which the Magistrate can examine witnesses more effectually if he examine them on the scene of the alleged events, at the house where a house-breaking is alleged to have taken place or the like. But then *he must record those witnesses' statements at the time they are made, and in the presence of the accused, who must have an opportunity of cross-examining them.* Under no circumstances can it be right for a Magistrate who is trying a case to hold a kind of Police investigation, questioning all kinds of people and hearing all kinds of statements, which must more or less influence his mind, which are made by irresponsible persons and are neither recorded nor made in the presence of the accused.—*C. P. Cr. Cir.*, Part V, No. 14. In all important cases under inquiry or trial before a Magistrate where a just appreciation of the evidence requires some knowledge of the scene of the alleged offence, the Magistrate should, if possible, personally visit the scene either before or during the inquiry or trial, so that he may the more readily understand the statement of witnesses.—Para. 30 (*b*), *Bom. H. C. Cr. Cir.*, p. 90.

Case law.—Personal inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that, **19 M. 263.** The Magistrate can inspect the *locus in quo* to understand the features of the locality, **3 C. W. N. 607.** It is highly advisable in many cases, that the trying Magistrate should himself inspect the scene of the offence in order to understand fully the hearing of the evidence given in Court, especially if the evidence is conflicting or if the guilt or innocence of the party depends upon local peculiarities of the situation which cannot be understood, except by personal visit, **19 A. 302** *followed* in **13 P. R. 1901; 37 C. 340;** and *see* also **1 P. W. R. 1910 = 11 Cr. L. J. 171.** In **37 C. 340**, CHATTERJEE, J., after a review of all the cases, has stated as his opinion that the Magistrate may inspect the *locus in quo* in cases where he cannot follow or understand the evidence without himself seeing the features of the land; and the Magistrate must necessarily use the testimony of his own senses for testing the veracity of the witnesses deposing before him as regards the feature of the locality. WOODROFFE, J., *held* that a Court cannot take a view of the locality for any purpose other than that

of understanding the evidence adduced in Court But STEPHEN, J, was of opinion that the trying Magistrate may visit the scene of an alleged offence to test the evidence he has heard in Court and act on the opinions he has formed from what he has seen in adjudicating between the parties In **16 C. W. N. 426 = 15 C. L. J. 403 = 13 Cr. L. J. 156**, the procedure of a Magistrate who made a local investigation to clear up a doubt which had been thrown upon the prosecution by the defence allegations and who decided the case upon his personal observations was upheld following **9 C. 363.** The rule that in criminal cases, Courts are justified in holding a local inspection only in order to explain the facts appearing in evidence does not apply to cases under s 147, nor is there anything in the law to prevent the presiding Magistrate from making an investigation himself, provided he records what he saw and does not act upon hearsay evidence **15 C. L. J. 267 = 12 Cr. L. J. 319**

23. Precautions to be taken in making local inspection —(*i*) The Magistrate should invariably be accompanied by both parties or their representatives **19 M. 263.** (*ii*) The Magistrate should take care that no information reaches him with reference to the occurrence under investigation beyond what he acquires from the view of the place, **21 C 920.** (*iii*) He should take care not to allow anyone on either side to say anything which may prejudice his mind one way or the other **19 A. 302.** (*iv*) It is very desirable that judicial officers conducting local investigations should place upon record the result of local investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judical officers consider to be established by the local investigations **19 C. 963** *followed* **16 C W. N. 426 = 15 C. L. J. 403 = 13 Cr. L. J. 156.** *See* Note 24 below.

24 After local inspection Magistrate must immediately place on record report of what is seen by him.—It is one of the most cherished and salutary principles of English criminal jurisprudence that no man shall be convicted except upon evidence which he has had an opportunity of testing by cross-examination and contradicting by rebutting evidence If the Magistrate therefore imports into the case any facts which he has himself observed he would be introducing into the case evidence which has not been subjected to these tests and in regard to which he may have been misled by his senses or biased in favour of either party It is on this account that many Judges refuse to make a local inspection When the law, however allows a view of the locality and it is in some cases not only convenient but necessary for the ends of justice every possible precaution should be taken that such a view should be nothing but a view of the local features and *an immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties Per* CHATTERJEE J, in **37 C 340.** Where however, a Magistrate made no record at the time of his local inspection as he should have done but embodied the result of his inspection in his judgment delivered four days later when what he saw was still fresh in his memory, *held* there was no defect of jurisdiction and the accused not having been prejudiced the conviction was upheld, **16 C. W. N. 426 = 15 C. L. J. 403 = 13 Cr. L. J. 156.** In the grounds of appeal the facts noted by the Judge had not been controverted *See* **9 C. 363,** Note **21** above and also **15 C. L. J. 267 = 12 Cr. L. J. 319.**

25. Time when local inspection may be made by trying Magistrate.—It follows from the ob[illegible] local investigation as stated above that the trying Magistrate should not visit the scene of occurrence [illegible] he has heard any evidence *See* **20 C. 857; 21 C. 920** and **19 M. 263**, when there is a dispute as to the [illegible] spot where the occurrence is said to have taken place the Magistrate will be wise to defer his [illegible] heard the whole of the evidence **21 C. 920** The Magistrate should not after making a local [illegible] deliver his judgment relying upon the investigation without giving an opportunity to the parties [illegible] opinion **37 C. 340.**

26. Magistrate may rely on facts observed by him in making local inspection.—[illegible] has seen a certain state of things and if witnesses examined before him testify to the con[illegible] that he should believe the testimony of his own senses and disbelieve the sworn testim[illegible] psychological impossibility that he should do otherwise As soon therefore, as it is [illegible] inspection is permissible it must also be admitted that the Magistrate can use the testim[illegible] for testing the veracity of the witnesses deposing before him as regards the features [illegible] where **19 A. 302** and **10 C. W N. 181** are *referred to* Though the facts observed [illegible] evidence in the strict sense of the term yet *the Evidence Act* does not prohibi[illegible] **363.** When the Magistrate made a local inspection in the presence of both [illegible] stated in his judgment some facts which he then observed, *held* rendered illegal on that ground, **Weir II, 727.** In another case, in

locality of the offence, and stated in his judgment what he then saw. *Held*, that having regard to the amendment of the section, the judgment was not vitiated by this circumstance.

27. **Magistrate must not base judgment upon matters of opinion and inference formed at local inspection and not on record, without giving opportunity to parties to controvert them.**—Where a Magistrate imports into his judgment matters of opinion and inference formed at a local investigation without placing them on the record and giving an opportunity to the accused to rebut them, such a judgment is bad and will be set aside.—*Per* CHATTERJEE, J. Such a judgment cannot be upheld on the ground that apart from the Magistrate's own observations there is sufficient evidence on the record to support the conviction, as it is a matter of entire speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to. There must be a re-trial. *See* also **3 C. W. N. 607** and **14 C. W. N. 119.** *Per* WOODROFFE, J., STEPHEN, J., however *held* that it was open to a trying Magistrate to visit the scene of an offence to test the evidence on record and act on the opinions he has formed from what he has seen in adjudication between the parties, **37 C. 340.** But if the facts observed support or rebut the evidence adduced by either side and cause the Court to understand that that evidence is true or false, inaccurate or exaggerated, then the statement that the facts observed negative or support any of the evidence in the case, is not a matter of opinion or inference but a matter of observation and it is the duty of the Judge as laid down in **9 C. 363** to consider the results of his observation and state them in his judgment, **16 C. W. N. 426 = 13 Cr. L. J. 156.** *See* also **1 P. W. R. 1910 = 11 Cr. L. J. 171; Weir II, 727** and **728.** A Magistrate commits serious irregularities if he bases any of his findings on his own local knowledge and if he treats his own memorandum made after the examination of the spot as evidence in the case, instead of having any facts brought to light by that examination duly brought on to the record by the testimony of witnesses subject to a cross-examination, rebuttal and explanation, **18 P. W. R. 1909 = 11 Cr. L. J. 110.**

28. **Magistrate must not import into judgment information not obtained from inspection.**—If a Magistrate visits the spot of the alleged offence and notes various features thereon of importance to the proper decision of the case, in the presence of both the parties, he exercises a wise discretion, but when he imports into his judgment what he could not have possibly noted from the locality, or from anything connected therewith, for instance, the position of the accused and other men at the time of the alleged occurrence, he exceeds the proper limits of his discretion in holding this investigation and thus disqualifies himself from trying the case, **3 C. W. N. 607 ; 14 C. W. N. 99.** A Judge cannot, without giving his evidence as a witness import into a case his own knowledge of particular facts, **L. R. 3 I. A. 259.**

29. **Disqualification by reason of inspection of scene of offence by Magistrates.**—It is to be noted that the law on this point is altered in the last part of explanation to this section. Under the 1882 Code, the Madras High Court *held* that a Magistrate making a personal inspection of the *locus in quo* where the offence is alleged to have been committed makes himself a witness in the case and thereby renders himself incompetent to try the same, **19 M. 263.** Where the Magistrate saw the locality and also a part of the occurrence and referred in his judgment to matters which came under his personal observation, he was *held* to be disqualified to try the case, **20 C. 857**; and in **21 C. 920** it was laid down that the Magistrate can see the locality for the purpose of understanding the evidence, but if he gets any information by personal observation he is disqualified from trying the case. All the **20 C. 857** decided was that a man who is *a priori* a witness to an occurrence cannot assume jurisdiction which he might otherwise have to decide on the facts of the occurrence as a Judge. When therefore after the evidence of both the parties the Magistrate made a local inspection to clear up a doubt as to the features of a locality, which had been thrown upon the prosecution evidence by the allegation of the defence and four days later, without making any record of the inspection delivered his judgment convicting the accused embodying therein his personal observations; and in the grounds of the appeal the facts noted by the Judge were not controverted, *held* there was no impropriety in the course of the inspection. The conviction was upheld, **16 C. W. N. 426 = 15 C. L. J. 403 = 13 Cr. L. J. 156.** *See*, however, **18 P. W. R. 1909 = 11 Cr. L. J. 110.** The addition to the explanation to the section as now enacted is that by merely viewing the *locus in quo* the Magistrate does not make himself a witness in the case and to make it clear that he is not disqualified to try it. It does not directly authorise a local investigation but it saves the jurisdiction of the Magistrate to try a case notwithstanding that he may have made a local inspection or investigation, **Weir II, 727** and **728.** It does not however go the length of doing away with the restrictions under which local investigation should be made. Therefore, if a Magistrate inspects the *locus in quo* to understand the features of the locality, but imports into the case anything else he becomes a witness and cannot try the case,

8 C. W. N. 607; where a Magistrate discards the evidence on record and decides a case under Chapter XII upon information received at a local inquiry he acts without jurisdiction 10 C. W. N. 181. The report of a person deputed to make a local inquiry is evidence, 14 Cr. L. J. 302 (C). Where a Magistrate does more than view the place for the purpose of following or understanding the evidence and testing it, the conviction is bad, 37 C. 340. *See* also 9 C. W. N. 222.

PRACTICE.

30. Objection as to the disqualification of a Judge should be specified—In every case where it is urged that there is disqualification in the Judge, the circumstances creating the disqualification would have to be clearly determined before effect could be given to the objection, and they ought therefore to be specified in the objection, 48 P. R. 1887. *See* also *R* v *Antrim*, (1895) 2 Ir. 603.

30-A. Consent or acquiescence cannot give jurisdiction.—Where a Magistrate is disqualified under this section the disqualification is not cured by consent or acquiesence of parties, nor can want of *bonâ fides* on the part of the objector to the jurisdiction affect the question of disqualification 53 Bom. 716.

31. No permission can be granted to Judge directing prosecution to hear appeal from conviction.—A Judge who has directed the prosecution, should not hear the appeal of the accused when convicted even although it is not against the conviction but only against the severity of the sentence 39 P. R. 1884; 1896 U. B. R. 2, L. B. (Cr. Rev.) 721 of 1904; 14 C. W. N. 63; 17 C. W. N. 12 The provision as to permission of superior Court, does not extend to a Judge hearing an appeal The prohibition in the case of an Appellate Court is absolute

Practising Pleader not to sit as Magistrate in certain Courts

557. No pleader who practises in the Court of any Magistrate in a Presidency town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court

Note.—Appointment of pleader to act as Magistrate is not forbidden.—This section does not deal with appointments, but merely lays down that no pleader who practises in the Court of any Magistrate in a Presidency town or district, shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court, and that the appointment of a pleader to act as Magistrate is not forbidden by any provision of the Code, 23 B. 490.

Power to decide language of Courts

558. The Local Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter

Provision for powers of Judges and Magistrates being exercised by their successors in office

***559.** (1) Subject to the other provisions of this Code the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office

(2) When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a Presidency town, and the District Magistrate outside such towns, shall determine by order in writing the Magistrate, who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate

(3) When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge

Officers concerned in sales not to purchase or bid for property

560. A public servant having any duty to perform in connection with the sale of any property under this Code, shall not purchase or bid for the property

* Section 559 was substituted by Act XVIII of 1923

Special provisions with respect to offence of rape by a husband.

561. (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

(*a*) take cognisance of the offence of rape where the sexual intercourse was by a man with his wife, or

(*b*) commit the man for trial for the offence.—

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a Police-officer with respect to such an offence as is referred to in sub-sec. (1), no Police-officer of a rank below that of Police Inspector shall be employed either to make, or to take part in the investigation.

Notes.—1. This section was introduced by Act X of 1891, commonly called *the Age of Consent Act*, 1891.

2. **Investigation by Police-officer below the rank of a Police Inspector, does not vitiate trial.**—When an offence to which cl. (*a*) of this section is applicable had been taken cognisance of by a District Magistrate, the fact that the investigation into the offence was made by an officer below the rank of a Police Inspector was not a material irregularity which would vitiate subsequent proceedings, **1895 A. W. N. 9.**

Saving of inherent power of High Court.

***561-A.** "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

Note.—Referring to the enactment of this section, the Select Committe say—

"We have slightly elaborated the provisions of this clause. We understand that a High Court—(44-A/401) has recently held that it had no power to direct the expunging of objectionable matter from a record. We think it desirable that it should be made clear that this clause is intended to meet such a case." *See* Note 93 on page 901. *See* Note 67-D to section 439. The High Court can order the expunging of objectionable matter in the judgment of the lower court. **29 Cr. L. J. 313; 1079 C. 912;** *see* also **9 Lah. 269.**

Notes.—1. Scope of the section.—The Court will not pass any orders under s. 561-A of the Code which would conflict with any of the provisions of the Code and so an application made under s. 89 of the Code will not be entertained if it is made beyond the period prescribed under the section, **26 Bom. L. R. 719.** *See* also for the scope and extent of this section, **49 M. L. J. 593. A. I. R. 1929 Lah. 705.**

2. **Whether costs can be awarded in proceedings under Chapter XII by the High Court under s. 561-A.**—The High Court when exercising its powers of revision in a proceeding under Chapter XII has no inherent power to award the successful party the costs incurred in the revision proceedings [**45 M. 913 (F.B.)** applied]; nor can the award of costs be regarded as incidental or consequential to the disposal of the revision petition within the meaning of s. 423 (1) (*b*), **48 M. 262.**

3. **Power to stay proceedings.**—The High Court has inherent power under this section to stay criminal proceedings arising out of a Civil litigation until the disposal of the latter, **30 Bom. L. R. 962; 28 Cr. L. J. 778.**

4. **Scope of this section.**—This section does not confer any new powers but merely declares that such interest powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code, **29 Cr. L. J. 669.**

5. The High Court has juridiction to grant bail pending an appeal in the Privy Council against its own decision under section 561 (A) of this code, **49 A. 247.**

6. **"Process"**—The word "process" in s. 561 (A) means in effect anything done by the Court, **28 Bom. L. R. 1043.**

* Section 561-A was inserted by Act XVIII of 1923.

FIRST OFFENDERS

Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment

"* **562.** (1) When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-Divisional Magistrate forwarding the accused to, or taking bail for his appearance before such Magistrate, who shall dispose of the case in manner provided by section 380

Conviction and release with admonition.

† (1-A) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment and no previous conviction is proved against him the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment release him after due admonition

‡ (2) Any order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision set aside such order, and in lieu thereof pass sentence on such offender according to law

Provided that, the High Court shall not, under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) The provisions of sections 122, 126 A and 406-A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section

Note.—Referring to the enactment of this section, the Select Committee say—

' We are of opinion that the salutary provisions of s 562 of the Code are capable of extension—more especially in view of the provisions of sub-sec (3) of the new section proposed by the Bill We have accordingly provided that any offender who is over the age of 21 years may be bound over on conviction of any offence not punishable with imprisonment exceeding seven years and that all women and all persons under the age of

* Section 562 was substituted by *ibid*

† Sub-section 1 A was inserted by Act XXXVII of 1923.

‡ This section was substituted for the original section by Act XVIII of 1924 s. 157

21 may be so bound over when convicted of offences not punishable with death or transportation for life we have altered the proviso to sub-sec. (3). We think that the High Court should in no case inflict a more severe sentence than could have been inflicted by the Court which tried the case." Sub-sec. (1-A) is newly added to give effect to the recommendation of the Indian Jails Committee.

Notes.—1. Amendments.—Sub-sec. (1) has been materially changed by the amending Act (XVIII of 1923). The list of offences for which a man may be let off on probation has been enlarged. Under the present amendment in the case of an offender over 21 years, a Court can release him on probation in the cases of all offences punishable with imprisonment for not more than seven years; and in the case of persons below 21 years or any woman the Court can exercise this power in the case of all offences not punishable with death or transportation for life.

(1) So it is now made clear that the present section does not apply merely to the case of youthful offenders.

(2) The period of probation under the present section is extended from one to three years.

(3) An order under this section may now be made by a Court of Appeal or Revision.

(4) Under the amendment the High Court has got power as a Court of Appeal or of Revision to set aside any order made under this section and pass sentence on such offender according to law in lieu thereof subject to the proviso that a greater punishment might not be inflicted than that which might have been inflicted by the Court which convicted the offender.

WHO MAY BE DIRECTED TO EXECUTE BOND.

2. Scope of the section.—"This section is a tardy recognition of a principle well established in England. It is one of the wisest features of the new Code, but being a provision hitherto entirely unknown to Indian Law may not be properly understood at first by lower ranks of Magistracy," **8 M. L. J., Pt. VI** at **p. 197.** In order to give a Court jurisdiction to release an offender under this section there must co-exist two conditions precedent: there must be previous conviction proved, and the offence must be one those specified in the section. If those conditions are fulfilled, the Court has jurisdiction, in the exercise of its discretion, to act under the section. But in exercising its discretion, the Court must have regard to the points specified in the section, namely, to the youth, character and antecedents of the offender, to the nature of the offence, and to any extenuating circumstances under which the offence was committed. The intention of the Legislature is not to make it essential that the offender must be young, that the offence must be trivial and that there must be extenuating circumstances, but merely to indicate the lines on which the discretion of the Court should be exercised, **2 L. B. R. 65 (F.B.) = 1 Cr. L. J. 558; 1904 U. B. R. 7.** Where the offender is a person in good position in life, he should rather be dealt with under this section than be whipped, **9 P. W. R. 1907 = 5 Cr. L. J. 217.** Petty squabbles of young persons should be dealt with under this section, **12 Cr. L. J. 242 (Burma).**

3. Section not limited to juvenile offenders.—This section is not intended for the benefit of juvenile offenders only. To enable a Magistrate to apply this section, the first essential is that the accused is a first offender, and if he is one, the extenuating considerations which entitle him to the indulgence are his youth, character and antecedents, **2 Bom. L. R. 817.** The benefit of the section is by no means confined to juveniles, but it should not be applied indiscriminately to the cases of all first offenders, **2 L. B. R. 314.** The mention of youth, character, antecedents, etc., merely indicates generally considerations with regard to which the discretion of the Court should be exercised in dealing with first offenders. *See* **6 C. W. N. 254; 24 A. 306; 1904 U. B. R. 7.** *See* **11 P. R. 1916 = 17 Cr. L. J. 254.** In **19 P. R. 1916 = 17 Cr. L. J. 317** it was *held* that s. 562 ought not to be applied to offences which require a good deal of preparation such as illicit manufacture of liquor.

4. Section does not apply to insane persons.—A Magistrate convicting under s. 304-A, I.P.C., an accused person who is unable to understand the proceedings cannot pass an order under this section but must report the case of orders of the High Court under s. 341, **11 M. L. T. 404 = 13 Cr. L. J. 248.**

4-A. Benefit of section extended even to cases where passing of sentence of imprisonment is obligatory.—A first offender is entitled to the benefit of s. 562 of the Code, provided the other provisions of the s[illegible] apply, even when without such provisions the Magistrate would be obliged to pass a sentence of [illegible]ent upon the offender, **27 Bom. L. R. 111.**

TO WHAT OFFENCES SECTION APPLIES.

5. The 'term of imprisonment' and not 'the nature of the offence' is the test.—A boy aged 18 years was convicted of an attempt to cause hurt with a dangerous weapon. The Magistrate ordered him to execute a bond with a surety under this section *Held*, the object of this section was to provide a lesser and an alternative remedy for a certain class of cases Though the maximum sentence under s 324, I P C, is three years, an attempt to commit that offence is only punishable with imprisonment for 18 months The "*term of imprisonment*" and not "*the nature of the offence*," being the test as to the applicability of this section, in cases as the present, the order of the Magistrate was legal, **3 L. B. R. 30.** S 562 (1) contemplates an offence primarily punishable with imprisonment, an offence punishable with fine only does not come within the scope of that sub-section, **28 Bom. L. R. 1031.**

6. Benefit of section restricted to persons convicted of specified offences.—Under the old section offenders could not be let off on probation if the offence committed was punishable with more than two years' imprisonment. But under the new amendment this restriction is taken off and seven years are put instead of two (*See* Note 1 above)

7. Under the old Code the benefit of section not extended to aggravated forms of theft or cheating.—A servant found guilty and convicted under s 381, I P C, of theft of his master s property was held not to be entitled to be released under this section, upon probation of good conduct, as *theft by a servant* is not one of the offences mentioned herein (**1 N. L. R. 139** *referred to*) When an Act gives special power, that power must be limited to the purpose for which it is conferred (**12 M. 297**), and jurisdiction must be exercised strictly in accordance with the provisions of the statute which creates it (**7 C. 157**) It is an evasion of the law to treat an agravated as an ordinary offence, and thus introduce a different jurisdiction or a lower scale of punishment (**5 C. 717; 12 M. 54; 13 B. 502** and **5 C. W. N. 372** *referred to*), **4 N. L. R. 18 = 7 Cr. L. J. 319; 13 P. L. R. 1913 = 27 P. W. R. 1913 = 14 Cr. L. J. 113.** The question whether this section applied to the aggravated form of *cheating* under s 420, I P C, was dealt with by a Full Bench of the Burma Chief Court in **3 L. B. R. 93 = 3 Cr. L. J. 21.** On the reasoning that the word "*theft*" as used in this section, can only mean simple theft, for otherwise it would not have been followed by the words "theft in a building" as well, it was *held* that the word "*cheating*" in the same section, can mean only simple cheating under s. 417, I P C., and cannot include the aggravated form of it under s. 420, I P C The words "theft," "dishonest misappropriation" and "cheating" *in this section, refer to theft, etc., in their simple form, punishable respectively, under ss. 379, 403 and 417, I P C. See* **23 P. W. R. 1908 = 8 Cr. L. J. 455; 16 P. R. 1911 = 155 P. L. R. 1911 = 12 Cr. L J. 213; 17 Bom. L. R. 921 = 5 Bom. Cr. Ca 133 = 16 Cr. L. J. 781; 41 M. 533.** But under the new amendment by sub-sec. (1) all these aggravated forms, *e g*, of theft, cheating, etc., will now fall under the present sub-sec. (1). *See* Note 1 above.

Contra—PIGGOTT, J, in **12 A. L. J. 465 = 15 Cr. L. J. 375,** however *held*, that the words "dishonest misappropriation" in s 562 apply to the offence of criminal misappropriation in all its forms and are intended to include offences punishable under s 404 as well as under s. 403 I P C, similarly the word "cheating" covers the offences of cheating in all its forms and is intended to include offences punishable under ss. 418, 419 and 420 as well as under s 417, I P C, otherwise the words in question are mere surplusage, the case of offences under ss 403 and 417, I P C, being sufficiently covered by the provision which follow with regard to all offences punishable 'with not more than two years' imprisonment' The argument to the contrary based on the distinct specification of the offences, of theft and theft in a building is not of much weight, the maximum period of imprisonment under ss 379 and 380, I P C., being in each case more than two years No doubt, the word 'theft' means simple theft and covers s. 379, I P C, only, but it does not follow that the words 'cheating and 'dishonest misappropriation' have a similarly restricted meaning.

8. The old section was not applicable for convictions under the Indian Railways Act.—So when the accused was found drunk in a Railway Station, an offence punishable under s. 120-A, of *the Indian Railways Act* He pleaded guilty and the Magistrate let him off with a warning *Held*, that s. 85 I P C, was inapplicable to this case, inasmuch as the act charged against the accused person, amounted to an offence under the Railways Act This section applies only where a person is convicted of one of certain offences punishable under the Indian Penal Code, and not of an offence under the Railways Act, **1 N. L. R. 139.** But under the new amendment it is not necessary for the application of this section that the conviction should be under the Penal Code The present section as amended does not speak of this restriction and so it appears that the section will apply even in cases of convictions under any law other than the Penal Code.

The words "Indian Penal Code" occur only in ... so it is *held* by the Bombay High Court in 28 Bom. L. R. 277 ... certain specified offences punishable under the Indian Penal Code ... punishable under other Acts, *e.g.*, the Motor Vehicles Act, ... 28 Cr. L. J. ... C. 598 or the Bombay City Municipality Act, 52 Bom. 259 = 30 Bom. L. R. ...

In 7 Lah. 32 it is *held* that s. 562 of the Code ... found guilty under a Special or Local Act, but it ... convicted under s. 61 (1) of the Excise Act which ...

WHAT COURTS MAY PASS ORDERS.

9. Power must be specially conferred so far as second- and third-class Magistrates are concerned.—... Magistrate of the second class, who has not been specially empowered ... part of this section, cannot take proceedings under that part ... Code, he was invested with all the powers specified in the ... Weir II, ... Punjab the second-class Magistrates have power to ... Local Government, dated 18th April, 1910, 100 I. C. 513 (2) ... 28 Cr. L. J. ...

9-A. Power of second- and third-class Magistrates under s. ... 562 (1) (*a*) even a second-class Magistrate can exercise ... admonition, without such powers being specially conferred ... read as a part of sub-sec. (1) (*a*), 47 A. 353.

But in 27 Bom. L. R. 1019 different view ... proviso to s. 562 of the Code which stands in the ... been newly added to the section. But it is submitted ... correct one. The proper remedy lies in putting the proviso ... 47 A. 353 ... and (1) (*a*) and this can only be done by an appeal to the Legislature.

10. Power of Magistrate to whom proceedings are submitted under proviso s. 562.—... the superior Magistrate to whom proceedings are submitted ... as ... have passed or made if the case had been originally ... ordinate Magistrate to pass a sentence, 4 L. B. R. 150 ... 7 Cr. L. J. ... pass any order (*e.g.*, an order demanding security ...), ... 4 L. B. R. 277 = 8 Cr. L. J. 476. It is open to the Magistrate ... once he comes to the conclusion that conviction should ... 1915 U. B. R. I. ... 16 ... J.

... Appellate or Revision Court may act under this section.—... by which a first offender is convicted, are by virtue of ... hearing an appeal and also by the High Court as a Court of Revision ... 24 A. 325. ... the words "*Court before which he is convicted*" in this section, it was not the intention ... to limit the power of making orders under the section to the Court of First Instance. The ... section is inconsistent with the view that this was the intention of the Legislature, 29 M. 557 ... *approved*. This power is specifically provided for by sub-sec. (2) and (3) as now amended.

12. Co-accused—Where Magistrate not empowered acts under proviso, only case of person to be dealt with, to be sent up.—Where two accuseds are jointly charged with theft before a second-class Magistrate and one of them is of tender age, both of them cannot be sent to a first-class Magistrate under this section in order that the one of tender age might be dealt with under it. The case of the grown-up accused should be dealt with by such Magistrate himself, while the other accused only should be sent to the first-class Magistrate, 2 Bom. L. R. 112.

PRACTICE.

13. Distinct conviction to be recorded before acting under this section.—The accused was charged before a first-class Magistrate in the alternative, with the offence of theft or retaining stolen property under ss. 380 and 411, I.P.C., respectively. The Magistrate was of opinion that the accused had committed the offence with which he was charged, but taking into consideration certain facts, which in his opinion

constituted extenuating circumstances, he ordered the accused under this section to be *released on bail with* surety for Rs 200, with a warning that he should appear, and receive sentence, when called upon during the period of one year during which he should keep the peace and be of good behaviour On a reference by the District Magistrate, *held* that there was no distinct conviction recorded by the Magistrate of the first class of any offence as required by s 367 of the Code The charge was in the alternative, but the Magistrate did not say of which offence he convicted the accused, and in the *absence of a conviction for theft, the order under* s. 562 would be illegal. The order was reversed and the Magistrate was directed to pass a legal order of conviction and of sentence consequent thereon, **1 Bom. L. R. 857.**

14. Contents of the order under this section.—All that a Magistrate can do under this section is to require the accused to appear before him, and receive sentence when called upon to do so He cannot order the accused to appear before him on a certain fixed date **2 Bom. L. R. 702.** The bond to be taken should not be only for good behaviour, but to appear and receive sentence when called upon, and in the meantime to keep the peace, **2 Bom. L R. 112.**

15. Difference between orders under this section and s. 8 of the Reformatory Schools Act—The procedure to be adopted under this section, should not be confounded with the procedure to be adopted under s 8 of *the Reformatory Schools Act* VIII of 1897 In the latter case, a substantive sentence of transportation or imprisonment, has to be first passed and the Court may then direct that instead of undergoing that sentence, the accused shall be sent to a Reformatory School Under this section, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour, **L. B. Crl. Rev. 204 of 1904.** Though the powers given by this section should be freely exercised, still when the circumstances permit, action should be taken rather under s 31 of *the Reformatory Schools Act*, in the case of boys and girls under fifteen years of age (*All Min*, *p* 376)

16. Minor may execute bond under this section.—The third proviso to s 118 "*that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties*" applies in terms only to bonds given under that section which is seldom used against minors, and when similar provision is not found in this section which was enacted chiefly for the benefit of youthful offenders, it must be presumed that the omission was intentional Therefore the third proviso to s 118, does not apply to bonds of first offenders released under this section. The words of this section "*on his entering into a bond with or without sureties*" are clear, **4 L. B. R. 12 = 6 Cr. L. J. 123,** where **2 L. B. R. 137** is *overruled* and **2 L. B. R. 168** is *referred to*

17. Sentence to be nominal, if accused unable to find surety.—The view that, if an accused person is ordered to give security under this section and fails to do so, he should be detained in person till the expiration of the period for which security is to be given, is not in accordance with any provision of law The proper course is for the Magistrate to ascertain before passing an order under this section whether the accused is likely to be able to give security immediately or within a reasonable time If he fails to give security within a reasonable time the Magistrate should pass a sentence which should be nominal, **3 L. B. R. 2 = 2 Cr. L. J. 374; 2 Rang. 360.**

17 A. Sentence of fine after an order under this section—A sentence of fine after an order under this section is passed, is illegal, **10 Lah. 722.**

APPEAL AND REVISION.

18. Appeal from orders.—Any person convicted may appeal though the conviction has not been followed by any sentence *See* s 407 *Quære*, if the appeal is unsuccessful and a sentence under s 563 follows will another appeal lie against the sentence alone? In **1904 U. B. R. 7 = 10 Bur. L. R. 321 = 1 Cr. L. J. 543,** IRWIN, J, *held* that there is a right of appeal from a conviction without a sentence, and when the conviction is by a first class Magistrate the appeal lies under s. 408 to the Court of Session, and not to the District Magistrate under s 406 So also where on submission of proceedings by a second-class Magistrate the first class Magistrate instead of proceeding under this section, proceeds under s 380 and imposes a sentence, **17 Bom. L. R. 893.** *See* also **24 P. R. 1904 = 1 Cr. L. J. 1098; 5 L. B. R. 129 = 11 Cr. L. J. 152; 17 Bom. L. R. 895 = 3 Bom. Cr. Ca 107 = 16 Cr. L. J. 738.**

19. Under the old law, where Magistrate improperly passes order, Appellate or Revisional Court must remand case and not itself pass sentence.—And under the old section it was held that where a

Magistrate convicted the accused for an offence under s. 420, I.P.C., but dealt with him under this section, the proper course for the Appellate or Revisional Court is not to direct a re-trial but to remand the case for passing legal sentence as the Appellate or Revisional Court cannot itself pass the proper sentence. This they are empowered to do by the very wide powers conferred by ss. 423, cl. (*d*) and 439 (**4 N. L. R. 18, 29 M. 567**), **24 L. 306** (*followed*), **16 P. R. 1911 = 156 P. L. R. 1911 = 12 Cr. L. J. 213**; *see* also **28 Bom. L. R. 671**—Where it is *held* that an appeal lies to the Court of Session, under s. 408 of the Code from an order passed under **s. 562 (1)** **52 Cal. 463** followed.

Provision in case of offender failing to observe conditions of his recognisance.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

Note.—" We have re-drafted this clause, as we propose to confine the exercise of the power of arrest to a Court having power to pass sentence, and not, as in England, to give power to any Magistrate to order the arrest of a first offender for breach of the conditions."—*Sel. Com. Rep.*

Condition as to abode of offender.

564. (1) The Court, before directing the release of an offender under section 562, sub-section (1) * shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in sections 562 and 563 shall affect the provisions of section 31 of Reformatory Schools Act, 1897.

PREVIOUSLY-CONVICTED OFFENDERS.

Order for notifying address of previously convicted offender.

† **565.** (1) (*a*) When any person having been convicted by a Court in British India of an offence punishable under sections 215, 489-A, 489-B, 489-C or section 489-D of the Indian Penal Code or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(*b*) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor-General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate, or Magistrate of the first class, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

* The word and figure "sub-section (1)" were inserted by Act VII of 1924.

† This section was substituted for the original section by Act XVIII of 1923, s. 158.

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a notice required for the purpose of preventing the commission of an offence

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated

Note.—Amendments.—The present amendment has enlarged the list of offences under which the address of previously-convicted offenders must be notified

Now the section also extends to cases where the previous conviction has been in a Native State

Under the present section all first-class Magistrates without any special power are authorised to pass orders under this section.

The punishment for the breach of rules made under this section is increased under the present amendment.

Finally by sub-sec (4) an order under this section may also be made by an Appellate Court or by the High Court in revision.

Notes.—1. Section applies only when the accused has been previously convicted—The passing of an order under this section on an accused convicted for the first time is illegal **8 M. L. T. 352**, *Madras Cr R C* 85 *of* 1906, *Madras Cr. A* 675 *of* 1904 But the previous conviction may have been had on the same day in a separate trial *M H C Proceedings J No* 3101 *of* 1907 It is absurd to use this section where a person is found technically guilty of a trifling offence, **3 P. W. R 1914 = 4 P. L. R. 1914 = 15 Cr. L. J. 183.** In **3 Rang 156** it is held that no order under this section can be made if the previous conviction was ultimately set aside although on technical grounds.

2. Section not applicable when conviction is for attempt to commit offence specified in Chapter XII or XVII, I P C.—Where either the previous or subsequent conviction of an accused person is under s 511, I P C., for an attempt to commit an offence punishable for a term of three years or upwards under any of the *sections specified in Chapter XII or XVII, I P C., the Court trying the case has no power to proceed and pass* an order against him under this section, **17 P. R. 1907 = 35 P. W R. 1907 = 6 Cr. L. J. 378.**

3. Under the old law the section was not applicable where the previous conviction was in Foreign State.—*The Indian Penal Code* could not as such be in force in a Feudatory State which is not [illegible]

the Chapters of *the Berar Penal Code* or *Berar Criminal Procedure Code* itself A Sessions Court of Berar convicted an accused person under s 379 of the Berar Penal Code, and sentenced him to rigorous imprisonment for seven years, supplemented by a direction under the Berar Criminal Procedure Code, to notify his residence for five years after the expiry of the said sentence, for the reason that there were six previous convictions against him in British Indian Courts of the Bombay Presidency under various sections of Chapter XVII, I P C. *Held* that so much of the sentence and order as depended for its legality on s 75 of *the Berar Penal Code*, or upon s. 565, *Berar Criminal Procedure Code* was *ultra vires*, and must be set aside, **4 N. L. R. 177 = 9 Cr. L. J. 97.** But *see* now sub-clause (*b*) of sub-sec (1). *See* also Preliminary Note (*supra*).

4. **Section not applicable where the sentence is whipping.**—The order contemplated by this section can only be passed when the convict is sentenced either to transportation or imprisonment; the section does not extend to cases where the Court, instead of passing that sentence, passes a sentence of whipping, **35 B. 137.**

5. **Previous conviction need not be set out in charge for proceeding under this section.**—An order under s. 565 is not such a punishment as is meant by the words of s. 221.—Therefore the provisions of s. 221 (7) do not apply to an order under s. 565 and such an order can legally be passed without the previous convictions on which it is based having been mentioned in the charge. Even if there was an omission to give the details of the convictions in the charge, it is a mere irregularity cured by s. 537, **9 N. L. R. 88 = 14 Cr. L. J. 390.**

6. **Sub-section (4)—Omission to give notice is offence under s. 176 (1), I.P.C.**—The notice of residence required from convicts under s. 565 (4) is not to prevent the commission of any particular offence, and the failure to give such notice comes under the first part of s. 176, I.P.C., **31 M. 543; 16 C. 386** *approved.* Where all that was proved was that the accused who had been ordered to notify his residence and change of residence under s. 565, of the Code, was absent from his house for a single night without notifying his absence :—

Held, that such temporary absence did not amount to a change of residence and that the accused was not guilty of an offence under s. 176, I.P.C., **40 M. 789.**

7. **Police may arrest without warrant any convict committing a breach of the rules.**—Under s. 54 (1) any Police-officer may, without a warrant, arrest any released convict committing a breach of any rule made under sub-sec. (3) of this section and punishable under s. 176, I.P.C., as provided for in sub-sec. (4). *See* **1 N. L. R. 133.**

8. **Order by Magistrate not empowered void.**—An order under s. 565 by a Magistrate not empowered to make such an order is void, **8 S. L. R. 340 = 16 Cr. L. J. 469.**

9. **Appellate or Revisional Court incompetent to pass order when trial Court not competent.**—An Appellate Court as a Court of Revision cannot make an order under this section where the Original Court was not so empowered, **8 S. L. R. 340 = 16 Cr. L. J. 469.**

Rules relating to the Notification of Residence by Released Convicts under sub-sec. (3).

I.—UNITED PROVINCES AND OUDH.

1. In these rules, the words "local area" mean a village or *muhalla* of a town.

2. When an order under s. 565 of the Cr. P. C. has been passed with reference to any person, a copy of the order in the annexed form shall be sent to the Superintendent of the Jail with the warrant of commitment.

3. Three months previous to the release of a convict with reference to whom an order under s. 565 of the Cr. P. C., 1898, has been passed, the Superintendent of the Jail shall inquire from the convict within what district he intends to reside on release, and shall transfer the prisoner to the head-quarters of the district he names, for release on due date. A copy of the order passed under s. 565, Cr. P. C., shall be sent with prisoner. Provided that, if the convict notifies his intention to reside in any district of British India outside the United Provinces and Oudh, the Superintendent shall request the Inspector-General of Prisons to obtain, through the Local Government, an order of removal under s. 32, Act V of 1871, and, after receipt of the order, shall transfer the prisoner to the jail of the district concerned, where he will be released and dealt with in accordance with the rules there in force.

4. At the time of release, the prisoner, together with a copy of the order passed under s. 565, Cr. P. C., shall be produced before the Magistrate of the district, or such officer as the Magistrate may appoint in that behalf, and shall notify to the officer before whom he is produced, the local area within which he will permanently reside after release. The Magistrate of the district, or the officer appointed by him in his behalf, shall enter the local area notified by the prisoner on the copy of the order passed under s. 565, and shall give to the prisoner a copy in vernacular of Rules 5 and 6, explaining at the same time their purport to him.

5. If, at any time subsequently, during the period fixed by the order under s. 565 of the Cr. P. C., 1898, the released convict proposes permanently to change his residence he shall, at least ten days previously to the change, notify to the Magistrate of the district, or such officer as the said Magistrate may appoint in this behalf and also to the Police authorities of the place which the convict is leaving, as well as to the Police authorities

of the place to which he is proceeding, the name of the local area to which he intends removing and the date on which he will change his residence

6 The notifications required by Rule 5 shall be made personally, except in the case of illness or for other adequate reason or on exemption granted by the District Magistrate, to the officers authorised to receive such notifications

Copy of the order for notifying address of previously convicted offenders

[To be sent to the Jail with the prisoner]

Whereas (name, description and address) has been convicted on the day of 19 , of the offence of under section of Act , having been previously convicted of the offences noted on the margin and has been sentenced to it has been ordered that the said shall notify his residence and any change of residence after release for a term of years from the date of the expiration of the said sentence in accordance with the rules made by the Local Government.

Offence	Date of conviction

(Sd)

Date Magistrate

District

* Date of release
* District within which prisoner states that he will reside
† Local area notified by prisoner before release as his permanent residence
† Permanent changes of residence subsequently notified
† Date of expiry of order

II —PUNJAB

1 *Released convicts to observe rules* —When, at the time of passing sentence of transportation or imprisonment on any person, the Court or Magistrate also orders that his residence and any change of residence after release be notified for the term specified in such order, such person shall comply with and be subject to the rules next following In these rules a person released subject to an order of the nature hereinbefore described is called a " released convict.

2 *Released convict to notify at the time of release intended place of residence to releasing officer* — Every convict in regard to whom an order has been made under s 565, Cr P C., 1898, shall not less than four days before the date on which he is entitled to be released notify the officer in-charge of the jail, or other place in which he may for the time being be confined, of the place at which he intends to reside after his release, and shall, as soon as he is released, proceed to such place without undue delay and there so reside accordingly

3 *Released convict to notify intention to change first residence at Local Police Station* —Whenever any released convict intends to change his place of residence from the place which he specified at the time of his release as the place at which he intended to reside, to any other place, he shall notify the fact of such intention and the place at which he thereafter intends to reside, not less than twenty four hours before he so changes his residence, to the officer in charge of the Police station within the limits of which he resides at the time when he notifies his intention to change his residence, and shall proceed to such place without undue delay and there so reside accordingly

4 *Released convict similarly to notify all subsequent intentions to change residence* —Whenever any released convict intends to change his place of residence from any place at which he may at any time, be residing, under the provisions of Rule 3 he shall notify any intended change of residence in the manner in that rule provided, and shall proceed without undue delay to the place notified by him and there so reside accordingly

5 *Released convict to notify the fact of his having actually taken up his residence at the place specified under preceding rules* —Every released convict shall, within twenty four hours of his arrival at the place

* To be filled up by Superintendent of Jail

† To be filled up by Magistrate of District.

of residence notified under Rule 2, or Rule 3, or Rule 4, notify the fact of such arrival to the officer-in-charge of the Police station within the limits of which, such place of residence is situate.

6. *Particulars of place of residence to be supplied.*—In notifying place of residence under these rules, released convicts shall—

(*a*) if the place of residence is in a rural tract—specify the name of the village hamlet, or locality of such place, and the jail, thana, tahsil and district within the limits of which such place is situate;

(*b*) if the place of residence is in a town or city—specify the name of the town or city and the street, quarter and sub-division of the town or city within the limits of which such place is situate.

7. *Manner of notifying changes of residence.*—Every notification to be made by a released convict under Rules 3, 4 and 5, respectively, shall be made by such convict, personally at the proper Police station:

Provided that—

(*a*) the District Magistrate may, by order in writing, exempt any released convict from the operation of this rule and may permit such convict to make such notification in writing or in such other manner as the District Magistrate may, in such order, prescribe in that behalf;

(*b*) if, from illness or other unavoidable cause, any released convict is prevented from making any notification required by these rules personally at the proper Police station, he may do so by written communication addressed to the officer-in-charge of the proper Police station. Such communication shall state the cause of his inability to attend in person at the Police station, and shall, before it is transmitted to the proper Police-officer, be attested by a village headman or other village officer.—*Government Punjab Notification*, No. 574, dated 3rd April, 1900; *Punjab Gazette*, 1901, Pt. I, p. 182.

III.—BURMA, BENGAL AND ASSAM.

1. Any order passed against a convict under s. 565, Act V of 1898, shall be entered on the warrant of imprisonment.

2. A convict against whom such an order has been passed shall, fourteen days before the date fixed for his release, give to the Superintendent of the Jail in which he is confined a true statement of the place in which he will take up his residence after his release. Such statement shall be in writing and shall be signed by the convict in the presence of the Superintendent of the Jail, who will countersign it. The following rules shall be also clearly explained to the convict before he leaves the Jail; he shall be told for what period he is required to observe them and a copy of them shall be given to him.

3. If the convict after release do not within ten days take up his residence in the place mentioned in statement, he shall attend in person at the Police station within the jurisdiction of which he has taken up residence and notify to the officer-in-charge his place of residence.

4. If, after taking up his residence in any place the convict desires to change his residence, he shall end in person at the Police station within the jurisdiction of which his then place of residence is situated, there notify to the officer-in-charge the place to which he intends to change his residence and the date on the change will take place. Such attendance shall be not less than fourteen days before his departure he is moving to the jurisdicton of another Police station and not less than seven days when he is moving a place within the jurisdiction of the same Police station. If for any reason he does not, within seven days the date on which he has notified that his change of residence will begin, take up his residence at that place, shall at once notify, in the manner above set out, any other change of residence he intends to make.—*Burma Gazette*, 1902, Pt. I, p. 63. In addition to these rules, the following rules are also in force in Bengal and Assam, *viz.*:—

5. If the convict intends to travel to another district, he shall, not less than seven days before his departure, similarly, notify the place to which he intends to proceed, and the probable dates of his arrival at and departure from such places.—See *Calcutta Gazette*, 1902, Pt. I, p. 97; *Assam Gazette*, 1900, Pt. II, p. 540.

6. In applying the foregoing rules to the case of a wandering man having no "residence" in the sense of a fixed place of abode, the place of residence shall be deemed to be the place where he sleeps, even

if he remains there only one night On his release, he shall be asked under Rule 2, where he intended to stay and be told, that if he moves, about the country, he must always notify the place of his temporary abode to the Police —*Notification, Bengal Government*, No 313, dated 14th January, 1902, G. L. No 2 of 15th March, 1902.

IV —BOMBAY

1 When a duly authorised Court or Magistrate at the time of passing sentence makes an order under s 565 Cr P C, that the sentenced person s residence and any change of residence after release be notified such Court or Magistrate shall attach a copy of such order to its warrant issued under s 383, Cr P C

2 Every person in respect of whom such an order may have been passed shall, within one week from the date of release, personally present himself before the officer in charge of the Police station within the jurisdiction of which he resides and declare to him his place of residence

3 Whenever such person changes his residence he shall in like manner declare his change of residence to the officers-in charge of the Police stations within the jurisdiction of which his old and new places of residence are situated

4 Registers of all persons, the notification of whose residence and change of residence has been ordered by a Court or Magistrate under s 565 Cr P C, shall be kept at every Police station by the officer in charge thereof, wherein the name and address of each person presenting himself for the first time under Rules 2 or 3 and the date of his so presenting himself, shall be entered, and such subsequent entries shall be made as may be necessary for the purpose of giving effect to the foregoing Rule 3

5 Every person duly presenting himself before the officer in charge of a Police station, as required by the foregoing rules, shall on each occasion be entitled to receive from such officer *free of cost* a copy of the entry in register relating to such fact, with a certificate that he has duly attended in person at the time and day specified

6 One month prior to the date of release of a person in respect of whom an order has been passed under s 565 Cr P C, the Superintendent of the Prison in which he is confined shall forward to the District Magistrate of the district in which the prison is situated and of the district in which he was convicted or of which he is known to have been a resident, a copy of the order passed under s 565, Cr P C, as aforesaid, with an intimation of the date on or about which the prisoner will be released

7 Prior to the release of any such person as aforesaid, the Superintendent of the Prison in which he is confined, or any officer appointed by him in this behalf shall give him a copy of the rules under sub-sec (3) s 565 Cr P C, written or printed in the language of the district in which the prison is situated, and if the prisoner is illiterate or does not understand the language in which such copy of the rules is written or printed shall personally explain their purport to him and the consequences under s 565 (4) of non-compliance therewith.

8 In these rules the words "District Magistrate" and "Officer in-charge of the Police stations" shall, in so far as the Presidency town of Bombay is concerned be read as "Commissioner of Police' and "Superintendent of the Division,' respectively—*Notification* No 1040 *Bombay Government Gazette* 1900, Pt I, p 374

For rules in British Baluchistan, see *Gazette of India*, 1900, Pt II, p 807, Central Provinces *Central Provinces Gazette*, 1901, Pt III, p 87

V —MADRAS *

In exercise of the powers conferred by sub-sec. (3) of s 565 of the Code of Criminal Procedure and with the previous sanction of the Governor General in Council, the Governor in-Council is pleased to make the following rules to carry out the provisions of the said section relating to the notification of residence by released convicts —

* In applying the above rules to the case of a wandering man who has no 'residence' in the sense of a fixed place of abode, they may be reasonably interpreted as meaning that he resides at the place where he sleeps even if he remains there only one night On his release he may therefore, be asked under Rule (2) where he is going to stay, and he may be told that if he moves about the country he must always notify the place of his temporary abode to the Police see S K Charlar s *Criminal Rules of Practice*, pp 35—40.

1. When an order has been passed under s. 565, Code of Criminal Procedure, that a convict shall notify his residence and any change of residence after release for a specified term, the Court, or Magistrate passing such order shall attach a copy thereof to the warrant of commitment issued under s. 383 of the Code in respect of such convict.

2. A convict in respect of whom such an order has been passed shall, when called upon by the officer-in-charge of the jail in which he is confined, state before his release, the place at which he intends to reside after his release, naming the village or town and the street therein.

3. After release, and on arrival at his residence, he shall, within twenty-four hours, notify at the nearest Police station that he has taken up his residence accordingly.

4. Whenever he intends to change his residence he shall, not less than two days before making such change, notify his intention at the nearest Police station, giving the date on which he intends to change his residence and the name of the village or the town and street in which he intends to reside, and on arrival at such residence, he shall, within twenty-four hours, notify at the nearest Police station that he has taken up his residence accordingly.

5. The officer recording a notification under either Rule 2 or Rule 4 shall appoint such period as may be reasonably necessary to enable the convict to take up his residence in the place notified. If the convict does not take up his residence in such place within the period so appointed, he shall, not later than the day following the expiry of such period, notify his actual place of residence to the officer-in-charge of the Police station within the limits of which he is residing.

6. Every notice required to be given by the foregoing rules shall be given by the released convict in person, unless prevented from doing so by illness or other sufficient cause, in which case the notice required shall be sent either by letter duly signed by him or by an authorised messenger on his behalf.

7. Whenever the released convict gives any notice required by the foregoing rules, he will be furnished with a certificate to the effect that he has given such notice by the officer to whom he gives it.

8. A copy of the order specified in rule (1) shall be served on the convict before his release from jail. A copy of these rules in English and the vernacular shall at the same time be given him, and the substance thereof fully explained to him in a language he understands. He shall also be informed for what period he is bound to observe these rules, and that any neglect or failure to comply with them will render him liable to punishment as if he had committed an offence under s. 176* of the Indian Penal Code.

9. If a convict in respect to whom an order has been passed under s. 565 of the Code of Criminal Procedure shall have been released from jail without a copy of the said order having been served upon him, and the other formalities specified in these rules having been complied with, he may at any time while the order remains in force be called upon by the Police to report himself on a given day at a Police station near the place where he is found, and on his reporting himself the copy of the order shall be served on him and the other formalities prescribed in Rules 2 to 4 shall be complied with.—*Madras G. O. No. 940, dated 15th June, 1904.*

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* S. 176, I P.C., makes punishable the intentional omission to give notice or information to a public servant by a person legally bound to do so

SCHEDULES.

[Schedule I—Repeal of Enactments Repealed by Act X of 1915.]

Offences under the following sections of the I P C may be tried by any Magistrate — 140 143 144 145 147 151 153 160 170 171 172 174 277 278 279 285 286 289 290 294 294 A 323 334 336 341 352 356 357 358 374 379 380 403 426 447 448 451 504 510

Offences under the following sections of the I P C may be tried by First or Second-Class Magistrates — ?? ?? ? ? ?
183 184 185 186 187 188
267 269 270 271 272 2
335 337 338 342 343 344 to 347 353 354 355 381 384 385 404 406 408 411 414 417 418 419 420 421 422 423 424 427 428 429 430 431 432 434 435 451 452 453 454 455 456 457 461 462 48? 483 486 487 488 489 490 491 49? 493 506 508

Offences under the following sections of the I P C to be tried by First-Class Magistrates only —120 B 124 A 1?9 133 148 15? 153 A 161 162 163 164 167 168 169 171 E 181 193 196 197 198 199 200 201 204 205 208 209 210 211 212 213 214 215 216 221 22? 225 229 233 235 237 239 240 242 243 246 247 248 249 250 251 25? 253 253 A 259 to 261 263 263 A 304 A 317 318 326 332 348 363 365 368 369 372 373 377 38? 392 393 394 401 407 409 420 435 440 455 458 465 468 469 477 A 484 485 494 497 500 501 502 505 506 507 509

Offences under the following sections of the I P C are exclusively triable by the Sessions Court —121 to 124 125 to 1?8 130 to 132 134 194 195 201 211 if offence charged be capital or punishable with transportation for life 213 214 218 to 221 222 226 231 232 234 235—if Queen's coin—236 238 244 245 255 256 to 258 30? to 304 305 to 308 310 to 316 3?7 to 331 333 364 366-A 366- 367 370 376 386 to 391 395 to 400 40? 412 413 433 436 to 439 449 450 459 460 466 467 471 when the forged document is a promissory note of the Government of India 472 to 477 489-A 489-B 489-C 489 D 492 493 495 496 511—if punishable with death transportation or imprisonment for seven years or upwards

Offences under the following sections of the I P C to be tried as warrant cases :—115 to 136 144 to 148 152 153 153 A 159 161 to 170 171 E 171 F 177 181 189 to 201 203 to 227 229 to 267 270 to 281 295 to 333 335 338 342 to 348 353 to 357 363 to 4 4 427 to 440 448 to 489 A to 489 D 493 to 500 511

Offences under the following sections of the I P C to be tried as summons-cases :— 137 to 143 151 153 to 158 160 171 171 G to 171 172 to 180 182 to 188 202 25 B 228 263 A 269 271 to 280 282 to 294 A 334 336 337 341 352 358 426 447 490 to 492 510

Offences under the following sections of the I P C are punishable with fine only :— 137 154 155 156 263-A 278 283 290 294 partly

Offences under the following sections of the I P C are compoundable :—298 324 (324), (325) 334 352 355 358 374 (403 (417) (418) (419) (420) 426—when the only loss or damage is loss or damage to a private person—427 when the only loss or damage caused is loss or damage to a private person— (430) 447 448 (451) (482 to 486) 490 491 497 498 500 501 502, 504 506 508 (509).

Note —*Offences* enclosed in brackets ( ) above are compoundable with permission of the Court.

SCHEDULE II.

TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this schedule applies also to the Police in the towns of Calcutta and Bombay.

CHAPTER V.– ABETMENT.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence abetted.	The Court by which the offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	Ditto	Ditto.
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Ditto ...	Ditto ...	Ditto ...	Ditto ...	The same punishment as for the offence intended to be abetted.	Ditto.
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Ditto ...	Ditto ...	Ditto ...	Ditto...	The same punishment as for the offence committed.	Ditto.
114	Abetment of any offence, if abettor is present when offence is committed.	Ditto ...	Ditto ...	Ditto ...	Ditto...	Ditto	Ditto.
115	Abetment of an offence punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
	If an act which causes harm be done in consequence of the abetment.	Ditto ...	Ditto ...	Ditto ...	Ditto...	Imprisonment of either description for 14 years and fine	Ditto.
116	Abetment of an offence punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto ...	Ditto ...	According as the offence abetted is bailable or not.	Ditto...	Imprisonment extending to a quarter part of the longest term and of any description, provided for the offence, or fine, or both.	Ditto.

CHAPTER V —ABETMENT—(contd.)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence						The Court by which the offence abetted is triable
		made without warrant but not otherwise			not.		
117	Abetting the commission of an offence by the public, or by more than 10 persons	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Ditto
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 7 years and fine	Ditto
	If the offence be not committed	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 3 years and fine	Ditto
119	A public servant concealing a design to commit an offence which it is his duty to prevent if the offence be committed	Ditto	Ditto	...able or not		...xtend. ...ion, ...of any ...vided ...e or	Ditto
	If the offence be punishable with death or transportation for life	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 10 years	Ditto
	If the offence be not committed	Ditto	Ditto	Bailable	Ditto	Imprisonment extending to a quarter part of the longest term and of any description, provided for the offence, or fine, or both.	Ditto
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.	Ditto	Ditto	According as the offence concealed is bailable or not.	Ditto	Ditto	Ditto
	If the offence be not committed.	Ditto	Ditto	Bailable.	Ditto	Imprisonment extending to one-eighth part of the longest term and of the description, provided for the offence, or fine	Ditto.

*CHAPTER V-A.—CRIMINAL CONSPIRACY.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
120-B	Criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards.	May arrest without warrant if arrest for the offence which is the object of the conspiracy may be made without warrant but not otherwise.	According as a warrant or summons may issue for the offence which is the object of the conspiracy.	According as the offence which is the object of the conspiracy is bailable or not.	Not compoundable.	The same punishment as that provided for the abetment of the offence which is the object of the conspiracy.	Court of Session when the offence which is the object of the conspiracy is triable exclusively by such Court: in the case of all other offences Court of Session, Presidency Magistrate or Magistrate of the first class.
	Any other criminal conspiracy.	Shall not arrest without a warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 6 months and fine, or both.	Presidency Magistrate or Magistrate of the first class.

* This Chapter was inserted by s. 6, and the Schedule of the Indian Criminal Law (Amendment) Act, 1913 (VII of 1913), General Acts, Vol. VII.

CHAPTER VI.—OFFENCES AGAINST THE STATE.

121	Waging or attempting to wage war, or abetting the waging of war, against the Queen.	Shall not arrest without a warrant.	Warrant.	Not bailable.	Not compoundable.	Death or transportation for life and fine.	Court of Session.
121-A	Conspiring to commit certain offences against the State.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life or any shorter term, or imprisonment of either description for 10 years and fine.	Ditto.
122	Collecting arms, etc., with the intention of waging war against the Queen.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life or imprisonment of either description for 10 years and fine.	Ditto.
123	Concealing with intent to facilitate a design to wage war.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
124	Assaulting Governor-General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.

CHAPTER VI—OFFENCES AGAINST THE STATE—(contd.)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
124 A	Sedition	Shall not arrest without warrant	Warrant	Not bailable	Not compoundable	Transportation for life or for any term and fine, or imprisonment of either description for 3 years and fine, or fine	Court of Session Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered by the Local Govt in that behalf
125	Waging war against any Asiatic power in alliance or at peace with the Queen, or abetting the waging of such war	Ditto	Ditto	Ditto	Ditto	Transportation for life and fine or imprisonment of either description for 7 years and fine, or fine	Court of Session
126	Committing depredation on the territories of any power in alliance or at peace with the Queen	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine and forfeiture of certain property	Ditto
127	Receiving property taken by war or depredation mentioned in sections 125 and 126	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine.	Ditto.
129	Public servant negligently suffering prisoner of State or war in his custody to escape.	Ditto	Ditto	Bailable	Ditto	Simple imprisonment for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
130	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner	Ditto	Ditto	Not bailable	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session

CHAPTER VII—OFFENCES RELATING TO THE ARMY AND NAVY

131	Abetting, mutiny, or attempting to seduce an officer, soldier or sailor from his allegiance or duty	May arrest without warrant	Warrant	Not bailable	Not compoundable	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session.

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY—(contd.)

1	2	3	4	5	6	7	8
Section	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
145	Joining or continuing in an unlawful assembly knowing that it has been commanded to disperse	May arrest without warrant	Warrant	Bailable.	Not compoundable	Imprisonment of either description for 2 years or fine or both	Any Magistrate
147	Rioting	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
148	Rioting armed with a deadly weapon	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Court of Session, Presidency Magistrate or Magistrate of the first class.
149	If an offence be committed by any member of an unlawful assembly every other member of such assembly shall be guilty of the offence	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence	According as the offence is bailable or not.	Ditto	The same as for the offence	The Court by which the offence is triable
150	Hiring engaging or employing persons to take part in an unlawful assembly	May arrest without warrant	According to the offence committed by the person hired engaged or employed	Ditto	Ditto	The same as for a member of such assembly and for an offence committed by any member of such assembly	Ditto
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse	Ditto	Summons	Bailable	Ditto	Imprisonment of either description for 6 months or fine or both	Any Magistrate
152	Assaulting or obstructing public servant when suppressing riot etc.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Court of Session, Presidency Magistrate or Magistrate of the first class
153	Wantonly giving provocation with intent to cause riot if rioting be committed	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year or fine or both	Any Magistrate
	If not committed	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 6 months or fine or both	Ditto

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY—(*concld.*)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
153 A	Promoting enmity between classes.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Ditto ...	Summons.	Bailable.	Ditto ..	Fine of 1,000 rupees ...	Presidency Magistrate or Magistrate of the first or second class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Ditto ...	Ditto ...	Ditto...	Ditto...	Fine	Ditto.
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
157	Harbouring persons hired for an unlawful assembly.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
158	Being hired to take part in an unlawful assembly or riot.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
159	Or to go armed ...	Ditto ...	Warrant.	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
160	Committing affray ...	Shall not arrest without warrant.	Summons.	Ditto...	Ditto...	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Any Magistrate.

CHAPTER IX.—OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS.

161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

CHAPTER IX.—OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
162	Taking a gratification in order by corrupt or illegal means to influence a public servant	Shall not arrest without warrant	Summons	Bailable	Not compoundable	Imprisonment of either description for 3 years, or fine or both	Court of Session, Presidency Magistrate or Magistrate of the first class
163	Taking a gratification for the exercise of personal influence with a public servant	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both	Presidency Magistrate or Magistrate of the first class
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
165	Public servant obtaining any valuable thing without consideration, from a person concerned in any proceeding or business transacted by such public servant	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both	Ditto
167	Public servant framing an incorrect document with intent to cause injury	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class.
168	Public servant unlawfully engaging in trade.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
169	Public servant unlawfully buying or bidding for property.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both and confiscation of property if purchased.	Ditto

CHAPTER IX.—OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS—(concld.)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
170	Personating a public servant.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Ditto ...	Summons.	Ditto...	Ditto...	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Ditto.

*CHAPTER IX-A.—OFFENCES RELATING TO ELECTIONS.

1	2	3	4	5	6	7	8
171-E	Bribery	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both, or if treating only, fine only.	Presidency Magistrate or Magistrate of the first class.
171-F	Undue influence and personation at an election.	Ditto ..	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 1 year, or fine, or both.	Ditto.
171-G	False statement in connection with an election.	Ditto ...	Ditto ...	Ditto...	Ditto...	Fine	Ditto.
171-H	Illegal payments in connection with elections.	Ditto ...	Ditto ...	Ditto...	Ditto...	Fine of 500 rupees ...	Ditto.
171-I	Failure to keep election accounts.	Ditto ..	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.

* This Chapter was added by the Elections Offences and Inquiries Act (XXXIX of 1920), s. 3.

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

1	2	3	4	5	6	7	8
172	Absconding to avoid service of summons or other proceedings from a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
	If summons or notice require attendance in person, etc., in a Court of Justice.	Ditto ..	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 9 months, or fine of 1,000 rupees, or both.	Ditto.
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
	If summons, etc., require attendance in person, etc., in a Court of Justice.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom witout hauthority.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.

CHAPTER X —CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—(*contd*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
	If the order require personal attendance, etc., in a Court of Justice.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable	Simple imprisonment for 6 months or fine of 1 000 rupees or both.	Any Magistrate
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month or fine of 500 rupees or both	The Court in which the offence is committed subject to the provisions of Chapter XXXV or if not committed in a Court a Presidency Magistrate or Magistrate of the first or second class.
	If the document is required to be produced in or delivered to a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months or fine of 1 000 rupees or both	Ditto
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information	Ditto	Ditto	Ditto	Ditto	S [illegible]	[illegible] first or second class.
	If the notice or information required respects the commission of an offence etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months or fine of 1 000 rupees or both.	Ditto
177	Knowingly furnishing false information to a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If the information required respects the commission of an offence etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both	Ditto

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—(*contd.*)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
178	Refusing oath when duly required to take oath by a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
179	Being legally bound to state truth, and refusing to answer questions.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Ditto ...	Ditto ...	Ditto. .	Ditto...	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	The Court in which the offence is committed subject to the provisions of Chapter XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
181	Knowingly stating to a public servant on oath as true that which is false.	Ditto ...	Warrant.	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto ...	Summons.	Ditto...	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—(*concld.*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
183	Resistance to the taking of property by the lawful authority of a public servant	Shall not arrest without warrant	Summons	Bailable	Not compoundable	Ir ... rupees ...	... first or second class
184	Obstructing sale of property offered for sale by authority of a public servant	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 500 rupees or both	Ditto
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 200 rupees, or both	Ditto
186	Obstructing public servant in discharge of his public functions	Ditto	Ditto			...ment of either	Ditto
187	*Omission to assist public servant when bound by law to give such assistance*	*Ditto*	*Ditto*			*200 rupees, or both*	*Ditto*
	Wilfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences etc	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 500 rupees or both	Ditto
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed	Ditto	*Ditto*	*Ditto*	*Ditto*	*Simple imprisonment for 1 month, or fine of 200 rupees or both*	*Ditto*
	If such disobedience causes danger to human life, health or safety, etc	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Ditto
189	Threatening a public servant with injury to him, or one in whom he is interested, to induce him to do, or forbear to do, ...	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Ditto
			Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both	Ditto

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	Giving or fabricating false evidence in any other case.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Ditto.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life or rigorous imprisonment for 10 years and fine.	Court of Session.
	If innocent person be thereby convicted and executed.	Ditto ...	Ditto ...	Ditto...	Ditto. .	Death, or as above ...	Ditto.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life, or with imprisonment for 7 years or upwards.	Ditto ...	Ditto ...	*Ditto...	Ditto...	The same as for the offence.	Ditto
196	Using in a judicial proceeding evidence known to be false or fabricated.	Ditto ...	Ditto ...	According as the offence of giving such evidence is bailable or not.	Ditto...	The same as for giving or fabricating false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Ditto ...	Ditto ...	Bailable.	Ditto...	The same as for giving false evidence.	Ditto.
198	Using as a true certificate one known to be false in a material point.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
199	False statement made in any declaration which is by law receivable as evidence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
200	Using as true any such declaration known to be false.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Court of Session.

* The words "Not bailable" were substituted for the word "Bailable" by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (I of 1903).

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—(*contd.*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
	If punishable with transportation for life or imprisonment for 10 years.	Shall not arrest without warrant	Warrant	Bailable	Not compoundable	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
	If punishable with less than 10 years' imprisonment	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term and of the description provided for the offence, or fine or both	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable
202	Intentional omission to give information of an offence by a person legally bound to inform	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 6 months, or fine or both	Presidency Magistrate or Magistrate of the first or second class
203	Giving false information respecting an offence committed	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both	Ditto
204	Secreting or destroying any document to prevent its production as evidence	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution or for becoming bail or security	Ditto	Ditto	[illegible]	[illegible]	[illegible]	[illegible] or Magistrate of the first class
206	Fraudulent removal or concealment etc., of property to prevent its seizure as a forfeiture or in satisfaction of a fine under sentence, or in execution of a decree	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture or in satisfaction of a fien under sentence, or in execution of a decree	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—(*contd.*)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable
208	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	*Presidency* Magistrate or Magistrate of the first class.
209	False claim in a Court of Justice.	Ditto ...	Ditto ..	Ditto...	Ditto...	Imprisonment of either description for 2 years and fine.	Ditto.
210	Fradulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Ditto ...	Ditto ..	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
211	False charge of offence made with intent to injure.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
	If offence charged be punishable with imprisonment for 7 years or upwards.	Ditto ..	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If offence charged be capital, or punishable with transportation for life.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Court of Session.
212	Harbouring an offender, if the offence be capital.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with transportation for life or with imprisonment for 10 years.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Ditto.
	If punishable with imprisonment for 1 year and not for 10 years.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment for a quarter of the longest term and of the description provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
	[illegible] to screen [illegible] punish- [illegible]nce be	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment for either description for 7 years and fine.	Court of Session.

CHAPTER XI —FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—(*contd*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
	If punishable with transportation for life or with imprisonment for 10 years.	May arrest without warrant	Warrant	Bailable	Not compoundable	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term and of the description provided for the offence, or fine or both	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session
	If punishable with transportation for life or with imprisonment for 10 years	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years	Ditto	Ditto	Ditto	Ditto	Ir [illegible] both	[illegible] of Court by which the offence is triable.
215	Taking gift to help to recover movable property of which a person has been deprived by an offence, without causing apprehension of offender	May arrest without warrant	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first class.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered if the offence be capital	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class.
	If punishable with transportation for life or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years with or without fine.	Ditto.

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—(*contd.*)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	If with imprisonment for 1 year and not for 10 years.	May arrest without warrant.	Warrant.	Bailable	Not-compoundable.	Imprisonment for a quarter of the longest term and of the description provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
216-A	Harbouring robbers or dacoits.	Ditto ..	Ditto ...	Ditto...	Ditto...	Rigorous imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Shall not arrest without warrant.	Summons.	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto ...	Warrant.	Ditto...	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender if the offence be capital.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years with or without fine.	Ditto.
	If punishable with transportation for life or imprisonment for 10 years.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 3 years with or without fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

CHAPTER XI—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—(contd)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
	If with imprisonment for less than 10 years	Shall not arrest without warrant	Warrant	Bailable	Not compoundable	Imprisonment of either description for 2 years with or without fine.	Presidency Magistrate or Magistrate of the first or second class.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice if under sentence of death	Ditto	Ditto	Not bailable	Ditto	Transportation for life or imprisonment of either description for 14 years with or without fine	Court of Session.
	If under sentence of transportation or penal servitude for life or transportation imprisonment or penal servitude for 10 years or upwards	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years with or without fine	Ditto.
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first class
223	Escape from confinement negligently suffered by a public servant	Ditto	Summons	Ditto	Ditto	Simple imprisonment for 2 years or fine, or both	Presidency Magistrate or Magistrate of the first or second class.
224	-	May arrest	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years or fine or both.	Ditto
225	Resistance or obstruction to the lawful apprehension of another person or rescuing him from lawful custody	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If charged with an offence punishable with transportation for life or imprisonment for 10 years.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class.
	If charged with a capital offence	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session.

CHAPTER XI—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—(*concld.*)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
	If under sentence of death.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
225-A	Omission to apprehend, or sufference of escape on part of public servant, in cases not otherwise provided for—						
	(*a*) in cases of intentional omission or sufference;	Shall not arrest without warrant.	Ditto ...	Bailable	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	(*b*) in case of negligent omission or sufferance.	Ditto ...	Summons	Ditto...	Ditto..	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
225-B	Resistance or obstruction to lawful apprehension, or escape, or rescue, in cases not otherwise provided for	May arrest without warrant.	Warrant.	Ditto...	Ditto...	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
226	Unlawful return from transportation.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life and fine, and rigorous imprisonment for 3 years before transportation.	Court of Session.
227	Violation of condition of remission of punishment.	Shall not arrest without warrant.	Summons	Ditto...	Ditto...	Punishment of original sentence, or if part of the punishment has been undergone, the residue.	The Court by which the original offence was triable.
228	Intentional insult or interruption to a public servant sitting in any stage of a judical proceeding.	Ditto ...	Ditto ...	Bailable	Ditto...	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV.
	Persontion of a juror or pressor.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER XII—OFFENCES RELATING TO COIN AND GOVERNMENT'S STAMPS

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
231	Counterfeiting or performing any part of the process of counterfeiting coin	May arrest without warrant	Warrant	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine	Court of Session
232	Counterfeiting or performing any part of the process of counterfeiting the Queen's coin	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
233	Making, buying, or selling instrument for the purpose of counterfeiting coin	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
234	Making, buying or selling instrument for the purpose of counterfeiting the Queen's coin	Ditto	Ditto	Ditto	Ditto	Imprisonment of either Description for 7 years and fine	Court of Session
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate of Magistrate of the first class
	If Queen's coin	Ditto	*Ditto*	*Ditto*	*Ditto*	*Imprisonment of either description for 10 years and fine*	*Court of Session*
236	Abetting in British India the counterfeiting out of British India of coin	Ditto	*Ditto*	*Ditto*	*Ditto*	The punishment provided for abetting the counterfeiting of such coin within British India	Ditto
237	Import or export of counterfeit coin, knowing the same to be counterfeit	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
238	Import or export of counterfeits of the Queen's coin, knowing the same to be counterfeit	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine	Court of Session
239	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
240	The same with respect to the Queen's coin	Ditto	Ditto	Ditto	Ditto	*Imprisonment of either description for 10 years and fine*	Ditto

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT'S STAMPS—(*contd.*)

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable
241	Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine of ten times the value of the coin counterfeited, or both.	Prisidency Magistrate or Magistrate of the first or second class.
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
243	Possession of Queen's coin by a person who know it to be counterfeit when he became possessed thereof.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Court of Session.
245	Unlawfully taking from a Mint any coining instrument.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
246	Fraudulently diminishing the weight or altering the composition of any coin.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Ditto.
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description.	Ditto ...	Dtto ...	Ditto ..	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.

CHAPTER XII —OFFENCES RELATING TO COIN AND GOVERNMENT S STAMPS—(*contd*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
250	Delivery to another of coin possessed with the knowledge that it is altered	May arrest without warrant	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 5 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
251	Delivery of Queen s coin possessed with the know...	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
252	... came possessed thereof		Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine	Ditto
253	Possession of Queen s coin by a person who knew it to be altered when he became possessed thereof	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine	Ditto
254	Delivery to another of coin as genuine which when first possessed the deliverer did not know to be altered	Ditto	Ditto	Ditto	Ditto	Ir	first or second class
255	Counterfeiting a Government stamp	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
257	Making buying or selling instrument for the purpose of counterfeiting a Government stamp	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
258	Sale of counterfeit Government stamp	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
259	Having possession of a counterfeit Government stamp	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first class.
260	Using as genuine a Government stamp known to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine or both	Ditto
261	Effacing any writing from a substance bearing a Government stamp or removing from a document a stamp used for it with intent to cause loss to Government.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Ditto

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT'S STAMPS—(*concld.*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant *or not.*	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or *not.*	Punishment under the Indian Penal Code	By what Court triable
262	Using a Government stamp known to have been before used.	May arrest without warrant.	Warrant.	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
263	*Erasure of mark denoting that stamp has been used.*	*Ditto* ...	*Ditto* ...	*Ditto*...	*Ditto*...	*Imprisonment of either* description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
263-A	Fictitious stamps ...	Ditto ...	Ditto ...	Ditto...	Ditto...	Fine of 200 rupees ...	Presidency Magistrate or Magistrate of the first class.

CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.

264	Fradulent use of false instruments for weighing.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
265	Fraudulent use of false weight or measure.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
266	Being in possession of false weights or measures for *fraudulent* use.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
267	Making or selling false weights or measures for fraudulent use.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XIV—OFFENCES AFFECTING THE PUBLIC HEALTH SAFETY CONVENIENCE DECENCY AND MORALS—(contd)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life	May arrest without warrant	Summons	Bailable	Not compoundable	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
271	Knowingly disobeying any quarantine rules	Shall not arrest without warrant	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months or fine or both	Ditto
272	Adulterating food or drink intended for sale so as to make the same noxious	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months or fine of 1 000 rupees or both	Ditto
273	Selling any food or drink as food and drink knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy or to change its operation or to make it noxious	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
275	adulterated		Ditto	Ditto	Ditto	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
277	Defiling the water of a public spring or reservoir	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 months or fine of 500 rupees or both	Any Magistrate.
278	Making atmosphere noxious to health	Shall not arrest without warrant	Ditto	Ditto	Ditto	Fine of 500 rupees	Ditto.
279	Driving or riding on a public way so rashly or negligently as to endanger human life etc.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months or fine of 1 000 rupees or both.	Ditto.
280	Navigating any vessel so rashly or negligently as to endanger human life etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.
281	Exhibition of a false light, mark or buoy	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 7 years or fine or both.	Court of Session.

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable
282	Conveying for hire any person, by water, in a vessel in such a state, or so loaded, as to endanger his life	May arrest without warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
283	Causing danger, obstruction or injury in any public way or line of navigation.	Ditto ...	Ditto ...	Ditto...	Ditto...	Fine of 200 rupees ...	Ditto.
284	Dealing with any poisonous substance so as to endanger human life, etc.	Shall not arrest without warrant.	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Ditto	Any Magistrate.
286	So dealing with any explosive substance.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
287	So dealing with any machinery.	Shall not arrest without warrant.	Ditto ..	Ditto...	Ditto ..	Ditto	Presidency Magistrate or Magistrate of the first or second class.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has right, entitling him to pull it down or repair it.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Ditto	Any Magistrate.
290	Committing a public nuisance.	Shall not arrest without warrant.	Ditto ...	Ditto...	Ditto...	Fine of 200 rupees ...	Ditto.
291	Continuance of nuisance after injunction to discontinue.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XIV —OFFENCES AFFECTING THE PUBLIC HEALTH SAFETY CONVENIENCE DECENCY AND MORALS—(concld)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
292	Sale etc. of obscene books etc.	May arrest without warrant.	Warrant.	Bailable	Not compoundable	Imprisonment of either description for 3 months or fine or both	Presidency Magistrate or Magistrate of the first class.
293	Sale etc. of obscene objects to young persons	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months or fine, or both	Ditto
294	Obscene songs	Ditto	Ditto	Ditto	Ditto	Ditto	Any Magistrate
294 A	Keeping a lottery office	Shall not arrest without warrant	Summons	Ditto	Ditto	Imprisonment of either description for 6 months or fine or both	Ditto
	Publishing proposals relating to lotteries.	Ditto	Ditto	Ditto	Ditto	Fine of 1 000 rupees	Ditto

CHAPTER XV —OFFENCES RELATING TO RELIGION

295	Destroying damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	May arrest without warrant.	Summons	Bailable.	Not compoundable.	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class.
296	Causing a disturbance to an assembly engaged in religious worship	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year or fine or both.	Ditto
297	Trespassing in place of worship or sculpture disturbing funeral with intention to wound the feelings or to insult the religion of any person or offering indignity to a human corpse.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
298	Uttering any word or making any sound in the hearing or making any gesture or placing any object in the sight of any person with intention to wound his religious feeling	Shall not arrest without warrant	Ditto	Ditto	Compoundable	Ditto	Ditto.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences affecting Life.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
302	Murder	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Death or transportation for life and fine.	Court of Session.
	Murder by a person under sentence of transportation for life.	Ditto ...	Ditto ...	Ditto...	Ditto...	Death	Ditto.
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death, etc.	Ditto ..	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years, or fine, or both.	Ditto.
304-A	Causing death by rash or negligent act.	Ditto ...	Ditto ...	Bailable.	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
305	Abetment of suicide committed by a child, or insane or delirious person, or an idiot, or a person intoxicated.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Death or transportation for life, or imprisonment for 10 years and fine.	Court of Session.
306	Abetting the commission of suicide.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
307	Attempt to murder ...	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
	If such act cause hurt to any person.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life or as above.	Ditto.
	Attempt by life convict to murder, if hurt is caused.	Ditto ...	Ditto ...	Ditto...	Ditto...	Death or as above ...	Ditto.
308	Attempt to commit culpable homicide.	Ditto ...	Ditto ...	Bailable.	Ditto...	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
	If such act cause hurt to any person.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
309	Attempt to commit suicide.	Ditto ...	Ditto ...	Ditto...	Ditto...	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug... ...	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life and fine.	Court of Session.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—(contd.)

Of the Causing of Miscarriage, of Injuries to Unborn Children; of the Exposure of Infants, and of the Concealment of Births

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
312	Causing miscarriage	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable	Imprisonment of either description for 3 years, or fine, or both	Court of Session.
	If the woman be quick with child	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
313	Causing miscarriage without woman's consent	Ditto	Ditto	Not bailable	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine	Ditto
314	Death caused by an act done with intent to cause miscarriage	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
	If act done without woman's consent	Ditto	Ditto	Ditto	Ditto	Transportation for life or as above	Ditto
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years or fine, or both	Ditto
316	Causing death of a quick unborn child by an act amounting to culpable homicide	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant	Ditto	Bailable	Ditto	Imprisonment of either description for 7 years, or fine or both	Court of Session Presidency Magistrate or Magistrate of the first class
318	Concealment of birth by secret disposal of dead body	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Ditto *

Of Hurt

323	Voluntarily causing hurt	Shall not arrest without warrant.	Summons	Bailable.	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.

* The words "or second" have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—(*contd.*)

Of Hurt—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
324	Voluntarily causing hurt by dangerous weapons or means	May arrest without warrant.	Summons.	Bailable.	Compoundable when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto ...	Ditto ...	Ditto ...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Ditto ...	Ditto ...	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	Ditto ...	Warrant.	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto ...	Court of Session.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc	Ditto ...	Ditto ...	Bailable.	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Ditto ...	Ditto ...	Not bailable.	Ditto .	Imprisonment of either description for 10 years and fine.	Ditto.

CHAPTER XVI —OFFENCES AFFECTING THE HUMAN BODY—(*contd*)

Of Hurt—(contd)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
332	Voluntarily causing hurt to deter public servant from his duty	May arrest without warrant	Warrant	Bailable	Not compoundable	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first class
333	Voluntarily causing grievous hurt to deter public servant from his duty	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 10 years and fine	Court of Session
334	[illegible] person who grave the provocation	[illegible]	[illegible]	[illegible]ble	Compoundable	Imprisonment of either description for 1 month or fine of 500 rupees or both	Any Magistrate
335	C[illegible] person who gave the provocation	[illegible]	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution is pending	Imprisonment of either description for 4 years, or fine of 2 000 rupees or both	Court of Session Presidency Magistrate or Magistrate [illegible]
336	Doing any act which endangers human life or the personal safety of others	Ditto	Ditto	Ditto	Not compoundable	Imprisonment of [illegible] description [illegible] months, or fine [illegible] rupees or both	Any Magistrate
337	Causing hurt by an act which endangers human life etc	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution [illegible]	Imprisonment [illegible] description [illegible] months, or [illegible] rupees, or [illegible]	Presidency Magistrate or Magistrate of the first or second class
							Ditto
							Ditto

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CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—(*contd.*)

Of Hurt—(concld.)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
338	Causing grievous hurt by an act which endangers human life, etc.	May arrest without warrant.	Summons.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

Of Wrongful Restraint and Wrongful Confinement.

1	2	3	4	5	6	7	8
341	Wrongfully restraining any person.	May arrest without warrant.	Summons.	Bailable.	Compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
342	Wrongfully confining any person.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
343	Wrongfully confining for three or more days.	Ditto ...	Ditto ...	Ditto...	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
344	Wrongfully confining for ten or more days.	Ditto ...	Ditto ...	Ditto ..	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Shall not arrest without warrant.	Ditto ...	Ditto..	Ditto...	Imprisonment of either description for 2 years, in addition to imprisonment under any other section.	Ditto.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—(*contd.*)

Of Wrongful Restraint and Wrongful Confinement—(contd)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
346	Wrongful confinement in secret	May arrest without warrant	Summons	Bailable	Compoundable when permission is given by the Court before which the prosecution is pending	Imprisonment of either description for 2 years in addition to imprisonment under any other section	Court of Session Presidency Magistrate or Magistrate of the first or second class
347	Wrongful confinement for the purpose of extorting property or constraining to an illegal act etc.	Ditto	Ditto	Ditto	Not compoundable	Imprisonment of either description for 3 years and fine	Ditto
348	Wrongful confinement for the purpose of extorting confession or information or of compelling a restoration of property, etc	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first class

Of Criminal Force and Assault

352	Assault or use of criminal force otherwise than on grave provocation	Shall not arrest without warrant	Summons	Bailable	Compoundable	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Any Magistrate
353	[illegible] his duty	[illegible]	[illegible]	[illegible]	Not compoundable	Imprisonment of either description for 2 years or fine, or both	Presidency Magistrate or Magistrate of the first or second class
354	Assault or use of criminal force to a woman with intent to outrage her modesty	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
355	Assault or criminal force with intent to dishonour a person otherwise than on grave and sudden provocation	Shall not arrest without warrant	Summons	Ditto	Compoundable	Ditto	Ditto

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—(*contd.*)

Of Criminal Force and Assault—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	May arrest without warrant	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto ..	Ditto ...	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Ditto.
358	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	Summons.	Ditto..	Compoundable.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.

Of Kidnapping, Abduction, Slavery and Forced Labour.

1	2	3	4	5	6	7	8
363	Kidnapping	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
364	Kidnapping or abducting in order to murder.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	Ditto ..	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Court of Session.
366-A	Procuration of minor girl...	Ditto ..	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.

CHAPTER XVI—OFFENCES AFFECTING THE HUMAN BODY—(*contd*)

Of Kidnapping Abduction Slavery and Forced Labour—(contd)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
366 B	Importation of girl from foreign country	May arrest without warrant	Warrant	Not bailable	Not compoundable	Imprisonment of either description for 10 years and fine	Court of Session
367	Kidnapping or abducting in order to subject a person to grievous hurt slavery etc	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
368	Concealing or keeping in confinement of kidnapped person	Ditto	Ditto	Ditto	Ditto	Punishment for kidnapping or abduction	Court of Session Presidency Magistrate or Magistrate of the first class
369	Kidnapping or abducting a child with intent to take property from the person of such child	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
370	Buying or disposing of any person as a slave	Shall not arrest without warrant	Ditto	Bailable	Ditto	Ditto	Court of Session
371	Habitual dealing in slaves	May arrest without warrant.	Ditto	Not bailable	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
372	Selling or letting to hire a minor for purposes of prostitution	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
373	Buying or obtaining possession of a minor for the same purposes	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
374	Unlawful compulsory labour	Shall not arrest without warrant	Ditto	Bailable	Compoundable	Imprisonment of either description for 1 year or fine or both	Any Magistrate

Of Rape

1	2	3	4	5	6	7	8
376	Rape— If the sexual intercourse was by a man with his own wife	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Transportation for life of imprisonment of either description for 10 years and fine	Court of Session
	In any other case	May arrest without warrant	Warrant.	Not bailable	Ditto	Ditto	Ditto

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—(*concld.*)

Of Unnatural Offences.

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
377	Unnatural offences.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY.

Of Theft.

379	Theft	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Any Magistrate.
380	Theft in a building, tent or vessel.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
381	Theft by clerk or servant of property in possession of master or employer.	Ditto ...	Ditto ..	Ditto...	Ditto...	Ditto	Court of Session, Presidency Magistrate or Magistate of the first or second class.
382	Theft, preparation having been made for causing death or hurt, or restraint, or fear of death, or of hurt, or of restraint, in order to the committing of such theft, or to retiring after committing it, or to retaining property taken by it.	Ditto ...	Ditto ...	Ditto...	Ditto...	Rigorous imprisonment for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Extortion.

384	Extortion	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
385	Putting or attempting to put in fear of injury in order to commit extortion.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.

CHAPTER XVII —OFFENCES AGAINST PROPERTY—(contd)

Of Extortion—(contd)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
386	Extortion by putting a person in fear of death or grievous hurt.	Shall not arrest without warrant	Warrant	Not bailable	Not compoundable	Imprisonment of either description for 10 years and fine	Court of Session
387	Putting or attempting to put a person in fear of death or grievous hurt in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
388	Extortion by threat of accusation of an offence punishable with death transportation for life or imprisonment for 10 years	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 10 years and fine	Ditto
	If the offence threatened be an unnatural offence	Ditto	Ditto	Ditto	Ditto	Transporation for life	Ditto
		—	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
	with imprisonment for 10 years in order to commit extortion.						
	If the offence be an unnatural offence	Ditto	Ditto	Ditto	Ditto	Transportation for life	Ditto

Of Robbery and Dacoity

392	Robbery	May arrest without warrant	Warrant	Not bailable.	Not compoundable	Rigorous imprisonment for 10 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
	If committed on the high way between sunset and sunrise	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 14 years and fine	Ditto
393	Attempt to commit robbery	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years and fine	Ditto
394	erson voluntarily causing hurt in commiting or attempting to commit robbery or any other person jointly concerned in such robbery	Ditto	Ditto	Ditto	Ditto	Transportation for life or rigorous imprisonment for 10 years and fine	Ditto
395	Dacoity	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—(*contd.*)

Of Robbery and Dacoity—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
396	Murder in dacoity ...	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Death, transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
397	Robbery or dacoity, with attempt to cause death or grievous hurt.	Ditto ...	Ditto ...	Ditto...	Ditto...	Rigorous imprisonment for not less than 7 years.	Ditto.
398	Attempt to commit robbery or dacoity when armed with deadly weapon	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
399	Making preparation to commit dacoity.	Ditto ...	Ditto ...	Ditto...	Ditto...	Rigorous imprisonment for 10 years and fine.	Ditto.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or rigorous imprisonment for 10 years and fine.	Ditto.
401	Belonging to a wandering of persons associated for the purpose of habitually committing thefts.	Ditto ...	Ditto ...	Ditto...	Ditto...	Rigorous imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
402	Being one of five or more persons assembled for the purpose of committing dacoity.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Court of Session.

Of Criminal Misappropriation of Property.

1	2	3	4	5	6	7	8
403	Dishonest misappropriation of movable property, or converting it to one's own use.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
404	Dishonest misappropriation of property knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Ditto ...	Ditto ..	Ditto...	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
	If by clerk or person emloyed by deceased.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—(*contd.*)

Of Criminal Breach of Trust

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
406	Criminal breach of trust	May arrest without warrant	Warrant	Not bailable	Not compoundable	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first or second class
407	Criminal breach of trust by a carrier wharfinger etc	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
408	Criminal breach of trust by a clerk or servant	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first or second class
409	Criminal breach of trust by public servant or by banker merchant or agent etc	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class

Of the Receiving of Stolen Property

1	2	3	4	5	6	7	8
411				Not bailable	Not compoundable	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first or second class.
412	Dishonestly receiving stolen property knowing that it was obtained by dacoity	Ditto	Ditto	Ditto	Ditto	Transportation for life or rigorous imprisonment for 10 years and fine.	Court of Session
413	Habitually dealing in stolen property	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description [illegible] 10 yea[illegible]	Ditto
414	Assisting in concealment or disposal of stolen property knowing it to be stolen.	Ditto	Ditto	Ditto	Ditto [illegible] ound able	Ditto	Ditto

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—(*contd.*)

Of Mischief—(contd.)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
432	Mischief by causing inundation or obstruction to public drainage, attended with damage.	May arrest without warrant.	Warrant.	Bailable	Not compoundable.	Imprisonment of either description for 5 years, or fine, or both.	Court of Session Presidency Magistrate or Magistrate of the first or second class
433	Mischief by destroying or moving or rendering less useful a lighthouse or seamark, or by exhibiting false lights.	Ditto ..	Ditto ..	Ditto ..	Ditto...	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
434	Mischief by destroying or moving, etc, a land-mark fixed by public authority.	Shall not arrest without warrant.	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or, in case of agricultural produce, 10 rupees or upwards.	May arrest without warrant.	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
436	Mischief by fire of explosive substance with intent to destroy a house, etc.	Ditto ...	Ditto ..	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
438	The mischief described in the last section when committed by fire or any explosive substance.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
439	Running vessel ashore with intent to commit theft, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
440	Mischief committed after preparation made for causing death, or hurt, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—(contd)

Of Criminal Trespass

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
447	Criminal trespass	May arrest without warrant	Summons	Bailable	Compoundable	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Any Magistrate
448	House-trespass	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 1 year or fine of 1 000 rupees or both	Ditto
449	House trespass in order to the commission of an offence punishable with death	Ditto	Ditto	Not bailable	Not compoundable	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session
450	House trespass in order to the commission of an offence punishable with transportation for life	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
451	House trespass in order to the commission of an offence punishable with imprisonment	Ditto	Ditto	Bailable	Compoundable when permission is given by the Court before which the prosecution is pending	Imprisonment of either description for 2 years and fine	Any Magistrate
	If the offence is theft	Ditto	Ditto	Not bailable	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
452	House-trespass, having made preparation for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
453	Lurking house-trespass, or house-breaking	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years and fine.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—(*contd.*)

Of Criminal Trespass—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
454	Lurking house-trespass, or house-breaking in order to the commission of an offence punishable with imprisonment.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
	If the offence is theft ...	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 10 years and fine.	Ditto.
455	Lurking house-trespass, or house-breaking after preparation made for causing hurt, assault, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
456	Lurking house-trespass, or house-breaking by night.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
457	Lurking house-trespass, or house-breaking by night in order to the commission of an offence punishable with imprisonment.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 5 years and fine.	Ditto.
	If the offence is theft ...	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 14 years and fine.	Ditto.
458	Lurking house-trespass, or house-breaking by night after preparation made for causing hurt, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
459	Grievous hurt caused whilst committing lurking house-trespass, or house-breaking.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY—(concld.)

Of Criminal Trespass—(concld.)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
461	[illegible] perty	[illegible]	Warrant.	Bailable	Not compoundable	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class.
462	Being entrusted with any closed receptacle containing or supposed to contain any property and fraudulently opening the same.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years or fine or both.	Court of Session Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS

465	Forgery	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 2 years or fine or both.	Court of Session Presidency Magistrate or Magistrate of the first class.
466	Forgery of a record of a Court of Justice or of a Register of Births etc., kept by a public servant.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 7 years and fine	Court of Session
467	Forgery of a valuable security will or authority to make or transfer any valuable security or to receive any money, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
	When the valuable security is a promissory note of the Government of India.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Ditto
468	Forgery for the purpose of cheating	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class.
[illegible]	[illegible] for that purpose.	[illegible]	Ditto	Bailable	Ditto	Imprisonment of either description for 3 years and fine	Ditto

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS—(*contd.*)

1	2	3	4	5	6	7	8
Section	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
471	Using as genuine a forged document which is known to be forged.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Punishment for forgery of such document.	Same Court as that by which the forgery is triable.
	When the forged document is a promissory note of the Government of India.	May arrest without warrant.	Ditto .	Ditto...	Ditto...	Ditto	Court of Session.
472	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Shall not arrest without warrant.	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 7 years and fine.	Court of Session.
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.
474	Having possession of a document knowing it to be forged, with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian Penal Code.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
	If the document is one of the description mentioned in section 467 of the Indian Penal Code.	Ditto ...	Ditto ...	Ditto...	Ditto...	Transportation for life, or imprisonment of either description for 7 years and fine.	Ditto.
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto ...	Ditto ...	Ditto...	Ditto..	Ditto	Ditto.
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 7 years and fine.	Ditto.

CHAPTER XVIII —OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS—(*contd*)

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting, a will, etc	Shall not arrest without warrant.	Warrant	Not bailable	Not compoundable	Transportation for life or imprisonment of either description for 7 years and fine	Court of Session
477-A	Falsification of accounts	Ditto	Ditto				[illegible] or Magistrate of the first class

Of Trade and Property Marks

1	2	3	4	5	6	7	8
482	Using a false trade or property mark, with intent to deceive or injure any person	Shall not arrest without warrant	Warrant	Bailable	Compoundable when permission is given by the Court before which the prosecution is pending	Imprisonment of either description for 1 year or fine or both	Presidency Magistrate or Magistrate of the first or second class
483	Counterfeiting a trade or property mark used by another, with intent to cause damage or injury	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years or fine or both	Ditto
484	Counterfeiting a property mark used by a public servant or any mark used by him to denote the manufacture quality, etc, of any property	Ditto	Summons	Ditto	Not compoundable	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
485	Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property or trade-mark.	*Ditto*	*Ditto*	*Ditto*	*Ditto*	*Imprisonment* of either description for 3 years, or fine or both	*Ditto*

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS—(*concld.*)

Of Trade and Property-Marks—(contd.)

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
486	Knowingly selling goods marked with a counterfeit property or trade-mark.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable with permission of the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
487	Fraudulently making a false mark upon any package or receptacle containing goods with intent to cause it to be believed that it contains goods which it does not contain, etc.	Ditto ...	Ditto ...	Ditto...	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
488	Making use of any such false mark.	Ditto ...	Ditto ...	Ditto ..	Ditto...	Ditto	Ditto.
489	Removing, destroying or defacing any property-mark with intent to cause injury.	Ditto ...	Ditto ...	Ditto...	Ditto...	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

* *Of Currency-Notes and Bank-Notes.*

1	2	3	4	5	6	7	8
489-A	Counterfeiting currency-notes or bank-notes.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either discription for 10 years and fine.	Court of Session.
489-B	Using as genuine forged or counterfeit currency-notes or bank-notes.	Ditto ...	Ditto ...	Ditto...	Ditto...	Ditto	Ditto.
489-C	Possession of forged or counterfeit currency-notes or bank-notes.	Ditto ...	Ditto ...	Bailable.	Ditto...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
489-D	Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.	Ditto ...	Ditto ...	Not bailable.	Ditto...	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.

* This portion was added to the Schedule by s. 3 of the Currency-Notes Forgery Act, 1899 (XII of 1899)

CHAPTER XIX—CRIMINAL BREACH OF CONTRACTS OF SERVICE

1	2	3	4	5	6	7	8
Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
490	Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or • person and voluntarily	Shall not arrest without warrant.	Summons	Bailable	Compoundable	Imprisonment of either description for 1 month or fine of 100 rupees, or both	Presidency Magistrate or Magistrate of the first or second class
491	from youth unsoundness of mind or disease and voluntarily omitting to do so.		Ditto	Ditto	Ditto	Imprisonment of either description for 3 months or fine of 200 rupees or both.	Ditto
492	Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer and voluntarily deserting the service or refusing to perform the duty	Ditto	Ditto ..	Ditto	Ditto	Imprisonment of either description for 1 month or fine of double the expense incurred or both	Ditto

CHAPTER XX—OFFENCES RELATING TO MARRIAGE

493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Shall not arrest without warrent.	Warrant	Not bailable	Not compoundable	Imprisonment of either description for 10 years and fine	Court of Session.
494	Marrying again during the lifetime of a husband or wife.	Ditto	Ditto	Bailable	Compoundable with permission of the Court before which the prosecution is pending	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class.
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 10 years and fine	Court of Session

XXIII.—ATTEMPTS TO COMMIT OFFENCES.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
511	Attempting to commit offences punishable with transportation or imprisonment, and in such attempt doing any act towards the commission of the offence.	According as the offence is one in respect of which the Police may arrest without warrant or not.	According as the offence is one in respect of which a summons or warrant shall ordinarily issue.	According as the offence contemplated by the offender is bailable or not.	Compoundable when the offence attempted is compoundable.	Transportation or imprisonment not exceeding half of the longest term, and of any description, provided for the offence, or fine, or both.	The Court by which the offence attempted is triable.
	Offences against other Laws.						
	If punishable with death, transportation or imprisonment for 7 years, or upwards.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	......	Court of Session.
	If punishable with imprisonment for 3 years and upwards, but less than 7 years.	Ditto...	Ditto ...	Not bailable except in cases under the Indian Arms Act, 1878, section 19, which shall be bailable.	Ditto...	......	Court of Session, Pesidency Magistrate or Magistrate of the first class.
	punishable with imprionment for 1 year and pwards, but less than years.	Shall not arrest without warrant.	Summons.	Bailable.	Ditto...	......	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
	nishable with imprionment for less than 1 , or with fine only.	Ditto ...	Ditto ...	Ditto...	Ditto...	......	Any Magistrate.

(8) Power to quash convictions in certain cases section 350

(9) Power to hear appeals from orders requiring security *for keeping the peace or* good behaviour, section 406

(9*a*) *Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties, section* 406*A*

(10) Power to hear or refer appeals from convictions by Magistrate of the second and third classes, section 407

(11) Power to call for records, sectiou 435

(12) Power to order inquiry into complaint dismissed or case of accused discharged, section 436

(13) Power to order commitment section 437.

(14) Power to report case to High Court, section 438

(15) Power to try European British subjects, section 443

(16) Power to sentence European British subject to more than three months' imprisonment or 1,000 rupees fine, or both, section 446

(17) Power to appoint person to be Public Prosecutor in particular case, section 492 (2).

(18) Power to issue commission for examination of witness sections 503, 506

(19) Power to hear appeals from or revise orders passed under sections *514, 515*

(20) Power to compel restoration of abducted female, section 552

SCHEDULE IV.

(See *sections* 37 *and* 38.)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED.

BY THE LOCAL GOVERNMENT.

(1) Power to require security for good behaviour in case of sedition, section 108.

(2) Power to require security for good behaviour, section 110.

(3) * * *

(4) Power to make orders prohibiting repetitions of nuisances, section 143.

(5) Power to make orders under section 144.

(6) * * *

(7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186.

(8) Power to take cognisance of offences upon complaint, section 190.

(9) Power to take cognisance of offences upon Police reports, section 190.

(10) Power to take cognisance of offences without complaint, section 190.

(11) Power to try summarily, section 260.

(12) Power to hear appeals from convictions by Magistrates of the second and third classes, section 407.

(13) Power to sell property alleged or suspected to have been stolen, etc., section 524.

(14) * * *

(15) Power to try cases under section 124A of the Indian Penal Code.

BY THE DISTRICT MAGISTRATE.

(1) Power to make orders prohibiting repetitions of nuisances, section 143.

(2) Power to make orders under section 144.

(3) * * *

(4) Power to take cognisance of offences upon complaint, section 190.

(5) Power to take cognisance of offences upon Police reports, section 190.

(6) Power to transfer cases, section 192.

POWERS WITH WHICH A MAGISTRATE OF THE SECOND CLASS MAY BE INVESTED	BY THE LOCAL GOVERNMENT	(1) * * * (2) Power to make orders prohibiting repetitions of nuisances, section 143 (3) Power to make orders under section 144 (3a) *Power to record statements and confessions during a Police investigation, section* 164 (3b) *Power to authorise detention of a person in the custody of the Police during a Police investigation, section* 167 (4) Power to hold inquests, section 174 (5) Power to take cognisance of offences upon complaint section 190 (6) Power to take cognisance of offences upon Police reports section 190 (7) Power to take cognisance of offences without complaint section 190 (8) Power to commit for trial section 206 (9) Power to make orders as to first offenders, section 562
	BY THE DISTRICT MAGISTRATE	(1) Power to make orders prohibiting repetitions of nuisances, section 143 (2) Power to make orders under section 144 (3) Power to hold inquests, section 174 (4) Power to take cognisance of offences upon complaint, section 190 (5) Power to take cognisance of offences upon Police reports, section 190
POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED	BY THE LOCAL GOVERNMENT	(1) Power to make orders prohibiting repetitions of nuisances, section 143 (2) * * * (3) Power to hold inquests, section 174 (4) Power to take cognisance of offences upon complaint, section 190 (5) Power to take cognisance of offences upon Police reports, section 190 (6) * * *
	BY THE DISTRICT MAGISTRATE	(1) Power to make orders prohibiting repetitions of nuisances, section 143 (2) * * * (3) Power to hold inquests section 174 (4) Power to take cognisance of offences upon complaint section 190 (5) Power to take cognisance of offences upon Police reports, section 190
POWERS WITH WHICH A SUB-DIVISIONAL MAGISTRATE MAY BE INVESTED	BY THE LOCAL GOVERNMENT	Power to call for records section 435

* The words and figures "(1) Power to pass sentences of whipping section 32" were repealed by the Whipping Act, 1909 (IV of 1909)

SCHEDULE V.

(*N.B.*—The changes introduced have been shown in italics.)

(See *section* 555.*)

FORMS.

I.—Summons to an Accused Person (see *section* 68).

To of

WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*), you are hereby required to appear in person (*or* by pleader, *as the case may be*) before the (*Magistrate*) of , on the day of . Herein fail not.

Dated this day of 19 .

(*Seal*) (*Signature*)

II.—Warrant of Arrest (see *section* 75).

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS of stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said and to produce him before me. Herein fail not.

Dated this day of 19 .

(*Seal*) (*Signature*)

(See *section* 76.)

This warrant may be endorsed as follows:—

If the said shall give bail himself in the sum of with one surety in the sum of (*or* two sureties each in the sum of) to attend before me on the day of and to continue so to attend until otherwise directed by me, he may be released.

Dated this day of 19 .

(*Signature*)

III.—Bond and Bail-bond after Arrest under a Warrant (see *section* 86).

I (*name*), of , being brought before the District Magistrate of (*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of , do hereby bind myself to attend in the Court of on the day of next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

I do hereby declare myself surety for the abovenamed of , that he shall attend before in the Court of on the day of next, to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

IV.—Proclamation requiring the Appearance of a Person accused (see *section* 87).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or* is suspected to have committed) the offence of , punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant);

* These figures were substituted for the figures "554" by Part II of of the Second Schedule to the Repealing and Amending Act, 1903 (I of 1903)

SCHEDULE V.

(*N.B.*—The changes introduced have been shown in italics.)

(See *section* 555.*)

FORMS.

I.—Summons to an Accused Person (see *section* 68).

To of

WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*) you are hereby required to appear in person (*or* by pleader, *as the case may be*) before the (*Magistrate*) of , on the day of . Herein fail not.

Dated this day of 19 .

(*Seal*) (*Signature*)

II.—Warrant of Arrest (see *section* 75).

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS of stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said and to produce him before me. Herein fail not.

Dated this day of 19 .

(*Seal*) (*Signature*)

(See *section* 76.)

This warrant may be endorsed as follows:—

If the said shall give bail himself in the sum of with one surety in the sum of (*or* two sureties each in the sum of) to attend before me on the day of and to continue so to attend until otherwise directed by me, he may be released.

Dated this day of 19 .

(*Signature*)

III.—Bond and Bail-bond after Arrest under a Warrant (see *section* 86).

I (*name*), of , being brought before the District Magistrate of (*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of , do hereby bind myself to attend in the Court of on the day of next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

I do hereby declare myself surety for the abovenamed of , that he shall attend before in the Court of on the day of next, to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

IV.—Proclamation requiring the Appearance of a Person accused (see *section* 87).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or* is suspected to have committed) the offence of , punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant);

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* These figures were substituted for the figures "554" by Part II of of the Second Schedule to the Repealing and Amending Act, 1903 (I of 1903)

Proclamation is hereby made that the said and of is required to appear at (*place*) before this Court (*or* before me) to answer the said complaint [on the day of]

Dated this day of 19

(*Seal*) (*Signature*)

V.—Proclamation requiring the Attendance of a Witness (see *section* 87).

WHEREAS *complaint has been made before me that* (*name, description and address*) has committed (*or* is suspected to have committed) the offence of (*mention the offence concisely*) and a warrant has been issued to compel the attendance of (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint, and whereas it has been returned to the said warrant that the said (*name of witness*) cannot be served, and it has shown to my satisfaction that he has absconded (*or* is concealing himself to avoid the service of the said warrant)

Proclamation is hereby made that the said (*name*) is required to appear at (*place*) before the Court of on the day of next at o clock to be examined touching the offence complained of

Dated this day of 19

(*Seal*) (*Signature*)

VI.—Order of Attachment to compel the Attendance of a Witness (see *section* 88).

To the Police-officer in charge of the Police-station at

WHEREAS a warrant has been duly issued to compel the attendance of (*name, description and address*) to testify concerning a complaint pending before this Court and it has been returned to the said warrant that it cannot be served, and whereas it has been shown to my satisfaction that he has absconded (*or* is concealing himself to avoid the service of the said warrant), and thereupon a *Proclamation has been or is being duly issued** and published requiring the said to appear and give evidence at the time and place mentioned therein †

This is to authorise and require you to attach by seizure the movable property belonging to the said to the value of rupees which you may find within the district of and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this day of 19

(*Seal*) (*Signature*)

Order of Attachment to compel the Appearance of a Person accused (see *section* 88)

To (*name and designation of the person or persons who is or are or to execute the warrant*).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or* is suspected to have committed) the offence of punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or* is concealing himself to avoid the service of the said warrant), and thereupon a *Proclamation has been or is being duly issued** and published requiring the said to appear to answer the said charge within days, and whereas the said is possessed of the following property other than land paying revenue to Government in the village (*or town*) of , in the district of , *viz*, , and an only order has been made for the attachment thereof

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this day of 19

(*Seal*) (*Signature*)

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* Substituted for the words 'Proclamation was duly issued' by the Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

† The words 'and he has failed to appear' have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)

This is to authorise and require you to enter the said house (*or other place*) with such assistance as shall be required and to use if necessary reasonable force for that purpose and to search every part of the said house (*or other place or if the search is to be confined to a part specify the part clearly*) and to seize and take possession of any property (*or* documents *or* stamps *or* seals *or* coins *or* obscene objects *as the case may be*)—[Add (*when the case requires it*) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents *or* counterfeit stamps *or* false seals *or* counterfeit coin (*as the case may be*)] and forthwith to bring before this Court such of the said things as may be taken possession of returning this warrant with an endorsement certifying what you have done under it, immediately upon its execution

Given under my hand and the seal of the Court this day of 19
(*Seal*) (*Signature*)

X —Bond to keep the Peace (see *section* 107).

WHEREAS I (*name*) inhabitant of (*place*) have been called upon to enter into a bond to keep the peace for the term of *or until the completion of the inquiry in the matter of* *now pending in the Court of* * I hereby bind myself not to commit a breach of the peace or do any act that may probably occasion a breach of the peace during the said term *or until the completion of the said inquiry** and in case of my making default therein I hereby bind myself to forfeit to Her Majesty the Queen Empress of India the sum of rupees

Dated this day of 19
(*Signature*)

XI —Bond for Good Behaviour (see *sections* 108 109 *and* 110)

WHEREAS I (*name*) inhabitant of (*place*) have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen-Empress of India and to all Her subjects for the term of (*state the period*), *or until the completion of the inquiry in the matter of* *now pending in the Court of* I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term *or until the completion of the said inquiry* * and in case of my making default therein I bind myself to forfeit to Her Majesty the sum of rupees

Dated this day of 19
(*Signature*)

(*Where a bond with sureties is to be executed add*)—We do hereby declare ourselves sureties for the abovenamed that he will be of good behaviour to Her Majesty the Queen Empress of India and to all Her subjects during the said term and in case of his making default therein we bind ourselves jointly and severally to forfeit to Her Majesty the sum of rupees

Dated this day of 19
(*Signature*)

XII —Summons on Information of a probable Breach of the Peace (see *section* 114).

To of

WHEREAS it has been made to appear to me by credible information that (*state the substance of the information*) and that you are likely to commit a breach of the peace (*or* by which act a breach of the peace will probably be occasioned) you are hereby required to attend in person (*or* by a duly authorised agent) at the office of the Magistrate of on the day of 19 , at ten o clock in the forenoon to show cause why you should not be required to enter into a bond for rupees

[*when sureties are required add* and also to give security by the bond of one (*or* two *as the case may be* surety (*or* sureties) in the sum of rupees (each *if more than one*)] that you will keep the peace for the term of

Given under my hand and the seal of the Court this day of 19
(*Seal*) (*Signature*)

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* Inserted by the Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

This is to authorise and require you to enter the said house (*or other place*) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (*or other place or if the search is to be confined to a part, specify the part clearly*) and to seize and take possession of any property (*or* documents, *or* stamps, *or* seals, *or* coins, *or* obscene objects, *as the case may be*)—[Add (*when the case requires it*) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, *or* counterfeit stamps, *or* false seals, *or* counterfeit coin (*as the case may be*)], and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

X.—Bond to keep the Peace (see *section* 107).

Whereas I (*name*) inhabitant of (*place*), have been called upon to enter into a bond to keep the peace, for the term of *or until the completion of the inquiry in the matter of now pending in the Court of* * I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term *or until the completion of the said inquiry** and in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen Empress of India, the sum of rupees

Dated this day of 19

(*Signature*)

XI.—Bond for Good Behaviour (see *sections* 108, 109 *and* 110)

Whereas I (*name*), inhabitant of (*place*) have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen Empress of India, and to all Her subjects for the term of (*state the period*), *or until the completion of the inquiry in the matter of now pending in the Court of* I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term *or until the completion of the said inquiry*, * and, in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees

Dated this day of 19

(*Signature*)

(*Where a bond with sureties is to be executed, add*)—We do hereby declare ourselves sureties for the abovenamed that he will be of good behaviour to Her Majesty the Queen Empress of India, and to all Her subjects during the said term, and, in case of his making default therein, we bind ourselves, jointly and severally to forfeit to Her Majesty the sum of rupees

Dated this day of 19

(*Signature*)

XII.—Summons on Information of a probable Breach of the Peace (see *section* 114).

To of

Whereas it has been made to appear to me by credible information that (*state the substance of the information*), and that you are likely to commit a breach of the peace (*or* by which act a breach of the peace will probably be occasioned), you are hereby required to attend in person (*or* by a duly authorised agent) at the office of the Magistrate of on the day of 19 , at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees

[*when sureties are required, add*, and also to give security by the bond of one (*or* two, *as the case may be* surety (*or* sureties) in the sum of rupees (each *if more than one*)] that you will keep the peace for the term of

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

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* Inserted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)

XVI.—Order for the removal of Nuisances (see *section* 133)

To (*name, description and address*).

WHEREAS it has been made to appear to me that you have caused an obstruction (*or* nuisance) to persons using the public road way (*or other public place*) which, etc (*describe the road or public place*), by, etc. (*state what it is that causes the obstruction or nuisance*), and that such obstruction (*or* nuisance) still exists,

or

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (*state the particular trade or occupation and the place where it is carried on*), and that the same is injurious to the public health (*or comfort by reason state briefly in what manner the injurious effects are caused*) and should be suppressed or removed to a different place,

or

WHEREAS it has been made to appear to me that you are owner (*or* are in possession of *or* have the control over) a certain tank (*or* well *or* excavation) adjacent to the public way (*describe the thoroughfare*) and that the safety of the public is endangered by reason of the said tank (*or* well *or* excavation) being without a fence (*or* insecurely fenced),

or

WHEREAS, etc (*as the case may be*),

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at in the Court of on the day of next, and to show cause why this order should not be enforced,

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same or to remove the said trade from the place where it is now carried on, or to appear, etc.,

or

I do heredy direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind offence and the part to be fenced*), or to appear, etc.,

or

I do hereby direct and require you, etc (*as the case may be*).

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XVII.—Magistrate's Order constituting a Jury (see *section* 138).

WHEREAS on the day of 19 , an order was issued to (*name*) requiring him (*state the effect of the order*) and whereas the said (*name*) has applied to me, by a petition bearing date the day of , for an order appointing a Jury to try whether the said recited order is reasonable and proper, I do hereby appoint (*the names etc, of the five or more Jurors*) to be the Jury to try and decide the said question, and do require the said Jury to report their decision within days from the date of this order at my office at

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XVIII.—Magistrate's Notice and Peremptory Order after the Finding by a Jury (see *section* 140).

To (*name, description and address*)

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the day of have found that the order issued on the day of requiring you (*state substantially the requisition in the order*) is reasonable and proper Such order has been made absolute and I hereby direct and require you to obey the said order within (*state the time allowed*), on peril of the penalty provided by the Indian Pinal Code for disobedience thereto

Given under my hand and the seal of the Court, this dav of 19

(*Seal*) (*Signature*)

XVI.—Order for the removal of Nuisances (see *section* 133).

To (*name, description and address*)

WHEREAS it has been made to appear to me that you have caused an obstruction (*or* nuisance) to persons using the public road way (*or other public place*) which, etc. (*describe the road or public place*), by, etc. (*state what it is that causes the obstruction or nuisance*), and that such obstruction (*or* nuisance) still exists,

or

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (*state the particular trade or occupation and the place where it is carried on*), and that the same is injurious to the public health (*or comfort by reason state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place,

or

WHEREAS it has been made to appear to me that you are owner (*or* are in possession of *or* have the control over) a certain tank (*or* well *or* excavation) adjacent to the public way (*describe the thoroughfare*) and that the safety of the public is endangered by reason of the said tank (*or* well *or* excavation) being without a fence (*or* insecurely fenced),

or

WHEREAS, etc (*as the case may be*),

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at in the Court of on the day of next, and to show cause why this order should not be enforced,

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.,

or

I do heredy direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind offence and the part to be fenced*), or to appear, etc.,

or

I do hereby direct and require you, etc. (*as the case may be*).

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XVII.—Magistrate's Order constituting a Jury (see *section* 138).

WHEREAS on the day of 19 , an order was issued to (*name*) requiring him (*state the effect of the order*) and whereas the said (*name*) has applied to me, by a petition bearing date the day of , for an order appointing a Jury to try whether the said recited order is reasonable and proper, I do hereby appoint (*the names, etc, of the five or more Jurors*) to be the Jury to try and decide the said question, and do require the said Jury to report their decision within days from the date of this order at my office at

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XVIII.—Magistrate's Notice and Peremptory Order after the Finding by a Jury (see *section* 140).

To (*name, description and address*)

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the day of have found that the order issued on the day of requiring you (*state substantially the requisition in the order*) is reasonable and proper Such order has been made absolute and I hereby direct and require you to obey the said order within (*state the time allowed*), on peril of the penalty provided by the Indian Pinal Code for disobedience thereto.

Given under my hand and the seal of the Court, this dav of 19

(*Seal*) (*Signature*)

E

XXIII.—Warrant of Attachment in the case of a Dispute as to the Possession of Land, etc.
(see *section* 146).

To the Police-officer in charge of the Police station at [*or*, To the Collector of]

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and whereas, upon due inquiry into the said claims, I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [*or* I am unable to satisfy myself as to which of the said parties was in possession as aforesaid];

This is to authorise and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XXIV.—Magistrate's Order prohibiting the doing of anything on Land or Water (see *section* 147).

A DISPUTE having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or* water) is claimed exclusively by (*describe the person or persons*), and it appearing to me on due inquiry into the same, that the said land (*or* water) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons describe him or them*) and (*if the use can be enjoyed throughout the year*) that the said use has been enjoyed within three months of the institution of the said inquiry (*or, if the use is enjoyable only at particular seasons, say* "during the last of the seasons at which the same is capable of being enjoyed"),

I do order that the said (*the claimant or claimants of possession*), or anyone in their interest, shall not take (*or* retain) possession of the said land (*or* water) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or* they) shall obtain the decree or order of a competent Court adjudging him (*or* them) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XXV.—Bond and Bail-bond on a Preliminary Inquiry before a Police-officer (see *section* 169).

I (*name*), of , being charged with the offence of , and after inquiry required to appear before the Magistrate of

or

and after inquiry called upon to enter into my own recognisance to appear when required, do hereby bind myself to appear at , in the Court of , on the day of next (*or* on such day as I may hereafter be required to attend) to answer further to the said charge, and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

I hereby declare myself (*or* we jointly and severally declare ourselves and each of us) surety (*or* sureties) for the above said that he shall attend at , in the Court of , on the day of next (*or* on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and, in case of his making default therein, I hereby bind myself (*or* we hereby bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

(7) That you on or about the day of at abetted the commission of suicide by *A B* a person in a state of intoxication and thereby committed an offence punishable under section 306 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

On section 306

(8) That you on or about the day of at voluntarily caused grievous hurt to and thereby committed an offence punishable under section 325 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

On section 325

(9) That you on or about the day of at robbed [*state the name*] and thereby committed an offence punishable under section 392 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

On section 392

(10) That you on or about the day of at committed dacoity an offence punishable under section 395 of the Indian *Penal Code and within* the cognisance of the Court of Session [*or* High Court]

On section 395

[*In cases tried by Magistrates substitute* within my cognisance *for* within the cognisance of the Court of Session and in (*c*) omit by the said Court.]

(II) Charge with two or more Heads

(*a*) I [*name and office of Magistrate etc*] hereby charge you [*name of accused person*] as follows —

(*b*) *First*—That you on or about the day of at knowing a coin to be counterfeit delivered the same to another person by name *A B* as genuine and thereby committed an offence punishable under section 241 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

On section 241

Secondly—That you on or about the day of at knowing a coin to be counterfeit attempted to induce another person by name *A B* to receive it as genuine and thereby committed an offence punishable under section 241 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

(*c*) And I hereby direct that you be tried by the said Court on the said charge

[*Signature and Seal of the Magistrate*]

[*To be substituted for* (*b*)] —

(2) *First*.—That you on or about the day of at committed murder by causing the death of and thereby committed an offence punishable under section 302 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

On sections 302 and 304

Secondly,—That you on or about the day of at by causing the death of committed culpable homicide not amounting to murder and thereby committed an offence punishable under section 304 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

(3) *First*.—That you on or about the day of at committed theft and thereby committed an offence punishable under section 379 of the Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

On sections 379 and 382

Secondly—That you on or about the day of , at committed ft and thereby cogni ance of

Thirdly—That you on or about the day of at committed theft having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft and thereby committed on offence punishable under section 382 of Indian Penal Code and within the cognisance of the Court of Session [*or* High Court]

This is to authorise and require you the said Superintendent (*or* Keeper) to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), subject to the provisions of section 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XXXI.—Summons to Witness (see *sections* 68 *and* 252).

To of

WHEREAS complaint has been made before me that has (*or* is suspected to have) committed the offence of (*state the offence concisely with time and place*), and it appears to me that you are likely to give material evidence for the prosecution,

You are hereby summoned to appear before this Court on the day of next at ten o'clock in the forenoon to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court, and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance

Given under my hand and the seal of the Court this day of 19

(*Seal*) (*Signature*)

XXXII.—Precept to District Magistrate to summon Jurors and Assessors (see *section* 326).

To the District Magistrate of

WHEREAS a Criminal Session is appointed to be held in the Court house at on the day of next, and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of Jurors and Assessors furnished to this Court; you are hereby required to summon the said persons to attend at the said Court of Session at 10 A.M on the said date, and, within such date to certify that you have done so in pursuance of this precept.

(*Here enter the names of Jurors and Assessors*)

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XXXIII.—Summons to Assessor or Juror (see *section* 328).

To (*name*), of (*place*).

PURSUANT to a precept directed to me by the Court of Session of requiring your attendance as an Assessor (*or* a Juror) at the next Criminal Session you are hereby summoned to attend at the said Court of Session at (*place*) at ten o'clock in the forenoon on the day of next.

Given under my hand and the seal of office this day of 19 .

(*Seal*) (*Signature*)

XXXIV.—Warrant of Commitment under Sentence of Death (see *section* 374)

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS at the Session held before me on the day of 19 , (*name of prisoner*) the (1st, 2nd, 3rd *as the case may be*) prisoner in case No of the Calendar at the said Session, was duly convicted of the offence of culpable homicide amounting to murder under section of the Indian Penal Code, and sentenced to suffer death subject to the confirmation of the said sentence by the Court of ,

This is to authorise and require you the said Superintendent (*or* Keeper), to receive the said (*prisoner's name*) into your custody in the said Jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court carrying into the effect the order of the said Court.

Given under my hand and the seal of the Court this day of 19 .

(*Seal*) (*Signature*)

XXXVII-A.—Bond for Appearance of Offender released pending Realisation of Fine (see *section* 369).

WHEREAS I, (*name*), *inhabitant of* (*place*), *have been sentenced to pay a fine of rupees and in default of payment thereof to undergo imprisonment for ; and whereas the Court has been pleased to order my release until the day of on condition of my executing a bond for my appearance on that day;*

I hereby bind myself to appear before the Court of at o'clock on the said day of next, and in case of making default herein, I bind myself to forfeit to His Majesty the King-Emperor of India, the sum of rupees

Dated this day of 19

(*Signature*)

Where a bond with sureties is to be executed, add—

We do hereby declare ourselves sureties for the abovenamed that he will appear before the Court of on the day of next, and, in case of his making default therein, we bind ourselves jointly and severally to forfeit to His Majesty the King-Emperor of India, the sum of rupees

(*Signature*)

XXXVIII.—Warrant of Commitment in certain cases of Contempt when a Fine is imposed (see *section* 480)

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS at a Court holden before me on this day (*name and description of the offender*) in the presence (or view) of the Court committed wilful contempt,

And whereas for such contempt the said (*name of offender*) has been adjudged by the Court to pay a fine of rupees , or in default to suffer simple imprisonment for the space of (*state the number of months or days*),

This is to authorise and require you, the Superintendent (*or* Keeper) of the said Jail, to receive the said (*name of offender*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*) unless the fine be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XXXIX.—Magistrate's or Judge's Warrant of Commitment of Witness refusing to answer

(see *section* 485).

To (*name and description of officer of Court*).

WHEREAS (*name and description*), being summoned (*or* brought before this Court) as a witness and this day required to give evidence on an inquiry into an alleged offence, refused to answer a certain question (*or* certain questions) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (*term of detention adjudged*);

This is to authorise and require you to take the said (*name*) into custody and him safely to keep in your custody for the space of days unless in the meantime he shall consent to be examined and to answer the question asked of him, and on the last of the said days, or forthwith on such consent being known, to bring him before this Court to be delt with according to law, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

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XLIII.—Warrant to discharge a person imprisoned on Failure to give Security (see *section* 500)

To the Superintendent (*or* Keeper) of the Jail at (*or other officer in whose custody the person is*).

WHEREAS (*name and description of prisoner*) was committed to your custody under warrant of this Court, dated the day of , and has since with his surety (*or* sureties) duly executed a bond under section 499 of the Code of Criminal Procedure,

This is to authorise and require you forthwith to discharge the said (*name*) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLIV.—Warrant of Attachment to enforce a Bond (see *section* 514).

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address of person*) has failed to appear on (*mention the occasion*) pursuant to his recognisance and has by such default forfeited to Her Majesty the Queen Empress of India the sum of rupees (*the penalty in the bond*), and whereas the said (*name of person*) has on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him

This is to authorise and require you to attach any movable property of the said (*name*) that you may find within the district of , by seizure and detention and if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court this day of 19

(*Seal*) (*Signature*)

XLV.—Notice to Surety on Breach of a Bond (see *section* 514)

To of

WHEREAS on the day of 19 , you became surety for (*name*) of (*place*) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen Empress of India and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees ,

You are hereby required to pay the said penalty or show cause within days from this date, why payment of the said sum should not be enforced against you

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLVI.—Notice to Surety to Forfeiture of Bond for Good Behaviour (see *section* 514).

To of

WHEREAS on the day of 19 , you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of and bound yourself in default therof to forfeit the sum of rupees to Her Majesty the Queen Empress of India , and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited ,

You are hereby required to pay the said penalty of rupees , or to show cause within days why it should not be paid

Given under my hand and the seal of the Court this day of 19 .

(*Seal*) (*Signature*)

XLIII.—Warrant to discharge a person imprisoned on Failure to give Security (see *section* 500)

To the Superintendent (*or* Keeper) of the Jail at (*or other officer in whose custody the person is*).

WHEREAS (*name and description of prisoner*) was committed to your custody under warrant of this Court, dated the day of , and has since with his surety (*or* sureties) duly executed a bond under section 499 of the Code of Criminal Procedure,

This is to authorise and require you forthwith to discharge the said (*name*) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this day of 19 ,

(*Seal*) (*Signature*)

XLIV.—Warrant of Attachment to enforce a Bond (see *section* 514).

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address of person*) has failed to appear on (*mention the occasion*) pursuant to his recognisance, and has by such default forfeited to Her Majesty the Queen Empress of India the sum of rupees (*the penalty in the bond*), and whereas the said (*name of person*) has on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him

This is to authorise and require you to attach any movable property of the said (*name*) that you may find within the district of , by seizure and detention and, if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLV.—Notice to Surety on Breach of a Bond (see *section* 514)

To of

WHEREAS on the day of 19 , you became surety for (*name*) of (*place*) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen Empress of India and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees ,

You are hereby required to pay the said penalty or show cause, within days from this date, why payment of the said sum should not be enforced against you.

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLVI.—Notice to Surety to Forfeiture of Bond for Good Behaviour (see *section* 514)

To of

WHEREAS on the day of 19 , you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of and bound yourself in default therof to forfeit the sum of rupees to Her Majesty the Queen Empress of India and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited,

You are hereby required to pay the said penalty of rupees or to show cause within days why it should not be paid.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLIII.—Warrant to discharge a person imprisoned on Failure to give Security (see *section* 500).

To the Superintendent (*or* Keeper) of the Jail at (*or other officer in whose custody the person is*).

WHEREAS (*name and description of prisoner*) was committed to your custody under warrant of this Court, dated the day of , and has since with his surety (*or* sureties) duly executed a bond under section 499 of the Code of Criminal Procedure,

This is to authorise and require you forthwith to discharge the said (*name*) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLIV.—Warrant of Attachment to enforce a Bond (see *section* 514).

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address of person*) has failed to appear on (*mention the occasion*) pursuant to his recognisance, and has by such default forfeited to Her Majesty the Queen Empress of India the sum of rupees (*the penalty in the bond*), and whereas the said (*name of person*) has on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him

This is to authorise and require you to attach any movable property of the said (*name*) that you may find within the district of , by seizure and detention and if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realize the amount aforesaid and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLV.—Notice to Surety on Breach of a Bond (see *section* 514)

To of

WHEREAS on the day of 19 , you became surety for (*name*) of (*place*) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen-Empress of India and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees .

You are hereby required to pay the said penalty or show cause, within days from this date, why payment of the said sum should not be enforced against you

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLVI.—Notice to Surety to Forfeiture of Bond for Good Behaviour (see *section* 514)

To of

WHEREAS on the day of 19 , you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of and bound yourself in default therof to forfeit the sum of rupees to Her Majesty the Queen Empress of India and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited,

You are hereby required to pay the said penalty of rupees or to show cause within days why it should not be paid

Given under my hand and the seal of the Court this day of 19 .

(*Seal*) (*Signature*)

XL.—Warrant of Imprisonment on Failure to pay Maintenance (see *section* 488).

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS (*name, description and address*) has been proved before me to be possessed of sufficient means to maintain his wife (*name*) [or his child (*name*), who is by reason of (*state the reason*) unable to maintain herself (*or* himself)] and to have neglected (*or* refused) to do so, and an order has been duly made requiring the said (*name*) to allow to his said wife (*or* child) for maintenance the monthly sum of rupees ; and whereas it has been further proved that the said (*name*) in wilful disregard of the said order has failed to pay rupees , being the amount of the allowance for the month (*or* months) of ; and thereupon an order was made adjudging him to undergo simple (*or* rigorous) imprisonment in the said Jail for the period of ;

This is to authorise and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody in the said Jail, together with this warrant, and there carry the said order into execution according to law returning this warrant, with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLI.—Warrant to enforce the Payment of Maintenance by Attachment and Sale (see *section* 488).

To (*name and designation of the Police-officer or other person to execute the warrant*).

WHEREAS an order has been duly made requiring (*name*) to allow to his said wife (*or* child) for maintenance the monthly sum of rupees , and whereas the said (*name*) in wilful disregard of the said order has failed to pay rupees , being the amount of the allowance for the month (*or* months) of ,

This is to authorise and require you to *attach any* * movable property belonging to the said (*name*) which may be found within the district of and if within (*state the number of days or hours allowed*) next after *such attachment*† the said sum shall not be paid (*or* forthwith), to sell the movable *property attached* ‡ or so much thereof as shall be sufficient to satisfy the said sum, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLII.—Bond and Bail-bond on a Preliminary Inquiry before a Magistrate (see *sections* 496 and 499).

I (*name*), of (*place*), being brought before the Magistrate of (*as the case may be*) charged with the offence of , and required to give security for my attendance in his Court and at the Court of Session, if required, to bind myself to attend at the Court of the said Magistrate on every day of the Preliminary inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be, and appear before the said Court when called upon to answer the charge against me; and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

I hereby declare myself (*or* we jointly and severally declare ourselves and each of us) surety (*or* sureties) for the said (*name*) that he shall attend at the Court of on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein, I bind mayself (*or* we bind ourselves) to forfeit to Her Majesty the Queen-Empress of India, the sum of rupees

Dated this day of 19 .

(*Signature*)

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* Substituted for the words "make distress by seizure of any" by the Criminal Procedure (Amendment) Act, 1923 (XVII of 1923)

† Substituted for "such distress" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

‡ Substituted for "property distrained" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

XLIII.—Warrant to discharge a person Imprisoned on Failure to give Security (see *section* 500)

To the Superintendent (*or* Keeper) of the Jail at (*or other officer in whose custody the person is*).

WHEREAS (*name and description of prisoner*) was committed to your custody under warrant of this Court, dated the day of , and has since with his surety (*or* sureties) duly executed a bond under section 499 of the Code of Criminal Procedure,

This is to authorise and require you forthwith to discharge the said (*name*) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this day of 19 ,

(*Seal*) (*Signature*)

XLIV.—Warrant of Attachment to enforce a Bond (see *section* 514).

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address of person*) has failed to appear on (*mention the occasion*) pursuant to his recognisance, and has by such default forfeited to Her Majesty the Queen Empress of India the sum of rupees (*the penalty in the bond*) and whereas the said (*name of person*) has on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him,

This is to authorise and require you to attach any moveable property of the said (*name*) that you may find within the district of , by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court this day of 19

(*Seal*) (*Signature*)

XLV.—Notice to Surety on Breach of a Bond (see *section* 514)

To of

WHEREAS on the day of 19 , you became surety for (*name*) of (*place*) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen Empress of India and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees ,

You are hereby required to pay the said penalty or show cause, within days from this date, why payment of the said sum should not be enforced against you

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

XLVI.—Notice to Surety to Forfeiture of Bond for Good Behaviour (see *section* 514)

To of

WHEREAS on the day of 19 you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of and bound yourself in default therof to forfeit the sum of rupees to Her Majesty the Queen Empress of India, and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited,

You are hereby required to pay the said penalty of rupees or to show cause within days why it should not be paid

Given under my hand and the seal of the Court this day of 19 .

(*Seal*) (*Signature*)

XLVII.—Warrant of Attachment against a Surety (see *section* 514).

To   of

WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*), and the said (*name*) has made default, and thereby forfeited to Her Majesty the Queen-Empress of India, the sum of rupees   (*the penalty in the bond*);

This is to authorise and require you to attach any movable property of the said (*name*) which you may find within the district of   by seizure and detention; and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realise the amount aforesaid, and made return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this   day of   19 .

(*Seal*)   (*Signature*)

XLVIII.—Warrant of Commitment of the Surety of an accused person admitted to Bail

(see *section* 514).

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen-Empress of India; and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of movable property of his, and an order has been made for his imprisonment in the Civil Jail for (*specify the period*);

This is to authorise and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody with this warrant and him safely to keep in the said Jail for the said (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this   day of   19 .

(*Seal*)   (*Signature*)

XLIX.—Notice to the Principal of Forfeiture of a Bond to keep the Peace (see *section* 514).

To (*name, description and address*).

WHEREAS on the   day of   19 , you entered into a bond not to commit, etc. (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees   or to show cause before me within   days why payment of the same should not be enforced against you.

Dated this   day of   19 .

(*Seal*)   (*Signature*)

L.—Warrant to attach the Property of the Principal on Breach of a Bond to keep the Peace.

(see *section* 514).

To (*name and designation of Police-officer*), at the Police-station of

WHEREAS (*name and description*) did on the   day of   19 , enter into a bond for the sum of rupees   binding himself not to commit a breach of the peace, etc. (*as in the bond*), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorise and require you to attach by seizure movable property belonging to the said (*name*) to the value of rupees   which you may find within the district of   , and, if the said sum be not paid within   , to sell the property so attached or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this   day of   19 .

(*Seal*)   (*Signature*)

LI —Warrant of Imprisonment on Breach of a Bond to keep the Peace (see *section* 514)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen Empress of India, the sum of rupees , and whereas the said (*name*) has failed to pay the said sum or to show cause, why the said sum should not be paid although duly called upon to do so and payment thereof cannot be enforced by attachment of his movable property and an order has been made for the imprisonment of the said (*name*) in the Civil Jail for the period of (*term of imprisonment*),

This is to authorise and require you, the said Superintendent (*or* Keeper) of the said Civil Jail to receive the said (*name*) into your custody, together with this warrant and him safely to keep in the said Jail for the said period of (*term of imprisonment*), and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

LII.—Warrant of Attachment and Sale on Forfeiture of Bond for Good Behaviour (see *section* 514).

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address*) did on the day of 19 , give security by bond in the sum of rupees for the good behaviour of (*name, etc of the principal*) and proof has been given before me and duly recorded of the commission by the said (*name*) of the offence of whereby the said bond has been forfeited, and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid and he has failed to do so or to pay the said sum

This is to authorise and require you to attach by seizure movable property belonging to the said (*name*) to the value of rupees which you may find within the district of and if the said sum be not paid within , to sell the property so attached or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

LIII.—Warrant of Imprisonment on Forfeiture of Bond for Good Behaviour (see *section* 514)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS (*name, description and address*) did, on the day of 19 give security by bond in the sum of rupees for the good behaviour of (*name etc, of the principal*) and proof of the breach of the said bond has been given before me and duly recorded, whereby the said (*name*) has forfeited to Her Majesty the Queen-Empress of India the sum of rupees , and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his movable property, and an order has been made for the imprisonment of the said (*name*) in the Civil Jail for the period of (*term of imprisonment*),

This is to authorise and require you, the Superintendent (*or* Keeper) to receive the said (*name*) into your custody, together with this warrant and him safely to keep in the said Jail for the said period of (*term of imprisonment*), returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court this day of 19

(*Seal*) (*Signature*)

XLVII.—Warrant of Attachment against a Surety (see *section* 514).

To of

WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*), and the said (*name*) has made default, and thereby forfeited to Her Majesty the Queen-Empress of India, the sum of rupees (*the penalty in the bond*);

This is to authorise and require you to attach any movable property of the said (*name*) which you may find within the district of by seizure and detention; and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realise the amount aforesaid, and made return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLVIII.—Warrant of Commitment of the Surety of an accused person admitted to Bail

(see *section* 514).

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen-Empress of India; and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of movable property of his, and an order has been made for his imprisonment in the Civil Jail for (*specify the period*);

This is to authorise and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody with this warrant and him safely to keep in the said Jail for the said (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

XLIX.—Notice to the Principal of Forfeiture of a Bond to keep the Peace (see *section* 514).

To (*name, description and address*).

WHEREAS on the day of 19 , you entered into a bond not to commit, etc. (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees or to show cause before me within days why payment of the same should not be enforced against you.

Dated this day of 19 .

(*Seal*) (*Signature*)

L.—Warrant to attach the Property of the Principal on Breach of a Bond to keep the Peace.

(see *section* 514).

To (*name and designation of Police-officer*), at the Police-station of

WHEREAS (*name and description*) did on the day of 19 , enter into a bond for the sum of rupees binding himself not to commit a breach of the peace, etc. (*as in the bond*), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum;

This is to authorise and require you to attach by seizure movable property belonging to the said (*name*) to the value of rupees which you may find within the district of , and, if the said sum be not paid within , to sell the property so attached or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .

(*Seal*) (*Signature*)

LI.—Warrant of Imprisonment on Breach of a Bond to keep the Peace (see *section* 514)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen Empress of India, the sum of rupees , and whereas the said (*name*) has failed to pay the said sum or to show cause, why the said sum should not be paid although duly called upon to do so and payment thereof cannot be enforced by attachment of his movable property, and an order has been made for the imprisonment of the said (*name*) in the Civil Jail for the period of (*term of imprisonment*),

This is to authorise and require you, the said Superintendent (*or* Keeper) of the said Civil Jail to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

LII.—Warrant of Attachment and Sale on Forfeiture of Bond for Good Behaviour (see *section* 514).

To the Police-officer in charge of the Police-station at

WHEREAS (*name, description and address*), did, on the day of 19 give security by bond in the sum of rupees for the good behaviour of (*name, etc of the principal*) and proof has been given before me and duly recorded of the commission by the said (*name*) of the offence of whereby the said bond has been forfeited, and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid and he has failed to do so or to pay the said sum

This is to authorise and require you to attach by seizure movable property belonging to the said (*name*) to the value of rupees which you may find within the district of and if the said sum be not paid within , to sell the property so attached or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 19

(*Seal*) (*Signature*)

LIII.—Warrant of Imprisonment on Forfeiture of Bond for Good Behaviour (see *section* 514)

To the Superintendent (*or* Keeper) of the Civil Jail at

WHEREAS (*name description and address*) did on the day of 19 give security by bond in the sum of rupees for the good behaviour of (*name etc, of the principal*) and proof of the breach of the said bond has been given before me and duly recorded, whereby the said (*name*) has forfeited to Her Majesty the Queen Empress of India the sum of rupees , and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his movable property, and an order has been made for the imprisonment of the said (*name*) in the Civil Jail for the period of (*term of imprisonment*),

This is to authorise and require you the Superintendent (*or* Keeper) to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court this day of 19

(*Seal*) (*Signature*)

APPENDIX I.

EXTRACTS FROM THE CHARTER ACT

An Act for establishing High Courts of Judicature in India 6th August 1861.

24 AND 25 VICTORIÆ REGINÆ, CAP CIV

* * * * * *

* * * * * *

8. Abolition of Supreme Courts and Sudder Courts

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Jurisdiction and powers of High Courts

9 Each of the High Courts to be established under this Act shall have and exercise all such civil criminal admiralty and vice-admiralty testamentary intestate and matrimonial jurisdiction original and appellate and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty may by such Letters Patent as aforesaid grant and direct subject however to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts

* * * * * *

11 Existing provisions applicable to Supreme Courts to apply to High Courts

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13. Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts

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14 Chief Justice to determine what Judges shall sit alone or in the Division Courts

* * * * * *

High Courts to superintend and to frame rules of practice for Subordinate Courts

15 Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided and also for keeping all books entries and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff Attorneys and all clerks and officers of Courts and from time to time to alter any such rule or form or table and the rules so made and the forms so framed and the tables so settled shall be used and observed in the said Courts provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force and shall before they are issued have received the sanction in the Presidency of *Fort William* of the Governor General in Council and in *Madras* or *Bombay* of the Governor in Council of the respective Presidencies

Notes.—1. Powers of High Court to be exercised subject to the legislative powers of the Governor-General in Council.—The exercise of jurisdiction by the High Court under the Charter Act, in any part of His Majesty's Indian territories, is meant to be subject to, and is not exclusive of, the general legislative power of the Governor-General in Council. **4 C. 172 (P.C.) = 5 I. A. 178.** *See* also **26 A. 144; 3 C. 63; 26 C. 188.**

2. **Nature and Scope of Jurisdiction.**—This section which gives to the High Court a general power or superintendence over Subordinate Courts, vests in it a power somewhat analogous to that of the King's Bench Division in the Supreme Court in England to interfere by *mandamus* (*Cf.* s. 45 of the Specific Relief Act) and the power is discretionary and ought to be exercised with every caution. If the Subordinate Court has acted without jurisdiction, the High Court will interfere. If the Court has proceeded with irregularity, the High Court will not interfere unless it be shown that someone interested has been materially prejudiced by such irregularity. **33 C. 68 (F.B.).** *See* also **26 C. 188; 16 C. 80; 26 C. 625; 32 C. 1093; 36 C. 994.** No hard and fast rule can be laid down as regards the class of cases in which the High Court will interfere. **28 M. L. J. 505** *referring to* **22 C. 131; 25 C. 233; 26 C. 786; 20 B. 543.** Section 15 has always been interpreted in a very extended meaning so as to give ample powers of superintendence, *i.e.*, powers of revision over proceedings of Subordinate Magistrates; **27 C. 126; 1 C. W. N. 49; 12 C. W. N. 678**; even if no question of jurisdiction is involved. **26 M. L. J. 208 = 15 Cr. L. J. 509; 28 M. L. J. 370.** In **14 M. L. T. 200 = 14 Cr. L. J. 529,** SUNDARA AIYAR, J., *referring to* **27 C. 126; 27 M. 223; 31 M. 510; 28 M. 28; 21 M. L. J. 484; 33 C. 68; 28 C. 709** was of opinion that the High Court has under this section plenary powers of interference where it is needed to correct injustice; (*see* Note 10 under s. 439); though a narrower view was adopted in **27 C. 692** and **6 C. L. J. 705.** In **1 A. 101; 21 A. 181; 24 A. 315; 2 C. 293; 9 C. W. N. 909; 26 C. 74; 36 C. 994; 26 A. 144; 31 A. 150; 3 M. 354** and **36 M. 275,** the High Court refused to interfere as there was no question of jurisdiction. *See* Notes under ss. 144, 145, 435, 439 of the Code.

3. **Power will not be exercised when other remedy open.**—When there is a right of appeal provided by law, the High Court will not exercise its extraordinary jurisdiction. All other remedies provided by law must be first exhausted. **3 C. 573; 30 A. 331; 7 C. 447.**

4. **Is the jurisdiction conferred by this section controlled by ss. 435 and 439 of the Code?**—*See* Note 5 under s. 439 of the Code.

4-A. **Powers of superintendence limited to proceedings of Courts.**—As to what is a Court, *see* Notes under Heading IV to s. 435 and Notes under Heading II to s. 476. *See* also **27 M. L. J. 227 = 15 Cr. L. J. 593.**

5. **Over what Courts the High Court has superintendence.**—In the case of orders passed by a Civil or a Revenue Court under s. 476, the High Court can exercise the powers vested in it by s. 115 of the Civil Procedure Code or s. 15 of the Charter Act, as they are Courts subordinate to the High Court, even though they are not superior Criminal Courts within the meaning of s. 435 of the Code. **40 C. 477 (F.B.)** *followed* in **16 Cr. L. J. 286 (C)** with reference to an order made under s. 195. As to jurisdiction of High Court over Magistrate acting under the Extradition Act, *see* Notes to s. 3 of Appendix II, *infra.*

(Calcutta).—The High Court at Calcutta has no jurisdiction over the Court of the Sessions Judge at Allahabad. **1 Ind. Jur. 219**; nor to hear an appeal from a conviction by the Superintendent of Cachar in his capacity as Magistrate of the District. **W. R. Sp. 18**; nor over the Superintendent of the Tributary Mahals while exercising jurisdiction over offences committed in Mohurbhanj. **9 C. 288.** *Quaere*: Whether the High Court can interfere with the proceeding of the Sub-Divisional Officer of the North Cachar Hills. **26 C. 874.** The High Court cannot hear appeals on conviction for offences committed within the Districts known as the Chittagong Hill Tracts. **27 C. 654.**

(Bombay).—The High Court at Bombay has jurisdiction to entertain a reference by a Political Agent for the Mehwasi Estates in the matter of conviction for a murder committed in a village in the Scheduled Districts. **25 B. 667.** The High Court has no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat, **24 B. 471**; nor over Courts in Sind except in reference to proceedings against European British subjects. **12 B. 561.**

(Madras).—The High Court has jurisdiction over the Court of the Agent in the Agency Tracts of Vizagapatam. **14 M. 121**; and over Village Magistrates. **26 M. 394.**

6. **Jurisdiction over Judge exercising Original Criminal Jurisdiction of High Court.**—A Judge of the High Court making an order in the exercise of original criminal jurisdiction of the High Court is not within the purview of this section. **15 W. R. 60 = 7 B. L. R. 244 (250 n.).**

7. High Court may stay proceedings in Criminal Courts subordinate to it—*See* **31 M. 510.** As to when such powers will be exercised *see* **30 M. 226; 31 M. 510; 23 C. 610; 31 C. 858; 34 C 848; 17 C. W. N 761 = 14 Cr. L. J. 398** and Notes under ss. 195 and 476 of the Code

8. Instances when High Court exercises the power conferred by this section.—(*i*) When the order said to be passed under s 144 of the Cr P C is without jurisdiction **16 C. 80; Weir II, 94; 24 W. R. 30; 19 C. 127; 2 C. W. N. 572; 12 C. W. N. 1044; 13 C W. N. CXIX,** not if with jurisdiction **5 C. 875; 3 M. 354; 2 C. 293; 5 M. L. T. 217; Ratanlal 516.** The High Court will interfere with an order under this section to prevent an indirect evasion of the law by the Magistracy **25 M L J. 370 = 14 Cr. L. J. 589.** *See* Notes under s 435 (*ii*) When orders said to be passed under s 145 of the Cr P C are without jurisdiction or are passed arbitrarily without good or sufficient reason and there has been serious prejudice **26 C. 188; 23 A. 537; 27 C. 892** and **918; 28 C. 416** and **709; 24 B 527; 36 C 994; 24 A 315** and **443; 23 M. L. J. 499 = 1912 M. W. N 1154 = 12 M. L. T. 439 = 13 Cr. L J 753,** not if with jurisdiction **33 C. 68; 26 A. 144** *See,* however, **31 A. 150.** (*iii*) When orders of dismissal and discharge are passed by Presidency Magistrates illegally *See* **33 C. 1282; 25 M. L. J. 510; 27 C. 126** and **36 C. 994.** (*iv*) When the Lower Court refused to grant a copy **8 C. 166.** (*v*) *See* **24 C. 551** where the High Court gave directions as to the manner of taking evidence. (*vi*) When an order passed under s 197 is without jurisdiction **28 C. 852.** (*vii*) When orders purported to be made under a provision of law are not warranted by the terms of the special Act. **21 A. 391.**

9. High Court's power to deal with contempt of inferior Courts.—For powers of the High Court in dealing with contempts of inferior Courts, *see* Notes to cl (2) *of the Letters Patent, infra*

EXTRACTS FROM THE LETTERS PATENT OF THE HIGH COURT OF JUDICATURE, MADRAS.

28th December, 1865

High Court at Madras to be continued

*** 2.** And We do by these presents, grant, direct and ordain that, notwithstanding the revocation of the said Letters Patent of the twenty sixth of June one thousand eight hundred and sixty two, the High Court of Judicature at Madras shall be and continue as from the time of the original erection and establishment thereof, the High Court of Judicature at Madras for the Presidency of Madras aforesaid and that the said Court shall be and continue a Court of Record and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders inforce in the said High Court immediately before the date of the publication of these Letters Patent shall continue in force except so as the same are altered hereby, until the same are altered by competent authority

Notes.—1. Jurisdiction of High Court to commit for contempt.—The High Court is a Court of Record in all its jurisdictions and it has the power to commit for any contempt in relation to any of these jurisdictions **8 W. R. 32.** It is an offence which by the Common Law of England is punishable by the High Court in a summary manner with fine or imprisonment or both That part of the Common Law of England was introduced in the Presidency towns when the late Supreme Courts were respectively established by the charters of justice **10 C. 109 (P.C.).** But whether the High Court has powers that would enable it to punish as an offence in a summary proceeding conduct in relation to a proceeding in a Mofussil Criminal Court and not in the face of that Court, such conduct not being an offence under the Penal Code is a matter of considerable doubt On the motion of the Advocate General for a rule calling upon a pleader to show cause why he should not be dealt with for contempt of Court for having issued a notice to a District Munsiff, the Madras High Court *held* that the pleader was guilty of a serious contempt of Court and following *R* v *Davies* (1906) **1 K. B. 32,** *held* further, that it had jurisdiction to punish for contempt of the inferior Court and that no distinction could be drawn between a Civil or a Criminal Court in such a matter **21 M. L. J. 832 = 10 M. L. T. 209 = 12 Cr L. J. 525.** The Calcutta High Court, *however, held* that whatever may be the powers of the High Court to punish for contempt of inferior Courts within the limits of its original jurisdiction, it had no jurisdiction to punish a person for contempt of a Mofussil Criminal Court (in this case the contempt being publishing comments on a pending criminal trial) The point

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* Clause 1 of the Allahabad Letters Patent corresponds to clauses 1 and 2 of the Letters Patent of Madras and other High Courts

whether the High Court could not exercise the power in a case where the contempt was in respect of proceedings which would ultimately come to it on appeal was left open. **41 C. 173.** In view of the new Bill introduced to make such contempts punishable in law, these decisions may become no longer important.

2. What are contempts.—Contempts against the Superior Courts or their Judges and scandalous reflections upon their proceedings have always been considered criminal. *R.* v. *Gray* (1900), **2 Q. B. 36.** Generally, any contemptuous or contumacious words spoken to the Judges of any Court in the execution of their offices are indictable and when disparaging words are spoken of the Judges ot the Superior Courts, the speaker is indictable at Common Law. *Reg.* v. *Wellje*, **2 Camp. 142.** It is a contempt to publish either verbally, or by writing, whether defamatory or not, or even to give theatrical representations relating to pending cases, which are calculated to prejudice the fair trial of those cases, and so interfere with the course of justice. *R.* v. *Parke* (1903), **1 K. B. 432.** The offence is committed if the publication is calculated to interfere with fair trial. *R.* v. *Davies* (1906), **1 K. B. 132.** A newspaper ought not before a case comes on for trial, to publish in full the private proceedings, such as the statement of a claim or an affidavit charging fraud or a writ containing similar charges. *Rex* v. *Aster*, **30 T. L. R. 10.** The power may be exercised against a corporate body. *Reg.* v. *Freeman's Journal* (1902), **2 Ir. Rep. 82**; *Rex* v. *Hammond & Co.* (1914), **2 K. B. 866.** *See* on this subject *Russell on Crimes*, pp. 537—547; *Archbold*, pp. 510, 1209—1913.

3. What circumstances justify recourse to summary process of contempt.—It is not enough that there should be a technical contempt of Court. It must be shown that it was probable that the publication would substantially interfere with the due administration of justice. *O'Shea* v. *O'Shea*, **L. R. 15 P. D. 64.** The publication should be shown to be likely to substantially interfere with administration of justice. **41 C. 173.** A Court ought not to lose sight of the intention by which a person giving publicity to a matter which is the subject ot the charge of contempt is actuated, **14 Cr. L J. 267 (C).** The cases are full of warnings that this arbitrary, unlimited uncontrolled power should be exercised with great caution. That this power merits this description will be realised when it is understood that there is no limit to the imprisonment and that the subject is protected by no right of general appeal. *McLeod* v. *St. Aubin*, **L. R. 1899 A. C. 549.** In *Plating Co.* v. *Farquharson*, **L. R. 17 Ch. D. 49,** *Jessel*, M. R., after saying that the practice of making these motions ought, to be discouraged as far as possible added "They lead to great waste of time and to a considerable amount of costs." *See* also *R.* v. *Gray*, (1900), **2 Q. B. 36** and *R.* v. *Dolan* (1907), **2 Ir. Rep. 260,** and cases cited in **41 C. 173.**

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

* **15.** And We do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment † *not being an order made in the exercise of revisiona jurisdiction and not being a sentence or order passed or made in the exercise of power of superintendence under the provisions of section* 107 *of the Government of India Act*, 1915 *or in the exercise of criminal jurisdiction* of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to s. 13 of the said recited Act; and that an appeal shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in Our or Their Privy Council, as hereinafter provided.

Notes.—1. Whether s. 15 deals with criminal judgments.—In **17 M. 105** and **28 M. L. J. 307 = 1915 M. W. N. 224 = 16 Cr. L. J. 303,** it was *held* that this section had nothing to do with the criminal jurisdiction of the High Court. But in **29 C. 286,** a Full Bench held, after referring to corresponding powers of the High Court in England, that the term 'judgment' includes all judgments except sentences or orders passed or made in any *criminal trial*, as opposed to one in a *criminal matter*. Therefore, though a Judge dealing with an application of a prisoner under ss. 456 and 491, Cr. P. C. (*Habeas Corpus*), may be exercising criminal jurisdiction, the order passed is not one passed in a criminal trial, and therefore an appeal lies from such order. It is also held in **28 Bom. L. R. 471** that an appeal lies from an order passed by a single Judge on the original side of the High Court, directing a writ of *Habeas Corpus* to issue. The High Court of Bombay has jurisdiction to issue a writ of *Habeas Corpus* for the production of a person outside British India, provided it is satisfied that he is in the custody or control of a person within its jurisdiction.

* Clause 15 of the Letters Patent for Madras, Bombay and Calcutta High Courts corresponds to clause 10 of the Allahabad Letters Patent.

† The words in tialics were substituted for the words "not being a sentence or order passed or made in any criminal trial."

2. Orders not in 'criminal trial.'—*See* **27 M. 510, 28 M. L. J. 307** for interpretation of the words 'criminal trial.'

(*i*) Order in revision under s 145, Cr P C is not made in a criminal trial and consequently an appeal lies under this section. **17 M. L. J. 158 = 6 Cr. L J. 343 (F.B).** (*ii*) Order under s 195 Cr P C in a sanction matter passed by a single Judge of the High Court is not made in a criminal trial **Weir II, 199 = 12 M. L. J. 408; 30 M. 311; 33 C. 379** but *see* **17 M. 105.** (*iii*) An order of a single Judge in the exercise of the ordinary original criminal jurisdiction of the High Court refusing an application under ss 456 and 491, Cr P C is a judgment not being a sentence or order in any criminal *trial*, within the meaning of this section and an appeal lies. **29 C. 236 (F.B)**, *see* Note 1, *supra*

3. Orders in 'criminal trials.'—Orders staying proceedings **31 M 510,** *see* however **33 C. 809**, orders transferring proceedings from one Presidency Magistrate to another, **28 C. 709; 13 M L J. 69; (1911) 2 M. W. R. 50 = 10 M. L. T. 518 = 12 Cr. L J. 451;** transfer of cases pending before Village Courts, **26 M 394, 10 Bom. L. R. 680;** order refusing to grant bail to an accused person **19 M. L. J. 478;** appellate judgment passed by a single Judge on an appeal by the Government against an acquittal **22 M. L. J. 44;** and orders passed in appeal or revision by a single Judge in proceedings under s 107, Cr P C, **27 M. 510; 28 C. 709, 28 M. L. J. 307 = 1915 M. W. N. 224 = 16 Cr. L. J. 303** are orders made in 'criminal trials.'

CRIMINAL JURISDICTION

***22.** And We do further ordain that the said High Court of Judicature at Madras shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons beyond such limits over whom the said High Court of Judicature at Madras shall have criminal jurisdiction at the date of the publication of these presents

Ordinary original jurisdiction of the High Court

Notes.—1. In the *Calcutta Letters Patent* for the portion beginning with and also in respect etc the following shall be substituted and read and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents. '

2. Jurisdiction of the High Court over European British subjects—The Bombay High Court has jurisdiction over the Court of the Judicial Superintendent of Railways in the Nizam's Dominions in criminal matters relating to European British subjects **9 B. 288, 22 B 112.** So also over the Cantonment Magistrate of Secunderabad **9 B. 333;** and over European British subjects in the Province of Sind **12 B 561** The Madras High Court has jurisdiction over European British subjects in the Civil and Military Station at Bangalore **2 M. H. C. R 444 = Weir I, 4.**

†23. And We [illegible]

Jurisdiction as to persons

‡24. And We do further ordain that the said High Court of Judicature at Madras shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such person brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

Note —Right of audience under the Criminal Law Amendment Act.—In Calcutta, the right of audience is confined exclusively to Barristers **13 C. W. N. 605,** while in Madras Vakils also have a right of audience. *See E* v *Nilakanta*, Special Bench Case No 1 of 1911 (Mad).

* Clause 15 of the Allahabad Letters Patent corresponds to this clause.
† " 16 " " " "
‡ " 17 " " " "

*25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Madras from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

Note.—Decision of Judge not open to review.—The exercise of the discretion of the Judge, as to whether he should reserve or not a point of law, is not open to review under s. 26, *infra*. **10 Bom. H. C. R. 75 (F.B.).**

†26. And We do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court shall be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

High Court to review on certificate of the Advocate-General.

Notes.—1. Scope of Section.—Clauses 25 and 26 apply to all criminal trials before the High Court, whether in the exercise of its ordinary or extraordinary original criminal jurisdiction, under clauses 22 and 24 of the Letters Patent or of any future statutory criminal jurisdiction that may be conferred upon it by the Legislature, as for example, *the Criminal Law Amendment Act*, XIV of 1908. **35 M. 397 at 418.**

2. Extent of High Court's power to review case on certificate.—In **32 B. 111,** DAVAR, J., *held* that in the absence of any reservation by the trying Judge or a certificate by the Advocate-General the Full Bench cannot sit in appeal on a judgment of the trial Judge and re-open a question decided by the trial Judge and not certified. So also in **35 M. 397,** BENSON and SUNDARA IYER, JJ., *held* that the certificate has not the effect of opening the whole case as if on appeal; but it only gives the Court the power or authority to review the case or so much of it as is necessary in order to determine the point or points of law raised. Where, however, the point reserved is one of improper admission of evidence, or the admission of rejected evidence, the Full Bench has power to review the whole case and determine if the judgment should or should not be reversed. **2 B. 61; 32 B. 111; 9 B. H. C. R. 358; 1 C. 207; 17 C. 642; 25 M. 61; 44 C. 477.** *See* **1 Ind. Jur. N. S. 424; 11 M. L. T. 213; 3 L. B. R. 75 = 3 Cr. L. J. 1,** for other cases where certificates were granted. *See* also **28 C. W. N. 170; A. I. R. (1924) Cal. 257.**

3. Statement of Judge as to what passed at trial conclusive.—The statement of a Judge who presides at a criminal trial, is, upon a case reserved, or upon a case certified, conclusive as to what has passed at the trial. Neither the affidavits of bystanders or of jurors, nor the notes of Counsel, or of shorthand writers, are admissible to controvert the statement of a Judge. **10 Bom. H. C. R. 75.** *See* also **10 C. 1079.**

‡27. And We do further ordain that the said High Court of Judicature at Madras shall be a Court of Appeal from the Criminal Courts of the Presidency of Madras, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Appeal from Criminal Courts in the Provinces.

Note.—*See* **10 Bom. L. R. 630 = 8 Cr. L. J. 141** and **26 M. 394,** noted under s. 15 of the Letters Patent.

§28. And We do further ordain that the said High Court of Judicature at Madras shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges, or by any other officers now authorised to refer cases to the said High Court, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said High Court.

Hearing of referred cases and revision of criminal trials.

* Clause 18 of the Allahabad Letters Patent corresponds to this clause.

† Clause 19 of the Allahabad Letters Patent corresponds to this clause. [ss. 11 and 12 of the Lower Burma Courts Act corresponds very nearly to clauses 25 and 26 of the Letters Patent. *See* **11 Bur. L. R. 298 = 3 L. B. R. 75 = 3 Cr. L. J. 1.**]

‡ Clause 20 of the Allahabad Letters Patent corresponds to this clause.

§ " 21 " " "

Note.—1. Hearing of reference under s 307, Cr. P. C., is not in exercise of its original jurisdiction.—The hearing under s 307, Cr P C, is not in any sense an original trial The jurisdiction which the High Court exercises in hearing a case submitted under this section is not its original criminal jurisdiction. **29 C. 286.** *See* Notes under s. 307, Cr P C. **Note —2.** Clause 28 of the Letters Patent does not give the High Court jurisdiction to revise the order of a Secretary to the Government of Bengal issuing a warrant under the Gundas Act I of 1923 (Beng) as such secretary was not an officer of Court possessing criminal jurisdiction in 1865 nor was the case subject to reference to, or revision by, the High Court at the time, and that such secretary is not an ' inferior Court' within s 435 Criminal Procedure Code, and the High Court cannot interfere under section 439 of the Code **51 Cal. 460.**

*** 29.** And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

High Court may direct the transfer of a case from one Court to another

Notes.—1. Case may be transferred from any Court to any other Court of equal or superior jurisdiction—The High Court has power under this clause to tranfer any criminal case from one Court to another **Weir II, 680; I, 788** (*b*) The High Court may transfer a case from the file of any Presidency Magistrate to that of any other **(1911) 2 M. W. N. 60;** so also from the file of Madras Village Magistrates **21 M. L. J. 755 = 12 Cr. L. J. 407.**

2. High Court may transfer to its own file.—A single Judge in the Original Side has power to entertain an application for the removal of a case from the Mofussil to the High Court **7 B. L R. 240** at **256 = 15 W. R. 69.** *See* also **7 Bom. L R. 105,** where the case was transferred from the file of the Resident's Court at Aden.

3. Transfer of Criminal Appeal—The High Court can transfer for hearing by itself a criminal appeal filed in the Court of Session **Ratanlal 110; 6 M. 32.**

4. Proceedings liable to be transferred—*See* Notes under s 526 of the Code

5. "By Officer or Court competent to investigate."—These words do not include competency as regards local jurisdiction but only competency with regard to the offender the nature of the offence and the punishment. Therefore the High Court has power to transfer the investigation etc of any offence committed in Calcutta to Mofussil Court. **15 W. R. 71 (n) = 1 B. L. R. 15.**

For other cases, *see* Notes to s 15 of the Charter Act.

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POWERS OF SINGLE JUDGES AND DIVISION COURTS

† 36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, under the provisions of the thirteenth ... and such Division Court ...

Single Judges and Division Courts

... majority, but if the Judges should be equally divided then the opinion of the Senior Judge shall prevail ...

Note—Effects of s 429 of the Cr. P. C.—In **6 W. R. 68** and **2 B. L. R. (F.B) 23 = 10 W. R. 45,** it was *held* that where a difference of opinion arises between two Judges of the High Court in a criminal appeal the opinion of the Senior Judge prevails under this clause notwithstanding s. 420 Cr P C (1861) But now under s. 429, Cr P C, when Judges differ in opinion, the case should be referred to a third Judge whose opinion should be followed In **22 M. L. J. 419 (F.B) = 11 M. L. T. 367 = (1912) M. W. N. 499 = 13 Cr. L J. 209,** it was *held* that the power conferred upon the High Court by s 195, cl (6) of the Code was not a part of the appellate and revisional

* Clause 22 of the Allahabad Letters Patent corresponds to this clause

† " 27 " " " "

jurisdiction of this Court conferred by Chaps. XXXI and XXXII of the Code, but was a special power conferred by s. 195, cl. (6), and that, therefore, when the Judges were equally divided in opinion, the case was governed by this section and not by s. 429 of the Code.

* * * * * * *

CRIMINAL PROCEDURE.

* **38.** And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Madras in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Regulation of proceedings.

* * * * * * *

APPEALS TO PRIVY COUNCIL.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter *not being of criminal jurisdiction*, from any final judgment, decree or order of the said High Court of Judicature at Madras made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 15th clause of these presents: Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order shall involve, directly, or indirectly, some claim, demand, or question to or respecting property amounting to or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council. Subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency; except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of our Privy Council, hereafter make in that behalf.

Power to Appeal.

Notes.—1. No appeal against orders made in criminal jurisdiction.—No appeal lies under this clause to the Privy Council against an order of the High Court refusing to quash by a writ of *certiorari*, the order made by a Deputy Collector as an Income Tax officer directing that the petitioner be prosecuted for an offence under s. 193, I. P. C. **25 M. L. J. 563 = 14 Cr. L. J. 656.**

2. No appeal against orders passed under s. 10 in proceedings in the exercise of disciplinary jurisdiction.—This section empowers the High Court to declare the fitness of an appeal in any matter not being of criminal jurisdiction, if it is the final judgment or order of the Courts made on appeal or in the exercise of original jurisdiction. A proceeding under s. 10 of the Letters Patent does not fall under any of the jurisdictions specified in this section and no leave to appeal can therefore be granted. **41 C. 734; 29 M. L. J. 16 (F.B.).**

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Madras at its discretion on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said High Court, in any such proceeding as aforesaid, *not being of criminal jurisdiction*, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal from interlocutory judgments.

* Clause 29 of the Allahabad Letters Patent corresponds to this clause.

***41.** And We do further ordain that *from any judgment*, order or sentence of the said High Court of Judicature at Madras, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided by any Court which has exercised original jurisdiction it shall be lawful for the person aggrieved by such judgment order or sentence

Appeal in criminal cases, etc

hat the case is
quire, subject
in that behalf

Notes.—1. When High Court grants leave to appeal to Privy Council in criminal cases —The decisions of Criminal Courts are final unless an appeal is allowed under the Cr P C, or any other law for the time being in force *See* ss 402 and 430, Cr P C) The Letters Patent specifically excludes criminal cases from the cognisance of the Privy Council, except where the High Court in any judgment order or sentence *made in the exercise of its original jurisdiction or in any criminal case has, reserved any points of law* for the opinion of the High Court and the High Court has declared it to be a fit case for appeal to the Privy Council on the application of the aggrieved person. The High Court has no power to grant leave to appeal from an order in a criminal case against a decision made by the High Court, in a case decided originally by a Magistrate and referred to the High Court by the District Magistrate **7 B. H. C. R. 77.** *An order made by the High Court* affirming an order passed by a Sessions Judge under s 118, Cr P C, binding down the petitioner to be of good behaviour for three years is not appealable to the Privy Council **18 C. L. J. 119 = 14 Cr. L J. 598.** Nor does an appeal lie against the judgment of a Judge of the High Court passed in a criminal appeal on a reference to him under s 429, Cr P C, in consequence of a difference of opinion between the Judges who originally heard the appeal **18 C. L. J. 121 = 124 Cr. L. J. 673.** The High Court grants leave to appeal to the Privy Council on the same principles as are laid down by the Judicial Committee for itself in granting special leave. **10 Bom. L R. 973.**

2. Jurisdiction of Privy Council over criminal proceedings of Inferior Courts—The Privy Council is not a Court of Criminal Appeal — The special position and function of the Board in considering applications for leave to appeal against the judgments of criminal tribunals in various parts of the Empire as well as the powers and practice of the Judicial Committee, are not truly one of jurisdiction. The power of His Majesty under His Royal authority to review proceedings of a criminal nature unless where such power and authority have been parted with by Statute, is undoubted On the other hand there are reasons both constitutional and administrative, which make it manifest that this power should not be lightly exercised The overruling consideration upon the topic has reference *to justice itself If throughout the Empire it were supposed that the* course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King s dominion These views are not new They were expressed more than 60 years ago by Dr LUSHINGTON in his judgment in *Queen-Empress v Joykissen* **1 Moo. P. (C.N.S.) 299** at **312**, and LORD KINGSDOWN in the case of *Falkland* ... **A. C.** ... It may be assumed that the Colonial Courts, whether the ... with such authority But the inconvenience of entertaining such appeals in cases of a strictly cri... is so great the obstruction which it would offer to the administration of justice in the Colonies is so obvious that it is very rarely that applications to this Board similar to the present have been attended with success Their Lordships desire *to state that in their opinion the principle and practice thus laid down by* LORD KINGSDOWN still remain those which are followed by the Judicial Committee. ' Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England, but they are not the rules adopted by this Board which is not a Court of Criminal Appeal And the authority of these decisions, which apply to a different system a different procedure and a different structure of principle must stand out of the reckoning of anybody of authority on the matter of the procedure of this Board in advising His ... the recent proceedings of this Board on applications for leave to ... **40 I. A. 241 = 41 C. 568 (P.C.)** and their Lordships refer to refusals referred to **(1914) A. C. 644 = 41 C. 1023 (P.C.).** ... ss appeals to the Board was strongly deprecated. **6 Lah.** In **43 Bom.** ... **226 = 48 M. L. J. 693.**

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* Clause 41 corresponds to clause 32 of the Allahabad Letters Patent

3. **Privy Council practice—Special leave to appeal.**—The principle on which special leave to appeal is given by the Privy Council is set out in the leading case of *Abraham Mallory Dillet* (1887) **12 App. Cas. 459** as follows:—" Her Majesty will not review criminal proceedings unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." This principle has been repeatedly affirmed and acted upon by the Privy Council, *Dinizulu* v. *Attorney-General of Zululand*, **61 L. T. 740**; *ex-parte Carew* (1897) **A. C. 719**; *in re McCrea* (1893) **A. C. 346**; *ex-parte Deeming* (1892) **A. C. 422 (P.C.)**. The applicant ought to fully inform the Board of the facts and show that the case comes within the rule laid down in *Dillet's* case, *E.* v. *Birch.* **15. C. W. N. LXI** = **(1911) 2 H. W. N. 159.** In the latest case on the point, *E.* v. *Channing Arnold*, where the accused was convicted by the Burma Chief Court of the offence of defaming a Magistrate, and special leave to appeal was applied for, on the ground that a grave miscarriage of justice had occurred owing to serious misdirections in the charge to the jury on the law of defamation, the Lord Chancellor in giving special leave observed as follows:—" In these cases, it is not their Lordships' practice to invite any detailed argument for the respondent, for the very obvious reason that their Lordships may go into arguments which may prejudice the hearing. Our present object is two-fold—that the case that is raised is a case which comes within what was laid down by this Board in *Dillet's* case, that the allegations, quite apart from their truth or otherwise, do amount to a disregard of the forms of legal process or some violation of the principles of natural justice which may cause substantial injustice. We think that if the case is made out, it would come within that rule, so that there is a case in which we consider we have jurisdiction. We express no opinion of any sort or kind about it, except that, it being a case of a type in which we may give leave to appeal, we think there has been enough said to make it right that there should be further inquiry." **17 C. W. N. CXVIII.** But no leave will be granted for mere violation of a technical rule of procedure, *R.* v. *Murphy*, **L. R. 2 P. C. 35**; nor in every case of misdirection, *in re McCrea* **(1893) A. C. 346**, nor where more than three years have elapsed since the expiration of the sentence on the petitioner and there was no *prima facie* case of miscarriage of justice, *Badger* v. *Attorney-General of New Zealand*, **97 L. T. 621**; nor in the region of fact, unless something gross, amounting to a misdescription of the whole bearing of the evidence has occurred, *Arnold* v. *R.* **(1914) A. C. 644** = **41 C. 1023**; nor against a conviction for murder, where it was alleged that the jury had been in communication during the trial with persons who were not their custodians, *Armstrong* v. *R.*, **30 T. L. R. 215 (P.C.)**; nor on the ground of admission of evidence of a statement by the prisoner, when in custody, in reply to a question by his superior officer, if such admission has not caused any miscarriage of justice, *Ibrahim* v. *R.* **(1914) A. C. 599**; nor where there was sufficient evidence for the jury and no fact is established sufficient to countervail the findings and verdict, *ex-parte Aldred*, **1892 A. C. 81**; *Clifford* v. *E.*, **40 I. A. 241 (P.C.)** = **41 C. 568.** *See* also *Tshingumuzi* v. *Attorney-General for Natal*, **1908 A. C. 248**; *Reg.* v. *Marais*, **1902 A. C. 51.** As to conditions and circumstances under which appeals have been and might be allowed to the Privy Council, *see* **10 B. H. C. R. 75**; **1 W. R. 13 (P.C.)**; **15 C. 608** *footnote*; **15 A. 310**; **L. R. 1897 A. C. 719**; **L. R. 12 A. C. 459**; **8 C. W. N. LXIII**; **25 M. 61 (P.C.)**; **32 C. 1.** Recently the Privy Council granted special leave in a case where the appellant was convicted of abetment of the murder of his daughter-in-law and sentenced to death by the Sessions Judge of Tanjore and the Judges of the High Court who heard the case on appeal differed in opinion as to the guilt of the appellant and the case was referred to a third Judge who confirmed the sentence, and the Madras High Court refused to give leave. **36 M. 501 (P.C.).** In **28 Bom. L. R. 158** it was held that neither the refusal of the Governor-General to transfer the case under section 527, nor the adequacy or the inadequacy of the Judge's charge to the jury, does amount to a disregard of the forms of legal process or violation of the principles of natural justice, to warrant the granting of a special leave to appeal. *See* also **27 Bom. L. R. 704**; **27 Bom. L. R. 148.**

4. **Principles which guide the Privy Council in dealing with criminal appeals.**—" LORD WATSON in *Dillet's* case observed that the rule had been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice, has been done. The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian & Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Crminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It

will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as had placed him outside of the pale of regular law or within that pale there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships *first* that the result arrived at was opposite to the result which their Lordships would themselves have reached and *secondly* that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided The limited nature of the appeal in *Dillet s* case has been referred to and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated. **(1914) A C. 644 = 41 C. 1023 (P C)** The Judicial Committee acquitted the accused who had been sentenced to death in the case reported in **36 M 501 (P C.)** immediately after hearing the arguments stating that full judgment would be delivered later on as they were of opinion that in that case owing in the main to the reception of wholly inadmissible evidence the use made of that evidence when admitted to the grave prejudice of the accused coupled with the absence of all reliable evidence of the appellant s guilt substantial and grave injustice had been done in convicting the appellant of the crime of which he had been convicted and therefore the conviction could not stand and that the case came well within the principles laid down in *Dillet's* case It was a case of a subject being sentenced to death upon no evidence at all *See* also *Louis Edouard Lanier* **18 C. W. N 98 (P C.)** *Clifford* **41 C. 568 (P C)** and *Ibrahim* v *E* **18 C W N 705 (P C)** for principles guiding the Privy Council in granting leave to appeal

5 Costs between subject and the Crown.—In **36 M 501 (P C)** when it was asked that the Crown should be directed to pay the costs of the successful accused their Lordships said that they would adhere to the rule laid down in *Johnson* v *R* **1904 A C 817, at 825** *viz* in future the Board will adhere to the practice of the House of Lords and the rule as to costs in cases between the Crown and the subject will be that the Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule Though the above was not a criminal case the rule was laid down broadly there and their Lordships did not know on what principle costs should be awarded as against the Crown. *See* also Archbold pp 149 150 (1910 edn) In the case of *Louis Edouard Lanier* **18 C. W N 98 (P C.)** their Lordships having regard to the special circumstances of the case awarded costs to the successful appellant as against the Crown

Rules as to transmission of copies of evidence and other documents

42 And We do further ordain that in all cases of appeal made from any judgment order sentence or decree of the said High Court of Judicature at Madras to Us Our heirs or successors in Our or Their Privy Council such High Court shall certify and transmit to Us Our heirs and successors in Our or Their Privy Council a true and correct copy of all evidence proceedings judgments decrees and orders had or made in such cases appealed so far as the same have relation to the matters of appeal such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us Our heirs and successors in Our or Their Privy Council a copy of the reasons given by the Judges of such Court or by any of such Judges for or against the judgment or determination appealed against And We do further ordain that the said High Court shall in all cases of appeal to Us Our heirs or successors conform to and execute or cause to be executed such judgments and orders as We Our heirs or successors in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment decree or decretal order or other order or rule of the said High Court, should or might have been executed

Letters Patent are subject to the enactments of the Governor General in Council

*** 44.** And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meeting for the purpose of making laws and regulations and also of the Governor General in cases of emergency under the provisions of an Act of the Twenty fourth and Twenty fifth Years of our Reign chapter sixty seven and may be in all respects amended and altered thereby

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* Clauses 42 and 44 correspond to clauses 53 and 35 of the Allahabad Letters Patent

APPENDIX II.

THE INDIAN EXTRADITION ACT No. XV OF 1903.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 4th November, 1903.)
[Amended by Act I of 1913.]

CONTENTS.

CHAPTER I.

PRELIMINARY.

SECTIONS.

1. Short title, extent and commencement.
2. Definitions.

CHAPTER II.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF FOREIGN STATES.

3. (1) Requisition for surrender.
   (2) Summons or warrant for arrest.
   (3) Inquiry by Magistrate.
   (4) Commitment.
   (5) Bail.
   (6) Magistrate's report.
   (7) Reference to High Court [illegible]
   (8) Warrant for surrender.
   (9) Law [illegible]
   (10) Discharge [illegible]
4. (1) Power of Magistrate [illegible]
   (2) Form of warrant [illegible]
   (3) Person arrested [illegible]
   (4) Bail.
5. (1) Power of Government to refuse to issue order under section 3 when crime of political character.
   (2) Power of Government to discharge any person in custody at any time.
6. References to "Police Magistrate" and "Secretary of State" in section 3 of Extradition Act, 1870.

CHAPTER III.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF STATES OTHER THAN FOREIGN STATES.

7. (1) Issue of warrant by Political Agents in certain cases.
   (2) Execution of such warrant.
   (3) Proclamation and attachment in case of persons absconding.
8. (1) Release on giving security.
   (2) Magistrate to retain bond.
   (3) Re-arrest in case of default.
   (4) Deposit in lieu of bond and forfeiture of bonds.
9. Requisitions by States not being Foreign States.

CHAPTER IV

RENDITION OF FUGITIVE OFFENDERS IN HIS MAJESTY'S DOMINIONS

CHAPTER V

OFFENCES COMMITTED AT SEA

CHAPTER VI

EXECUTION OF COMMISSIONS ISSUED BY CRIMINAL COURTS OUTSIDE BRITISH INDIA

CHAPTER VII

SUPPLEMENTAL

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO THE EXTRADITION AND RENDITION OF CRIMINALS

33 and 34 Vict c 52 36 and 37 Vict c 69 44 and 45 Vict., c 69

Whereas it is expedient to provide for the more convenient administration in British India of the Extradition Acts 1870 and 1873 and of the Fugitive Offenders Act 1881

And whereas it is also expedient to amend the law relating to the extradition of criminals in cases to which the Extradition Acts 1870 and 1873 do not apply

It is hereby enacted as follows —

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called the Indian Extradition Act, 1903.

(2) It extends to the whole of British India (including British Baluchistan, the Sonthal Purgannas and the Purganna of Spiti), and

(3) It shall come into force on such day as the Governor-General in Council, by notification in the *Gazette of India* may direct.*

Notes.—1. British India.—For definition, *see* Notes to s. 1 of the Code.

Scope of the Act.—The English Extradition Act, 1870 (33 and 34 Vict., c. 32), as amended by subsequent Acts of 1873, 1895 and 1906, and the Indian Extradition Act, XV of 1903, as amended by Act I of 1913, relate only to the surrender to Foreign and Native States of criminals of such States taking refuge in British Territory; and they do not in any way affect the demands *vice versa* of British Governments on Foreign or Native States for the surrender of its criminals, as the procedure therefor is regulated by the Treaties, Conventions and arrangements entered into with Foreign and Native States and also by usage. It is now held in **A. I. R. (1925) Nag. 313** that Extradition between H.E.H. the Nizam's Dominions and Berar is governed by the Extradition Treaty of 1867 and not by the Extradition Act, and that there is no necessity of a warrant from the Political Agent, Hyderabad, and that there is no limit of time laid down for such Extradition. In matters of bail, the Magistrate has no power to admit to bail an accused person even under the Extradition Act except under sections 8 and 8A.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context:—

(*a*) "European British subject" means a European British subject as defined by the Code of Criminal Procedure for the time being in force;

(*b*) "Extradition offence" means any such offence as is described in the first schedule.

33 and 34 Vict., c. 52; 36 and 37 Vict., c. 60.

(*c*) "Foreign State" means a State to which, for the time being, the Extradition Acts, 1870 and 1873, apply;

(*d*) "High Court" means the High Court as defined by the Code of Criminal Procedure for the time being in force;

(*e*) "Offence" includes any act wheresoever committed which would, if committed in British India, constitute an offence, and

(*f*) "Rules" include prescribed forms.

Notes.—1. European British subject.—For definition, *see* s. 4 (*i*) and Notes thereunder.

2. Offence.—In **26 M. 607** it was held by WHITE, C.J., that the word "*offences*" as used in s. 6 of *the Extradition Act* of 1879 is not restricted to offences as defined by s. 40, I.P.C.; nor is it restricted to the definition of "*offence*," in s. 4 (*o*) of the Criminal Procedure Code which is the same as that contained in *the General Clauses Act*, 1897. In this case it was *held* that a Justice of the Peace appointed under *the Extradition Act*, of 1879, in and for the territories of Mysore had jurisdiction to try, or to commit for trial to the Madras High Court, an European British subject charged with an offence under the Mysore Mines Regulation, but which was not an offence under the Indian Penal Code. *See* also Notes to s. 4, Cr. P. C.

3. Foreign State.—Chandranagore is a foreign state as defined by s. 2 (*c*) of the Indian Extradition Act, and the provisions of Chapter II thereof must be followed before a fugitive offender can be surrendered to the French authorities. **48 Cal. 328.**

* The Act came into force on the 1st day of June, 1904.

CHAPTER II.*

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF FOREIGN STATES.

Requisition for surrender

3. (1) Where a requisition is made to the Government of India or to any Local Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in British India, the Government of India or the Local Government as the case may be may if it thinks fit issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case

Summons or warrant for arrest

(2) The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue

Inquiry by Magistrate

(3) When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers as nearly as may be as if the case were one triable by the Court of Session or High Court and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime

Committal

(4) If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Government of India or the Local Government, as the case may be

Bail

(5) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure for the time being in force, the Magistrate may release the fugitive criminal on bail

Magistrate's report.

(6) The Magistrate shall report the result of his inquiry to the Government of India or the Local Government as the case may be, and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of the Government.

Reference to High Court if Government thinks necessary

(7) If the Government of India or the Local Government, as the case may be is of opinion that such report or written statement raises an important question of law it may make an order referring such question of law, to such High Court as may be named in the order, and the fugitive criminal shall not be surrendered until such question has been decided

Warrant for surrender

(8) If, upon receipt of such report and statement or upon the decision of any such question the Government of India or the Local Government as the case may be, is of opinion that the fugitive criminal ought to be surrendered, it may issue a warrant for the custody and removal of such criminal and for his delivery at a place and to a person to be named in the warrant

Lawfulness of custody and retaking under warrant for surrender

(9) It shall be lawful for any person to whom a warrant is directed in pursuance of sub-section (8), to receive hold in custody and convey the person mentioned in the warrant to the place named in the warrant and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re taken as a person accused of an offence against the law of British India may be re-taken upon an escape

Discharge of fugitive criminals committed to prison after two months

(10) If such a warrant as is prescribed by sub-section (8) is not issued and executed in the case of any fugitive criminal who has been committed to prison under sub-section (4) within two months after such committal, the High Court may, upon application made to it on behalf of such fugitive criminal and upon proof that reasonable notice of the intention to make such application has been given to the Government of India or the Local Government, as the case may be, order such criminal to be discharged, unless sufficient cause is shown to the contrary

* Under s 18 of the English Extradition Act 33 and 34 Vict, c 52 it has been notified that this Chapter will have effect in British India as if it were part of the Extradition Act, 1870 *See order in Council* published in *London Gazette* of 8th March 1904

Notes.—1. Competency of Magistrate to take proceedings.—The competency of a Magistrate to hold an inquiry under this section depends on the authorisation of the Executive Government. The words "local limits" in sub-section (1) do not refer to the territorial jurisdiction of the Magistrate selected by Government to conduct the inquiry, for "any Magistrate" may be so authorised if he be a first-class Magistrate or a Magistrate empowered by the Local Government in that behalf, **38 C. 547** at p. **551.** A Magistrate is not disqualified merely because the accused resided beyond the limits of his jurisdiction. **39 C. 164.** *See* **4 C. 31.**

2. Illegality of arrest will not vitiate extradition proceedings.—Any irregularity in the original arrest is immaterial, such as the want of a warrant or the absence of the fugitive within the local limits of the Magistrate's jurisdiction at the time of the issue of the warrant, provided that the subsequent proceedings are right, **39 C. 164,** where *R.* v. *Weil,* **9 Q. B. D. 701** is followed. The substantial question is not how the accused was brought before the Court, but whether the Court which inquired into his case had jurisdiction to do so. *See* also **35 B. 225,** *Reg.* v. *Lopez,* **1858, Dearsley and Bell, 52.**

3. Magistrate cannot discharge.—Under this section, the Magistrate has no jurisdiction to discharge the fugitive. Under the English Act, however, the Police Magistrate has power to discharge.

4. Irregularities in the inquiry of the Magistrate.—Mere irregularities in the proceedings of the Magistrate which are unimportant in regard to the sufficiency of the proceedings are not reviewable; but where the objections are to the reception of evidence which, if allowed would leave no residum of evidence, upon which the report of the Magistrate could be supported, the proceedings may be questioned. *Per Mookerji, J.,* in **39 C. 164.**

5. Magistrate must give reasonable opportunity to accused to produce evidence.—A Magistrate who conducts an inquiry under sub-section (3) is bound to afford reasonable opportunity to the person arrested to produce his evidence, and if he decline to do so, he fails to conduct the inquiry in the mode prescribed by the Legislature and the result is that the issue of a warrant upon such inquiry is invalid. **39 C. 164.**

6. Competency of Government to issue warrant.—The only Government competent to issue the order for inquiry under sub-section (1) is the Government to whom the Foreign State has made the requisition for surrender of the fugitive criminal. Where, therefore, a requisition has been made to the Government of India, that Government alone is competent to issue the order for inquiry to the Magistrate and that power cannot be delegated to any Local Government. **39 C. 164.**

7. Government must strictly comply with statutory provision.—The Government when it issues a warrant for surrender under sub-section (8) does so in exercise of a statutory authority; such power can be exercised validly only after strict compliance with the necessary preliminary provisions formulated by the Legislature in this very Act. Consequently, if the provisions of the Act have been contravened, the action of the Government may be successfully challenged, even though the warrant for surrender may have been already issued. The jurisdiction of the Court is not ousted merely because the Government has issued a warrant. **39 C. 164.**

8. High Court has no jurisdiction to revise proceedings of Magistrates under the Extradition Act.—Section 15 of the Charter Act gives the High Court "superintendence over all Courts which may be subject to its appellate jurisdiction." The District Magistrate acting under the Extradition Act is not subject to any appellate jurisdiction: he makes inquiry and reports the result to Government: his powers are specially conferred for the limited purposes of the Act. No appeal lies to the High Court from the decision which any Magistrate may arrive at under the Act. The High Court cannot, therefore, revise the proceedings of Magistrates under ss. 3 and 4 of this Act, **38 C. 547; 38 C. 550** (*footnote*). *See* also **39 C. 164** and **19 C. W. N. 221 = 21 C. L. J. 68 = 16 Cr. L. J. 31.**

9. High Court has jurisdiction under s. 491, Cr. P. C., to examine legality of extradition proceedings.—The High Court has jurisdiction under s. 491 to give a direction in the nature of *Habeas Corpus* and to examine whether a person detained in public custody under this Act is legally detained. The High Court, however, will not sit in appeal, to review and weigh the evidence, if there should be some evidence of the offence upon which the Magistrate may reasonably act. If there is no evidence, the High Court will interfere. **39 C. 164.** The absence of jurisdiction in the High Court to interfere in revision with the orders passed by Magistrates in execution of the warrant issued by a Political Agent, does not in any way conflict with its

power to interfere otherwise than by revision The power of the Court to interfere under s 491 of the Code is untouched, as that is a power not created by this Act or exercisable by way of revision but vested in Presidency Courts to protect the liberty of the subject in appropriate cases whatever may be the occasion of deprivation of which complaint is made **19 C. W. N. 221 = 21 C L J 68 = 16 Cr. L. J 31**

10. High Court has power to direct bail —The High Court has the fullest discretion having regard to the provisions relating to bail in the Criminal Procedure Code by which the matter must be regulated to allow bail to a prisoner against whom proceedings under this Act are pending **15 C W. N. 736 = 12 Cr. L. J. 358.**

11. High Court not competent to transfer inquiry from one Magistrate to another —As the competency of a Magistrate to hold an inquiry under s 14 of the Extradition Act XXI of 1879 (corresponding to s 3 of this Act) depends on the authorisation of the Executive Government the High Court has no power to order the transfer of the inquiry **33 C. 530 (*footnote*) = 15 C. W. N 735.** *See* **46 C 31.**

12. Proceedings under s. 3 do not overlap proceedings under s 4. *See* Note 1 under s 4 *infra*

Power to Magistrate to issue warrant of arrest in certain cases

4. (1) Where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State he may if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the crime of which he is accused or has been convicted had been committed within the local limits of his jurisdiction

Issue of warrant to be reported forthwith

(2) The Magistrate shall forthwith report the issue of a warrant under this section to the Local Government.

Person arrested not to be detained unless order received

(3) A person arrested on a warrant issued under this section shall not be detained more than two months unless within that period the Magistrate receives an order made with reference to such person under section 3 sub-section (1)

Bail

(4) In the case of a person arrested or detained under this section the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the crime of which he is accused or has been convicted

Notes.—1. Scope of Section.—This section does not contemplate any inquiry it provides for *ad interim* arrest of the alleged fugitive criminal so as to render effective the proceedings under s 3 when they are subsequently instituted. An arrest under s 4 may be effected before the receipt of the requisition from a Foreign Government mentioned in s 3, otherwise the criminal might escape if the receipt of the requisition in the usual diplomatic way had to be awaited in every case The two sections do not overlap each other as soon as *arrest has been effected* under this section and the question of bail or detention has been determined its operation for all purposes is exhausted There is no conceivable reason why thereafter a proceeding under s 3 should not be instituted **39 C. 164.**

2. Procedure for extradition to Foreign States.—The English Statute of 1870 (33 and 34 Vict c 52) as amended, regulates the surrender to Foreign States of fugitives running away from the United Kingdom and British Possessions not specially excepted The offence must be extraditable under the Act and be included in the treaty *See* Ch II of this Act.

There are two ways of making the application *Firstly*—demand for extradition is addressed to Government which, if the application is an order and evidence sufficient will require the Magistrate concerned *to issue warrant for* apprehension of fugitive Document accompanying requisition, together with the warrant of Foreign State, will be sent to the Magistrate along with Government order The fugitive on arrest will be brought before the Magistrate issuing the warrant *Secondly* in cases of urgency, a first class Magistrate or a Presidency Magistrate in Madras may issue under s 4 (1) of the Indian Extradition Act of 1903 on such information or complaint and on such evidence as would justify the issue of a warrant if crime of which the fugitive is accused or has been convicted had been committed within his jurisdiction A sworn information by a reasonable suspicion of commission of crime and guilt of accused should be required before issue of warrant and the information must purport to be based upon a letter or telegram from a diplomatic judicial or public

authority of the State, stating the offence charged, the issue of warrant for fugitive's arrest and that extradition will be demanded. The Magistrate should report to Government, through District or Chief Presidency Magistrate, the fact of issue of provisional warrant, together with copies of evidence and information, and the fugitive so arrested should not be detained for more than two months, unless in the interval the Magistrate receives the order of Government as stated in the foregoing paragraph. An arrest otherwise than under s. 3 (2) or s. 4 (1) of this Act must not be had except in the most urgent and exceptional cases, and if a person is so arrested under the ordinary law, a warrant under s. 4 (1) should be obtained at the earliest opportunity. The Magistrate must, after arrest under s 3 (2) or s. 4 (1) of the Act, proceed as presented in s. 3 (3)—(5) and submit a report to Government as required by sub-section (6), through the District Magistrate or the Chief Presidency Magistrate. After committal to jail a prisoner should not be released except on Government order under s. 3 (8) or s. 5 or upon discharge by High Court under s. 3 (10) of the Act, and such order of discharge will be issued only when proceedings against the fugitive are delayed. Magistrates and Police-officers should, therefore, take special care that a discharge is not made through their neglect or default. In cases where foreign fugitives take refuge in any Native State, in India the demand will be made to Government which, if it is justified by the treaty with the State, will instruct the Resident or Political Agent to obtain offender's arrest and surrender him. A full statement of the expenses incurred for arrest and detention should be submitted by the Magistrate to Government, whether the proceedings terminated in the ultimate release or surrender of the accused. See *Madras Extradition Manual*, 1911.

Power of Government to refuse to issue order under section 3 when crime of political character.

5. (1) If the Government of India or any Local Government is of opinion that the crime of which any fugitive criminal of a Foreign State is accused or alleged to have been convicted is of a political character, it may, if it think fit, refuse to issue any order under section 3, sub-section (1).

Power of Government to discharge any person in custody at any time.

(2) The Government of India or the Local Government may also at any time stay any proceedings taken under this Chapter and direct any warrant issued under this Chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged.

References to "Police Magistrate," "Secretary of State" in section 3 of Extradition Act, 1870, 33 and 34 Vict., c. 52.

6. The expressions "the Police Magistrate" and "the Secretary of State" in section 3 of the Extradition Act, 1870, shall be read as referring respectively to the Magistrate directed to inquire into a case under section 3 of this Act, and to the Government of India or the Local Government, as the cases may be.

CHAPTER III.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF STATES OTHER THAN FOREIGN STATES.

Issue of warrant by Political Agents in certain cases.

7.* (1) Where an extradition offence has been committed or is supposed to have been committed by a person not being an European British subject, in the territories of any State not being a Foreign State, and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant addressed to the District Magistrate of any district in which such person is believed to be, † *or if such person is believed to be in any Presidency town to the Chief Presidency Magistrate of such town* for his arrest and delivery at a place, and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly.

Execution of such warrant.

(2) A warrant issued as mentioned in sub-section (1) shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants, and the accused person when arrested, shall ‡ *be produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, who shall record any statement made by him; such accused shall then,* unless released in accordance with the provisions of this Act, be forwarded to the place and delivered to the person or authority indicated in the warrant.

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* The Political Agent may issue a warrant for the arrest and surrender of any person accused of having done in any State against the law of that State an act which would, if done in any part of British India, where the *Criminal Tribes Act* XXI of 1871, is in force have constituted an offence against any of the provisions of the latter Act (*Gazette of India*, 1898, Pt. I., p. 1196).

† Inserted by the Indian Extradition (Amendment) Act, I of 1913, s. 2 (1).

‡ " " " " " s. 2 (2).

(3) The provisions [of the Code of Criminal Procedure for the time being in force in relation to proclamation and attachment in the case of persons absconding shall with any necessary modifications apply where any warrant has been received by a District Magistrate* *or Chief Presidency Magistrate* under this section as if the warrant had been issued by himself

Proclamation and attachment in case of persons absconding

Notes.—*See* ss. 75—86 Cr P C as to issue of warrant of arrest ss 87—89 as to proclamation and attachment

1. Section applies to Presidency Towns—The words *Chief Presidency Magistrat* were newly inserted in this section in order to remove doubts as to the applicability of the provisions of this section to the execution of warrants in the Presidency towns and to empower the Chief Presidency Magistrate to execute such warrants in the Presidency towns—*Statement of Objects and Reasons of the bill* (a) Extradition warrant must be signed by the Political Agent.—A warrant of extradition signed by the Assistant British Envoy of Nepal Court is not a valid warrant when that officer is not empowered as a Political Agent within the meaning of section 7 of Indian Extradition Act **25 Cr L. J 687 = 81 I C 175**

2 Rules framed by the Governor-General in Council regulating procedure and prescribing forms—

(1) The Political Agent shall not issue a warrant under this section in any case which is provided for by treaty if the State concerned has expressly stated that it desires to abide by the procedure of the treaty nor in any case in which a requisition for surrender has been made by or on behalf of the State under s 9 *infra*

(2) The Political Agent shall not issue a warrant under this section except on a request preferred to him in writing either by or by the authority of the person for the time being administering the executive government of the State for which he is a Political Agent or by any Court within such State which has been specified in this behalf by the Governor-General in Council or by the Governor of Madras or Bombay in Council as the case may be by notification in the *Official Gazette*

(3) If the accused person is a British subject the Political Agent shall before issuing a warrant under this section consider whether he ought not to certify the case as one suitable for trial in British India and he shall instead of issuing such a warrant to certify the case if he is satisfied that the interests of justice and the convenience of the witnesses can better be served by the trial being held in British India *See* **6 B 622**

(4) The Political Agent shall in all cases before issuing a warrant under this section satisfy himself by preliminary inquiry or otherwise that there is a *prima facie* case against the accused person

(5) (a) The Political Agent shall before issuing a warrant under this section decide whether the warrant shall provide for the delivery of the accused person—(i) to the Political Agent or to a British officer subordinate to the Political Agent or (ii) to an authority of the State with a view to his trial by the State Courts

(b) Before coming to a decision the Political Agent shall take the following matters into consideration —(i) the nature of the offence charged (ii) the delay and trouble involved in bringing the accused person before himself (iii) the judicial qualification of the Courts of the State (iv) whether the accused person is a British subject or not, and if he is a British (other than an European British) subject whether the Courts of the State by custom or by recognition try such British subjects surrendered to them (v) whether the Courts of the State have by custom or by recognition powers to inflict the punishment which may be inflicted under the Indian Penal Code for an offence similar to that with which the accused person is charged

(6) Notwithstanding anything in Rule 5 the Political Agent shall make the warrant provide for the delivery of the accused person to himself or to an officer subordinate to himself or to an authority of the State concerned as the case may be if he is generally or specially instructed by the Governor General in Council to try an accused person himself or to make him over for trial to the proper Courts of such State

(7) In the case of an accused person made over for trial to the Court of the State the Political Agent shall satisfy himself that the accused receives a fair trial and that the punishment inflicted on conviction is not excessive or barbarous and if he is not so satisfied, he shall demand the restoration of the prisoner to his custody pending the orders of the Governor General in Council. (As to trial for an offence other than that for which extradited *see* **17 B 369** at pp **374** and **375** and ss. 227 and 337 Cr P C)

* Inserted by the Indian Extradition (Amendment) Act I of 1913 s. 2 (3)

(8) A return of all persons made over for trial to the Courts of the State shall be submitted half-yearly by the Political Agent to the Government of India or to the Government of Madras or Bombay, as the case may be, in the following form:—

Number.	Name of the person.	Nationality.	Offence for which charged.	Where arrested.	Date of surrender.	Native State to which surrendered for trial.	Reasons for surrender.	Name of sentence passed	REMARKS

(9) Accused persons arrested in British India on warrant issued under this section or s. 9, *infra* shall be treated as far as possible in the same way, as persons under trial in British India

(10) A person sentenced to imprisonment by a Political Agent, shall, if a British subject, be conveyed to the most convenient prison under British Administration and shall there be dealt with as though he had been sentenced under the Local Law:

Provided always that this rule shall not be constructed so as to give such person any right of appeal other than that allowed by the rule for the time being in force, regulating appeals from the Political Agent. [*Gazette of India*, 1901, *II. I. p.* 364] *See* s. 22, *infra* as to power to make rules.

3. Extradition to Native States.—Chapter III (ss 7—18) of this Act, together with the rules framed under s. 22, regulates the procedure to be followed in British India upon the receipt of requisition for surrender of criminals who have fled from justice out of a Native State into British India. The provisions of subsisting treaties with Native States are however preserved by s. 18, but as there are no treaty obligations regarding the five Native States under political control of the Madras Government and there is no treaty with Mysore, and Hyderabad has by agreement of 1887 waived its right to the procedure prescribed by the treaty of 1867 in favour of that laid down by the Extradition Act, the procedure in Chapter III of this Act, should therefore be followed in all these cases. Regarding other Native States in India reference should be made to Aitchison Treatise, etc., to ascertain if there are subsisting treaties with them to govern the procedure. Where there is no subsisting treaty, a Native State can under their Act obtain the surrender of its fugitive in two ways:—(i) by applying under s. 7 to the Political Agent who is authorised to comply in cases of grave offences set out in Schedule I to the said Act or (ii) by making a requisition to Government under s. 9, where the offence is of a political character or is not an extradition crime. Action under the latter section should not be taken, unless specially pressed for, and should the Durbar desire to proceed under s. 9, the Political Agent should forward the requisition for orders of Government with a report of the circumstances of the case and his own recommendation as to whether the Durbar's request should be granted or refused and then the question whether extradition should be granted is one entirely for disposal by Government—See *Madras Extradition Manual*, 1911.

4. Preliminary inquiry by District Magistrate not a condition precedent to execution of warrant.—There is no provision in this Act making an inquiry by a competent British Court in British India, into the truth of the accusation, whether in the presence of the accused or otherwise, a condition precedent to the issue and execution of the warrant of the Political Agent under this section.—*Per* ASTON, J., in **7 Bom. L. R. 463 = 2 Cr. L. J. 439.** *See* also **41 C. 400.**

5. Accused should be present.—In all cases where inquiries are held by Magistrates with a view of extraditing accused persons, it would be desirable that they should, if possible, be present thereat—*Per* RUSSELL, J., *ibid.*

6. Warrant of Political Agent not open to revision.—**In 36 P. W. R. 1908 = 3 P. R. 1909 = 9 Cr. L. J. 3,** the Punjab Chief Court held that it had no power to interfere in respect of a warrant issued by a Political Agent of a Native State under s. 7 of the Act, on the grounds either (1) that there is no *prima facie* case aganist the petitioner or (2) that the circumstances under which that officer was originally moved, do not justify him exercising his power under the said section. *See* also **19 C. W. N. 221 = 21 C. L. J. 68.** *See* **7 Lah. 159.**

7. Proceedings of Magistrates on a warrant issued by the Political Agent not open to revision.—When a warrant is issued by the Political Agent under s. 7, its execution by the District Magistrate in accordance with the Provisions of the Act is an executive act and the High Court cannot interfere in revision with such execution. If the fugitive criminal arrested considers himself aggrieved, he can invoke the action of the Government under s. 15. **19 C. W. N. 221 = 21 C. L. J. 68 = 16 Cr. L. J. 31.**

8 **Political Agent cannot issue warrant after certifying under s 188 of the Code** —Where a Political Agent has issued a certificate under s 188 of the Code that the accused should be tried in British India it is not open to him to recall the certificate and direct the accused to be handed over to the Native States for trial **14 Bom L R. 377 = 1 Bom Cr C 140 = 13 Cr L J 537**

9. **When High Court will revise orders purporting to be made under the Act** —*See* Notes 2 and 3 to s. 15 *infra.*

8 (1) Where a Political Agent has directed by endorsement on any such warrant that the person for whose arrest it is issued may be released on executing a bond with sufficient sureties for his attendance before a person or authority indicated in this behalf in the warrant at a specified time and place the Magistrate to whom the warrant is addressed shall on such security being given release such person from custody

Release on giving security

Magistrate to retain bond

(2) Where security is taken under this section the Magistrate shall certify the fact to the Political Agent who issued the warrant and shall retain the bond

Re arrest in case of default

(3) If the person bound by any such bond does not appear at the time and place specified the Magistrate may on being satisfied as to his default issue a warrant directing that he be re-arrested and handed over to any person authorised by the Political Agent to take him into custody

Deposit in lieu of bond and forfeiture of bonds

(4) In the case of any bond executed under this section the Magistrate may exercise the powers conferred by the Code of Criminal Procedure for the time being in force (in relation to taking a deposit in lieu of the execution of a bond and with respect to the forfeiture of bonds and the discharge of sureties)

***Notes* —1 Jurisdiction of Magistrate to hold the arrested person to bail to appear before a tribunal in a Foreign State** —A Magistrate could bind over the prisoner to appear before himself and then when the prisoner has surrendered to his bail after receiving the warrant from the Political Agent to the State could proceed to execute it under s. 7 cl (2), *supra* or if the warrant had been duly endorsed by the Political Agent under sub-sec. (1) of this section could bind the prisoner over to appear at the time and place indicated in the warrant. Neither the Code of Criminal Procedure nor this Act authorises a Magistrate to hold a person to bail to appear before a tribunal in a Foreign State to which the Act applies **33 C 1032** *See* **20 Bom L R 1009**

2 **Jurisdiction of Magistrate to release arrested person on bail, without endorsement by Political Agent.**—Where a person was arrested upon a warrant issued by a Political Agent and the Magistrate released him on bail and directed him to appear before the Political Agent on a date specified although there was no endorsement on the warrant giving the Magistrate power to pass such an order *held* that in the absence of such endorsement the order of the Magistrate was one passed without jurisdiction **12 C W N 602 = 7 C L J 171 = 7 Cr. L J 198.** *See* **20 Bom L R 1009**

Power to report case for orders of Local Government.

8A. * *Notwithstanding anything contained in section 7 sub-section (2) or in section 8 when an accused person arrested in accordance with the provisions of section 7 is produced before the District Magistrate or Chief Presidency Magistrate as the case may be* ... *such Magistrate* ... *the Local Govern*

Requisition by being Foreign States

9 ... of India or to any Local Government by ... ign State for the surrender of any person accused ... the territories of such State such requisition shall (except in so far as relates to the taking of evidence to show that the offence is of a political character or is not an extradition crime) be dealt with in accordance with the procedure prescribed by s 3 for requisitions made by the Government of any Foreign States as if it were a requisition made by any such Government under that section

Provided that if there is a Political Agent in or for any such State the requisition shall be made through such Political Agent.

* Newly added by the Indian Extradition (Amendment) Act I of 1913 s 3

10. (1) If it appears to any Magistrate of the first class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State or that a warrant may be issued for his arrest under s. 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of warrant if the offence had been committed within the local limits of his jurisdiction.

Power to Magistrates to issue warrants of arrest in certain cases.

(2) The Magistrate shall forthwith report the issue of a warrant under this section if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent and in other cases to the Local Government.

Issue of warrant to be reported forthwith.

(3) A person arrested on a warrant issued under this section shall not, without the special sanction of the Local Government, be detained more than two months, unless within such period the Magistrate receives an order made with reference to such person in accordance with the procedure prescribed by s. 9, or a warrant for the arrest of such person under s. 7.

Limit of time of detention of person arrested.

(4) In the case of a person arrested or detained under this section, the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the offence with which he is charged.

Bail.

Notes.—1. Scope of Section.—This section confers on Magistrates in British India jurisdiction to make preliminary inquiries and to take evidence on the information given or complaint laid in regard to offences alleged to have been committed by Native Indian or British subjects of His Majesty, within and beyond the limits of British India, not being in a Foreign State as defined in this Act and to order warrants to issue for the arrest of such accused persons. **8 Bom. L. R. 507=4 Cr. L. J. 49.** This section applies only to cases if the warrant issued under s. 7 is legal, but absconding from jail not being an offence mentioned in Schedule I of the Indian Extradition Act, 1903, a warrant for arrest on such a charge does not fall within s. 7. In spite of certain powers of Government under s. 15, the High Court has jurisdiction to interfere in a case where action under the Act has not been taken under a valid warrant. Section 9 applies only when a requisition has been made to Government and not when a warrant has been addressed to the District Magistrate. **1 Patna 57.** *See* s. 188, Cr. P. C. As to the effect of irregularity in issuing warrant, *see* Notes to s. 537, *supra*.

2. Police officer may arrest without warrant.—*See* s. 54 (7), Cr. P. C. and Notes thereto and *see* s. 23, *infra*.

11. (1) A person accused of an offence committed in British India, not being the offence for which his surrender is asked, or undergoing sentence under any conviction in British India, shall not be surrendered in complince with a warrant issued by a Political Agent under s. 7 or a requisition made by or on behalf of any State not being a Foreign State under s. 9, except on the condition that such person be re-surrendered to the Government of India or the Local Government, as the case may be, on the termination of his trial for the offence for which his surrender has been asked:

Surrender of person accused of, or undergoing sentence for, offence in British India.

Provided that no such condition shall be deemed to prevent or postpone the execution of a sentence of death lawfully passed.

(2) On the surrender of a person undergoing sentence under a conviction in British India, his sentence shall be deemed to be suspended until the date of his re-surrender, when it shall revive and have effect for the portion thereof which was unexpired at the time of his surrender.

Suspension of sentence on surrender.

12. The provisions of this Chapter with reference to accused persons shall, with any necessary modifications, apply to the case of a person who, having been convicted of an offence in the territories of any State not being a Foreign State, has escaped into or is in British India before his sentence has expired.

Application of Chapter to convicted persons.

13. Every person who is accused or convicted of abetting or attempting to commit any offence shall be deemed for the purposes of this Chapter to be accused or convicted of having committed such offence and shall be liable to be arrested and surrendered accordingly

Abetment and attempt

14 It shall be lawful for any person to whom a warrant is directed in pursuance of the provisions of this Chapter to receive hold in custody and convey the person mentioned in the warrant to the place named in the warrant and if such person escapes out of any custody to which he may be delivered in pursuance of such warrant he may be retaken as a person accused of an offence against the law of British India may be re taken upon an escape

Lawfulness of custody retaking under warrant issued under Chapter

15. The Government of India or the Local Government may by order stay any proceedings taken under this Chapter and may direct any warrant issued under this Chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged

Power of Government to stay proceedings and discharge persons in custody

Notes —1 Ouster of the jurisdiction of the High Court —This section ousts the jurisdiction of the High Court to inquire into the propriety of the warrant but leaves open the question of the High Courts power to interfere with a Magistrate s action if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal **7 Bom L R 463 = 2 Cr L J 439** *See* also Note 4 to s 7 *supra*

2 High Court has general revisional powers to set aside illegal orders, purporting to be made under the Act.—S 15 of the Act no doubt ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law but is in fact without jurisdiction not being sanctioned by it it cannot but be assumed that the Magistrate has acted in his general jurisdiction and as such his order is liable to be set aside by the High Court in the exercise of its revisional powers, at the instance of the party whose liberty is affected by it **7 Bom L R. 463 = 2 Cr L J 439** and **21 P R 1888** *approved* **41 C. 400** In this case one G Nepalese subject was caused to be arrested by a Sub-Divisional Magistrate of M in British territory in pursuance of an inquiry from the Sub-Divisional Magistrate in Nepal who required his arrest in connection with a murder committed in Nepal and promised to send proof of criminality and nationality G was subsequently released on bail and on receipt of the evidence of criminality and nationality and after examining witnesses for the prosecution and the defence the Sub-Divisional Magistrate of M directed the surrender of G to the Nepalese authorities *Held* on a reference by the Sessions Judge that the order of the Magistrate was bad (i) because the issue of warrant against G was on mere information without any evidence and was contrary to the provisions of cl (1) of s 10 of this Act (ii) because he did not report the issue of the warrant to the Political Agent in Nepal under cl (2) of s 10 (iii) because the inquiry was made into the case without a warrant issued by the Political Agent for Nepal as required by s 7 (iv) and because he ordered the surrender of the fugitive on a procedure unknown to the Extradition Act **41 C 400**

3 An order passed by a District Magistrate or Chief Presidency Magistrate under section 7 of this Act is a judicial order and not an executive act Such an order can be revised by the High Court under s 439 or s. 561 (A) or interfered with under s 491 of this Code **31 Bom L R 62**

16. The provisions of this Chapter shall apply to an offence or to an extradition offence as the case may be committed before the passing of this Act and to an offence in respect of which a Court of British India has concurrent jurisdiction

Application of Chapter to offences committed before its commencement

17. (1) In any proceedings under this Chapter exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof and official certificates of facts and judicial documents stating facts may if duly authenticated be received as evidence

Receipt in evidence of exhibits depositions and other documents

(2) Warrants depositions or statements on oath which purport to have been issued received or taken by any Court of Justice outside British India or copies thereof and certificates of or judicial documents stating the fact of conviction before any such Court shall be deemed duly authenticated —

Authentication of the same

(*a*) if the warrant purports to be signed by a Judge Magistrate or officer of the State where the same was issued or acting in or for such State

(*b*) if the depositions or statements or copies thereof purport to be certified under the hand of a Judge Magistrate or officer of the State where the same were taken or acting in or for such State to be the original depositions or statements or to be true copies thereof as the case may require

(*c*) if the certificate of, or judicial document stating the fact of a conviction purports to be certificated by a Judge, Magistrate or officer of the State where the conviction took place or acting in or for such State:

(*d*) if the warrants, depositions, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State where the same were respectively issued, taken or given.

Definition of "warrant."

(3) For the purposes of this section, "warrant" includes any judicial document authorising the arrest of any person accused or convicted of an offence.

Chapter not to derogate from treaties.

18. Nothing in this Chapter shall derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any such treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly.

CHAPTER IV.*

RENDITION OF FUGITIVE OFFENDERS IN HIS MAJESTY'S DOMINIONS.

Application of Fugitive Offenders' Act, 1881, 44 and 45 Vict., c. 69.

19. For the purpose of applying and carrying into effect in British India the provisions of the Fugitive Offenders' Act, 1881, the following provisions are hereby made:—

(*a*) the powers conferred on "Governors" of British possessions may be exercised by any Local Government;

(*b*) the powers conferred on a "Superior Court" may be exercised by any Judge of a High Court;

(*c*) the powers conferred on a "Magistrate" may be exercised by any Magistrate of the first class or by any Magistrate empowered by the Local Government in that behalf, and

(*d*) the offences committed in British India to which the Act applies, are piracy, treason and any offence punishable under the Indian Penal Code with rigorous imprisonment for a term of twelve months, or more, or with any greater punishment.

CHAPTER V.

OFFENCES COMMITTED AT SEA.

Requisition for surrender in case of offence committed at sea.

20. Where the Government of any State outside India makes a requisition for the surrender of a person accused of an offence committed on board any vessel on the high seas which comes into any port of British India, the Local Government and any Magistrate having jurisdiction in such port and authorised by the Local Government in this behalf, may exercise the powers conferred by this Act.

CHAPTER VI.

EXECUTION OF COMMISSIONS ISSUED BY CRIMINAL COURTS OUTSIDE BRITISH INDIA.

Execution of commissions issued by Criminal Courts outside British India.

21. The testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in any country or place outside British India in like manner as it may be obtained in any civil matter under the provisions of the Code of Civil Procedure for the time being in force with respect to commissions, and the provisions of that Code relating thereto shall be construed as if the term "suit" included a criminal proceeding:

Provided that this section shall not apply when the evidence is required for a Court or tribunal in any State outside India other than a British Court and the offence is of a political character.

CHAPTER VII.

SUPPLEMENTAL.

Power to make rules.

22. (1) The Governor-General in Council may make rules to carry out the purposes of this Act. †

* Under s. 32 of the English *Fugitive Offenders' Act*, 44 and 45 Vict., c. 69, it has been notified that this Chapter shall be recognised and given effect to throughout His Majesty's Dominions and on the High Seas, as if it were part of the *Fugitive Offenders' Act*. See *Order in Council* published in *London Gazette* of 8th March, 1904.

† For the Procedure to be followed for the confinement of a prisoner under sentence of death and for his execution, *see Gazette of India*, 1893, Part I, p. 229.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the removal of prisoners accused or in custody under this Act, and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them,

(*b*) the seizure and disposition of any property which is the subject of, or require for proof of any *alleged offence to which this Act applies*,

(*c*) the pursuit and arrest in British India by officers of the Government or other persons authorised in this behalf, of persons accused of offences committed elsewhere, and

(*d*) the procedure and practice to be observed in extradition proceedings

(3) Rules made under this section shall be pubished in the *Gazette of India* and shall thereupon have effect as if enacted by this Act.

Note.—The rules framed under this section do not apply to territory under British Administration in which the Code of Criminal Procedure (Act V of 1898) is in force—*Gazette of India* 1875 *Pt I p* 524 *See* also **13 M. 39; 9 B. 333** at p **339, and 26 M. 67.**

Detention of persons arrested under s 54 clause *seventhly*, Act V of 1898

23. Notwithstanding anything in the Code of Criminal Procedure, 1898 any person arrested without an order from a Magistrate and without a warrant in pursuance of the provisions of s 54, clause *seventhly*, of the said Code may, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under s 10

Repeals

24. The Acts mentioned in the second schedule are repealed to the extent specified in the fourth column thereof

THE FIRST SCHEDULE

EXTRADITION OFFENCES

[See s 2, Clause (b) and Chapter III (Surrender of Fugitive Criminals in case of States other than Foreign States)]

[The sections referred to are the sections of the Indian Penal Code]

Frauds upon creditors (s. 206).
Resistance to arrest (s. 224)
Offences relating to coin and stamps (ss. 230 to 263-A)
Culpable homicide (ss 299 to 304).
Attempt to murder (s 307)
Thuggi (ss 310, 311).
Causing miscarriage and abandonment of child (ss 312 to 317)
Causing hurt (ss 323 to 333).
Wrongful confinement (ss *347, 348*)
Kidnapping and slavery (ss 360 to 373)
Rape and unnatural offences (ss 375 to 377)
Theft Extortion Robbery, etc. (ss 378 to 414).
Cheating (ss 415 to 420)
Fraudulent deeds etc. (ss 421 to 424)
Mischief (ss 425 to 440)
Lurking house-trespass (ss 443, 446)
Forgery, using forged documents, etc (ss 463 to 477 A)

Desertion from any unit of Indian State Forces declared by the Governor General in Council by notification in the *Gazette of India* to be a unit desertion from which is an extradition offence.*

Piracy by law of nations

grievous bodily harm

the high seas against the

authority of the master

* Substituted by Act XVI of 1922

Any offence against any section of the Indian Penal Code or against any other law which may, from time to time, be specified by the Governor-General in Council by notification in the *Gazette of India* either generally for all States or specially for any one or more States.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

(*See Section* 24.)

Year.	No.	Short Title.	Extent of Repeal.
1879	XXI	The Foreign Jurisdiction and Extradition Act, 1879.	So much as is unrepealed.
1895	IX	The Extradition (Indian) Act, 1895 ...	The whole Act.
1896	V	The Foreign Jurisdiction and Extradition Act (1879), Amendment Act, 1896.	The whole Act.

EXTRADITION RULES BETWEEN THE BRITISH AND FOREIGN POSSESSIONS IN INDIA.

I.—British and French Indian Governments.

1. By the tacit consent of both the contracting powers—the French and English Governments—the clause in the Convention of March, 1915, relating to the extradition of *Debtors*, has been treated as not in force and has not been acted on; consequently, it must be considered null and void. Further, although the 9th Article of the Treaty speaks of *offences* generally, the subsequent and uniform exposition of the Article, by the Acts and Declarations of the two Governments, has virtually put an interpretation to some extent upon the word " offences," so as to limit its meaning to offences of a grave character, and to exclude from the operation of the treaty (*a*) mere petty local offences, which would not necessarily be treated as criminal acts by the laws of both countries and (*b*) political offences. The Governor in Council resolves to give a general direction to all District Magistrates, to surrender to the French Authorities all persons claimed by them, as fugitives from justice in respect of offences of a grave character. All felonies and all crimes described as " heinous " in the Fugitive Foreign Offenders' Act, No. VII of 1854, would, of course, come within the category of grave offences. Other cases of grave offences might easily be suggested; and where there is room for doubt, a reference to Government will be requisite before surrender is made; while a report of his proceedings in every case of surrender should be invariably made by the Magistrate with a view to his protection by the ratification of his act.—(*G.O., 14th March*, 1872, *No.* 359; *19th November*, 1881, *No.* 2391, *and 18th January*, 1887, *No.* 89, *Judicial.*)

2. With reference to the above proceedings, the several District Magistrates will, in future, submit the reports referred to at the close of para. 4 of G.O., 14th March, 1872, No. 359, in a form containing the following particulars:—

(1) Names of offenders; (2) nature of offence; (3) to what authority surrendered; (4) date of surrender; (5) remarks.—(*G.O., 24th October*, 1888, *No.* 2194, *Judicial.*)

3. It was pointed out in G.O., 14th March, 1872, No. 359, that, although the 9th Article of the Treaty with France speaks of *offences* generally, practice has long since limited the meaning to offences of a " grave " character. Looking at the Schedule attached to Act XXI of 1879 [now Schedule I to Act XV of 1903], the Government consider that the sections of the Indian Code there enumerated furnish a generally sufficient list of grave offences. The offence for which the present French warrant was issued is described as " *abus de con finance.*" If this may be rendered by " Criminal Breach of Trust," it is a grave offence, and is inserted as such in the list abovementioned; but as the Acting Magistrate seems to consider that the French term has a wider meaning and would include a departure from French Territory by a mere debtor, it is competent to him to ask for paticulars after a reference to the articles of the " Code Penal " cited in the warrant; the extradition of debtors, as well of course as of Political offenders, not being within the Treaty, as interpreted by practice. As regards the question whether a resident of British Territory, sojourning in the French Territory for a few weeks or months on business affairs (with the *animus reverlendi*) and returning to his own village thereafter

should be deemed to take refuge within our territory or to become a fugitive from justice within the meaning of the Treaty of 1815 it is obligatory on the British Government to deliver up all persons against whom judicial proceedings shall be instituted within the French limits for grave offences committed within the said limits and who shall take refuge out of the same The form of the *Manda' a Arret* issued by the French authorities appears unobjectionable but the authority to deliver up fugitive offenders has been vested by *Government* in District Magistrates only —the attention of the French authorities should be invited to the necessity of making their requisitions to such officers only in future cases —(*G O 19th May* 1882 *No* 335 *Judicial*)

4 In cases where surrender is applied for of persons escaping into British Territory on conviction by French Courts regard should be had to the nature of the offence with which the person was originally charged By G O 14th March 1872 No 359 and connected papers the word offences is limited to mean only offences of a grave character and this distinction should be borne in mind whether the person has been only charged or both charged and convicted of an offence in French Territory —(*G O 31st January* 1889 *No* 178 *Judicial*)

5 Where it is doubtful whether the offence committed is a grave crime as contemplated by the received interpretation of the Treaty of 1815 the Magistrate should ask for a copy of the complaint and submit it to Government for orders before taking any step for the apprehension of the accused —(*G O 26th March* 1888 *No* 747 *Judicial*)

Police Convention

The following Police Convention of 1872 regarding the suppression of offences and crimes committed in French and British Territories will be followed in all parts of the Presidency which adjoin French Territory —

(1) The Police of both territories will respectively communicate any useful information regarding what they do

(2) They will exchange lists of vagrants and people without fixed residences who wander from one territory to another

(3) The officers of the Judicial Police belonging to French Territory will arrest provisionally on either written or verbal requisitions of officers of the British Police—

(*a*) All French subjects suspected of theft with dacoity of gang robbery on the high roads of theft with force of homicide or of murder They will draw up reports of the arrest and submit information as to what has been done by them

(*b*) British subjects suspected of grave crimes and offences other than those relating to the Revenue and Customs Laws

(4) They will proceed on similar requisitions to search for articles stolen and prepare reports regarding their seizure

(5) They will forthwith send the arrested prisoners and the articles seized to Pondicherry for the orders of the Solicitor General

(6) In no case and under no pretext will they themselves make over the prisoners arrested or the articles seized to foreign agents (unknown parties)

(7) They are prohibted from performing any of their duties in foreign territory

(8) The above provisions are reciprocal and will be observed by the officers of the British Police on requisitions made by officers of the French Judicial Police

Such arrest if not supported by a warrant issued by a Magistrate having jurisdiction under [s 4 of the Indian Extradition Act 1903] would be illegal It will accordingly be an instruction to the Police on receiving a requisition for provisional arrest to apply to the Magistrate having jurisdiction for a warrant under [s 4 of Act XV of 1903] and it is probable that in most cases the Magistrate will be satisfied in the first instance with the mere production of the French requisition —(*G O 9th February* 1887 *No* 276 *and 20th May* 1887 *Nos.* 1068 *and* 1078, *Judicial*)

Letter to Commissioners.

The following letter, dated 28th June, 1884, from the Secretary to the Government of Bengal all commissioners of Divisions and District Magistrates, is important with reference to extradition between the French and British possessions in India :—I am directed to state, for your information, that the question of extradition between the French and British possessions in India has recently been under the consideration of the Government of India and Her Majesty's Secretary of State for India. The practical question at issue was whether the procedure in cases of extradition should be regulated by the stipulation of Article IX of the Treaty of 7th March, 1815, between Great Britain and France, which relates exclusively to the Indian possessions of the two countries, and under which persons accused of non-political offences of a grave character have hitherto been surrendered upon application, supported by a warrant and summary of the charges, no depositions of witnesses being required ; or whether it was necessary to observe the more stringent provisions of [s. 3 of the Indian Extradition Act, XV of 1903] and ss. 3 and 10 of Statute 33 and 34 Vict., c. 52, relating to extradition. The decision at which Her Majesty's Government has arrived is, that the existing practice is to be maintained, and that the Indian Act of 1903 and the English Statute of 1870 do not apply.

See *Punjab Record*, 1893, p. 47.

II.—Hyderabad.

1. AGREEMENT made beween the British Government and that of His Highness the Nizam by which the Treaty concluded between both those Governments in 1887 has been modified, so far as the procedure to be observed in cases of extradition of offenders from British India to the Hyderabad State is concerned.

Article 1st.—The two Governments hereby agree to act upon a system of strict reciprocity as hereinafter mentioned.

Article 2nd.—Neither Government shall be bound in any case to surrender any person not being a subject of the Government making the requisition. If the person claimed should be of doubtful nationality, he shall, with a view to promote the ends of justice, be surrendered to the Government making the requistion.

Article 3rd.—Neither Government shall be bound to deliver up debtors, or civil offenders, or any person charged with any offence not specified in Article 4th.

Article 4th.—Subject to the above limitations, any person who shall be charged with having committed within the territories belonging to, or administered by, the Government making the requisition, any of the undermentioned offences, and who shall be found within the territories of the other, shall be surrendered ; the offences are mutiny, rebellion, murder, attempting to murder, rape, great personal violence, maiming, dacoity, kidnapping, abduction, thuggi, robbery, burglary, knowingly receiving property obtained by dacoity, robbery or burglary, thefts of property exceeding 100 rupees in value, cattle stealing, breaking and entering a dwelling house and stealing therein, setting fire to a village, house or town, forgery or uttering forged documents, counterfeiting current coin, knowingly uttering base or counterfeit coin, embezzlement, whether by public officers or other persons, and being an accessory to any of the abovementioned offences.

Article 5th.—In no case shall either Government be bound to surrender any person accused of any offence except upon requisition duly made by, or by the authority of the Government within whose territories the offence shall be [illegible] charged to have been committed, and also upon such evidence of criminality as, according, to the laws of the country [illegible] ofte: in which the person accused shall be found, would justify his apprehension and sustain the charge, if the offe[illegible] (*G.O.*, nce ha[illegible] *tober* there committed.

in G.O., 14th March, 1872, [illegible] ue in force until either one or the other of the high

Article 6th.—The above treaty shall conti[illegible] [illegible] bee[illegible] ctice has long [illegible] ish to terminate it, and no longer.

contracting parties shall give notice to the other of its w[illegible] Act XXI [illegible] ents shall continue in full force.

Article 7th.—All existing engagements and agreem[illegible] h war [illegible] e there

2. Whereas a Treaty relating to the extradition of [illegible] offenders was concluded on the 25th May, 1867, between the British Government and the Hyderabad State ; a[illegible] ust," and whereas the procedure prescribed by the Treaty for the extradition of offenders from British India to the H[illegible] as to Hyderabad State has been found by experience to be less simple and effective than the procedure prescribed by [illegible] by a the law as to the extradition of offenders in force in British India : It is hereby agreed between the British Gov[illegible] de Pe rnment and the Hyderabad State that the provisions of the Treaty prescribing a procedure for the extradition [illegible] with[illegible] f offenders shall no longer apply to cases of extradition from British India to the Hyderabad State, bu[illegible] sojourn the procedure prescribed by the law as to the extradition of offenders for the time being in force in Britis[illegible] and re, shall be followed in every such case.—(*G.O.*, *28th November*, 1887, *No.* 2697, *Judicial.*)

3. When offenders from the Hyderabad State are apprehended in British Territory by the Nizam s Police and made over to the British authorities in view to their formal surrender to the Nizam s Government the receipt of the Magistrate having jurisdiction in the place in which the offenders are arrested shall in all cases be required as a voucher —(*G O 16th June* 1870 *No* 814 *Judicial*)

The following direction by the Governor General dated 22nd May 1885 has been published

I *No* 1637 *I*—In exercise of the powers conferred by [s 22 of Act XV of 1903 The Indian Extradition Act] and of all other powers enabling him in this behalf the Governor General in Council is pleased to direct as follows —

(1) The Superintendent of the Hyderabad Residency Bazaars for the time being shall exercise within the limits of the Hyderabad Residency Bazaars, the powers of a District Magistrate as described in the Code of Criminal Procedure

(2) The First Assistant to the Resident at Hyderabad for the time being shall exercise within the limits of the Hyderabad Residency Bazaars the powers of a Court of Sessions as described in the Code of Criminal Procedure

(3) The Resident at Hyderabad for the time being shall exercise within the limits of the Hyderabad Residency Bazaars the powers of a High Court as described in the Code of Criminal Procedure

(4) This notification applies to all proceedings except proceedings against European British subjects or persons jointly charged with European British subjects

(5) All criminal powers which may before the date of this notification have been exercised by the officers referred to herein within the limits specified shall be deemed to have been exercised in accordance with law

(6) So much of the notification of the Government of India in the Foreign Department No 79 Judicial dated the 18th January 1869 as applies to the Hyderabad Residency Bazaars is hereby cancelled

II *No* 1639 *I*—In exercise of the powers conferred by [s 22 of Act XV of 1903 The Indian Extradition Act] *and of all other powers enabling him in this behalf the Governor-General in Council is pleased to direct* as follows —

(1) The Superintendent of the Hyderabad Residency Bazaars for the time being shall exercise within the limits of His Highness the Nizam s Territories in all cases in which such powers may lawfully be exercised by the Governor General in Council within such territories the powers of a District Magistrate as described in the Code of Criminal Procedure

(2) The First Assistant to the Resident at Hyderabad for the time being shall exercise within the limits of His Highness the Nizam s Territories in all cases in which such powers may lawfully be exercised by the Governor General in Council within such territories the powers of a Court of Sessions as described in the Code of Criminal Procedure

(3) The Resident at Hyderabad for the time being shall exercise the powers of a High Court as described in the said Code in respect of all offences over which magisterial jurisdiction is exercised by the Superintendent of the Hyderabad Residency Bazaars within the said territories and in respect of all offences over which the jurisdiction of a Court of Sessions is exercised by the First Assistant to the Resident within the said territories

(4) In the exercise of the jurisdiction of a Court of Sessions conferred on him by this notification the First Assistant to the Resident may take cognisance of any offence as a Court of original criminal jurisdiction without the accused person being committed to him by a Magistrate and shall when so taking cognisance of any offence follow the procedure laid down by the Code of Criminal Procedure for the trial of warrant cases by Magistrates

(5) This notification applies to all proceedings except proceedings against European British subjects or persons jointly charged with European British subjects and it applies to proceedings which may be pending at the date of this notification if they have been instituted and are being conducted in conformity with the provisions herein contained

(6) Nothing in this notification shall be deemed to extend to any Cantonment or to the Hyderabad Residency Bazaars or to any railway lands situate within the said territories —(*Gazette of India 23rd May 1885 Part I p 301*)

III.—Mysore.

1. Any person, liable to be tried for an offence committed within the limits of the territories described in Chapter I, section 1, of the Indian Penal Code, may be arrested within the territories of Mysore by an officer of Police subordinate to the Chief Commissioner of Mysore, of other person duly authorised for the purpose, in the same way and under the same conditions, with or without warrant, as if the offence had been committed in the territories of Mysore.

2. If the person, so arrested, be a British subject, or other than a subject of Mysore, he shall be surrendered for trial to the British authorities.

3. If the person, so arrested, be a subject of the Government of Mysore, he shall either be tried in the Courts in Mysore or surrendered for trial in British Courts, as may be found most convenient.

4. Any subject of the Mysore Government liable to be tried for an offence committed beyond the limits of the Mysore territories may be dealt with by the Mysore Courts, in the same manner as if such offence had been committed within the said territories.—(*G.I. Notification, 6th January*, 1871, *No.* 5, *Judicial, Foreign Department.*)

5. Officers exercising the powers of a Magistrate, when requiring the surrender of an accused person who is within the territories of His Highness the Maharaja of Mysore, shall apply to the Commissioner of the Division in which the accused is supposed to be, forwarding with the application copies of the evidence and any other papers on which the requisition is based; the reasons for laying down this procedure being that it is the Commissioner who is to issue the warrants for the arrest of the accused, and who is to be held responsible for the propriety of their issue against persons who are within his territorial jurisdiction, and that it is but reasonable that the Commissioner should have sufficient evidence of criminality laid before him to justify his action in arresting and delivering up the accused.—(*G.O., 3rd May*, 1869, *No.* 741 *and 7th April*, 1873, *No.* 553, *Judicial.*)

6. For the purpose of having the house of a person searched in the Mysore Territory, the Magistrate in the British Territory is not to issue any warrant himself, which he has no power to do, but to apply to the Commissioner of the Division having jurisdiction over the locality to issue his warrant for the purpose, the application being supported by the required evidence.—(*G.O., 1st May*, 1877, *No.* 1109, *Judicial.*)

IV.—Ceylon.

The law of Extradition which governs Ceylon is contained in the Statute 6 and 7 Vict., c. 34; and it is under that law alone that extradition of offenders escaping from India into Ceylon can be rightly obtained by the Indian Government. The course to be taken was communicated to the Inspector-General of Police and to all District Magistrates by G.O., dated 27th May, 1864, No. 757. The essential parts of the procedure, as will be gathered from the papers therein referred to, are—

I.—That the Magistrate must have some satisfactory evidence before him to justify the issue of a warrant for the apprehension of the offender;

II.—That true copies of the depositions, etc., on which the warrant was issued must be furnished to the constable who is to proceed with the warrant to Ceylon;

III.—That the constable should be in a position to swear that the depositions, etc., are true copies, and to the seal and signature of the Magistrate granting the warrant;

IV.—That on arrival in Ceylon, the constable is to place himself in communication with the Colonial Police, in view to obtaining the endorsement of Her Majesty's Judge and to the taking of the other steps necessary to the warrant being executed.—(*G.O., 18th April*, 1877, *No.* 970, *Judicial.*)

V.—Penang.

Where the Lieutenant-Governor of Penang telegraphed to the Chief Police Officer of Negapatam requesting him to arrest an accused person who had escaped from Penang, the arrest made by the Police Officer, without a warrant from a duly authorised Magistrate was held improper and the delivery of the accused without the warrant of the Local Government still more irregular. What a Magistrate, subordinate to the District Magistrate, should do, after issuing the warrant of arrest in any such case is to report his action to Government through the usual channel or channels and the District Magistrate in submitting the report to the Chief Secretary should state that he has telegraphed to the Executive Government or Foreign Power concerned, requesting that a requisition to give up the accused person may be made to the Governor in Council in accordance with [The Indian Extradition Act, 1903].—(*G.O., 29th April*, 1882, *No.* 314, *Judicial.*)

VI.—Other States.

With reference to the provisions of s. 13 of Act XXI of 1879 the Governor General in Council was pleased to direct that for offences committed in any of the following States, *viz.* Patiala, Jind, Nabha, Maler Kotla, Kalsia, Dujana, Pataudi and Loharu, Bahawalpur, Chamba, Faridkot, Mandi, Suket, Sirmur (Nahan), Kahlur (Bilaspur), Bashahr, Nalagarh, Keonthal, Baghal, Baghat, Jubbal, Kumharsain, Bhajji, Mailog, Balson, Dhami, Kuthar, Mangal, Bija, Darkuti, Taroch, Sangri the persons accused shall be handed over by the Political Agent concerned to the Courts of the State for trial. But this direction was subject to the instructions contained in the notifications published in the *Gazette of India* No. 87 J. dated the 16th August 1876 and to the further condition that should there be in any particular instance special reason for so doing the Political Agent might dispose of the case himself. *Letter dated Simla 13th August 1885 Foreign Secretary to Government of Punjab* (*Punjab Rec. Circular Or. p.* 28.)

VII.—Miscellaneous.

1. *Bail.*—When a prisoner has been arrested under the provisions of the Extradition Act under a Political Agent's warrant (s. 7) or under a warrant issued by the Governor General in Council or any Local Government bail cannot be taken under s. 10 (4) and the person arrested must be removed in custody and delivered up at the place and to the person named in the warrant.—*Letter from the Government of India 6th May* 1875 *No.* 53 *J. read in G. O., 17th June* 1875 *No.* 867 *Political.*)

2. *Act XV of* 1903.—Act XV of 1903 does not profess to deal with the matter of requisitions for the surrender of criminals who have fled from justice out of British India into a Native State but with the converse. The standing order on the subject by the Government of India is that where such a demand is made it should be made by our Magistrates not to the State direct, but through the Political Officer and the demand should invariably be accompanied by a copy of any depositions made or where no evidence has yet been taken by a statement of the information on which the arrest of the offender is deemed necessary. It should rest with the Political Agent if necessary to call on the Magistrate for further information but if the Political Agent possesses the influence and weight he ought to have he will seldom fail to obtain compliance with any reasonable demand made to the Durbar to which he is accredited for the surrender of an absconded criminal. As to what is a reasonable demand the Government of India state that it certainly includes the case of all offences (*vide* Schedule I of Act XV of 1903) for which the arrest and removal of criminals escaping into British India is allowed and that some cases outside of that catalogue may probably be added with propriety. Such instances however would be exceptional and the requisitions for surrender should not be made without the sanction of the Governor in Council where the offence is not one of those mentioned in the Schedule above cited or where the Political Agent doubts the reasonableness of the grounds of the requisition and the Magistrate of the District continues to press it.—(*G. O. 12th April* 1875 *No.* 219 *Political.*)

3. *Procedure in arrest.*—Officers or the Magistracy in applying for the arrest and surrender of criminals who have escaped from British India into a Native State should do so by means of a letter addressed to the Political Agent concerned. The issue of a warrant in such cases is clearly irregular and unauthorised.—(*G. O., 3rd May* 1875 *No.* 258 *Political.*)

4. The surrender of accused persons escaping into British India is governed by the provisions of ss. 3, 7 or 9 as the case may be of the Indian Extradition Act XV of 1903 the necessary formalities prescribed being the following:—

(*a*) Th

dominions or territory should be given up.

(*b*) The Governor in Council has then to issue an order to the Magistrate who would have had jurisdiction to inquire into the offence if it had been committed within his local jurisdiction directing him to inquire into the truth of the accusation.

(*c*) Such Magistrate has thereupon to issue his summons or warrant for the arrest of the person named as the case may be according to the nature of the offence and inquire into the truth of the accusation.

(*d*) On closing his inquiry, the Magistrate has to report the result to the Government.

(c) If satisfied on such report that the accused ought to be delivered up, the Governor in Council, may issue his warrant for the custody and removal of the accused person and for his delivery at a place and to a person to be named in the warrant.

It is not until these several formalities have been observed and complied with that the accused can be surrendered to the authority making the requisition.—(*G.O.*, 8*th February*, 1878, *No.* 283, *Judicial.*)

5. *Charges.*—In the matter of defraying charges connected with the sending of European British subjects to the High Court at Madras for trial for offences committed in Natives States, the Governor in Council resolves to direct that the practice heretofore observed be uniformly followed., *viz.*, for the Madras Government to defray the expenses of prosecutors and witnesses, and for the Native Government to defray the expenses on account of the accused.—(*G.O.*, 6*th April*, 1872, *No.* 478, *Judicial.*)

APPENDIX III.

THE WHIPPING ACT No. IV OF 1909.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the* 22*nd March*, 1909.)

CONTENTS.

SECTIONS.

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO THE PUNISHMENT OF WHIPPING.

WHEREAS it is expedient to consolidate and amend the law relating to the punishment of whipping; it is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Whipping Act, 1909, and

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Sonthal Purgannas.

Whipping added to punishments described in Act XLV of 1860.

2. In addition to the punishments described in s. 53 of the Indian Penal Code offenders are also liable to the punishment of whipping.

Notes.—1. This is the same as s. 2 of the *Whipping Act*, VI of 1864.

2. "I think the Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act (VI of 1864) formed a part of the Penal Code from the date of its enactment."—*Per* NORMAN, C.J., **7 B. L. R. 165** at p. **169.** *See* also **5 M. H. C. R. Rul. XVIII.**

3. **What Magistrates may pass sentence of whipping.**—*See* s. 32 of the Code. Now only the Presidency Magistrates and Magistrates of the first class are competent to pass a sentence of whipping.

4. **When sentence of whipping may be passed.**—*See* rules and orders printed under Notes to s. 32 of the Code.

5. **Execution of sentence of whipping.**—*See* s. 390 of the Code.

6. **Who cannot be punished with whipping.**—*See* s. 393 of the Code.

7. **Mode of inflicting whipping.**—*See* s. 392 of the Code.

8. **Procedure when whipping cannot be inflicted.**—*See* s. 395 of the Code and Notes thereunder.

Offences punishable with whipping in lieu of other punishment

3. Whoever commits any of the following offences, *viz* —

(*a*) theft, as defined in s 378 of the Indian Penal Code other than theft by a clerk or servant of property in possession of his master,

(*b*) theft in a building tent or vessel as defined in s 380 of the said Code

(*c*) theft after preparation for causing death or hurt as defined in s 382 of the said Code

(*d*) lurking house-trespass or house breaking, as defined in ss 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section,

(*e*) lurking house trespass by night, or house-breaking by night, as defined in ss 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section,

may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code

Notes —1. Alterations.—This is the same as s 3 of the Act of 1864 as amended by Act III of 1895 but the following offences have been omitted —

(i) Theft by a clerk or servant as defined in s. 381 I P C.

(ii) Extortion by threat s. 388 I P C.

(iii) Putting a person in fear of accusation in order to commit extortion s 389, I P C

(iv) Dishonestly receiving stolen property, s 411 I P C

(v) Dishonestly receiving stolen property in the commission of a dacoity

1A. House-breaking to commit adultery—The offence of outraging a womans modesty not being punishable with whipping house-breaking in order to commit that offence cannot be so punished **A. I. R. (1925) All. 591.**

2. Reasons for imposing whipping must be given—When a sentence of whipping is imposed the grounds for awarding it should be stated in the judgment. **5 M. 158**

3 Whipping can be imposed only "in lieu of" other punishment and not in addition.—Where an accused person is sentenced to whipping under this section the punishment of fine or imprisonment of both cannot be legally inflicted under the I P C in addition to the *whipping* **16 B. 357, 10 Bur L T. 211, U. B. R. (1917) 3rd Qr. 32.** A sentence of whipping in addition to another punishment for one of two offences of the same character of which the prisoner is simultaneously convicted is not warranted by law **8 P. R 1885** But when an illegal sentence of whipping and imprisonment has been passed and the whipping has been carried into execution, and where the sentence as a whole is unduly lenient, the High Court will not necessarily set aside the sentence of imprisonment. **Weir I, 935** *See* **Weir I, 934,** where an accused convicted for the first time under ss 454 and 380, I P C, was sentenced to imprisonment and whipping and the High Court amended the sentence by allocating the sentence of imprisonment to one of the offences and whipping to the other *See* also **1864 W. R. 33; 1 W. R. 24; 2 W. R. 63, 4 W. R. 20; 25 C. R. L. J. 1185; 82 I. C. 49 (1).**

4. Punishment.—The word punishment in this section means the total of punishments awardable under the I P C., **16 B. 357;** *see* also **8 L. B. R. 22 = 10 Cr. L. J. 120** and Note 5 to s 5 *infra*

5 Double sentence in simultaneous conviction—When a person is convicted at one time of two or [illegible] to sentence the prisoner in the one case to [illegible] 1864 **5 Mad. H. C. R. App XVIII (F.B),** but [illegible] on is convicted at one time of two or more offences it is illegal to sentence him to whipping for one of those offences *in addition to* imprisonment or fine for the other or others, but it is not illegal to sentence him to *one whipping in lieu of all other punishment* *See* also **4 Bom. L. R. 829 at p 830 and Ratanlal 565,** where it was *held* that a double sentence of whipping is illegal

6. Sentence under I.P.C. need not be imposed—When a sentence of whipping is passed under this section, it is not necessary first to pass a sentence provided for the offence under the I P C and then to convert such sentence into one of whipping **Ratanlal 906.** Such a procedure would not be legal **5 L. B R. 22 = 10 Cr. L. J. 120**

[illegible] night

[illegible]

8. **Abetment of an offence by person not a juvenile offender not punishable with whipping.**—The Whipping Act is not a special enactment, but is a highly penal enactment and should be construed in the sense most favourable to the subject. Persons who are not juvenile offenders, convicted of abetment of theft or abetment of any other offence mentioned in this section, are not liable to the punishment of whipping. **7 L. B. R. 63 = 15 Cr. L. J. 3.**

9. **Concurrent sentences of whipping illegal.**—It is illegal to pass concurrent sentences of whipping; the word 'concurrent' in s. 35 of the Code applies only to sentences of imprisonment. **6 L. B. 22 = 12 Cr. L. J. 465.**

Offences punishable with whipping in lieu of, or in addition to, other punishment.

4. Whoever—

(*a*) abets, commits or attempts to commit rape, as defined in s. 375 of the Indian Penal Code;

(*b*) compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in s 377 of the said Code;

(*c*) voluntarily causes hurt in committing or attempting to commit robbery, as defined in s. 390 of the said Code;

(*d*) commits dacoity as defined in s. 391 of the said Code;

may be punished with whipping in lieu of, or in addition to any other, punishment to which he may for such offence, abetment or attempt, be liable under the said Code.

Notes.—1. This section is new.—The ss. 3, 4 and 4A of the Act of 1864 as amended by Act III of 1895, have not been re-enacted. The repealed sections were as follows:—

On second conviction of offence mentioned in section 2, whipping may be added to other punishment.

[3. Whoever, having been previously convicted of any one of the offences specified in the last preceding section, shall again be convicted of the same offence, or of any offence included in the same group of offences may be punished with whipping in lieu of, or in addition to any other, punishment to which he may for such offence be liable.]

Offences punishable in case of second conviction, with whipping in addition to other punishment

4. Whoever, having been previously convicted of any one of the following offences, shall be again convicted of the same offence, or any offence included in the same group of offences, may be punished with whipping in addition to any other punishment to which he may be liable under the Indian Code, that is to say:—

Group A.

(1) Giving or fabricating false evidence in such manner as to be punishable under s. 193 of the Indian Penal Code;

(2) Giving or fabricating false evidence with intent to procure conviction of a capital offence as defined in s 194 of the said Code;

(3) Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment, as defined in s 195 of the said Code;

Group B.

(4) Falsely charging any person with having committed an unnatural offence, as defined in ss. 211 and 377 of the said Code;

Group C.

(5) Assaulting or using criminal force to any woman with intent to outrage her modesty, as defined in s 354 of the said Code;

(6) Rape, as defined in s. 375 of the said Code;

(7) Unnatural offences, as defined in s. 377 of the said Code;

Group D

(8) Robbery or dacoity as defined in ss 390 and 391 of the said Code

(9) Attempting to commit robbery as defined in s 393 of the said Code

(10) Voluntarily causing hurt in committing robbery as defined in s 394 of the said Code

Group E

(11) Habitually receiving or dealing in stolen property as defined in s 413 of the said Code

Group F

(12) Forgery as defined in s 463 of the said Code

(13) Forgery of a document, as defined in s. 466 of the said Code

(14) Forgery of a document as defined in s 467 of the said Code

(15) Forgery for the purpose of cheating as defined in s 468 of the said Code

(16) Forgery for the purpose of harming the reputation of any person as defined in s 469 of the said Code

Group G

(17) Lurking house-trespass or house breaking as defined in ss 443 and 445 of the said Code in order to the committing of any offence punishable with whipping under this section

(18) Lurking house-trespass by night or house-breaking by night as defined in ss 444 and 445 of the said Code in order to the committing of any offence punishable with whipping under this section

Additional punishment of whipping for rape in certain cases.

[4A. Whenever any Local Government has with the previous sanction of the Governor General in Council by notification in the local *Official Gazette* declared the provisions of this section to be in force in any local area within the province any persons in that local area who being a member of an assembly of two or more persons the common object of which assembly is to commit rape as defined in s 375 of the Indian Penal Code abets, commits or attempts to commit such offence may be punished with whipping in addition to any other punishment to which for such abetment offence or attempt he may be liable under the said Code s 2]

2 **Section must be read subject to ss 391 and 393 of the Cr P. C.**—A sentence of whipping when the imprisonment awarded is for a term less than three months is illegal **4 Bom. L R 436,** *see* s 391 (3) *supra*

3 **Section applicable to juveniles also**—*See* **7 Bom. H. C R. Cr. Ca 70**

Juvenile offenders when punishable with whipping

5. Any juvenile offender who abets commits or attempts to commit—

(*a*) any offence punishable under the Indian Penal Code *except offences specified in Chapter VI and in ss* 163*A and* 505 *of that Code and* offences punishable with death or

(*b*) any offence punishable under any other law with imprisonment which the Governor General in *Council may by notification in the Gazette of India specify in this behalf*

may be punished with whipping in lieu of any other punishment to which he may for such offence abetment or attempt be liable

Explanation—In this section the expression juvenile offender means an offender whom the Court after making such enquiry (if any) as may be deemed necessary shall find to be under sixteen years of age the finding of the Court in all cases being final and conclusive

Notes.—1. This section is same as s 5 substituted by s 3 of Act V of 1900 for the corresponding section in the Act VI of 1864 except the italicised portion which is new

2 This section is not meant to supersede ss 3 and 4 but to be applied in the proper cases alternatively with those sections Sections 3 and 4 *supra* apply to juvenile offenders also **Ratanlal 78** and *see* Note 3 to s 4 above

3. **Juvenile offender**—The explanation is in accordance with **8 Bom H C. R Cr Ca 9** and **6 A. 482.** Under this section the finding of the Magistrate on the question of age is final and conclusive **15 Cr L J. 338 (Bur).**

4. **Sentence of imprisonment cannot be commuted to whipping.**—Under *the Whipping Act*, the Court cannot, after passing a sentence of imprisonment commute it to a sentence of whipping, which ought to be passed directly. **5 L. B. R. 22; 1 L. B. R. 292.** *See* also Note 5 to s. 3 above.

5. **"In lieu of any other punishment."**—Under s. 5, a juvenile offender may be punished with whipping in lieu of any other punishment to which he may be liable, but the words "in lieu of" mean in lieu of the whole punishment to which he is liable (*see* **16 B. 357,** Note 3 to s. 3 above). So it is illegal to pass a sentence of whipping in lieu of imprisonment, under the Whipping Act and, at the same time, to pass sentence of fine under the I.P.C. **5 L. B. R. 22 = 10 Cr. L. J. 120; A. I. R. (1924) All. 455.**

6. **Notification of the Governor-General.**—*No.* 350—In pursuance of s. 5, cl. (*b*) of the Whipping Act, 1909 (IV of 1909), the Governor-General in Council is pleased to specify offences under the laws mentioned in the schedule hereto annexed, being offences punishable under the said laws with imprisonment, as offences for the abetment or commission of or attempt to commit which juvenile offenders may be punished with whipping in accordance with the provisions of the said section.

THE SCHEDULE.

(1) The Bengal Embankment Act, 1855 (XXXII of 1855), ss. 16 and 17. (2) The Police Act, 1861 (V of 1861) s. 34. (3) The Calcutta Suburban Police Act, 1866 (Bengal Act 2 of 1866), s. 41. (4) The Public Gambling Act, 1867 (III of 1867), ss. 4, 13 and 15. (5) The Bengal Public Gambling Act, 1867 (II of 1867), ss. 4, 11 and 13. (6) The Cattle Trespass Act, 1871 (I of 1871), s. 24. (7) The Northern India Canal and Drainage Act, 1873 (VIII of 1873), s. 70, cls. 1 and 2. (8) The Bengal Irrigation Act, 1876 (Bengal Act III of 1876), s. 93. (9) The Opium Act, 1878 (I of 1878), s. 9. (10) The Indian Forest Act, 1878 (VII of 1878), ss. 25, 32 and 62, and rules made under s. 41 for the infringement of which imprisonment is prescribed as a penalty. (11) The Indian Arms Act, 1878 (XI of 1878), ss. 19, 20, 22 and 23. (12) The Bombay Abkari Act, 1878 (Bombay Act V of 1878), ss. 43 and 48. (13) The Bengal Embankment Act, 1882 (Bengal Act II of 1882), s. 77. (14) The Indian Telegraphs Act, 1885 (XIII of 1885), ss. 24 and 25. (15) The Madras Abkari Act, 1886 (Madras Act I of 1886), ss. 55 and 58. (16) The Bombay Prevention of Gambling Act, 1887 (Bombay Act IV of 1887), ss. 5 and 12. (17) The Madras City Police Act, 1888 (Madras Act III of 1888), ss. 46, 53, 65, 71, 72 and 75. (18) The Madras Towns Nuisances Act, 1889 (Madras Act III of 1889), ss. 3 and 5. (19) The Bombay District Police Act, 1890 (Bombay Act IV of 1890), ss. 62, 70 and 71. (20) The Indian Railways Act, 1890 (IX of 1890), ss. 126, 127, 128 and 129. (21) The Prevention of Cruelty to Animals Act, 1890, (XI of 1890), ss. 3, 4 and 5. (22) The Prisons Act, 1894 (IX of 1894), s. 42. (23) The Excise Act, 1896 (XII of 1896) ss. 45, 46, 48, 49 and 51. (24) The Indian Fisheries Act, 1897 (IV of 1897), ss. 4 and 5. (25) The Reformatory Schools Act, 1897 (VIII of 1897), ss. 27 and 28. (26) The Indian Post Office Act, 1898 (VI of 1898), ss. 61, 62 and 68. (27) The Cantonment Code, 1899, s. 66. (28) The Burma Gambling Act, 1899 (Burma Act), ss. 10, 11, 12 and 13. (29) The Rangoon Police Act, 1899 (Burma Act IV of 1890), ss. 30, 31 and 42. (30) The Punjab Land Preservation (Chos.) Act, 1900 (Punjab Act II of 1900), s. 19. (31) The City of Bombay Police Act, 1902 (Bombay Act IV of 1902), s. 122. (32) The Burma Forest Act, 1902 (Burma Act IV of 1902), s. 55, cl. (*b*). (33) The Indian Electricity Act, 1903 (III of 1903), s. 39, sub-sec. (2). (34) The Ancient Monuments Preservation Act, 1904 (VII of 1904), s. 16. (35) The Bengal Excise Act, 1909 (Bengal Act V of 1909), ss. 46 and 52.

Special provision as to punishment with whipping in frontier districts.

6. Whenever any Local Government has, by notification in the *Official Gazette*, declared the provisions of this section to be in force in any frontier district or any wild tract of country within the jurisdiction of such Local Government, any person who in such district or tract of country after such notification as aforesaid commits any offence punishable under the Indian Penal Code with imprisonment for three years or upwards, may be punished with whipping in lieu of any other punishment to which he may be liable under the said Code.

Note.—This section is the same as s. 6 of the Act of 1864 which has been extended to the Hill Tracts within the jurisdiction of the Agent to the Governor in Ganjam.

Amendment of s. 392, Act V of 1898.

7. To s. 392, sub-sec. (2), of the Code of Criminal Procedure, 1898, the words "and in the case of a person under sixteen years of age, it shall not exceed fifteen stripes" shall be added.

Repeals.

8. The enactments mentioned in the schedule are hereby repealed to the extent specified in the fourth column thereof.

THE SCHEDULE

(*See* Section 8)

ENACTMENTS REPEALED

1	2	3	4
Year	No	Subject or Short Title	Extent of Repeal
		Acts of the Governor General in Council	
1864	VI	The Whipping Act 1864	So much as is unrepealed
1895	III	The Indian Criminal Law Amendment Act 1895	Section 5
1898	V	The Code of Criminal Procedure 1898	The words whipping (if specially empowered) in sub-sec (1) and sub-sec (3) of s 32. The words and figures (1) Power to pass sentences of whipping s 32' under the heading Powers with which a Magistrate of the second class may be invested in Schedule IV
1898	XIII	The Burma Laws Act 1898	Section 4 sub-section (3) clause (*b*) and the second schedule
1900	V	The Whipping Act 1900	The whole Act.

APPENDIX IV.

THE REFORMATORY SCHOOLS ACT No VIII OF 1897

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL

(*Received the assent of the Governor General on the 11th March,* 1897

CONTENTS

I—Preliminary

III.—Management of Reformatory Schools.

17. Appointment of Superintendent and Committee of Visitors or Board of Management.
18. Superintendent may license youthful offenders to employers of labours.
19. Cancellation of license.
20. Determination of license.
21. Cancellation of license in case of ill-treatment.
22. Superintendent to be deemed guardian of youthful offenders.
Power to apprentice youthful offender.
23. Duties of Committee of Visitors.
24. Powers of Board of Management.
25. Power to appoint Trustees or other Managers of a School to be a Board of Management.
26. Power of Board to make rules.

IV.—Offences in relation to Reformatory Schools.

27. Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders.
28. Penalty for abetting escape of youthful offender.
29. Arrest of escaped youthful offender.

V.—Miscellaneous.

30. Application of Act XV of 1869 to youthful offenders, detained in Reformatory Schools.
31. Power to deal in other ways with youthful offenders, including girls.
32. Procedure when youthful offender under detention in a Reformatory School is again convicted and sentenced.

AN ACT TO AMEND THE LAW RELATING TO REFORMATORY SCHOOLS AND TO MAKE FURTHER PROVISION FOR DEALING WITH YOUTHFUL OFFENDERS.

Preamble.

WHEREAS it is expedient to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders;

It is hereby encted as follows:—

I.—Preliminary.

Title, commencement and extent.

1. (1) This Act may be called the Reformatory Schools Act, 1897, and

(2) It shall come into force at once.

(3) This section and s. 2 shall extend to the whole of British India. The other sections shall extend in the first instance to the whole of British India, except the territories for the time being administered by the Lieutenant-Governor of the Punjab and Chief Commissioner of Coorg, but either of the said Local Governments may, at any time, by notification in the local *Official Gazette*, extend these sections to their territories from such day as may be fixed in any such notification.

Note.—Extent.—This Act has been declared to be in force in *Upper Burma* (except the Shan States)—Act XIII of 1898; in the *Sonthal Purgannas*, see *Calcutta Gazette*, 1897, Pt. I, p. 1116. The Act was in 1903 extended to *the Punjab*. *See* **1903 Punj. Rec., Pt. II,** p. 20.

Repeal of Act V of 1876.

2. (1) The Reformatory Schools Act, 1876, is hereby repealed.

(2) But all proceedings taken, orders passed, officers appointed or authorised, and rules made under the said Act shall, as far as may be, be deemed to have been respectively passed, appointed or authorised and made, under this Act.

(3) Any enactment or document referring to the said Act shall, as far as may be, be construed to refer to this Act or to the corresponding portion thereof.

Note.—Rules under repealed Act to be followed as far as may be.—Having regard to the provisions of this section, it was *held* in **21 M. 430,** that a Magistrate was bound to follow the rules framed under the old Act (V of 1876) and direct the detention of a juvenile offender until he attains the age of eighteen. The rules under the old Act have to be followed, in so far as they are not inconsistent with the provisions of this Act—*Ibid.,* p. **431.**

Section 399 of Act X of 1882 repealed on date fixed by a notification under s. 1, sub-sec. (3)

3. From the day fixed by any notification issued under s. 1, sub-sec. (3), s. 399 of the Code of Criminal Procedure 1882, shall be repealed in the province to which the notification relates.

Note.—Section 399, Cr. P. C., is in force only in Coorg and it will cease to be in force in that province on the extension of this Act to that province. *See* the newly added sub-sec. (3) to s. 399. *See* **25 C. 333** and **12 M. 94.**

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment, and who, at the time of such conviction, was under the age of fifteen years.*

Note.—*Cf.* s. 5 (*Explanation*) of the *Whipping Act* and *see* **Ratanlal 905.** *See* also Note 5 to s. 8 *infra.*

(*b*) "Inspector-General" includes any officer appointed by the Local Government to perform all or any of the duties imposed by this Act on the Inspector General; and

(*c*) "District Magistrate" shall include a Chief Presidency Magistrate.

II.—Reformatory Schools.

Power to establish and discontinue Reformatory Schools.

5. With the previous sanction of the Governor-General in Council, the Local Government may—

(*a*) establish and maintain Reformatory Schools at such places as it may think fit;

(*b*) use as Reformatory Schools, kept by persons willing to act in conformity with such rules, consistent with this Act, as the Local Government may prescribe in this behalf;

(*c*) direct that any school so established or used shall cease to exist as a Reformatory School or to be used as such.

Note.—Reformatory Schools.—The following have been declared to be Reformatories under this Act:—In BURMA—the Reformatory at *Poungdeh* (*Br. Bur. Gaz.*, p. 340), and at *Insein* (*Br. Bur. Gaz.* 1887, Pt. I, p. 301); in MADRAS—the Reformatory School at *Chingleput* (*Fort St. George Gazette*, 1887, Pt. I, p. 811); in BOMBAY—part of the *Poona City Jail* (*Bombay Gazette*, 1873, Pt. I, p. 98) and *Yerrowda*; in SINDH—the Juvenile Prison at *Shikarpore* for all juvenile offenders sentenced in the Districts of Karachi and Hyderabad (*Sindh Gazette*, 1875, Pt. I, p. 556); in PUNJAB—the Reformatory School at *Delhi*; in the UNITED PROVINCES—the Reformatory School at *Bareilly* (*All. Man.*, p. 309).

Requisites of Schools.

6. Every school so established or used must provide—

(*a*) sufficient means of separating the inmates at night;

(*b*) proper sanitary arrangements, water supply, food, clothing and bedding for the youthful offenders detained therein;

(*c*) the means of giving such youthful offenders industrial training;

(*d*) an infirmary or proper place for the reception of such youthful offenders when sick.

Inspection of Reformatory School.

7. (1) Every school intended to be established or used as a Reformatory School shall, before being used as such, be inspected by the Inspector General and if he finds that the requirements of s. 6 have been complied with and that in his opinion, such school is fitted for the reception of such youthful offenders as may be sent there under this Act he shall certify to that effect and such certificates shall be published in the local *Official Gazette*, together with an order of the Local Government establishing the school as Reformatory School or directing that it shall be used as such, and the school shall thereupon be deemed to be a Reformatory School.

(2) Every such school shall, from time to time, and at least once in every year, be visited by the said Inspector General, who shall send to the Local Government a report on the condition of the school in such form as the Local Government may prescribe.

Power of Court to direct youthful offenders to be sent to Reformatory Schools.

8. (1) Whenever any youthful offender is sentenced to transportation or imprisonment and is in the judgment of the Court by which he is sentenced a proper person to be an inmate of a Reformatory School the Court may, subject to any rules made by the Local Government, direct that instead of undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall be not less than three, or more than seven years.

For the word "fifteen" in section 4, "sixteen" is substituted by Bombay Act XIII of 1924 (The Bombay Children Act.)

(2) The powers so conferred on the Court by this section shall be exercised only by (*a*) the High Court, (*b*) a Court of Sessions, (*c*) a District Magistrate and (*d*) any Magistrate specially empowered by the Local Government in this behalf, and may be exercised by such Courts whether the case comes before them originally or on appeal.

(3) The Local Government may make rules for—

(*a*) defining what youthful offenders should be sent to Reformatory Schools, having regard to the nature of their offences or other considerations, and

(*b*) regulating the periods for which youthful offenders may be sent to such schools according to their ages or other considerations.

Notes.—1. Rules.—For the rules regulating the period for which youthful offenders may be sent to Reformatories, *see* as to BENGAL—*Calcutta Gazette*, 1899, Pt. I, p. 226; BOMBAY—List of Local Rules, Edition 1896, Vol. I., p. 160; CENTRAL PROVINCES—List of Local Rules and Orders, Edition 1796, p. 23; BURMA—*Burma Gazette*, 1897, Pt. I., p. 307; MADRAS—List of Local Rules and Orders, Edition 1903, Vol. I, p. 147; N.-W. PROVINCES—See *N.-W.P. Gazette*, *30th July*, 1897, Pt. VI, p. 167. *See* pp. xlii and xliii, *infra*.

2. **Contents of the Order.**—The language of this and s. 9 shows that in all cases of conviction, a sentence must first be passed and then a direction given according to this section. **1 Bom. L. R. 162.** In **24 M. 18** at pp. **15-16** SHEPHARD, J., remarked that—"As a general rule, it is clearly the duty of a Magistrate when pronouncing a sentence, to define precisely the nature of the sentence intended. Generally the sentence, like the decree in a civil case, I apprehend, to be self-contained, so that the functionary who has to execute it should have nothing more to do, but to obey the directions given without making any inquiry on his own account. There are no words in the Act, that I can find, to indicate that a Magistrate acting under this section is not to proceed in accordance with this principle." *See* also **15 A. 208.**

3. **Clear finding as to age necessary.**—A Session Judge cannot pass an order for detention of the prisoner in a Reformatory in supersession of the order for imprisonment, without taking evidence as to his age as required by s. 11. **4 C. W. N. 225.** In order that a Magistrate may have jurisdiction under the Act, it is necessary that the offender should be under 15 years of age at the time of conviction and the Magistrate must on inquiry be satisfied on this point. **Weir I, 879.** Where there is no clear finding as to the age of the offender the High Court might interfere with such an order as one made without jurisdiction, either in appeal or in revison, **21 A. 391 (F.B.)**

4. **Sentence of transportation or imprisonment condition precedent to detention.**—In the absence of a sentence of transportation or imprisonment, an order directing that an offender be sent to the Reformatory School is illegal. **Weir I, 878** and **879**; *see* also **5 C. W. N. 210; Ratanlal, 726; 34 P. R. 1910 = 12 Cr. L. J. 56,** and **4 Bur. L. T. 69 = 12 Cr. L. J. 244.** In the case of a juvenile offender whom it is desirable to send to a Reformatory, a Magistrate must on convicting him sentence him according to law, and if he sentences him to imprisonment, whether rigorous or simple, he may then make a further order, such as is contemplated in this section. **Ratanlal 518.** When the accused was only bound over to keep the peace, and in default of furnishing sureties was ordered to be imprisoned, such an order is not a sentence of imprisonment or transportation, instead of which he may be detained in a Reformatory. **7 Bur. L. R. 80.**

5. **Order of detention not a sentence within meaning of the Act.**—Sections 8, 10 and 30 of this Act make a distinction between an order for detention and a sentence. Such an order is not included among punishments in s. 53, I.P.C. A Session Judge cannot therefore prevent the carrying out of the order for detention by suspending the sentence pending the disposal of the appeal before him. **6. Cr. L. J. 134 (M.)**

6. **Who may be sent to a Reformatory School.**—It is not every boy that is convicted that can be sent to a Reformatory School, but only such as are found to be proper persons to be the inmates of such a school. As a rule, no boy should be sent to the school on a first conviction, unless there be reasonable cause for supposing that he is likely to lapse into crime. **Weir I, 878** at p. **879.** A youthful offender convicted of murder and sentenced to transportation for life, is eligible for despatch to a Reformatory School. But he should not ordinarily be sent to it where, *e.g.*, the conduct of the accused argued great depravity. **4 N. L. R. 180 = 9 Cr L. J. 99.** *See* also **Ratanlal 726,** where it was *held* that the inmates of the school ought not to be obliged to associate with a person convicted of a serious offence, such as *rape*. In **A. I. R. (1924) Rang. 16** it was laid down that under s. 4 of this Act a boy ceases to be a youthful offender at the age of 15, therefore it is illegal to order detention of a boy of 16. The section is too clear to require any authority.

7. Minimum period of detention to be three years—Where a juvenile offender (14 years old) was convicted of the offences of house-breaking and theft in a building (ss 454 and 380, I P C), and sentenced to one year's rigorous imprisonment for each offence and in lieu of undergoing the imprisonment, directed to be detained in the Reformatory for a period of two years, *held* that the order was illegal, being contrary to the provisions of sub-sec (1) of this section **Ratanlal 947; 25 C. 333.**

8. Magistrate specially empowered.—All Presidenc ** exercise the powers conferred by this section —*G O No* Magistrate not specially empowered, directing the detent is liable to be set aside by the High Court as illegal **Ratanlal 947 and 936.**

9. Rules defining what youthful offenders should be sent to the Reformatory School, etc.—(A) Bengal Rules.—(1) Youthful offenders whom the Court or the District Magistrate, as the case may be does not think fit to discharge after due admonition, or to deliver to their parents, guardians or nearest adult relatives on the execution of a bond for good behaviour, under s 31 of the Act, should, subject to the next following rule, be sent to a Reformatory School, if they are convicted of offences against property, or any other offences showing dishonesty or depravity, (*a*) in all cases, when they have been previously convicted of any such offence and (*b*) on first conviction, when a chief term of imprisonment is considered an undesirable and inadequate punishment, or they are without proper parental or other control, or there is reasonable cause for supposing that they are being trained to, or are likely to, relapse into crime

(2) Youthful offenders should not be sent to a Reformatory School when they are convicted of an unnatural offence, or have, on previous conviction undergone imprisonment in a jail for more than six months, or are seriously deformed or of weak intellect or subject to epileptic fits or other well marked nervous disease

(3) Youthful offenders should be sent to a Reformatory School for not less than seven years when they are under eleven years of age, and for not less than five years when they are over that age unless in the latter case, they shall attain earlier the age of eighteen

(4) The foregoing rules shall not, however, debar the authorities having the control and management of a Reformatory School, from recommending to the Government the discharge, under the provisions of s 14 of the Act, of any youthful offender who, in their opinion, may safely and with advantage to himself be released before the expiry of the full term for which he was sent to Reformatory School—*Calcutta Gazette*, 1899, p 226

(B) Madras and Bombay Rules.—No boy shall be sent to the Reformatory School, if under ten years of age for a less period than seven years, if over ten years of age for a less period than five years unless he shall sooner attain the age of eighteen years—*Fort St George Gazette*, 1887, Pt. I, p 580 *Bombay Gazette*, 1890, Pt I, p 758 For effect of Government Notification *see* **24 M. 13** and **Weir I, 834.**

(C) Punjab Rules.—I It should be noted that the only Courts empowered to direct youthful offenders to be sent to the Reformatory School are —(*a*) the Chief Court, (*b*) the Court of Sessions, (*c*) a District Magistrate and (*d*) any Magistrate specially empowerd by the Local Government in this behalf Local Government do not at present propose to specially empower any other Magistrates, but any Magistrate who has not been so empowered may under s 9 of the Act refer the case of any youthful offender to the District Magistrate to whom he is subordinate, and all Magistrates should do so in suitable cases.

II A youthful offender is defined as meaning any boy who has been convicted of any offence punishable with transportation or imprisonment, and who at the time of such conviction was under the age of fifteen years, and it is incumbent on all Courts and Magistrates dealing with cases of youthful offenders whether specially empowered or not, to make a preliminary inquiry and to record a finding as to the age of the offender In taking the medical evidence mentioned in paragraph IV (*a*) of this Circular, the opinion of the medical officer as to the age of the boy should invariably be recorded

III Under Punjab Government *Notification No* 427A, dated the 2nd October, 1903, a Court or Magistrate convicting any youthful offender of any of the offences noted below *must* send the offender to the Reformatory School, provided such Court or Magistrate is of opinion that the offender should not be—(*a*) whipped, or (*b*) dealt with under s 562 of the Code of Criminal Procedure, or (*c*) dealt with under s 31 of the Reformatory Schools Act, the provisions of which are very similar to those of s 562 of the Code of Criminal Procedure

It will be observed that this gives Courts and Magistrates no discretion: they must either sentence every youthful offender, upon conviction of one of the specified offences to be whipped, or must deal with him under s. 562 of the Code of Criminal Procedure or under s. 31 of the Reformatory Schools Act. If the Court or Magistrate is of opinion that the youthful offender cannot be adequately dealt with in any of these three ways such Court or Magistrate has no option but to send the offender to the Reformatory School.

List of offences specified, (1) Chapter XII; Chapter XVI, except ss. 302, 303, 304, 307, 308, 311 to 318 (inclusive), 328, 354, 367, 372, 373, 376 and 377; Chapter XVII, except ss. 384 to 389 (inclusive), 395 to 402 (inclusive), and 413 and Chapter XXII of the Indian Penal Code;

(2) section 19 (1) *of the Criminal Tribes Act* XXVII of 1871, or

(3) any abetment or attempt in connection with any such offence as above detailed.

IV. It should be borne in mind that before recording an order directing the detention of a boy in the Reformatory School, Courts and Magistrates should satisfy themselves—

(*a*) after taking medical evidence that he is not blind, insane, idiot, leprous, tuberculous, epileptic or suffering from any permanent physical incapacity for industrial employment, or

(*b*) that he has not been twice previously convicted and sentenced for any offence under Chapter XII or Chapter XVII of the Indian Penal Code. Two or even more previous convictions under other Chapters of the Indian Penal Code do not in themselves render a boy inadmissible to the Reformatory School, provided that the aggregate amount of imprisonment undergone does not exceed three months, or

(*c*) that he has not been previously convicted under s. 377 of the Indian Penal Code, or

(*d*) that he has not undergone detention in jail for a period or periods amounting in all to three months.

A youthful offender with any of these disqualifications will not be admitted into the Reformatory School, and Courts or Magistrates must deal with such an offender in the ordinary course under the Indian Penal Code, or under s. 562 of the Code of Criminal Procedure.

These rules will, it is hoped, secure as inmates of the Reformatory School casual criminals and first offenders capable of reformation, and will exclude the corrupting influence of incorrigible offenders, and of boys who have already learnt the evil that can be learnt in jail.

V. Section 8, sub-sec. (1) of the Reformatory Schools Act prescribes the period for which Magistrates must order detention in the Reformatory School. This period cannot be less than three or more than seven years. This section should be read in connection with Punjab Government Notification No. 427B, dated the 2nd October, 1903, which further limit the Magistrate's discretion as to the period of detention he can order. It should, nevertheless, be borne in mind that a boy ordered to be detained in the Reformatory School for seven years will not necessarily be kept in the school for so long. He will in any case, be discharged when he attains the age of 18 years. Besides, this Local Government has discretion to order any youthful offender to be discharged at any time, and the Superintendent of the Reformatory School may license youthful offenders to employers of labour, and may also apprentice any licensed youthful offender, under certain conditions, and on being so apprenticed the youthful offender shall be discharged from the Reformatory School, the unexpired term of his sentence being cancelled.

VI. Besides the case of youthful offenders convicted by a Court or Magistrate of one of the offences specified (*vide* list subjoined to paragraph III of this circular), s. 10 of the Reformatory Schools Act contemplated another case in which detention in the Reformatory School may be directed. This section gives the Superintendent of a jail power to produce before the District Magistrate any boy who is under the age of 15 years. In deciding whether any youthful offender brought to his notice in this manner should be sent to the Reformatory School, the District Magistrate will, of course, be guided by the rules made by the Local Government under s. 8, sub-sec. (3), clause (*a*) of the Reformatory Schools Act, published as Punjab Government Notification No. 427A, dated the 2nd October, 1903. Should the District Magistrate consider that the youthful offender, though not admissible to the Reformatory under those rules, is a proper person to be an inmate of the school, he must refer the case to the Local Government.

VII. Magistrates should make free use of the provisions of the Whipping Act of s. 562 of the Code of Criminal Procedure, and of s. 31 of the Reformatory Schools Act, in dealing with boys,—and should refrain from sending boys to the Reformatory School in cases where they can be suitably dealt with under the foregoing provisions of the law. Boys sentenced to whipping and found unfit for it should be sent to the Reformatory School and not to jail.

VIII Under the rules made by the Local Government for the classification separation and daily employment of youthful offenders boys detained in a Reformatory School will be classed in two divisions a *senior* and a junior, and each division will be sub-divided into two sub-divisions A and B The senior division will consist of boys above 14 and the junior division of boys under 14 years of age. Sub-division A will contain boys not in sub-division B and sub-division B will contain (1) boys who by reason of previous offences whether the subject of criminal prosecution or not or of the character of their offence or the circumstances under which it was committed (offences against morals and serious or organised offences whether against property or against the person) appear to have marked criminal propensities (2) boys who have been in jail except those sent to jail under the *proviso* to s 12 of the Reformatory Schools Act temporarily *i e* detained in jail for want of accommodation in the Reformatory School (3) boys whose parents are habituals criminals and boys who have been subjected to family influences and surroundings which are likely to prejudice to a life of crime In directing the detention of a boy in the Reformatory School Magistrates should with reference to this rule record their opinion as to the sub-division in which the boy should be placed while under the detention.

IX When a Magistrate orders a boy to be detained in the Reformatory School he should by telegram ascertain from the Superintendent thereof whether accommodation is available If there is accommodation the boy should be sent at once to the school otherwise he should be sent to the jail prescribed by the Local Government in Notification No 426 dated 2nd October 1903 and the Superintendent of the Reformatory School should be informed of the jail to which he is sent or to which he may thereafter be transferred.

X The Honourable the Judges trust that the foregoing instructions will be observed strictly Appellate, Revisional and Controlling Courts are specially enjoined to keep a watchful eye on Subordinate Courts and should report to this Court any Magistrate who disregards these instructions. **1903 Punj Rec Pt II,** pp 20 to 23

For **Forms of warrants** of commitment to a Reformatory prescribed in the Punjab *see* **1903 Punj Rec, Executive No. 2,** pp 4 to 6

(D) Burma Rules.—

If (*a*) either of the youthful offender's parents is a habitual criminal or

(*b*) the youthful offender is destitute or

(*c*) circumstances under which the youthful offender is convicted indicated a general corruption of moral character or

(*d*) the youthful offender having been once previously convicted is again convicted of a similar offence then the period for which he may be sent to a Reformatory School shall not be less than

(i) if he is not over ten years of age seven years

(ii) if he is not over ten and not over thirteen years of age five years

(iii) if he is over thirteen years of age such period as may bring him to the age of eighteen

The period for which a youthful offender whose case does not fall within the above rule may be sent to a Reformatory School shall not be less than (i) if he is over ten years of age five years,

(ii) if he is over thirteen years of age three years—*Burma Gazette* 1897 Pt I, p 301

(E) United Provinces Rules.—

(1) No person may be ordered to be detained in a Reformatory School unless

(*a*) he is a male

(*b*) he is under the age of fifteen years

(*c*) he is convicted of an offence (as defined in the General Clauses Act 1897 s 3 (37) punishable with transportation or imprisonment

(*d*) he is actually sentenced to transportation or imprisonment and

(*e*) he is of a class declared by the rules made by Government, under s 8 (3) suitable for Reformatory treatment

(2) Before ordering detention in a Reformatory School, the Court must pass a substantive sentence of transportation or imprisonment, and such sentence should in view of s. 12, Act VIII of 1897, not be a nominal but an adequate punishment for the offence. The Court has no power to direct detention in Reformatory School either without a substantive sentence of transportation or imprisonment or in addition to such a sentence, but must order that the offender, instead of undergoing a sentence imposed; shall be detained in the Reformatory School.

(3) The period for which the Court may order the detention in a Reformatory School of youthful offenders admissible under the Act and rules, must not be less than three years, nor more than seven years. The following table shows the period of detention in the case of boys between the ages of nine and fourteen who alone should, as a rule, be sent to the Reformatory School:—

Age of youthful offender.	Period of detention.
9 years ...	... Seven years
10 do. ...	... Not less than five years and not more than seven years.
11 do. ...	... Do. do. do. do.
12 do. ...	... Not less than five years and not more than six years.
13 do. ...	... Five years.
14 do. ...	... Four years.

(1) The most proper subjects for Reformatory treatment are those who are without proper parental or other control, and who have committed an offence or offences against property.

(2) As a rule, no boy should be sent to a Reformatory School, on a first conviction, unless there is reasonable cause for supposing that he is being trained up to, or likely again to lapse into crime

(3) As a rule, it is not desirable to send boys to a Reformatory School before they have completed their ninth, or after they have completed their fourteenth years of age.

(4) No boy belonging to any of the undermentioned tribes, whether such tribes, have or have not been formally proclaimed in these provinces under the Criminal Tribes Act, 1871, should be sent to a Reformatory School. The tribes are—Aheriahs, Beriahs, Bauriahs, Barwars, Bhutus, Daleras, Doms, Haburahs, Kanjars, Nats, Sanariahs, Sansiahs.

Other boys who appear to be habitual offenders should be sent (if at all) at an early stage in their career, being less amenable to reforming influences as they approach the age of 15.

(5) No boy should be sent to a Reformatory School who has been convicted of an unnatural offence or whose antecedents afford reasonable grounds for assuming habitual immorality.

(6) A youthful offender convicted of murder should not ordinarily be sent to a Reformatory School. All. Man., p. 311; *N.-W.P. Gazette*, 30th July, 1897, Pt. VI., pp. 167-168.

(F) **Assam Rules.**—

Rule I.—No boy shall be sent to a Reformatory School on a first conviction (except as provided in Rule III), if under ten years of age, for a less period than five years; if over ten, for a less period than three years, unless he shall sooner attain the age of 18.

Rule II.—On a subsequent conviction for a similar offence, a boy under ten years of age shall not be sent to a Reformatory School for a less period than seven years; if over ten, for a less period than five years, unless he shall sooner attain the age of 18.

Rule III.—A first conviction may bring a boy under Rule II—

(1) if he belongs to a criminal tribe within the meaning of Act XXVII of 1871, s. 2;

(2) if either of his parents is a habitual criminal;

(3) if he is destitute, and

(4) if the offence of which he is convicted is one arguing great depravity—*Gazette of India*, 1895, Pt. I, p. 507; *Assam Gazette*, 1895, Pt. III, p. 840.

10. **Power to make rules.**—Under s 22 of the old Act, the power to make rules was vested *in the* Governor General in Council while sub-sec. (3) of this section confers such power on the Local Governments The Madras Government in an order (G O No 934 Judicial, dated 23rd July 1897), has observed that the operation of the rules framed by the Government of India has been saved by sub-sec. (2) to s 2 *supra* and has decided that it is necessary to frame new rules **21 M 430** at p **431**

Procedure where Magistrate is not empowered to pass an order under s 8

9. (1) When any Magistrate not empowered to pass an order under the last foregoing section is of opinion that a youthful offender convicted by him is a proper person to be an inmate of a Reformatory School he may without passing sentence, record such opinion and submit his proceedings and forward the youthful offender to the District Magistrate to whom he is subordinate

(2) The Magistrate to whom the proceedings are so submitted may make such further inquiry (if any) as he may think fit and pass such sentence and order for the detention in a Reformatory School of the youthful offender, or otherwise, as he might have passed if such youthful offender had been originally tried by him

Notes —1. Superior Magistrate must first pass sentence —On a conviction for a theft a youthful offender was forwarded by a third-class Magistrate to the District magistrate as a proper person to be an inmate of a Reformatory School The District Magistrate without passing any sentence ordered the accused to be detained in a Reformatory School *Held* that the language of ss. 8 and 9 shows that a sentence must first, in all cases of conviction be passed and then a direction given that instead of undergoing the sentence the youthful offender shall be sent to a Reformatory School **1 Bom L. R. 162.** *See* also **15 Cr L. J. 32 (M)** and Note 4 to s. 8 above

2. Period of detention must be fixed —A District Magistrate before whom the case of a youthful offender came under this section found him to be thirteen years old and on sentencing him to six months' rigorous imprisonment directed that in lieu of the imprisonment awarded he should be detained in a Reformatory for five years *unless he should* attain the age of eighteen years at an earlier date *Held* that the order was wrong inasmuch as it failed to fix the exact period of detention **24 M 13** Following this case it was *held* in **15 Bom. L R 205=14 Cr. L. J 256,** that fixing an alternative period of time or until he attains the age of eighteen years' to an order directing a youthful offender to be detained in a Reformatory School was objectionable Consequently those words were deleted leaving only the period of five years as the exact period for which the boy was to be detained in the Reformatory

3. Superior Magistrate cannot transfer case submitted —A District Magistrate to whom a case was submitted transferred the case to a Sub-divisional Magistrate who passed orders under this section, *held* that the orders of the District Magistrate and Sub-divisional Magistrate were illegal **2 L. B. R. (1903-4) 121.**

Power of Magistrates to direct boys under fifteen sentenced to imprisonment to be sent to Reformatory Schools

10. The officer in charge of a prison in which a youthful offender is confined in execution of a sentence of imprisonment may bring him if he has not then attained the age of *fifteen years,* before the District Magistrate within whose jurisdiction such prison is situate, and such Magistrate may, if such youthful offender appears to be a proper person to be an inmate of a Reformatory School direct that instead of undergoing the residue of his sentence, he shall be sent to a Reformatory School, and there detained for a period which shall be subject to the same limitations as are prescribed by or under s 8, with reference to the period of detention thereby authorised

Notes.—1. Exact age must be ascertained.—A Magistrate acting under this section is bound to ascertain the age of the juvenile offender and in accordance with that finding direct his confinement in a *Reformatory School* *It is not sufficient* for the Magistrate merely to find that the prisoner is under a particular age **14 B. 381.** *See* also **25 C 333** at p **340 , 24 M. 13.**

2. Proceedings of Magistrate judicial —The order of a Magistrate under this section is not an executive act, but a judicial proceeding and the High Court has jurisdiction to revise it. Under s **11,** *infra* the Magistrate has to take evidence as to the age of the prisoner and as his proceedings is clearly a judicial proceedings involve the alteration of a sentence after the due exercise of a judicial discretion, such proceeding within the scope of ss 4 and 435 Cr P C **14 B. 381; Ratanlal 494.** It is doubtful whether it is a *case* within the meaning of s 28 of the Letters Patent. **14 B 388** at p **383** *See* Notes 4—6 to s 16 *infra*

8. **Procedure for Magistrate desiring to commute sentence of offender in jail to detention.**—A District Magistrate who is of opinion that any juvenile offender in jail undergoing a sentence of imprisonment should be sent to a Reformatory, he should communicate with the officer in charge of the jail and request him to send the offender to be dealt with under this section. If his request is not complied with, the matter must be brought to the notice of the Inspector-General of Prisons or before Government. **Bom. H. C. Cr. Rulings 55 of 1889.**

Preliminary inquiry and finding as to age of youthful offender.

11. (1) Before directing any youthful offender to be sent to a Reformatory School under ss. 8, 9 or 10, the Court or Magistrate shall inquire into the question of his age, and, after taking such evidence (if any) as may be deemed necessary, shall record a finding thereon, stating his age as nearly as may be.

(2) A similar inquiry shall be made and finding recorded by every Magistrate not empowered to pass an order under s. 8, before submitting his proceedings and forwarding the youthful offender to the District Magistrate as required by s. 9, sub-sec. (1).

Note.—Clear finding as to age necessary.—Before an order for detention in a Reformatory School can be passed in lieu of a sentence of imprisonment, there should be a definite finding as to the age of the accused and as to his being a fit subject for a Reformatory School. **8 C. W. N. 576.** *See* also **Weir I, 879; 14 B. 381; Ratanlal 725; 25 C. 333,** and *see* Note 3 to s. 8, and Note 1 to s. 10 above. It is generally desirable that, when it is procurable, there should be some reliable evidence as to the age of the accused, especially when it may be necessary to determine the period of the detention which is limited to his attaining eighteen years of age, **27 C. 133.** *See* also **11 C. W. N. XI.** "In some cases it is not necessary to ascertain the exact age of the prisoner boy. So long as he is not over fifteen, the Magistrate may rightly fix a period of three years, or if the boy is not over eleven, he may safely fix a period of seven years, without further inquiry. But if inquiry is necessary in order to fix the period as it would be when the boy is over eleven and the Magistrate wishes to make the period as long as possible, then the Magistrate must find as well as he can, the exact age of the boy and he is not at liberty to leave the decision of the question to the Reformatory officials." *Per* SHEPHARD, J. **24 M. 18** at p. **16; 8 Rang. 218.**

Government to determine Reformatory School to which such offenders shall be sent.

12. Every youthful offender directed by a Court or Magistrate to be sent to a Reformatory School shall be sent to such Reformatory School as the Local Government may, by general or special order, appoint for the reception of youthful offenders, so dealt with by such Court or Magistrate:

Provided that, if accommodation in a Reformatory School is not immediately available for such youthful offender, he may be detained in the juvenile ward or such other suitable part of a prison as the Local Government may direct—

(*a*) until he can be sent to a Reformatory School, or

(*b*) until the term of his original sentence expires,

whichever event may first happen. Should the term of his original sentence first expire, he shall thereupon be released; but should he be sent to a Reformatory School then the period of detention previously undergone shall be treated as detention in a Reformatory School.

Persons found to be over eighteen years not to be detained in Reformatory Schools.

13. (1) If at any time after a youthful offender has been sent to a Reformatory School it appears to the Committee of Visitors of Board of Management, as the case may be, that the age of such youthful offender has been understated in the order for detention and that he will attain the age of eighteen years before the expiration of the period for which he has been ordered to be detained, they shall report the case for the orders of the Local Government.

(2) No person shall be detained in a Reformatory School after he has been found by the Local Government to have attained the age of eighteen years.

Discharge or removal by order of Government.

14. The Local Government may, at any time, order any youthful offender—

(*a*) to be discharged from a Reformatory School;

(*b*) to be removed from one Reformatory School to another such school situate within the territories subject to such Government: Provided that the whole period of his detention in a Reformatory School shall not be increased by such removal.

Power to Governor General in Council to direct use of Reformatories in one province for reception of youthful offenders from another

15. (1) The Governor General in Council may by general or special order direct that any Reformatory School situated in one province shall be available for the reception of youthful offenders directed to be sent to any Reformatory School by any Court or Magistrate in any other province

(2) Any such order may also provide for the removal of the youthful offender and the cost of his maintenance, and may give any such further directions as may be necessary

Note —In sub-sec (1) of this section for the words one province' and 'any other province respectively the words 'British India and the Hyderabad Assigned Districts the Hyderabad Residency Bazaars the Cantonment of Secunderabad Hyderabad Cantonment stations of Aurangabad Bolarum Hingoli Jalna Mominabad and Raichur, and the railway lands in the territories of His Highness the Nizam (other than the railway lands referred to in the Notification of the Government of India in the Foreign Department No 4564 I dated the 18th November 1891 and No 3244 I B dated the 26th August, 1897), shall be substituted. **3 C. W. N. XVI**—*Government of India Notification No 2773-I B*

16. Nothing contained in the Code of Criminal Procedure 1882 (now 1898) shall be construed to authorise any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

Certain orders not subject to appeal or revision

Notes—**1. Section, how to be construed** — This section is not well drawn up but apart from obvious verbal criticisms its object is clear enough It does not exclude the exercise of appellate or revisional jurisdiction under Cr P C in all cases where the subordinate Court has ordered an offender to be detained in a Reformatory School The exclusion is limited to two specific matters in regard to which the Legislature considered the Court trying a youthful offender better placed in arriving at a sound conclusion than an Appellate or Revisional Court. *First* of these is the age of the youthful offender a finding on which is under s. II a necessary condition precedent to every order for detention in a Reformatory School and which might often be difficult to determine and in determining which a subordinate Court which saw the offender would have considerable advantage over a superior Court which did not. *Second is the substitution of an order for detention in a Reformatory School for transportation or imprisonment* These words are not very general and if read in the absolute literalness would protect the most illegal orders substituting detention for imprisonment from any sort of interference So to read them would I think defeat the plain intention of the Legislature ***It appears to me that they refer only to the propriety or suitableness of such substitution in the particular case, having regard to all circumstances*** They do not include the legality of the substitution directed or the competency of the Court or Magistrate to direct it. The Legislature may well have thought that upon the question whether the offender would benefit by detention in a Reformatory School or whether under the circumstances imprisonment would be more suitable as well as upon the question of age the Court having the youthful offender before it and observing his appearance and demeanour would be more likely to be right than a superior Court not having that advantage But there the advantage ends This section cannot have been intended to enable the most Junior Magistrate in the country to make at pleasure orders substituting detention in a Reformatory School for imprisonment in any case whatever for prisoners of any age or class or either sex for any period of time in absolute disregard of the Act without the possibility of correction If this view is right the words in this section protecting from appellate or revisional interference the substitution of an order

read with absolute literaless

9 or 10 not orders made

substitution within the meaning of these sections then s 16 applies and the order cannot be altered or reversed in appeal or revision If it is not an order for substitution within the meaning of these sections then s 16 does not apply and it may be altered or reversed like any other illegal order I do not think that this construction does violence to the terms of this section. It cannot be said that the section is unambiguous but in such a case we are at liberty to put on it a construction in accordance with the intention of the Legislature —*Per* STRACHEY, C J in **21 A 331** at pp **395 396**, referring to *Caledonian Railway Company v North British Railway Company* (**1881**) **L R. 6 App Case 114**, *ex parte Bradlaugh* (**1878**) **L R 3 Q B D 509**, and the *Colonial Bank of Australasia v Willan* (**1874**) **L. R 5 P. C. 417** on the question of construction.

2 Order of detention without conviction illegal.—**In 20 A. 160**, the High Court intefered in revision with a Magisterial order directing the detention of the petitioner in a Reformatory School when the petitioner had not been convicted of any offence and had not been sentenced to any term of imprisonment or transportation for which alone detention in a Reformatory could be substituted

3. **There should be reliable evidence of the age of accused.**—In **27 C. 133**, at p. 136, PRINSEP and HILL, JJ., observed:—"We do not desire to be understood as holding that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender within the definition given in the Act, but we think that it is generally desirable that when it is procurable, there should be some reliable evidence on the point, and especially when it may be necessary to determine the period of detention which is limited to his attaining eighteen years of age."

4. **Revision and appeal.**—This section only precludes interference of a superior Court with the original Court's order so far as it (*a*) determines the age of a youthful offender, or (*b*) directs the substitution of detention in a Reformatory School for transportation or imprisonment, where such detention is not made without jurisdiction, or is not otherwise illegal, having regard to the provisions of the Act. **21 A. 391 (F.B.)**, *overruling* **20 A. 158** and *ibid.* **159** where it was *held* that the High Court was in no case competent to interfere in appeal or revision with an order for detention in a Reformatory School passed in substitution for transportation or imprisonment, even though the order is made without jurisdiction or is otherwise illegal. *See* also **20 A. 160; 1 Bom. L. R. 162; 6 Bom. L. R. 550; 21 M. 430; 25 C. 333; 6 P. R. 1882.** It does not affect the jurisdiction of the High Court to consider in revision the legality, etc., of sentence or conviction. **5 C. W. N. 210.** See *ibid.* **211; 2 P. R. 1908 = 7 Cr. L. J. 279; 11 C. W. N. XI.**

5. **High Court may consider propriety or legality of any sentence.**—In **28 C. 423**, it was *held* that the power of the High Court remains intact to consider the propriety or legality of any sentence passed upon a juvenile offender. Cancelling therefore an order of detention for four years, the High Court directed the youthful offender to be whipped by way of discipline. *See* also **5 C. W. N. 210; 18 P. R. 1907 = 43 P. W. R. 1907,** and **5 S. L. R. 173.** *See*, however, **3 C. W. N. 576; 25 Cr. L. J. 1312.**

6. **What orders may be revised.**—(*a*) Orders of detention of offenders belonging to classes or tribes exempted by the rules. **21 A. 391; 21 C. 133.** (*b*) Order directing a person bound over to furnish security to keep the peace or in default to be imprisoned. **7 Bur. L. R. 80.** (*c*) Order directing detention without passing proper sentence of transportation or imprisonment. **20 A. 160; 27 C. 133; 28 C. 423; 5 C. W. N. 210.** (*d*) Orders containing no clear finding as to age. **24 M. 13; 27 C. 133.** (*e*) Orders of Magistrates not specially empowered. **Ratanlal 936; 12 M. 94.** (*f*) Orders directing less than the minimum period of detention.

III.—Management of Reformatory Schools.

Appointment of Superintendent and Committee of Visitors or Board of Management.

17. (1) For the control and management of every Reformatory School, the Local Government shall appoint either (*a*) Superintendent and a Committee of Visitors, or (*b*) a Board of Management.

(2) Every Committee and every Board so appointed must consist of not less than five persons, of whom two at least shall be natives of India.

(3) The Local Government may suspend or remove any Superintendent or any Member of a Committee or Board so appointed.

Superintendent may license youthful offenders to employers of labour.

18. (1) Every Superintendent so appointed may, with the sanction of the Committee, by license under his hand permit any youthful offender sent to a Reformatory School, who has attained the age of fourteen years, to live under the charge of any trustworthy and respectable person named in the license, or any officer of Government or of a Municipality, being an employer of labour and willing to receive and take charge of him, on the condition that the employer shall keep such youthful offender employed at some trade, occupation or calling.

(2) The license shall be in force for three months and no longer, but may, at any time and from time to time until the expiration of the period for which the youthful offender has been directed to be detained, be renewed, for three months at a time.

Cancellation of license.

19. The license shall be cancelled at the desire of the employer named in the license.

Determination of license.

20. If during the term of the license the employer named therein dies, or ceases from business or to employ labour, or the period for which the youthful offender has been directed to be detained in the Reformatory School expires, the license shall thereupon cease and determine.

Cancellation of license in case of ill-treatment.

21. If it appears to the Superintendent that the employer has ill-treated the youthful offender, or has not adequately provided for his lodging and maintenance, the Superintendent may cancel the license.

Superintendent to be deemed guardian of youthful offenders.

22 (1) The Superintendent of a Reformatory School shall be deemed to be the guardian of every youthful offender detained in such school within the meaning of Act XIX of 1850 (*concerning the binding of apprentices*)

Power to apprentice youthful offender

(2) If it appears to the Superintendent that any youthful offender licensed under s 18 has behaved well during one or more periods of his license the Superintendent may with the sanction of the Committee apprentice him under the provisions of the said Act and on such apprenticement the right to detain such youthful offender in a Reformatory the unexpired term (if any) of his sentence shall be cancelled

Note.—Act XIX of 1850 is an Act for better enabling children and specially orphans and poor children brought up by public charity to learn trades crafts and employments by which when they come to full age they may gain a livelihood

Duties of Committee of Visitors.

23. (1) Every Committee of Visitors appointed under s 17 for a Reformatory School shall at least once in every month—

(*a*) visit the school to hear complaints and see that the requirement of s 6 have been complied with and that the management of the school is proper in all respects

(*b*) examine the punishment book

(*c*) bring any special cases to the notice of the Inspector General and

(*d*) see that no person is illegally detained in the school.

(2) If any member of a Committee of Visitors so appointed fails or neglects during a period of six consecutive months to visit the school and assist in the discharge of the duties aforesaid he shall cease to be a member of such Committee.

Powers of Board of Management

24. If in exercise of the power conferred by s 17 the Local Government appoints a Board of Management for any Reformatory School such Board shall have the powers and perform the functions of the Superintendent under ss 18 to 22 both inclusive and the license mentioned in s 18 may be under the hand of their Chairman and they shall be deemed to be the guardians of the youthful offenders detained in such school.

Power to appoint Trustees or other Managers of a School to be a Board of Management

25. The Local Government may declare any body of Trustees or Managers of a School who are willing to act in conformity with the rules referred to in s 5 clause (*b*) to be a Board of Management under this Act and thereupon such body or Managers shall have all the powers and perform all the functions of such Board of Management

Power of Board to make rules

26. (1) With the previous sanction of the Local Government every Board of Management of a Reformatory School may from time to time make rules consistent with this Act—

(I) to prescribe the articles which are to be deemed to be prohibited articles and

(II) to regulate—

(*a*) the conduct of business of the Board

(*b*) the management of the school

(*c*) the education and industrial training of youthful offenders,

(*d*) visits to and communication with youthful offenders

(*e*) the terms and conditions under which any articles declared by the Board to be prohibited articles may be introduced into or removed out of the school

(*f*) the manner in which such articles are to be removed when introduced without due authority,

(*g*) the conditions and limitations under which such articles may be supplied outside the school to any youthful offender under order of detention therein

(*h*) the conditions on which the possession by any such youthful offender of such articles may be sanctioned

(*i*) the penalties to be imposed for the supply or possession of such articles when supplied or possessed without due authority,

(*j*) the punishment of offences committed by youthful offenders and

(*k*) the granting of licenses for the employment of youthful offenders.

(2) In the absence of a Board of Management the Local Government may make rules consistent with this Act to regulate for any Reformatory School the matters mentioned in any clause of sub-sec. (1), other than clause (II) (*a*), and also the mode in which the Committee of Visitors shall conduct their business.

Note.—For rules relating to the constitution and working of the Reformatory School at *Chingleput*, see *Fort St. George Gazette*, 1898, Pt. I-B., p. 572, and for later amendments of these rules, *G.O. No.* 245, *Educational, dated 25th April*, 1902; *G.O. No.* 150, *Educational, dated 13th March*, 1900, *and G.O. No.* 413, *Educational, dated 1st August*, 1900.

IV.—Offences in relation to Reformatory Schools.

Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders.

27. Whoever, contrary to any rule made under s. 26, introduces or removes or attempts by any means whatever to introduce or remove into or from any Reformatory School, or supplies or attempts to supply outside the limits of any Reformatory School to any youthful offender under order of detention therein, any prohibited article, and every officer or person in charge of a Reformatory School who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any Reformatory School, to be possessed by any youthful offender detained therein, or to be supplied to any such youthful offender outside its limits,

and whoever, contrary to any such rule, communicates or attempts to communicate with any such youthful offender,

and whoever abets any offence made punishable under this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both.

Penalty for abetting escape of youthful offenders

28. Whoever abets an escape, or an attempt to escape, on the part of a youthful offender, from a Reformatory School, or from the employer of such youthful offender, shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding two hundred rupees, or with both.

Arrest of escaped youthful offender.

29. A Police-officer may, without orders from Magistrate and without a warrant, arrest any youthful offender sent to a Reformatory School under this Act who has escaped from such school or from his employer, and take him back to such school or to his employer.

V.—Miscellaneous.

30. [*Repealed by Act III of* 1900, *Schedule III.*]

Power to deal in other ways with youthful offenders including girls.

31. (1) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, any Court may, if it shall think fit instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to be—

(*a*) discharged after due admonition, or

(*b*) delivered to his parent or to his guardian or nearest adult relative, on such parent, guardian or relative executing a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months.

(2) For the purposes of this section the term "youthful offender" shall include a girl.

[**Note.**—*Cf.* s. 399 of the Cr. P. C., which applies to juvenile offenders of either sex.]

(3) The powers conferred on the Court by this section shall be exercised by Courts empowered by, or under, s. 8.

(4) When any youthful offender is convicted by a Court not empowered to act under this section, and the Court is of opinion that the powers conferred by this section should be exercised in respect of such youthful offender, it may record such opinion and submit the proceedings and forward the youthful offender to the District Magistrate to whom such Court is subordinate.

(5) The District Magistrate to whom the proceedings are so submitted may thereupon make such order or pass such sentence as he might have made or passed if the case had originally been tried by him.

Note.—No bond to be taken after sentence executed.—A boy of fourteen years was convicted for causing hurt with a dangerous weapon and sentenced to 15 stripes with a light rattan under s. 5 of the Whipping Act. *Held* the boy could not be delivered to his parents under this section, *on their giving a bond*, as the section did not contemplate a bond being given after the whipping had been inflicted. **3 L. B. R. 30.** *See* **25 C. 333.**

32. When a youthful offender during his period of detention in a Reformatory School is again convicted by a Criminal Court the sentence of such Court shall commence at once notwithstanding anything to the contrary in s. 397 of the Code of Criminal Procedure 1882 (now 1898) but the Court shall forthwith report the matter to the Local Government which shall have power to deal with the matter in any way in which it thinks fit.

Procedure when youthful offender under detention in a Reformatory School is again convicted and sentenced

APPENDIX V.

THE EUROPEAN VAGRANCY ACT No IX OF 1874 *

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO EUROPEAN VAGRANTS

(Received the assent of the Governor General on the 7th April, 1874)

CONTENTS

ee the First Part of the Second Schedule to Act XX ation III of 1886 It has been declared under the

Dhalbhum and the Kolhan in the distri t of Sing d under the same Act to the Scheduled D str ct of

PART V.

PENALTIES.

PART VI.

MISCELLANEOUS.

Preamble.

WHEREAS it is expedient to consolidate and amend the laws relating to persons of European extraction who wander in a destitute condition throughout India;

It is hereby enacted as follows:—

PART I.—*Preliminary.*

Short title.

1. This Act may be called "The European Vagrancy Act, 1874."

Local extent.

It extends to the whole of British India and to the dominions of Princes and States in India in alliance with Her Majesty.

Commencement.

And it shall come into force at once: Provided that ss. 4 to 16 (both inclusive), 19, 20, 24 and 29, shall not come into force in Coorg, or in the Andaman and Nicobar Islands, or in any of the dominions of the Princes and States in India in alliance with Her Majesty not situate within the limits of any Presidency, Lieutenant-Governorship, or Chief Commissionership in British India, until such day or respective days as the Governor-General in Council from time to time, by Notification in the *Gazette of India* appoints in this behalf.

Repeal of Act.

2. Acts No. XXI of 1869 (*to provide against European Vagrancy*) and No. XXVIII of 1871 (*to amend the European Vagrancy Act*, 1869) are hereby repealed.

But all appointments and orders made, work-houses provided, certificates given, powers conferred, rules prescribed, and exemption granted under the former Act shall be deemed to have been respectively made provided, given, conferred, prescribed and granted under this Act.

Interpretation clause

3 In this Act Person of European extraction includes—

(a) persons born in Europe America the West Indies, Australia Tasmania New Zealand Natal or the Cape Colony

(b) the sons and grandsons of such persons

but does not include persons commonly called Eurasians or East Indians

Vagrant

Vagrant means a person of European extraction found asking for alms or wandering about without any employment or visible means of substance

Master of a ship

Master of a ship includes any person in charge of a decked vessel

Magistrate

And in Parts III and V of this Act Magistrate means within the limits of the towns of Calcutta Madras and Bombay a Presidency Magistrate and outside those limits a person exercising powers under the Code of Criminal Procedure not less than those of a Magistrate of the second class

PART II —*Procedure*

Power to require apparent vagrant to go before Magistrates

4 Any Police-officer may within the limits of the towns of Calcutta Madras and Bombay require any person who is apparently a vagrant to accompany him or any other Police-officer to and to appear before the nearest Presidency Magistrate and may without those limits, require any such person to accompany him or any other Police-officer to and to appear before the nearest Justice of the Peace exercising the powers of a Magistrate of the first class under the Code of Criminal Procedure

Summary inquiry into vagrant's circumstances Declaration of vagrancy

5. The Presidency Magistrate or Justice shall in such case or in any other case where a person apparently a vagrant comes before him make a summary inquiry into the circumstances and character of the apparent vagrant and if he is satisfied that such person is a vagrant he shall record in his office a declaration to that effect

Order to go to work house

If he is further of opinion that the vagrant is not likely to obtain employment at once or if he has reason to believe that a declaration of vagrancy has on any former occasion been recorded in respect of such vagrant he shall require the vagrant to go to a Government work house and shall draw up an order to that effect

The vagrant shall then be placed in charge of the Police for the purpose of being forwarded to the work house and the said order shall be a sufficient authority to the Police for retaining him to their charge while he is on his way to the work house and to the Governor of the work house for receiving and detaining such vagrant.

Forwarding vagrant to place of employment

6. Where the officer making the inquiry mentioned in s 5 is of opinion that the vagrant is likely to obtain employment in any place subject to the Local Government or (when the vagrant is in any part of the dominions mentioned in s 1) in any place subject to any adjacent Local Government such officer may in his discretion forward the vagrant to such place in charge of the Police and draw up an order to that effect.

Such order shall be a sufficient authority to the Police for retaining the vagrant in their charge while he is on his way to such place of employment.

Note.—Transfer to other Provinces not competent.—Under the terms of this section the transfer of European vagrants from the United Provinces to the other Provinces is contrary to law s 6 merely authorises the transfer of a vagrant from the dominions of any allied Prince or State to the jurisdiction of an adjacent local administration or *from one part of a local administration to another* Vagrants arrested within the limits of the United Provinces should be dealt with strictly *in accordance with the terms of the Act* The only transfer authorised by law in cases of arrest within the United Provinces is from one part of the Provinces to another and this should *only* be permitted *on ground shown as to the* likelihood of obtaining employment In all other cases action should be taken under Parts III and IV of the Act the vagrant being sent to the Government work house at Allahabad for eventual deportation—*United Provinces, G O No 31 A, dated 17th November* 1875

7. Upon his arrival at the place of employment, the vagrant shall be taken before the nearest Presidency Magistrate or Justice of the Peace exercising powers as aforesaid, to whom the order for transmission shall be delivered.

Assistance to obtain employment.

Such officer shall thereupon, to the best of his ability, assist the vagrant in seeking employment, and may, in the meantime, if he thinks fit, keep the vagrant in the charge of the Police.

Should the vagrant fail to obtain suitable employment, within a reasonable time not exceeding fifteen days from such arrival, such officer shall forward him to a Government work-house in the manner provided by s. 5.

8. Every person while in charge of the Police, whether before inquiry as to his vagrancy, or while he is on his way, under s. 5, to the work-house, or under s. 6, to a place of employment shall be entitled to an allowance for his subsistence at the rate of eight annas *per diem.*

Subsistence allowance.

The Presidency Magistrate or Justice before whom any vagrant is taken under s. 7, may, if he thinks fit, order the vagrant to receive a similar allowance while he is seeking employment.

The Local Government shall cause such allowance to be paid out of such funds at its disposal, and to such manner, as it may, from time to time, direct.

9. Any Presidency Magistrate or Justice of the Peace exercising powers as aforesaid may, on being satisfied that any person of European extraction is not likely to become a vagrant, give such person a certificate under his hand, stating that for a certain time (mentioning it) not exceeding six months from the date of the certificate, and within certain limits (mentioning them), nothing in ss. 4, 5, 6 and 7 shall apply to the holder of such certificate; and thereupon, so long as the certificate remains in force, nothing in ss. 4, 5, 6 and 7 shall apply to such person within such limits as aforesaid.

Power to give certificates.

Every such certificate shall be in the form set forth in the first schedule to this Act annexed, or as near thereto as circumstances will admit.

Form of certificate.

10. The Local Government may, from time to time, by notification in the *Official Gazette*, invest any Justice of the Peace, District Superintendent of Police, or Assistant District Superintendent of Police with the jurisdiction and powers conferred by this Part on a Justice of the Peace exercising powers as aforesaid.

Power to invest certain officials with jurisdiction of Justices under ss. 5, 7, 8 and 9

PART III.—*Government Work-houses.*

11. The Local Government, with the previous sanction of the Governor-General in Council, may provide work-houses with their necessary furniture and establishment, at such places as it may think proper, for the temporary reception of vagrants;

Provisions of Government work-houses.

or may, by writing under the hand of a Secretary to such Government, certify any building, or part of a building, not provided as a work-house under the former part of this section, to be fit for a work-house for the purposes, of this Act. Every such certificate shall be published in the local *Official Gazette*, and thereupon such building or part of a building shall, until the Local Government otherwise orders, be deemed a Government work-house under this Act.

The Local Government shall allow the same scale of diet for the support of vagrants received in such work-houses as is for the time being allowed for Europeans confined in the local prisons or penitentiaries.

Scale of diet

12. Every such work-house shall be under the immediate charge of a Governor who shall be appointed, and may be suspended or removed, by the Local Government.

Superintendents of work-houses.

Every such Governor shall, if the Local Government thinks fit, be subject to the order of a Committee of Management appointed from time to time by such Government or, in the absence of a Committee, to the orders of such officer as the Local Government from time to time appoints in this behalf.

13. Every such Governor may order that any vagrant admitted to the work-house under his charge shall be searched and that the vagrant's bundles, packages and other effects shall be inspected, and may direct that any money then found with or on the vagrant shall be applied (subject to the orders of the Local Government) towards the expenses of carrying this Act into execution, and may order that all or any of the said effects shall be sold, and that the produce of the sale be supplied as aforesaid, but subject to the like orders.

Search of vagrants.

14. Vagrants admitted to work houses under h s Act shall be subject to such rules of management and discipline as may from time to time be described by the Local Government with the previous sanction of the Governor (eneral In Council

D sc pl ne

The Local Government may authorise any Governor of a work house to punish (under or not under the supervision and direction of a Committee of Management as the Local Government thinks fit) any vagrant who knowingly disobeys or neglects any such rule with any one of the following punishments (namely) —

(*a*) solitary confinement within the work house for any time not exceeding seven days

(*b*) solitary confinement with in the work house for any time not exceeding three days upon a diet reduced to such extent as the Local Government may prescribe

(*c*) hard labour for any time not exceeding seven days

(*d*) reduction of diet to such extent as the Local Government may prescribe for any time not exceeding five days

or in lieu of any such punishment any such vagrant may on conviction before a Magistrate of such disobedience or neglect be punishable with rigorous imprisonment in jail for a term which may extend to three months

15 The Governor and the Committee of Management (if any) of every such work house shall use his and their best endeavours to obtain outside the work house suitable employment for the vagrants admitted thereto

Refusal to accept employ ment

When such employment is obtained any such vagrant refusing or neglecting to avail himself thereof shall on conviction before a Magistrate be punishable with rigorous imprisonment for a term which may extend to one month

PART IV —*Removal from India*

16 If after the lapse of reasonable time no suitable employment is obtainable for any such vagrant the Local Government may either (when he has entered into such agreement as hereinafter mentioned) cause him to be removed from British India in manner herein after provided the cost of such removal being paid by Government

Removal of vagrants C st of removal

or it may cause ss. 23 and 30 to be read to him and may then release h m

17 Any vagrant or other person of European extraction may enter into an agreement in writing with the Secretary of State for India in Council binding himself—

Agreements w th vagrants

(*a*) to proceed to such port in British India as shall be ment oned in the agreement

(*b*) there to embark on board such ship and at such time as is directed by an officer appointed in this behalf by the Local Government of the terr tories in which such port is situate for the purpose of being removed from India at the expense of the said Secretary of State in Council

(*c*) to remain on board such ship until she has arrived at her port of destination and

(*d*) not return to India until five years have elapsed from the date of such embarkation

Every such agreement * shall be in the form set forth in the second schedule to this Act annexed or as near therto as circumstances admit

Form of agreements

18 The Local Government of the territories in wh ch the said port is situate may enter into such contracts for conveyance or otherwise and perform such other acts as may be necessary to carry out such agreement on the part of the said Secretary of State in Council

Power to perform agree ment

PART V —*Penalties*

19 Any person refusing or failing to accompany a Police-officer to or to appear before a Presidency Magistrate or Justice of the Peace for the purpose of preliminary inquiry when required so to do under s 4 may be arrested without warrant and shall be punishable whether he be or be not a European British subject on conviction before a Magistrate with imprisonment for a term which may extend to one month or with fine or with both

Refusal to go before Mag strate

* Ce ta n words wh ch were repealed by Act I of 1879 have been om tted That Act exempts these agreements from stamp duty—*See* Stamp Act II of 899

And any person, who, when required under s. 4 to accompany a Police-officer to, or to appear before a Presidency Magistrate or Justice of the Peace, commits an offence punishable under s. 353 of the Indian Penal Code, may, whether he be or be not an European British subject, be tried by a Magistrate for such offence.

Assaulting Police.

Escaping from Police.

20. Any vagrant who escapes from the Police while committed to their charge under the orders specified in ss. 5 and 6,

Quitting work-house without leave.

or who leaves a work-house under this Act without permission from the Governor,

or who, having such permission left a work-house for a limited time or a specified purpose, fails to return on the expiration of such time, or when such purpose has been accomplished or proves to be impracticable,

Failing to return to work-house.

shall, for every such offence, be punishable, on conviction before a Magistrate, with rigorous imprisonment for a term which may extend to two years.

Failing to proceed to port of embarkation; Refusing to go on board ship; Escaping from ship.

21. Any person entering into an agreement under s. 17, and failing to proceed in pursuance thereof to the port therein mentioned, or refusing to embark when directed so to do under the same section, or escaping from the ship in which he has so embarked before she has reached her port of destination,

shall, for every such offence be punishable, whether he be or be not an European British subject, on conviction before a Magistrate, with rigorous imprisonment for a term which may extend to six months.

Returning to India.

22. Any person returning to India within five years of the date of his embarkation pursuant to any agreement entered into under s. 17, unless specially permitted so to do by the Secretary of State for India, shall, for every such offence, be punishable, whether he be or be not an European British subject, on conviction before a Magistrate, with rigorous imprisonment for a term which may extend to two years.

Begging.

23. Any person of European extraction found asking for alms when he has sufficient means of subsistence,

or asking for alms in a threatening or insolent manner,

or continuing to ask for alms of any person after he has been required to desist,

shall be punishable, whether he be or be not an European British subject, on conviction before a Magistrate, with rigorous imprisonment for a term not exceeding one month for the first offence, two months for the second and three months for any subsequent offence.

Procedure on close of imprisonment.

24. Every person imprisoned under ss. 19, 20, 21, 22 or 23 shall, at the end of his term of imprisonment be placed before the nearest Presidency Magistrate or Justice of the Peace exercising powers as aforesaid, who shall, if he thinks fit, forthwith deal with him in the manner prescribed by ss. 5 and 6.

The order of transmission shall certify the fact of the previous conviction.

Penalty on shipmaster bringing European convicts to India.

25. Every master of a ship landing or allowing to land in any part of British India any person of European extraction who has been convicted in any other part of Her Majesty's dominions of felony or of an offence which, if committed in England, would be felony shall, on conviction before a Magistrate, be liable, for every such person so landed or allowed to land, to pay a fine not exceeding five hundred rupees, and not less than one hundred rupees, and, in default of payment, to imprisonment for any term not exceeding two months,

unless the defendant satisfy the Magistrate by evidence (which the defendant is hereby declared competent to give) that he had made due inquiry as to the person so landed are allowed to land, and that he had no reason to believe that such person had been convicted as aforesaid.

Power to exempt certain shipmasters.

The Governor-General in Council may, from time to time, by notification in the *Gazette of India* exempt from the operation of the former part of this section the masters of any class of ships, on such terms, as the Governor-General in Council deems fit, and either in respect of all or of any of the persons on board such ships.*

The Governor-General in Council may, in like manner, revoke any exemption made under this section.

* *Gazette of India*, 22nd October, 1876, p. 723.

Recovery of fines.

26. All fines imposed under this Act may be recovered "in the manner provided by the law for the time being in force for the recovery of fines imposed by Criminal Courts"*

Payment of fines

All fines recovered under this Act shall be paid to the credit of the Government of India, or as the Governor General in Council from time to time directs

Prosecutions

27. All prosecutions under this Act may be instituted and conducted by such officer as the Local Government from time to time appoints in this behalf

Limits of jurisdiction

28. In imposing penalties under this Part and Part III of this Act, no person shall exceed the limits of jurisdiction prescribed for him by the Code of Criminal Procedure in the case of offenders not being European British subjects

Validity of proceedings where Magistrate is not the nearest

29. No proceeding under this Act shall be deemed invalid by reason only that the Presidency Magistrate or Justice before whom a person apparently a vagrant, was required to appear, or before whom a person was placed under s 24 was not the nearest

PART VI —*Miscellaneous*

Deprivation of privileges of European British subject under Criminal Procedure Code

30. Any European British subject who upon the summary inquiry mentioned in s 5, has been determined to be a vagrant, or who has been convicted under s 22 or 23 shall so long as he remains in India be subject, beyond the limits of the said towns to the provisions of the Code of Criminal Procedure (other than those contained in Chapter VIII of the same Code) applicable to an European not being a British subject

If from any cause he is committed or held to bail by a Justice of the Peace to take his trial before a High Court he shall not be at liberty to object to the jurisdiction of such Justice of the Peace or High Court on the ground of anything contained in the former part of this section

Save as aforesaid, nothing herein contained shall be deemed to confer jurisdiction over European British subjects on Magistrates, who, if this Act had not been passed would have had no such jurisdiction

Note.—For provisions of the Criminal Procedure Code exempting European Vagrants, *see* s III of the Code

Liability of importers of Europeans or employers of soldiers becoming vagrants

31. Whenever any person of European extraction lands in India or being a non commissioned officer or soldier in Her Majesty's Army leave that Army in India, under an engagement to serve any other person, or any Company, Association or body of persons in any capacity,

and whenever a sailor, of European extraction, not being a British subject is discharged from his ship in any British Indian port,

and becomes chargeable to the State as a vagrant within one year after his arrival in India or leaving the Army, or discharge from his ship, as the case may be, then the person or Company Association or body, to serve whom he has so landed in India or left the Army or, in the case of a sailor, the person who is at the date of the discharge, the owner or agent of the ship from which the sailor has been so discharged, shall be liable to pay to the Government the cost of his removal under this Act, and all other charges incurred by the State in consequence of his becoming a vagrant

Recovery of charges

Such costs and charges shall be recoverable by suit as if an express agreement to repay them had been entered into, with the Secretary of State for India in Council by the person Company, Association, body, owner or agent chargeable

Liability of Consignee in case of Europeans who arrive in charge of animals and become vagrants

32. When any person of European extraction lands in India, being or having been during his passage to India, or from one Indian port to another, in charge of, or in attendance upon any animal, and becomes chargeable to the State as a vagrant, within one year after his arrival in India, then

the consignee of such animal,

or the agents in India for the sale of such animal,

or if such consignee or agent cannot be found the agent to whom the ship in which such animal arrived in India was consigned

shall be liable to pay to the Government the cost of such person's removal under this Act, and all other charges incurred by the State in consequence of his becoming a vagrant

* The words quoted have been substituted for certain words which have been repealed *See* Act XII of 1891

Any such consignee or agent shall be entitled to charge the consignor or principal for any payment to the Goverement under this section.

For the purposes of this section 'consignee' includes any person who undertakes to dispose of such animal for the benefit of the consignor, and 'agent' includes any person who undertakes the agency of such ship, though it may not have been consigned to him.

'Consignee' defined.
'Agent' defined.

33. In any proceeding under this part, a certified copy of the declaration recorded under s. 5 shall be *prima facie* evidence that the European British subject named therein has been upon the summary inquiry mentioned in that section, determined to be, and that he was, at the date of the declaration, a vagrant.

Evidence of declaration under s. 5.

34. The Powers and duties conferred and imposed by ss. 16 and 18 on a Local Government may be exercised and performed by such class of officers as the Local Government, from time to time, by notification in the *Official Gazette* appoints in this behalf.*

Exercise of powers conferred on Local Government

35. The powers and duties conferred and imposed by this Act on Magistrates, Justices of the Peace exercising the powers of a Magistrate of the first class, and Police-officers, respectively may, in places beyond the limits of British India, be exercised and performed by such persons respectively as the Governor-General in Council, from time to time, by notification in the *Gazette of India* appoints in this behalf.

Exercise in Native States of powers conferred on Magistrates, Justices and Police.

36. The Governor-General in Council may, from time to time, make rules consistent with this Act, for the guidance of officers in matters connected with its enforcement.

Powers to make rules for guidance of officers

All such rules shall be published in the *Gazette of India*, and shall thereupon have the force of law.

THE FIRST SCHEDULE.

(See *Section* 9.)

WHEREAS *E. F.* of , a person of European extraction, and holder of this certificate, has appeared before me, and satisfied me that he is not likely to become a vagrant within the meaning of the European Vagrancy Act, 1874, THESE ARE TO CERTIFY that for the space of months from the date hereof, and within the Province [*or* District] of , nothing in ss. 4, 5, 6 and 7 of the same Act shall be deemed to apply to him, unless he is found asking for alms, IN WHICH CASE this certificate shall be void.

Dated this day of 18 .

(Signed) *G. H.*

Presidency Magistrate for the town of or Justice of the Peace for exercising the powers of a Magistrate of the class.

THE SECOND SCHEDULE.

(See *Section* 17.)

ARTICLES OF AGREEMENT made this day of 18 , BETWEEN the Secretary of State for India in Council of the one part, and *C. D.*, of, etc. [*the vagrant*], of the other part: Each of the parties hereto (so far as relates to the acts on his own part to be performed) hereby agrees with the other of them as follows:—

1. The said *C. D.* shall proceed forthwith to the port of [*the port of embarkation*].

2. The said *C. D.* shall there embark on board such ship and at such time as an officer appointed in this behalf by the Local Government shall direct.

3. The said *C. D.* shall remain on board such ship until she shall have arrived at her port of destination.

4. The said *C. D.* shall not return to India until five years shall have elapsed from the date of such embarkation, unless specially permitted so to return by the said Secretary of State.

* See *N.-W. Province Gazette*, 10th July, 1875, p. 927.

5 The said Secretary of State in Council shall defray the cost of the transit of the said *C D* to the said port, and of his lodging and subsistence *during* such transit and during his detention (if any) at the same *port*, and shall contract with the owner of the said ship or his agent for the passage of the said *C D* on board the said ship and for his subsistence during the voyage for which he shall embark as aforesaid

In witness whereof *A F* [by order of the Governor General of India in Council (*or* the Governor of in Council *or* the Lieutenant Governor of *or* the Chief Commissioner of) or behalf of the said Secretary of State In Council] and the said *C D* have hereunto set their hands the day and year first above written

APPENDIX VI.

THE CATTLE TRESPASS ACT No 1 OF 1871

(AS AMENDED TILL* THE 1ST JANUARY 1907)

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL

(*Received the assent of the Governor General on the* 13*th January* 1871

CONTENTS

* S for Amendments Acts XVIII of 1883 and 1 of 1891

CHAPTER IV.

DELIVERY OR SALE OF CATTLE.

CHAPTER V.

COMPLAINTS OF ILLEGAL SEIZURE OR DETENTION.

CHAPTER VI.

PENALTIES.

CHAPTER VII.

SUITS FOR COMPENSATION.

CHAPTER VIII.

SUPPLEMENTAL.

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO TRESPASSES BY CATTLE.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to trespasses by cattle; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Title and extent.

[**1.** (1) This Act may be called the Cattle Trespass Act, 1871, and

(2) It extends to the whole of British India * except the Presidency towns and such local areas as the Local Government, by notification in the *Official Gazette*, may from time to time exclude from its operation.

(3) The Local Government may at any time, by notification in the *Official Gazette*, cancel or vary a notification under sub-sec. (2)] †

* Act I of 1871 has been declared in force in Upper Burma generally [except the Shan States] by Act XX of 1886, s. 6 [*Burma Code*, Ed. 1889, p. 364], in the Hill Districts of Arakan by Regulation IX of 1874, s. 3 [*ib.*, p. 354], in British Baluchistan by Regulation I of 1890, s. 3 [*Baluchistan* (*Code*, Ed. 1890, p. 69], and in the Sonthal Purgannas by Regulation III of 1872 as amended by Regulation III of 1886, s. 6 [*Bengal* (*Code*, Vol. I, Ed. 1889, p. 605], also by notification under the Scheduled District Act, 1874 [in the following Scheduled Districts, namely, the Districts of Hazaribagh, Lohar, Dugga and Manbhum and *Purganna Dhalbhum and the Kolhan in the District of* Singbhum [*Gazette of India* 1881, Pt I, p. 504] and the North-Western Provinces, Tarai [*ib.*, 1876, Pt. I, p. 505].

† Substituted by Act I of s. 1, 1891,

Repeal of Acts

2. The Acts mentioned in the schedule hereto annexed are repealed

Reference to repealed Acts

References to any of the said Acts in Acts pas ed subsequently thereto shall be read as if made to this Act

All pounds established, pound keepers appointed and villages determined under Act No III of 1857* (*relating to trespasses by cattle*) shall be deemed to be respectively established, appointed and deter mined under this Act.

Note.—No interference by High Court with conviction under repealed Act unless substantial injustice done.—Where a prisoner was properly convicted of illegally seizing cattle but was sentenced under the old Act (III of 1857) which had been repealed by this Act the High Court declinad to interfere with the sentence, as no injustice had been done **16 W. R. 12**

SCHEDULE TO THE ACT

NO AND YEAR	TITLE OF ACT
III of 1857	An Act relating to trespasses by cattle
V of 1860	An Act to amend Act III of 1857
XXII of 1861	Do do.

Interpretation clause

3. In this Act, ' officer of Police ' includes also village watchman and ' cattle ' includes also elephants camels, buffaloes horses, mares geldings ponies colts fillies mules asses pigs, rams ewes, sheep, lambs goat and kinds, and

" local authority " † means any body of persons for the time being invested by law with the control and administration of any matters within a specified local area and

[' local fund ' means any fund under the control or management of a local authority] ‡

CHAPTER II

POUNDS AND POUND KEEPERS

Establishment of pounds

4. Pounds shall be established at such places as the Magistrate of the District subject to the general control of the Local Government from time to time directs

The village by which every pound is to be used shall be determined by the Magistrate of the District

Control of pounds Rates of charge for feeding impounded cattle

5. The pounds shall be under the control of the Magistrate of the District and he shall fix, and may from time to time alter, the rates of charge for feeding and watering impounded cattle

Appointment of pound keepers

6. The Magistrate of the District shall also appoint for each pound a pound keeper

Ex-officio pound keepers in Madras and Bombay

Provided that in the Presidency of Fort St George the heads of villages and in the Presidency of Bombay, the police patels or (where there are no police patels) the heads of villages shall be *ex officio* the keepers of village pounds

Suspension or removal of pound keepers

Every pound keeper appointed by the Magistrate of the District may be suspended or removed by such Magistrate

Pound keepers may hold other offices.

Any pound keeper may hold simultaneously any other office under Government

Pound keepers to be "public servants"

Every pound keeper shall be deemed a bublic servant within the meaning of the Indian Penal Code

Duties of Pound keepers

To keep registers and furn

7. Every pound keeper shall keep such registers and furnish such returns as

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* s 4 (2) applies to all Acts passed after the 14th January ...

‡ Added by s 2 Act I of 1891

To register seizures.

8. When cattle are brought to a pound, the pound-keeper shall enter in his register—

(*a*) the number and description of the animals,

(*b*) the day and hour on and at which they were so brought,

(*c*) the name and residence of the seizer, and

(*d*) the name and residence of the owner, if known

and shall give the seizer or his agent a copy of the entry.

To take charge of and feed cattle.

9. The pound-keeper shall take charge of, feed and water the cattle until they are disposed of as hereinafter directed.

CHAPTER III.

Impounding Cattle.

Cattle damaging land.

10. The cultivator or occupier of any land, or any person who has advanced cash for the cultivation of the crop or produce on any land,

or the vendee or mortgagee of such crop or produce, or any part thereof,

may seize or cause to be seized any cattle trespassing on such land, and doing damage thereto or to any crop or produce thereon, and [send them or cause them to be sent within twenty-four hours]* to the pound established for the village in which the land is situate.

Police to aid seizures.

All officers of police shall, when required, aid in preventing (*a*) resistence to such seizures and (*b*) rescues from persons making such seizures.

Notes—1. Negligence is no defence.—The provisions of this section are applicable where a person is guilty of negligence in guarding an animal which strays into the ground of a person not its owner. **9 B. 273; Ratanlal 185, 189; Weir I, 487.**

2. **When cattle may not be seized.**—Certain cattle had escaped from the pound and were next day found grazing in charge of their owner, who resisted their being seized again. *Held*, that under the circumstances he did not commit any offence under s. 24. **Ratanlal 294.** Cattle can be seized and impounded only when they are actually trespassing. **Weir I, 709.** But where there is no damage done by the trespassing cattle, the seizure is illegal, **Ibid.**

3. **Who may seize cattle.**—Where the accused had grown indigo on their own land for a certain factory which supplied the seed and paid for the labour of sowing, the ryot receiving a certain amount per *bhiga* sown; and a factory peon finding some buffaloes grazing on the land and damaging the plants seized them and while taking them to the pound was attacked by the accused and the cattle rescued. *Held*, the factory peon was not a person authorised to seize within the scope of this section, as the factory was neither the cultivator nor the occupier of the land, and though the factory had some interest in the crop, yet the interest was not such as is covered by this section and consequently the accused were not liable to be convicted for rescuing the buffaloes. **9 C. W. N. 624 = 2 Cr. L. J. 345.** *See* also **Weir I, 497 = 5 M. H. C. R. App. 29.**

4. **Intentionally causing cattle to enter upon land.**—Where the owner actually and wilfully causes cattle to enter upon land to cause damage, he is guilty of mischief under s. 425, I.P.C. **Weir I, 492; 7 B. 126.** *See* also **29 A. 565.**

Cattle damaging public roads, canals and embankments.

11.† Persons in charge of public roads, ‡ pleasure-grounds, plantations, canals, drainage works, embankments, and the like, and officers of police may seize, or cause to be seized, any cattle doing damage to such roads, grounds, plantations, canals, drainage works, embankments and the like, or the sides or slopes of such road, canals, drainage works or embankments or found straying thereon,

and shall [send them or cause them to be sent within twenty-four hours] § to the nearest pound.

* These words in s. 10 were substituted for the original words "*take them or cause them to be taken without unnecessary delay*" by Act I of 1891, s. 3

† As to the application of s. 11 to Forests, *see* Act VII of 1878, s. 69, Act XIX of 1891, s. 68, and Regulation VI of 1887, s 66; to Railways, *see* Act IX of 1890, s. 125 (4).

‡ Public road in this section and in s. 26, *infra* includes a Railway [Act IX of 1890, s. 125 (4)].

§ The words in square brackets have been substituted for the words "*take them without unnecessary delay*" by Act I of 1891, s. 4.

Notes.—1. Cattle liable to be seized.—The accused forcibly opposed the seizure of their cattle by village officers who found them grazing in a reserved forest. They were acquitted on the ground that there was no trespass, as the cattle had not gone into the reserved forest of themselves, but had been driven into it by the accused. On appeal against acquittal, *held* that under s 63 of Act VII of 1878 and under this section the cattle were liable to seizure. **Ratanlal 602.**

2. No damage necessary under Forest Act.—This section having been applied to Forests by s 69 *of the Indian Forest Act* VII of 1879, the seizure by a Forest-officer of cattle found straying in a reserved forest is legal, even if no damage has been actually done. **22 B. 933.**

3. Power of D. P. W. Officer to seize cattle.—Cattle are not liable to seizure by the officers of the Public Works Department, unless they were trespassing on public property in charge of the officers of the department. Where, therefore, the Magistrate had not decided whether the land on which the cattle were seized was public property and in charge of the Public Works Department, the conviction was quashed and the case directed to be re-tried. **24 M. 318.**

Fines for cattle impounded

12. For every head of cattle as aforesaid, the pound keeper shall levy a fine in accordance with the scale for the time being prescribed by the Local Government in this behalf by notification in the *Official Gazette*. Different scales may be prescribed for different local areas.

All fines so levied shall be sent to the Magistrate of the District through such officer as the Local Government may direct.

A list of the fines and of the rates of charge for feeding and watering cattle shall be posted in a conspicuous place on or near to every pound.

[S 12 was substituted by the present section by Act XVII of 1921.]

Notes.—1. Fine levied under this section does not exempt owner from punishment.—A fine levied by a pound keeper is not a punishment on conviction for an offence and it is an error to hold that a person cannot be tried for an offence of having contravened the Municipal Rules by allowing his cattle to stray because he has paid a fine under this section. **7 B. H. C. R. Cr. Ca. 53.**

2. Areas within which fines at double rates are leviable.—On every head of cattle which may be seized and impounded, fines at double the rate specified in this section shall be levied in (*a*) portions of the *Nilgiri District* (*Fort St. George Gazette*, 1897) Pt I, p. 1077, (*b*) The Cantonment of *Wellington* (*Fort St George Gazette*, 1899 Pt I, p 1110), (*c*) *Wynaad Taluk, Malabar District* (*Fort St George Gazette*, 1891, Pt I, p 844), (*d*) The area comprised within a radius of 3 miles from *The Emerald Valley* (*Fort St George Gazette*, 1903, Pt I, p 767), (*e*) The Contonment of *St Thomas Mount* (*Fort St. George Gazette*, 1903 Pt I p 1065).

CHAPTER IV

Delivery or Sale of Cattle

Procedure when owner claims the cattle and pays fines and charges

13. If the owner of impounded cattle or his agent appear and claim the cattle, the pound keeper shall deliver them to him on payment of the fines and charges incurred in respect of such cattle.

The owner or his agent, on taking back the cattle, shall sign a receipt for them in the register kept by the pound keeper.

Procedure if cattle be not claimed within a week

14. If the cattle be not claimed within seven days from the date of their being impounded, the pound keeper shall report the fact to the officer in charge of the nearest Police station, or to such other officer as the Magistrate of the District appoints in this behalf.

Such officer shall thereupon stick up in a conspicuous part of his office a notice stating—

(*a*) the number and description of the cattle,

(*b*) the place where they were seized,

(*c*) the place where they are impounded,

and shall cause proclamation of the same to be made by beat of drum in the village at the market place nearest to the place of seizure.

If the cattle be not claimed within seven days from the date of the notice they shall be sold by public auction by the said officer or an officer of his establishment deputed for that purpose, at such place and time and subject to such conditions as the Magistrate of the District by general or special order from time to time directs.

Provided that if any such cattle are, in the opinion of the Magistrate of the District, not likely to fetch a fair price if sold as aforesaid, they may be disposed of in such manner as he thinks fit.

Delivery to owner disputing legality of seizure but making deposit

15. If the owner or his agent appear and refuse to pay the said fines and expenses, on the ground that the seizure was illegal and that the owner is about to make a complaint under s. 20, then upon deposit of the fines and charges incurred in respect of the cattle, the cattle shall be delivered to him.

Procedure when owner refuses or omits to pay the fines and expenses

16. If the owner or his agent appear and refuse or omit to pay or (in the case mentioned in s. 15) to deposit the said fines and expenses, the cattle, or as many of them as may be necessary, shall be sold by public auction by such officer, at such place and time, and subject to such conditions, as are referred to in s. 14

Deduction of fines and expenses

The fines leviable and the expenses of feeding and watering, together with the expenses of sale, if any, shall be deducted from the proceeds of the sale.

Delivery of unsold cattle and balance of proceeds

The remaining cattle and the balance of the purchase money, if any, shall be delivered to the owner or his agent, together with an account showing—

(*a*) the number of cattle seized;

(*b*) the time during which they have been impounded;

(*c*) the amount of fines and charges incurred;

(*d*) the number of cattle sold;

(*e*) the proceeds of sale, and

(*f*) the manner in which those proceeds have been disposed of

Receipt.

The owner or his agent shall give a receipt for the cattle delivered to him and for the balance of the purchase money (if any), paid to him according to such account.

Disposal of fines, expenses and surplus proceeds of sales

17. The officer by whom the sale was made shall send to the Magistrate of the District the fines so deducted

The charges for feeding and watering deducted under s. 16 shall be paid over to the pound-keeper, who shall also retain and appropriate all sums received by him on account of such charges under s. 13.

The surplus unclaimed proceeds of the sale of cattle shall be sent to the Magistrate of the District, who shall hold them in deposit for three months, and, if no claim thereto be preferred and established within that period, shall, at its expiry, dispose of them as hereinafter provided.

Application of fines and unclaimed proceeds of sales

18. Out of the sums received on account of fines and the unclaimed proceeds of the sale of cattle shall be paid—

(*a*) the salaries allowed to pound-keepers under the orders of the Local Government;

(*b*) the expenses incurred for the construction and maintenance of pounds, or for any other purpose connected with the execution of this Act,

and the surplus * (if any) shall be applied, under orders of the Local Government to the construction and repair of roads and bridges and to other purposes of public utility.

Officers and pound-keepers not to purchase cattle at sales under Act

19. No officer of police, or other officer or pound-keeper appointed under the provisions herein contained shall, directly or indirectly, purchase any cattle at a sale under this Act.

Pound keepers when not to release impounded cattle.

No pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this Chapter, unless such release or delivery is ordered by a Magistrate or Civil Court.

* As to the crediting of the surplus to Local Fund, *see* s. 31, *infra*.

Note.—Purchase not at a sale.—Where the accused a Sub-Inspector of Police was convicted of a criminal breach of trust in respect of a pony impounded at his station in contravention of the provisions of this section, and the Magistrate found that there had been no public sale, but that the accused paid almost the approximate value of the animal KEMP, OFFG C J, observed in setting aside the conviction "It is to be regretted in this case that the Magistrate did not proceed under s 19 of Act I of 1871, taken with s 169, I P C.; but as the Magistrate found on evidence that no sale took place and has convicted the accused, we must hold as a point of law that the prisoner has not committed any offence under s 405 I P C" **8 B L.R. Appx. I.**

CHAPTER V.*

COMPLAINTS OF ILLEGAL SEIZURE OR DETENTION

Power to make complaints

20. Any person whose cattle have been seized under this Act, or, having been so seized, have been detained *in contravention of this Act*, may, at any time within ten days from the date of the seizure, make a complaint to the Magistrate of the District or any Magistrate authorised to receive and try charges without reference by the Magistrate of the District.

Notes.—1. Illegal seizure of cattle is an "offence."—By s 4 (*o*) of the Cr P C as now enacted the word, "offence" includes an act in respect of which a complaint may be made under this section , therefore an illegal seizure of cattle is now an offence. **29 M. 517; 4 L. B. R 11 = 6 Cr. L J. 122** and **34 C. 926.** The Rulings under s 22 *infra* reported in **9 M. 102; 13 C. 304; 15 C. 712; 23 C. 248, 18 A. 353; 2 C L. R. 507, 9 M. 374,** and **233 C. 442,** at p **445** are now superseded *See* Notes under s 4 (*o*) of the Code

2. Summary trial.—Offences under this section may be tried summarily *See* s 260 (1) (*m*) Cr P C.

3. District Magistrate may transfer—s 192 (1) Cr. P. C.—Although a complaint under this section must be entertained by a District Magistrate or a Magistrate specially authorised, such Magistrate has *now* power, under s. 192 (1), Cr P C., to transfer the case after taking cognisance of it, to any *Subordinate Magistrate.* **34 C. 926; 23 C. 300** and **442** are no longer law. *See* also **26 P. R. 1879.**

4. Any Magistrate may try the offence—Though a complaint under this section must be entertained by the District Magistrate or Magistrate specially empowered , any Magistrate may try the same on transfer as it is an 'offence' (*see* Note 1 above), falling within the last clause of Schedule II to the Cr P C. **34 C 926.**

5. Suit for compensation will lie for wrongful seizure—The provisions of this Act are no bar to a suit for compensation for wrongful seizure **16 C. 159,** where **15 W. R. 279 Civ.** is followed while **2 C L R. 344** is *dissented from*

[illegible]

7. Charges means complaints.—*See* **11 C. P. L. R. 10.**

Procedure on complaint

21. The complaint shall be made by the complainant in person, or by an agent personally acquainted with the circumstances. It may be either in writing or verbal If it be verbal, the substance of it shall be taken down in writing by the Magistrate

If the Magistrate, on examining the complainant or his agent sees reason to believe the complaint to be well founded he shall summon the person complained against, and make an enquiry into the case

Note.—Who may complain.—The person entitled to complain under this section is either the complainant in person or *an agent personally* acquainted with the circumstances , hence where the cattle belonging to one person are *in the custody of* another and are seized from that custody, the owner, if he is not personally acquainted with *the facts and circumstances, is not* entitled to institute a complaint under this section. **5 Bom. L. R. 205.**

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* This Chapter was substituted for the original Chapter V by Act I of 1891 s 6

22. If the seizure or detention be adjudged illegal, the Magistrate shall award to the complainant for the loss caused by the seizure or detention, reasonable compensation, not exceeding one hundred rupees, to be paid by the person who made the seizure or detained the cattle, together with all fines paid and expenses incurred by the complainant in procuring the release of the cattle.

Compensation for illegal seizure or detention

And, if the cattle have not been released, the Magistrate shall, besides awarding such compensation, order their release and direct that the fines and expenses leviable under this Act shall be paid by the person who made the seizure or detained the cattle.

Release of cattle.

Notes.—1. Compensation for loss caused by the seizure and detention—Court fees.—"These words do not necessarily refer only to such special damage as is sustained by the seizure and detention prior to the release of the cattle, but also include all expenses necessarily incurred by reason of such seizure and detention though it may be after the release. The Legislature intended to provide a summary and expeditious mode of recovering compensation for loss caused by such seizure and detention, probably on the ground that it is generally so small that it would be deemed inexpedient to have recourse to a regular suit for its recovery. The language is wide enough to include the Court and process fees necessarily paid on account of the refusal to make compensation or refund the fine paid, and a narrower construction would, I think, defeat the intention of the Legislature."—*Per* MUTTUSAMY AIYAR, J., **7 M. 345** at p. **346**; *see* also **4 L. B. R. 11 = 6 Cr. L. J. 122.** An order which awards distinct amounts for compensation and for Court and process fees, though improperly worded is not bad in law if the intention was to include the costs in the compensation. **Weir I, 715.**

2. **Complainant not entitled to compensation unless he makes a specific claim.**—A complainant who makes no claim for compensation for loss caused by the illegal seizure of cattle, is not entitled to any compensation, but he is entitled to a refund of the expenses incurred in procuring the release of the cattle from the pound-keeper and is also entitled under s. 31 of *the Court Fees Act* to the refund of the fees paid on the complaint and the process fees which he had paid, because the word *offence* in the Cr. P. C. includes any act in respect of which a complaint may be made under this section. **4 L. B. R. 11 = 6. Cr. L. J. 122.**

3. **Sufficiency of compensation.**—Where some compensation was awarded in addition to the sum allowed on account of the fines paid and "expenses incurred in procuring the release of cattle," it was *held*, that the High Court would not consider the sufficiency or insufficiency of the amount allowed. **Weir I, 715.**

4. **Nature of Proceedings.**—Proceedings under this section are *quasi* civil in their nature; a Magistrate being at liberty under this section to assess and enforce, in a summary manner, compensation for an injury for which a civil action might be brought. An order, therefore, for the payment of a sum as fine and compensation, passed against two persons under this section, which does not specify the proportionate amount payable by each, is good. **14 C 175.**

5. **Magistrate cannot refer parties to Civil Court.**—This chapter of the Act has no penal clause. It is compensation that is to be awarded and the granting of the power to award compensation ought to carry with it the power of deciding if the grounds on which the compensation is asked are good or bad. Where there was a dispute as to the ownership of the land on which cattle were found grazing before they were impounded, it was *held* that the order of the Magistrate referring the parties to the Civil Court was illegal, and that the Magistrate should have disposed of the case himself under this section. **23 W. R. 2.**

6. **Fine cannot be imposed under this section.**—A Magistrate is not competent under this section to pass any sentence of fine. He can only award compensation for illegal seizure of cattle. **27 C. 992; 25 P. R. 1878.** A sentence of fine in addition to the amount awarded as compensation is illegal. **7 M. H. C. R. App. 24; 5 B. R. 1880.** Where an order under this section designated the amount payable as a *fine*, it was *held* the irregularity was merely one of form, and that the order was not illegal, as the intention to award compensation was clear. **Weir I, 715.**

7. **Imprisonment in default of payment bad.**—A sentence of imprisonment, in default of payment of compensation adjudged, is illegal. **Weir I, 711** *followed in* **Weir I, 712; 27 C. 992; 2 C. L. R. 507** *followed in* **22 C. 139; 19 M. 238.**

8. **Procedure on default of payment of compensation**.—In default of payment of compensation, the procedure to be followed is that prescribed in s 386 Cr P C **Weir I, 711** and *see* next section

9. **Appeal lies against order granting compensation, etc.**—Having regard to the definition of offence in s 4 (o) of the Cr. P. C of 1898, it was *held* that an appeal lies under s. 407, Cr P C, *against an order under this* section and that the person against whom the order is made is *a person convicted* on a trial **Weir I, 712=29 M. 517; 4 L. B. R. 10=6 Cr. L. J. 121.** The *Rulings in* **10 B. 230; 11 M. 359, Weir I, 711; Ratanlal 520; 15 C. 712; 23 C. 300; 9 M. 374** and **19 M. 238** must be regarded as no longer law An order awarding compensation and repayment of fines, etc., under this section is appealable under s 408 of the Cr P C The compensation so awarded is not a fine, and consequently the restrictive provisions of s 413 of the Cr P C do not apply **46 Bom. 53=23 Bom. L. R. 836.**

10. **Distinction between compensation under s. 250, Cr. P. C., and under this section.**—S 250 of the Cr P. C. applies to a case in which compensation is awarded to an accused person, because a frivolous complaint is made against him Under this section compensation is awarded not to the accused but to the complainant **29 M. 517** and *see* Notes under s 250, Cr P. C

11. **Acts amounting to theft should not be treated as illegal seizure.**—An accused was found to have loosed the complainant's cattle at night from a cattle pen, and to have driven them to the pound with the object of sharing with the pound keeper the fees to be paid for their release He was proceeded against under this Act, and under the provisions of this section ordered to pay compensation to the complainant and in default to undergo one month s rigorous imprisonment *Held,* that this section was inapplicable to the facts of the case, and that the order must be set aside On the facts it was not a case of "illegal seizure and detention" of cattle, but rather one of theft, as all the elements of that offence were present and the accused should have been charged with and tried for that offence **22 C. 139.**

Recovery of compensation

23. The compensation, fines and expenses mentioned in s 22 may be recovered as if thay were fines imposed by the Magistrate

Notes.—*The General Clauses Act* X of 1897, s 3 (25) declares the provisions of I P C, s 70, and Cr. P C, s 386, *as to levy of fines applicable to fines imposed under other Acts and Regulations The ordinary* mode of levying a fine is laid down by s 386 **22 C. 139** *See* Note 8 to s 22, *supra*

CHAPTER VI.

PENALTIES

Penalty for forcibly opposing the seizure of cattle or rescuing the same

24. Whoever forcibly opposes the seizure of cattle liable to be seized under *this Act,*

and whoever rescues the same after seizure either from a pound, or from any person taking or about to take them to a pound, such person being near at hand and acting under the powers conferred by this Act,

shall, on conviction before a Magistrate, be punished with imprisonment for a period not exceeding six months, or with fine not exceeding five hundred rupees, or with both

Notes.—1. Opposing seizure of cattle not "liable to be seized" no offence.—(i) Certain cattle impounded in a cattle pound escaped The next day they were grazing in charge of their owner, the accused The Police *patel*, attempting to seize them again, the accused resisted, and the *patel* instead of attempting to seize the cattle lodged a complaint before a Magistrate, who, under this section, fined the accused Rs 3 *Held*, that to resist the seizure of cattle under the circumstances was not an offence punishable under this section **Ratanlal 294; 4 P. R. 1891.** (ii) When cattle have left the place where they were doing damage they are not liable to be seized, and if any person opposes their seizure he is not guilty of any offence under this section **4 P. R. 1891.** (iii) The conviction under this section can only be supported if the cattle were 'liable to be seized *under this Act, otherwise their rescue* is no offence and the fact the rescuers had a special remedy under s 20, *supra*, does not affect the matter **24 M. 318,** *see* **23 C. W. N. 387; 1 Pat. L. J. 176** *See* also Notes 2 and 3 to s 10 above

2. Where the accused removed bullocks from the cattle-pound and returned them to the true owner, *held* they were not guilty of theft, as there was no dishonest intent, but only of an offence of pound-breach under this section. **Weir I, 716.**

Recovery of penalty for mischief committed by causing cattle to trespass

* **25.** Any fine imposed † [under the next following section or] for the offence of mischief by causing cattle to trespass on any land, may be recovered by sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the property of the person convicted of the offence, or were only in his charge when the trespass was committed.

Penalty for damage caused to land or crops or public roads by pigs.

26. Any owner or keeper of pigs who through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land, or any public road, ‡ by allowing such pigs to trespass thereon, shall, on conviction before a Magistrate, be punished with fine not exceeding ten rupees.

[The Local Government, by notification in the *Official Gazette*, may from time to time, with respect to any local area specified in the notification, direct that the foregoing portion of this section shall be read as if it had reference to cattle generally, or to cattle of a kind described in the notification, instead of to pigs only, or as if the words "fifty rupees" were substituted for the words "ten rupees" or as if there were both such reference and such substitution.] §

[The Local Government may at any time, by notification in the *Official Gazette* cancel or vary a notification under this section.] §

Notes.—1. Neglect must be proved.—Before any person can be convicted under this section, the prosecution must establish that the owner has through neglect or otherwise, damaged or caused or permitted to be damaged land, etc., by allowing his cattle to trespass thereon. A personal neglect on the part of the owner and his allowing his cattle to trespass must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to exist. **Ratanlal 867.**

2. Where a Magistrate passed the maximum sentence in the absence of clear evidence of damage the High Court reduced the sentence. **2 Bom. L. R. 335.**

3. **Proof of intention or knowledge necessary in case of other animals.**—In the case of other animals there must be an intention to cause damage or a knowledge that damage is likely to be caused. When, therefore, the accused admitted that he was the owner of a buffalo and that it had done damage to complainant's property, but when intention or knowledge on the part of the owner was neither charged nor proved, the conviction and sentence were reversed. **Ratanlal 60, 21 Bom. L. R. 247.**

N.B.—It will be observed that this Ruling will be applicable until the Local Government have published the notification referred to in clause 2 of this section. When such notification is published, an intention to cause damage will not have to be proved, *i.e.*, other cattle will be equal to pigs.

4. **Extension of the section.**—This section shall be read as if it had reference to cattle generally instead of 'pigs' only and as if the words "fifty rupees" were substituted for the words "ten rupees" in the following areas in the Madras Presidency:—(*a*) Portion of *the Nilgiris District* (*Fort St. George Gazette*, 1897, Pt. I, p. 1077); (*b*) *The Wynaad Taluq*, Malabar District (*Gazette*, 1891, Pt. I, p. 884; and 1898, Pt. I, p. 171); (*c*) (*Kodaikanal Gazette*, 1894, Pt. I, p. 1224); (*d*) Deputy Tahsildar's Division of *Yercaud*, Salem District (*Gazette*, 1894, Pt. I, p. 128); (*e*) certain *Padugais*, in the Salem District (*Gazette*, 1899, Pt. I, p. 288).

* As to the application of s. 25 in the case of cattle trespassing on a Railway—*see* Act IX of 1890, s. 125 (3).

† These words in s. 25 were inserted by Act I of 1891, s. 7.

‡ "Public road" in s. 26 includes a Railway—*see* Act X of 1890, s. 125 (4).

§ Added by Act I of 1894, s. 8.

Penalty on pound keeper failing to perform duties

27. Any pound keeper releasing or purchasing or delivering cattle contrary to the provisions of s. 19 or omitting to provide any impounded cattle with sufficient food and water or failing to perform any of the other duties imposed upon him by this Act shall over and above any other penalty to which he may be liable be punished on conviction before a Magistrate with fine not exceeding fifty rupees

Such fines may be recovered by deductions from the pound keeper s salary

Notes.—1 Who is not a pound keeper—A person merely entertained by a Police *patel* who is *ex-officio* pound keeper to look after the impounded cattle and to water them cannot be convicted under this section. **9 B H. C R 164**

2. A cattle pound keeper levied Rs. 5 for five buffaloes in his charge but gave a receipt for Rs. 4 only to the owner of the cattle and entered only Rs 4 in hi accounts but before the money was paid into the treasury altered his accounts and entered the proper amount In such a case he cannot be charged under this section but he should be charged under ss 409 and 511 I P C **Ratanlal 632**

Application of fines recovered under ss 25 26 or 27

28. All fines recovered under ss 25 26 or 27 may be appropriated in whole or in part as compensation for loss or damage proved to the satisfaction of the convicting Magistrate

CHAPTER VII

Suits for Compensation

Saving of right to sue for compensation

29. Nothing herein contained prohibits any person whose crops or other produce of land have been damaged by trespass of cattle from suing for compensation in any competent Court.

Set off

30 Any compensation paid to such person under this Act by order of the convicting Magistrate shall be set off and deducted from any sum claimed by or awarded to him as compensation in such suit.

CHAPTER VIII*

Supplemental

Power of Local Government to transfer certain functions to local authority and direct credit of surplus receipts to Local Fund

31 The Local Government may from time to time by notification in the *Official Gazette*—(*a*) transfer to any local authority † within any part of the territories under its administration in which this Act is in operation all or any of the functions of the Local Government or the Magistrate of the District under this Act within the local area subject to the jurisdiction of the local authority or

(*b*) direct that the whole or any part of the surplus accruing in any district under s 18 of this Act shall be placed to the credit of such Local Fund or Funds as may be formed for any local area or local areas comprised in that district

and may from time to time by notification in the *Official Gazette* cancel or vary any notification under this section

Note—The control of all cattle pounds within the Municipal limit in the town of *Calicut* has been transferred from the District Magistrate to the Municipal Commission (*Fort St George Gazette* 1885 Pt. I, *p* 73) For similar powers conferred on the Municipalities of *Cochin Tellicherry* and *Cannanore* see *Gazette* 1886 Pt. I pp 820 and 963 and on the Cantonment Committees of *Pallavaram* and *Wellington* see *Gazette* 1895 Pt. I *p* 851 and 1899 Pt I p 1110 respectively

* Chapter VII was added by Act I of 1891 s 3

† For special enactments see as to the Central Provinces Act I of 1883 s. 5 cl (*f*) and s 23 ( ) cl (*c*), as to the North Western Provinces and Oudh Act XIV of 1883 s 24 cl (*f*) and s 28 c (*c*) and as to the Punjab Act XX of 1883 s 20 cl (*n*)

APPENDIX VII.

THE BREACH OF CONTRACT ACT No. XIII OF 1859.*

The whole of this Act now stands repealed from the 1st day of April, 1926 by Act No. III of 1925. The schedule to this Act III of 1925 containing enactments repealed is as follows :—

THE SCHEDULE.

ENACTMENTS REPEALED.

Year.	No.	Name of Act.	Extent of Repeal.
1859	XIII	The Workmen's Breach of Contract Act, 1859 ...	The whole.
1920	XII	Do. do. (Amendment) Act, 1920.	Do.
1920	XXXVIII	The Devolution Act, 1920	So much of the first schedule as relates to the Workmen's Breach of Contract Act, 1859.

APPENDIX VIII.

THE CORONERS' ACT No. IV OF 1871.*

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 27th January*, 1871.)

CONTENTS.

PREAMBLE.

CHAPTER I.

SECTIONS.

PRELIMINARY.

1. Short title.
2. (*Repealed.*)

CHAPTER II.

APPOINTMENT OF CORONERS.

3. Coroners of Calcutta and Bombay.
4. Their appointment, suspension and removal.
5 Coroners to be public servants.
6. Power to hold other offices.
7. (*Repealed.*)

CHAPTER III.

DUTIES AND POWERS OF CORONERS.

8. Jurisdiction to inquire into deaths.
9. Coroner to be sent for when prisoner dies.
10. Power to hold inquests on bodies within local limits wherever cause of death occurred.
11. Power to order body to be disinterred.
12. Summoning jury.
    Inquest may be on Sunday.

* As amended by Act X of 1889, V of 1889 and IV of 1908

CHAPTER IV

CORONERS JURIES

CHAPTER V

RIGHTS AND LIABILITIES OF CORONERS

by

ig of the

AN ACT TO CONSOLIDATE AND AMEND ... S RELATI... Government

Preamble WHEREAS it is expedient ... and ...
in the Presidency town

Notes.—1. Act is not affected by the Cr. P. Code.—The Coroners' Act is a special enactment which is unaffected by the Code of Criminal Procedure, being saved by s. 1 of the Code. **31 C. 1; 16 B. 159, and 2 Ind. Jur. (N.S.) 101.**

2. **Nature of the proceedings.**—" The Act is evidently framed on the principles and on the forms of a regular inquiry by a Magistrate. Evidence is given on oath before a jury, who may question the witnesses; and evidence on behalf of the accused must also be received. Confessions also to a Coroner are to be considered as confessions to a Magistrate; the evidence is recorded in writing and submitted to the High Court; and the Coroner has also the power to arrest the accused after verdict. The Act gives the Coroner also the power of commitment. Historically this power is a relic of the large jurisdiction at one time held by that officer." **16 B. 159** at p. 160.

3. **Coroners** are ancient officers of the English Common Law, so called because they deal principally with the Pleas of the Crown, and were of old time the principal conservators of the peace within their country *Archbold*, p. 159.

4. **Law dealing with Coroners in England.**—*See* the Coroners' Act, 1887 (50 and 51 Vict., c. 71) a consolidating Act.

5. **Destruction of records of Coroner's Court, Bombay.**—The records of the Coroner's Court should be destroyed after the expiry of five years from the date of any final proceeding under this Act, except the records of inquests in cases in which an offence is alleged to have been committed and the alleged offender has not been traced. Bom. G. G. 8 9-1910 P. P. 1436.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called " The Coroners' Act, 1871." *

Repeal of enactments.

2. [*Repealed by Act XII of* 1873.]

CHAPTER II.

APPOINTMENT OF CORONERS.

Coroners of Calcutta and Bombay.

3. Within the local limits of the ordinary original civil jurisdiction of each of the High Courts of Judicature at Fort William and Bombay there shall be a Coroner. Such Coroners shall be called, respectively, the Coroner of Calcutta and the Coroner of Bombay.†

Note.—In the town of Madras, the office of Coroner was abolished by Act V of 1889. Section 4 of the said Act V of 1889 enacts that ss. 174, 175 and 176 of the Code of Criminal Procedure shall, in their application o the town of Madras, be read as follows :—

174. *Inquiry into violent or suspicious death to be ordinarily conducted by officer in charge of Police-station.* (1) An officer in charge of a Police-station, on receiving information that a person—

(*a*) has committed suicide, or

(*b*) has been killed by another, or by an animal, or by machinery, or by an accident, or

(*c*) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the Commissioner of Police and, in the absence of any rule or order under the next following section to the contrary, proceed to the place where the body of such deceased person is, and there in the presence of five or more respectable inhabitants of the neighbourhood, make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner or by what weapon or instrument (if any), such marks appear to have been inflicted.

* The second clause relating to local extent has been repealed by Act X of 1881, and the third clause as to commencement by Act XVI of 1874.

† Substituted by Act No. V of 1889, s 2.

(2) The report shall be signed by such Police-officer and other persons or by so many of them as concur therein and shall be forthwith forwarded to the office of the Commissioner of Police

(3) In any of the following cases namely —

(a) in any case in which the Local Government may by rule so require

(b) in any case in which death appears to have been caused by violence or there is any doubt regarding the cause of death

(c) in any other case in which the Police-officer considers it expedient so to do he shall cause the body to be examined by a medical officer appointed in this behalf by the Local Government

(4) The Police-officer may by order in writing summon five or more persons as aforesaid for the purpose of the investigation under this section and any other person who appears to be acquainted with the facts of the case Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture

(5) If the facts do not disclose a cognisable offence to which s 170 applies such persons shall not be required by the Police-officer to attend a Magistrate s Court

175 *Power to make rules and orders with respect to investigations by other authorities than officers in charge of Police stations* (1) The Local Government may make rules and the Commissioner of Police may from time to time make general or special orders consistent with those rules defining—

(a) the circumstances in which an officer in charge of a Police-station after giving intimation to the Commissioner of Police of any such event as is mentioned in clause (a) clause (b) or clause (c) of sub-sec (1) of the last foregoing section is not to proceed to discharge any of the further functions of such an officer under that section and

(b) the circumstances in which and in such circumstances the authority by whom those further functions are to be discharged

(2) The authority to whom the discharge of such further functions may be entrusted by rules or orders under sub-sec (1) may be the Commissioner of Police or any of his Deputies or Assistants or any other officer of rank not below that of Inspector and such authority in discharge of those functions may exercise any of the powers and shall perform the duties which but for such rules or orders might be exercised and should be performed by the officer in charge of the Police station

176 *Provisions with respect to inquiries by Presidency Magistrates and the disinterment of dead bodies* (1) The Chief Presidency Magistrate or such other Presidency Magistrate as the Chief Presidency Magistrate may depute in this behalf shall when any person dies while in the custody of the Police or in prison and may in any other case mentioned in s 174 sub-sec (1) clause (a) clause (b) or clause (c) hold an inquiry into the cause of death either instead of or in addition to the investigation under either of the two last foregoing sections, and where he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence and shall record any evidence taken by him in the course of the inquiry as nearly as may be in the manner prescribed in s 362

(2) Whenever the Commissioner of Police or a Presidency Magistrate considers it expedient for the discovery of the cause of death of a deceased person whose body has been interred that an examination should be made of the dead body, such Commissioner or Magistrate as the case may be may cause the body to be disinterred and examined

N B —For rules for the guidance of Police officers in the City of Madras in conducting inquests see *Notification No* 87 *Fort St George Gazette* 1889 Pt I p 366

Their appointment suspension and removal

4 Every such officer shall be appointed and may be suspended or removed by the Local Government *

Coroners to be public servants.

5 Every Coroner shall be deemed a public servant within the meaning of the Indian Penal Code

Note —*See* s 21 I P C.

Power to hold other offices

6 Any Coroner may hold simultaneously any other office under Government

Oath to be taken by Coroner

7 [*Repealed by Act* X *of* 1873]

* This section had another paragraph which was repealed by Act XII of 1891

CHAPTER III.

DUTIES AND POWERS OF CORONERS.

Jurisdiction to enquire into deaths

8. When a Coroner has reason to believe that the death of any person has been caused by accident, homicide, suicide, or suddenly by means unknown, or that any person, being a prisoner, has died in prison

and that the body is lying within the place for which the Coroner is so appointed, the Coroner shall enquire into the cause of death.

Every such enquiry shall be deemed a judicial proceeding within the meaning of s. 193 of the Indian Penal Code.

Notes.—1. Amendment.—The words "has reason to believe" were substituted for the words "is informed" by s. 5, Coroners' Act of 1881.

2. Right of Coroner to hold Inquests.—The Coroner has not an absolute right to hold inquests in every case in which he chooses to do so. (See *R.* v. *Kent, JJ.*, **11 East, 229.**) It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress, and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death—that it may have been due to other causes than common illness. In such cases the Coroner not only may, but ought to hold an inquest. *R.* v. *Price*, **12 Q. B. D. 247.** And a Coroner is justified in holding an inquest if he honestly believes in the truth of the information given to him which, if true, would make it his duty to hold such inquest. *R.* v. *Stephenson*, **13 Q. B. D. 331.**

3. No analogy between a Coroner's inquest and Inquiry by Magistrate under s. 176, Cr. P. C.—"Some comparison has been made between a Coroner's inquiry and the inquiry under s. 135 (now s. 176), Cr. P. C. As far as I can see the only semblance of any basis for that comparison arises out of the word 'inquest' which is used not in s. 176, but in the earlier sections, where the Legislature apportions the various duties of Magistrates. I think that we ought not to introduce any analogy which does not really exist. The proceedings of a Coroner are in their nature regular criminal proceedings having a distinct result and a result upon which if it affects any particular person at all, ulterior proceedings can be taken against that person. I think also I am speaking correctly, when I say that even in some cases where no particular person was affected, still the result of the verdict of the Coroner's jury might be to affect a forfeiture of property to the Crown. No doubt some of the results do not exist now and have fallen into disuse; but we must, I think, remember what the Coroner's inquest originally was when we are asked to consider why it results in a finding."—*Per* MARKBY, J., in **3 C. 742** at p. 752 = **3 C. L. R. 59.**

Coroner to be sent for when prisoner dies.

9. Whenever a prisoner dies in a prison situate within the place for which a Coroner is so appointed, the Superintendent of the Prison shall send for the Coroner before the body is disposed of.* Any Superintendent failing herein shall, on conviction before a Magistrate, be punished with fine not exceeding five hundred rupees.

Nothing in the former part of this section applies to cases in which the death has been caused by cholera or other epidemic disease.

Note.—The words "*disposal of*" have been substituted for the word "*buried*" by s. 2 of Act IV of 1908.

Power to hold inquests on bodies within local limits wherever cause of death occurred.

10. Whenever an inquest ought to be holden on any body lying dead within the local limits of the jurisdiction of any Coroner, he shall hold such inquest, whether or not the cause of death arose within his jurisdiction.

Power to order body to be disinterred.

11. A Coroner may order a body to be disinterred within a reasonable time after the death of the deceased person, either for the purpose of taking an original inquisition where none has been taken, or a further inquisition *where the Coroner considers it necessary or desirable in the interests of justice to take a further inquisition.*

Note.—The words in italics were substituted for the words '*where the first was insufficient.*'—S. 3 of Act IV of 1908. *Cf.* s. 176, para. 2 of the Code.

* Amended by s. 2 of Act IV of 1908.

Summoning jury

12. On receiving notice of any death mentioned in s 8 the Coroner shall summon five seven nine eleven thirteen or fifteen respectable persons to appear before him at a time and place to be specified in the summons for the purpose of enquiring when how and by what means the deceased came by his death

Inquest may be on Sunday

Any inquest under this Act may be held on a Sunday

Opening Courts

13. When the time arrives the Coroner shall proceed to the place so specified open the Court by proclamation and call over the names of the jurors

Jurors to be sworn

14. When a sufficient jury is in attendance he shall administer an oath to each juror to give a true verdict according to the evidence and shall then proceed with the jury to view the body

View of body

15. The Coroner and the jury shall view and examine the body at the first sitting of the inquest and the Coroner shall make such observations to the jury as the appearance of the body requires

["Provided that the Coroner may with the concurrence of a majority of the jury, dispense with a view of the body, if he is satisfied from medical evidence or medical certificates that no advantage would result from such viewing]*

Proclamation for witnesses

16. The Coroner shall than make proclamation for the attendance of witnesses or where the inquiry is conducted in secret shall call in separately such as know anything concerning the death

Summoning witnesses

17. It shall be the duty of all persons acquainted with the circumstances attending the death to appear before the inquest as witnesses the Coroner shall enquire of such circumstances and the cause of the death and if before or during the inquiry he is informed that any person, whether within or without the local limits of his jurisdiction can give evidence or produce any document material hereto may issue a summons requiring him to attend and give evidence or produce such document on the inquest.

Any person disobeying such summons shall be deemed to have committed an offence under ss 174 175 or 176 of the India Penal Code as the case may be †

For the purpose of causing prisoners to be brought up to give evidence the Coroner shall be deemed a Criminal Court within the meaning of [Part IX of *the Prisoners Act* 1890] ‡

Post mortem examinations

18. The Coroner may direct the performance of a *Post mortem* examination, with or without any analysis of the contents of the stomach or intestines by any medical witness summoned to attend the inquest

Fees to medical witnesses

and every medical witness, other than the Chemical Examiner to Government, shall be entitled to such reasonable remuneration as the Coroner thinks fit

Report of Chemical Examiner

"**18-A.** Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Act may be used as evidence in any inquest under this Act and in any subsequent inquiry trial or other proceeding under the Code of Criminal Procedure 1898

Note —This section has been added by s 6 of Act IV of 1908

Evidence to be on oath
Evidence on behalf of accused

19 All evidence given under this Act shall be on oath and the Coroner shall be bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person

* Portions in brackets added by s 4 of Act IV of 1908

† The first two paras of s 17 have been substituted by Act X of 1881 s 6

‡ Portions in bracket added by s 4 of Act IV of 1908

27. [*Repealed by s.* 10 *of Act IV of* 1908.]

Note.—The repealed section was as follows:—

"In cases where the jury has found against any person a verdict of culpable homicide, not amounting to murder, or of killing by a rash or negligent act not amounting to culpable homicide, the Coroner may, if he thinks fit, accept bail with sufficient sureties for the appearance of such person at the next Criminal Sessions, and thereupon such person, if in custody of any officer of the Coroner's Court, or in any jail under a warrant of commitment issued by the Coroner, shall be discharged therefrom."

Power to accept bail

28. When the proceedings are closed, or before, if it be necessary to adjourn the inquest, the Coroner shall give his warrant for the disposal of the body on which the inquest has been taken.

Warrant for burial

Inquisition not to be quashed for want of form.

29. No inquisition found upon or by any inquest shall be quashed for any technical defect.

Amendment of inquisition.

In any case of technical defect, a Judge of the High Court may, if he thinks fit, order the inquisition to be amended, and the same shall forthwith be amended accordingly.

Note.—Defective Inquisition.—In England, if the inquisition is defective, it may be brought up with the depositions by *certiorari* to the King's Bench Division of the High Court and quashed. *R. v. Clerk of Assize of Oxford Circuit* 1897, 1 Q. B. 370 = 18 Cox 518.

30. It shall no longer be the duty of the Coroner to enquire whether any person dying by his own act was or was not *felo de se*, to enquire of treasure-trove or wrecks, to seize any fugitive's goods, to execute process, or to exercise as Coroner any jurisdiction not expressly conferred by this Act.

Cessation of jurisdiction as to treasure-trove, wrecks, etc.

Felo de se.

A *felo de se*, shall not forfeit his goods.

Deodands.

Deodands are hereby abolished.

Note.—1. Felo de se.—"A *felo de se* is he that deliberately puts an end to his own existence or commits an unlawful malicious act, the consequence of which is his own death, as, if attempting to kill another, he runs upon his antagonist's sword: or shooting at another, the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our Coroner's juries are apt carry it, *viz.*, that the very act of suicide is an evidence of insanity, as if every man who acts contrary to reason has no reason at all . . . . If a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man."—BLACKSTONE, Vol. IV, p. 189.

2. **Deodand.**—"By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the King to be applied to pious uses, and distributed in alms by his High Almoner; though formerly destined to a more superstitious purpose. . . . . If an adult person falls from a cart and is killed, the thing is certainly forfeited. If a horse or ox or other animal of his own motion kill, as well an infant as an adult, or if a cart run over him they shall in either case be forfeited as *deodand* . . . . In all cases of homicide, the instrument of death may be claimed by the King as *deodand*; but no *deodands* are due for accidents happening on the High Seas, that being out of the jurisdiction of the Common Law, but if a man falls from a boat or ship in fresh water and is drowned, the vessel and cargo are a *deodand*"—BLACKSTONE, Vol. I, pp. 300—302.

CHAPTER IV.

CORONER'S JURIES.

31. Whenever any person has been duly summoned to appear as a juror by a Coroner, and fails or neglects to attend at the time and place specified in the summons, the Coroner may cause him to be openly called in his Court three times to appear and serve as a juror; and upon the non-appearance of such person, and proof that such summons has been served upon him, or left at his usual place of abode, may impose such fine upon the defaulter, not exceeding fifty rupees as the Coroner seems fit.

Fine on juror neglecting to attend.

Certificate as to defaulting juror

32. The Coroner shall make out and sign a certificate, containing the name and surname, the residence and trade or calling of every person so making default together with the amount of the fine so imposed, and the cause of such fine, and shall send such certificate to one of the Magistrates of the place of which he is the Coroner,

Service of copy of certificate

and shall cause a copy of such certificate to be served upon the person so fined, by having it left at his usual place of residence, by or sending the same through the post office, addressed as aforesaid and registered

Levy of fine

33. Thereupon such Magistrate shall cause the fine to be levied in the same manner as if it had been imposed by himself

Jurors not to be twice summoned within the year

34. Unless in case of necessity no person who has appeared, or has been summoned to appear, as a juror on an inquest, and has not made default, shall, within one year after such appearance or summons, be summoned to appear as a juror under this Act

Jurors on inquest on prisoner

35. When an inquest is held on the body of a prisoner dying within a prison, no officer of the prison and no prisoner confined therein shall be juror on such inquest

CHAPTER V.

Rights and Liabilities of Coroners

Coroner's salary

36. Every Coroner shall be entitled to such salary for the performance of the duty of his office as is prescribed in that behalf by the Governor General in Council

Disbursements to be repaid

37. All disbursements duly made by a Coroner for fees to medical witnesses, hire of rooms for the jury, and the like, shall be repaid to him by the Local Government

Power to appoint deputy

38. Every Coroner may, from time to time, with the previous sanction of the Local Government, appoint, by writing under his hand, a proper person to act for him as his deputy in the holding of Inquests *

All inquests taken and other acts done by any such deputy, under or by virtue of any such appointment shall be deemed to be the acts of the Coroner appointing him

Provided that no such deputy shall act for any such Coroner except during the illness of the said Coroner or during his absence for any lawful and reasonable cause

Revocation of appointment

Every such appointment may at any time be cancelled and revoked by the Coroner by whom it was made

Exemption from serving on juries

39. No Coroner or Deputy Coroner shall be liable to serve as a juror

Privilege from arrest

40. Coroners and Duputy Coroners shall be privileged from arrest while engaged in the discharge of their official duty

Penalty for failure to comply with Act

41. Any Coroner and Deputy Coroner failing to comply with the provisions of this Act or otherwise misconducting himself in the execution of his office shall be liable to such fine as the Chief Justice of the High Court, upon summary examination and proof of the failure or misconduct, thinks fit to impose

Proceedings barred by tender

42. No proceeding for anything done under this Act, or for any failure to comply with its provisions, shall be commenced or prosecuted † after tender of sufficient amends

FIRST SCHEDULE—[*Repealed by Act XII of* 1873]

SECOND SCHEDULE.

Form of Inquisition

An inquisition taken at on the day of 187 before E F, Coroner of in the case of A B deceased ‡] upon the oath of G H, I J, K L and M N, then and there duly sworn and

We, the said Jurors, find unanimously [*or* by a majority of] that the death of the said A B was caused, on or about the day of 187 by [*here state the cause of death*] *as in the following examples*:—

(1) *Cases of homicide*—a blow on the head with a stick inflicted on him by C D under such circumstances that the act of C D was justifiable [*or* accidental] homicide.
—a stab on the heart with a knife inflicted on him by C D, under such circumstances that the act of C D was culpable homicide not amounting to murder [*or* culpable homicide amounting to murder, *or* a rash *or* negligent act not amounting to culpable homicide].

(2) *Cases of accident*—falling out of a boat into the river Hooghli, whereby he was drowned.
—a kick from a horse which fractured his skull and ruptured blood-vessel in his head.

(3) *Cases of suicide*—shooting himself through the head with a pistol.
—arsenic, which he voluntarily administered to himself.

(4) *Cases of sudden death by means unknown*—disease of the heart.
—apoplexy.
—sunstroke.

And so say the jurors upon their oath aforesaid.

Witness our hands. E. F., Coroner of

G H, I J, K L, M N, O S (jurors).

APPENDIX IX.

PRISONERS' ACT No. III OF 1900.

(*Received the Governor-General's assent on the 2nd February*, 1900.)

CONTENTS.

PART I.

PRELIMINARY.

SECTIONS.

PART II.

GENERAL.

PART III.

PRISONERS IN THE PRESIDENCY TOWNS.

Commissions for Examination of Prisoners.

44. Commissions for examination of prisoners.
45. Commissions for examination of prisoners beyond limits of appellate jurisdiction of High Court.
46. Commission how to be directed.

Service of Process on Prisoners.

47. Process how served on prisoners.
48. Process served to be transmitted at prisoner's request.
49. Application of this Part in certain cases.
50. Deposit of costs.
51. Power to make rules under this Part.
52. Power to declare who shall be deemed officer in charge of prison.
53. Repeals.

AN ACT TO CONSOLIDATE THE LAW RELATING TO PRISONERS CONFINED BY ORDER OF A COURT.

Preamble.

WHEREAS it is expedient to consolidate the law relating to prisoners* confined by order of a Court; It is hereby enacted as follows:—

PART I.—*Preliminary.*

Short title, extent and commencement.

1. (1) This Act may be called the Prisoners' Act, 1900.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Sonthal Purganńas, and the Purganna of Spiti, and

(3) it shall come into force at once.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Court" includes a Coroner and any officer lawfully exercising Civil, Criminal or Revenue jurisdiction, and

(*b*) "prison" includes any place which has been declared by the Local Government by general or special order, to be a subsidiary jail.

PART II.—*General.*

Officers in charge of prisons to detain persons duly committed to their custody.

3. The officer in charge of a prison shall receive and detain all persons duly committed to his custody, under this Act or otherwise, by any Court, according to the exigency of any writ, warrant, or order by which such person has been committed, or until such person is discharged or removed in due course of law.

Officers in charge of prisons to return writs, etc., after execution or discharge.

4. The officer in charge of a person shall forthwith, after the execution of every such writ, order or warrant as aforesaid, other than warrant of commitment for trial, or after the discharge of the person committed thereby, return such writ, order or warrant to the Court by which the same was issued, or made, together with a certificate endorsed thereon and signed by him showing how the same has been executed or why the person committed thereby has been discharged from custody before the execution thereof.

Note.—For return of warrant on execution, *see* s. 400, Cr. P. C.

PART III.—*Prisoners in the Presidency towns.*

Warrants, etc., to be directed to Police-officers.

5. Every writ or warrant for the arrest of any person issued by the High Court in the exercise of its ordinary, extraordinary or other criminal jurisdiction shall be directed to, and executed by a Police-officer within the local limits of such jurisdiction.

Powers for Local Governments to appoint Superintendents of Presidency-prisons.

6. The Local Government may appoint officers who shall have authority to receive and detain prisoners committed to their custody under this part.

Explanation.—An officer so appointed, by whatever designation he may be styled, is hereinafter referred to as "the Superintendent."

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*A defendant in a civil suit arrested before judgment and confined for failure to furnish security is not a *prisoner* within the meaning of this Act and a Judge is at liberty to direct the Jailor to bring him up before the Court at the hearing of the suit without having recourse to the procedure under this Act. **5 B. L. R. 215=13 W. R. 278.**

Delivery of persons sentenced to imprisonment or death by High Court

7. Where any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to imprisonment or to death the Court shall cause him to be delivered to the Superintendent together with its warrants and such warrant shall be executed by the Superintendent and returned by him to the High Court when executed

Delivery of persons sentenced to transportation or penal servitude by High Court

8 Where any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to transportation or penal servitude the Court shall cause him to be delivered for intermediate custody to the Superintendent and the transportation or penal servitude of such person shall be deemed to commence from such delivery

Delivery of persons committed by High Court in execution of a decree or for contempt

9 Where any person is committed by the High Court whether in execution of a decree or for contempt of Court or for any other cause the Court shall cause him to be delivered to the Superintendent together with its warrant of commitment.

Note—Section not applicable to persons sentenced—This section does not apply to a prisoner convicted and sentenced by the High Court in the exercise of its powers on a reference under s 307 Cr P C and such a prisoner can be committed to any jail within its revisional jurisdiction **6 C W N 254**

Delivery of persons sentenced by Presidency Magistrates

10 Where any person is sentenced by a Presidency Magistrate to imprisonment or is committed to prison for failure to find security to keep the peace or to be of good behaviour the Magistrate shall cause him to be delivered to the Superintendent together with his warrant

Delivery of persons committed for trial by High Court

11. Every person committed by a Magistrate or Justice of the Peace for trial by the High Court in the exercise of its original criminal jurisdiction shall be delivered to the Superintendent together with a warrant of commitment directing the Superintendent to produce such person before the Court for trial and the Superintendent shall as soon as practicable cause such person to be taken before the Court at a Criminal Session thereof together with the warrant of commitment in order that he may be dealt with according to law

Note—The words *or Coroner* have been omitted after justice of the peace —Act IV of 1908 s. 13

Custody pending hearing by High Court under s 350 of the Court of Civil Procedure of application for insolvency

12 The High Court may pending the hearing under s 350 of the Code of Civil Procedure of any application for a declaration of insolvency cause the judgment debtor concerned to be delivered to the Superintendent subject to the provisions as to release on security of s 349 of the said Code and the Superintendent shall detain the said judgment debtor in safe custody until he is re delivered to an officer of the High Court for the purpose of being taken before it in pursuance of its order or until he is released in due course of law

Note—The New Civil Procedure Code (Act V of 1908) contains no provisions corresponding to Chapter XX (ss. 344—360-A) of the Code of 1882 The whole of the Insolvency Chapter in the 1882 Code was repealed by the Provincial Insolvency Act of 1907 which contains the law of Insolvency in the Mofussil The Presidency towns Insolvency Act of 1909 contains the law relating to Insolvency in the Presidency towns

Delivery of persons arrested in pursuance of warrant of High Court or Civil Court in Presidency town

13. (1) Every person arrested in pursuance of a writ warrant or order of the High Court in the exercise of its original civil jurisdiction or in pursuance of a warrant of any Civil [illegible]

issued awarded or made or before a Judge thereof if the said Court or a Judge thereof is then sitting for the exercise of original jurisdiction

(2) If the said Court or a Judge thereof is not then sitting for the exercise of original jurisdiction such person arrested as aforesaid shall unless a Judge of the said Court otherwise directs be delivered to the Superintendent for intermediate custody and shall be brought before the said Court or a Judge thereof at the next sitting of the said Court or of a Judge thereof for the exercise of original jurisdiction in order that such person may be dealt with according to law and the said Court or Judge shall have power to make or award all necessary orders or warrant for that purpose

PART IV—*Prisoners outside the Presidency towns*

References in this Part to prisons etc to be construed as referring also to Reformatory Schools

14 In this Part all references to prisons or to imprisonment or confinement shall be construed as referring also to Reformatory Schools or to detention therein.

Power for officers in charge of prisons to give effect to sentence of certain Court.

15. (1) Officers in charge of prisons outside the Presidency towns may give effect to any sentence or order or warrant for the detention of any person passed or issued—

(*a*) by any Court or tribunal acting, whether within or without British India, under the general or special authority of Her Majesty, or of the Governor-General in Council, or of any Local Government, or

(*b*) by any Court or tribunal in the territories of any Native Prince or State in India—

(i) If the presiding Judge, or, if the Court or tribunal consist of two or more Judges, at least one of the Judges is an officer of the British Government authorised to sit as such Judge by the Native Prince or State, or by the Governor-General in Conncil, and

(ii) if the reception, detention, or imprisonment in British India, or in any province of British India, of persons sentenced by any such Court or tribunal, has been authorised by general or special order by the Governor-General in Council or the Local Government, as the case may be, or

(*c*) by any other Court or tribunal in the territories of any Native Prince or State in India, with the previous sanction of the Governor-General in Council or of the Local Government, in the case of each such sentence, order, or warrant.

(2) Where a Court or tribunal of such a Native Prince or State has passed a sentence which cannot be executed without the concurrence of an officer of the British Government, and such sentence has been considered on the merits, and confirmed by any such officer specially authorised in that behalf, such sentence, and any order or warrant issued in pursuance thereof, shall be deemed to be the sentence, order, or warrant of a Court or tribunal acting under the authority of the Governor-General in Council.

Warrant of officer of such Court to be sufficient authority

16. A warrant under the official signature of an officer of such Court or tribunal as is referred to in s. 15 shall be sufficient authority for holding any person in confinement, or for sending any person for transportation, in pursuance of the sentence passed upon him.

Procedure where officer in charge of prison doubts the legality of warrant sent to him for execution under this Part.

17. (1) Where an officer in charge of a prison doubts the legality of a warrant or order sent to him for execution under this sort, or the competency of the person whose official seal or signature is affixed thereto to pass the sentence and issued the warrant or order, he shall refer the matter to the Local Government, by whose order on the case he and all other public officers shall be guided as to the future disposal of the prisoner.

(2) Pending a reference made under sub-sec. (1), the prisoner shall be detained in such manner, and with such restrictions or mitigations, as may be specified in the warrant or order.

Execution in British India of certain capital sentences not ordinarily executable there.

18. (1) Where a British Court, exercising, in or with respect to territory beyond the limits of British India, jurisdiction which the Governor-General in Council has in such territory,—

(*a*) has sentenced any person to death, and

(*b*) being of opinion that such sentence should, by reason of there being in such territory no secure place for the confinement of such person, or no suitable appliances for his execution in a decent and humane manner, be executed in British India, has issued its warrant for the execution of such sentence to the officer in charge of a prison in British India,

such officer shall, on receipt of the warrant, cause the execution to be carried out at such place as may be prescribed therein in the same manner, and subject to the same conditions, in all respects as if it were a warrant duly issued under the provisions of s. 381 of the Code of Criminal Procedure, 1898.

(2) The prisons of which the officers in charge are to execute sentences under any such warrants as aforesaid shall be such as the Governor-General in Council, or a Local Government authorised by the Governor-General in Council in this behalf, may, by general or special order, direct.

(3) A Court shall be deemed to be a British Court for the purposes of this section if the presiding Judge, or, if the Court consists of two or more Judges, at least one of the Judges is an officer of the British Government authorised to act as such Judge by any Native Prince or State in India, or by the Governor-General in Council:

Provided that every warrant issued under this sub-section by any such tribunal shall, if the tribunal consists of more than one Judge, be signed by a Judge who is an officer of the British Government authorised as aforesaid.

Notes.—1. For notifications authorising certain British Courts to send warrants under sub-sec. (1) to jails in British India (to be notified by the Governor General in Council) *see* Western India volume of *British Enactments in force in Native States* Edition 1900 p 463 and for notifications appointing certain jails in British India to which such Courts may send their warrants for the execution of capital sentences see *ibid* p 464

2 For notification authorising the Madras Government to specify the jails where capital sentences may be executed *see* G O No 2145 Judicial (*Madras Local Rules and Orders* Edition 1903, Vol. I Part II p 191) see *ibid*, pp. 191 192 for notification declaring that British Criminal Courts having jurisdict on in *Ramandrug* and *Periyar* Camps may send their warrants for the execution of death sentence to the District Jails of Bellary and Madura respectively

PART V.—*Persons under Sentence of Penal Servitude*

Persons under sentence of penal servitude how to be dealt with

19. (1) Every person under sentence of penal servitude may be confined in such prison within British India as the Governor General in Council by general order directs and may while so confined be kept to hard labour and until he can conveniently be removed to such prison be imprisoned with or without hard labour and dealt with in all other respects as persons under sentence of rigorous imprisonment may for the time being by law be dealt with.

(2) The time of such intermediate imprisonment and the time of removal from one prison to another, shall be taken and reckoned in discharge or part discharge of the term of the sentence

Note.—For notification declaring the barracks and other places used for the confinement of prisoners at Port Blair, Port Mouat and the Nicobars to be prisons for the confinement of convicts sentenced to penal servitude see *Gazette of India* 1891 Part I p 41

Enactments respecting persons under sentences of transportation or imprisonment with hard labour applied to persons under sentence of penal servitude

20. Every enactment now in force in British India with respect to persons under sentence of transportation or under sentence of imprisonment with hard labour shall so far as is consistent with this Act be construed to apply to persons under sentence of penal servitude

Power to grant licenses to persons sentenced to penal servitude

21. (1) [illegible] as the Governor General in Council may think fit

(2) The Governor General in Council may revoke or alter any license granted under sub-sec. (1)

Licenses to be allowed to go at large

22. So long as any license granted under s 21 sub-sec (1) continues in force and unrevoked the licensee shall not be liable to imprisonment or penal servitude by reason of his sentence but shall be allowed to go and remain at large according to the terms of the license

Apprehension of convict where license revoked

23 In case of the revocation of any such license as aforesaid any Secretary to the Government of India may by order in writing signify to any Justice of the Peace or Magistrate that the license has been revoked and require him to issue a warrant for the arrest of the licensee and such Justice or Magistrate shall issue his warrant accordingly

Execution of warrant

24 A warrant issued under s 23 may be executed by any officer to whom it is directed or delivered for that purpose in any part of British India and shall have the same force in any place within British India as if it had been originally issued or subsequently endorsed by the Justice of the Peace or Magistrate or other authority having jurisdiction in the place where it is executed

Licensee when arrested to be brought up for re-commitment

25 (1) When the licensee for whose arrest a warrant has been issued under s 23 is arrested there under he shall be brought as soon as conveniently may be before the Justice or Magistrate by whom the warrant was issued or before some other Justice or Magistrate of the same place or before a Justice or Magistrate having jurisdict on in the district in which the lincensee has been arrested

(2) Such Justice or Magistrate as aforesaid shall thereupon make out a warrant under his hand and seal for the re-commitment of the licensee to the prison from which he was released under the license

26 When a warrant has been issued under s 25 sub sec (2) the licensee shall be re committed accordingly and shall thereupon be liable to be kept in penal servitude for such [illegible] oned [illegible] ler the

Penalty for breach of condition of the license

27. If a license is granted under s. 21 upon any condition specified therein, and the licensee—

(*a*) violates any condition so specified, or

(*b*) goes beyond the limits so specified, or

(*c*) knowing of the revocation of the license, neglects forthwith to surrender himself, or conceals himself, or endeavours to avoid arrest, he shall be liable, upon conviction, to be sentenced to penal servitude for a term not exceeding the full term of penal servitude mentioned in the original sentence.

PART VI.—*Removal of Prisoners.*

References in this Part to prisons, etc., to be construed as referring also to Reformatory Schools.

28. In this Part, all references to prisons or to imprisonment or confinement shall be construed as referring also to Reformatory Schools or to detention therein.

Removal of prisoners from one prison to another in the same Province

29.* (1) The Governor-General in Council may, by general or special order, provide for the removal of any prisoner confined in a prison—

(*a*) under sentence of death, or

(*b*) under, or in lieu of a sentence of imprisonment or transportation, or

(*c*) in default of payment of a fine, or

(*d*) in default of giving security for keeping the peace, or for maintaining good behaviour, to any, other prison in British India.

(2) The Local Government and (subject to its orders and under its control) the Inspector-General of Prisons may, in like manner provide for the removal of any prisoner confined as aforesaid in the Province to any other in the Province.

Lunatic prisoners how to be dealt with

30. (1) Where it appears to the Local Government that any person detained or imprisoned under any order or sentence of any Court is of unsound mind, the Local Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind order his removal to a Lunatic Asylum or other place of safe custody within the Province, there to be kept and treated, as the Local Government directs, during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned, or, if, on the expiration of that term, it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law.

(2) Where it appears to the Local Government that the prisoner has become of sound mind, the Local Government shall, by a warrant directed to the person having charge of the prisoner, if still liable to be kept in custody, remand him to the prison from which he was removed, or to another prison, within the Province, or if the prisoner is no longer liable to be kept in custody, order him to be discharged.

(3) The provisions of s. 9 of the Lunatic Asylum's Act, 1858,† shall apply to every person confined in a Lunatic Asylum under sub-sec. (1) after the expiration of the term for which he was ordered or sentenced to be detained or imprisoned; and the time during which a prisoner is confined in a Lunatic Asylum under that sub-section shall be reckoned as part of the term of detention or imprisonment, which he may have been ordered or sentenced by the Court to undergo.

(4) In any case in which a Local Government is competent under sub-sec. (1) to order the removal of a prisoner to a Lunatic Asylum or other place of safe custody within the Province, the Governor-General in Council may order his removal to any Lunatic Asylum or other place of safe custody in any part of British India; and the provisions of this section, respecting the custody, detention, remand, and discharge of a prisoner removed by order of a Local Government shall, so far as they can be made applicable, apply to a prisoner removed by order of the Governor-General in Council.

31. ‡ [* * * * * * .]

* This section was substituted by Act I of 1903 the (*Repealing and Amending Act*). Schedule II, for the original section 29.

† *See* Act XXXVI of 1858.

‡ This section which related to the removal of prisoners from territories under one Local Government to territories under another was repealed by Act I of 1903.

PART VII.—*Persons under Sentence of Transportation*

Appointment of places for confinement of persons under sentence of transportation and removal thereto

32. The Governor General in Council may appoint places within British India to which persons under sentence of transportation shall be sent, and the Local Government, or some officer duly authorised in this behalf by the Local Government, shall give orders for the removal of such persons to the places so appointed, except when sentence of transportation is passed on a person already undergoing transportation under a sentence previously passed for another offence

Note.—For notification appointing the Central Jails at *Rajahmundry, Vellore, Salem, Trichinopoly, Coimbatore and Cannanore* and the District Jails at *Mangalore and Pamban* and the *Madras Penitentiary* as places to which prisoners sentenced to transportation may be sent see *Gazette of India* 1900 Part I p 7, for similar notifications as to *Yerrowada Central Jail* Bombay, see *Gazette of India*, 1873 Part I, p 732, for *Raipur Jail, Gazette*, 1891, Part I, p 185, *Delhi and Multan, Gazette* 1889, Part I, p 339, *Benares Ahmedabad, Farrukabad, Agra and Bareilly Jails Gazette*, 1893 Part I, p 2, *Lucknow, Gazette*, Part I, p 171, for *Montgomery Central Jail, Gazette*, 1894 Part I, p 180, for *Umballa and Rawalpindi, Gazette*, 1895, Part I, p. 183; for Jails in *Rangoon, Moulmein, Bassein, Mandalay, Insein and Thayet m-yo, Gazette*, 1897 Part I, p 320 All these notifications under Act V of 1871 are still kept in force by s 24 of *the General Clauses Act*, Act X of 1897

PART VIII.—*Discharge of Prisoners*

Release on recognisance by order of High Court of prisoner recommended for pardon

33. Any Court established under the Indian High Courts Act 1861 * may, in any case in which it has recommended to Her Majesty the granting of a free pardon to any prisoner, permit him to be at liberty on his own recognisance

PART IX.—*Provisions for requiring the Attendance of Prisoners and obtaining their Evidence.*

ATTENDANCE OF PRISONERS IN COURT

References in this Part to prisons, etc to be construed as referring also to Reformatory Schools

34. In this Part, all references to prisons or to imprisonment or confinement shall be construed as referring also to Reformatory Schools or to detention therein.

Power for Civil Courts to require appearance of prisoner to give evidence

35. Subject to the provisions of s 39, any Civil Court may, if it thinks that the evidence of any person confined in any prison within the local limits of its appellate jurisdiction if it is a High Court, or if it is not a High Court, then within the local limits of the appellate jurisdiction of the High Court to which it is subordinate, is material in any matter pending before it make an order in the form set forth in the first schedule, directed to the officer in charge of the prison.

District Judge in certain cases to countersign orders made under s 35

36. (1) Where an order under s 35 is made in any civil matter pending—

(*a*) in a Court subordinate to the District Judge or

(*b*) in a Court of Small Causes outside a Presidency town,

it shall not be forwarded to the officer to whom it is directed, or acted upon by him until it has been submitted to, and countersigned by—

(i) the District Judge to whom the Court is subordinate or

(ii) the District Judge within the local limits of whose jurisdiction the Court of Small Causes is situate

(2) Every order submitted to the District Judge under sub-sec. (1) shall be accompanied by a statement, under the hand of the Judge of the Subordinate Court or Court of Small Causes, as the case may be, of the facts which, in his opinion render the order necessary, and the District Judge may, after considering such statement, decline to countersign the order

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* *See* Stat, 24 and 25 Vict, c 104

37. Subject to the provisions of s. 39, any Criminal Court may, if it thinks that the evidence of any person confined in any prison within the local limits of its appellate jurisdiction, if it is a High Court, or if it is not a High Court, then within the local limits of the appellate jurisdiction of the High Court to which it is subordinate, is material in any matter pending before it, or if a charge of an offence against such person is made or pending, make an order in the form set forth in the first or second schedule, as the case may be directed to the officer in charge of the prison:

Power for certain Criminal Courts to require attendance of prisoner to give evidence or answer to charge.

Provided that, if such Criminal Court is inferior to the Court of a Magistrate of the first class, the order shall be submitted to, and countersigned by, the District Magistrate to whose Court such Criminal Court is subordinate, or within the local limits of whose jurisdiction such Criminal Court is situated.

Note—Section does not apply to prisoners confined in Presidency towns.—Under the corresponding section of the Prisoners' Testimony Act XV of 1869, it was *held* a Presidency Magistrate was not competent to countersign a warrant issued by a District Magistrate for the production before him of a convict confined in the Penitentiary at Madras and that such production would require the sanction of the High Court. **Weir I, 866.** *See* also **Ratanlal, 66,** where it was *held* a Magistrate can, without the intervention of the High Court, procure under this section the attendance of a convict as an accused person. *See* also **Ratanlal 776 and 19 B. 195.**

38. Where any person, for whose attendance an order as in this Part provided is made, is confined in any district other than that in which the Court making or countersigning the order is situate, the order shall be sent by the Court by which it is made or countersigned to the District or Sub-divisional Magistrate within the local limits of whose jurisdiction the person is confined, and that Magistrate shall cause it to be delivered to the officer in charge of the prison in which the person is confined.

Order to be transmitted through Magistrate of the District or Sub division in which person is confined.

39. (1) Where a person is confined in a prison within a Presidency town, or in a prison more than one hundred miles distant from the place where any Court, subordinate to a High Court, in which his evidence is required is held, the Judge or presiding officer of the Court in which the evidence is so required shall, if he thinks that such person should be removed under this Part for the purpose of giving evidence in such Court, and if the prison is within the local limits of the appellate jurisdiction of the High Court to which such Court is subordinate, apply in writing to the High Court, and the High Court may, if it thinks fit, make an order in the form set forth in the first schedule directed to the officer in charge of the prison.

Procedure where removal is desired of person confined in Presidency town or more than one hundred miles from place where evidence is required.

(2) The High Court making an order under sub-sec. (1) shall send it to the District or Sub-divisional Magistrate within the local limits of whose jurisdiction the person named therein is confined, or, in the case of a person confined in a prison within a Presidency town, to the Commissioner of Police and such Magistrate or Commissioner shall cause it to be delivered to the officer in charge of the prison in which the person is confined.

Note—Scope of the Section.—This section applies only where a prisoner's *evidence* is required. If he be wanted to answer a criminal charge, the proper procedure is under s. 36, *supra.* **Ratanlal 66.** *See* also the remarks of MUTTUSAMY AIYAR, J., in **Weir I, 866.**

40. Where a person is confined in a prison beyond the local limits of the appellate jurisdiction of a High Court, any Judge of such Court may, if he thinks that such person should be removed under this Part for the purpose of answering a charge of an offence, or of giving evidence in any criminal matter, in such Court or in any Court, subordinate thereto, apply in writing to the Local Government of the territories within which the prison is situate, and the Local Government may, if it thinks fit, direct, that the person be so removed, subject to such rules regulating the escort of prisoners as the Governor-General in Council may prescribe.

Persons confined beyond limits of appellate jurisdiction of High Court.

41. Upon delivery of any order under this Part to the officer in charge of the prison in which the person named therein is confined, that officer shall cause him to be taken to the Court in which his attendance is required, so as to be present in the Court at the time at which such order is mentioned, and shall cause him to be detained in custody in or near the Court until he has been examined, or until the Judge or presiding officer of the Court authorises him to be taken back to the prison in which he was confined.

Prisoner to be brought up.

42. The Governor General in Council or the Local Government may by notification in the *Gazette of India* or the local *Official Gazette*, as the case may be, direct that any person or any class of persons shall not be removed from the prison in which he or they may be confined, and thereupon, and so long as such notification remains in force, the provisions of this Part other than those contained in s 44 to s. 46, shall not apply to such person or class of persons

Power of Government to exempt certain prisoners from operation of this Part

Note.—As to Rules under th ... the escort of prisoners and co ... Commissioner of Assam—*Assa* ... (iii) the Government of Punjab as to removal of State Prisoners—*Punjab Gazette*, 1901, Part I, p 19, (iv) Chief Commissioner of Central Provinces—*C P. Gazette*, 1900, Part I, p 159 (v) Government of Bombay, *Bombay Gazette*, 1901, Part I, p 1728 and (vi) Ajmere Merwara—*Gazette of India*, 1903 Part I p 433

Officer in charge of prison when to abstain from carrying out orders

43. In any of the following cases, that is to say,—

(a) where the person named in any order made under ss. 35 37 or 39 appears to be, from sickness or other infirmity unfit to be removed the officer in charge of the prison in which he is confined shall apply to the District or Sub-divisional Magistrate within the local limits of whose jurisdiction the prison is situate, and if such Magistrate, by writing under his hand, declares himself to be of opinion that the person named in the order is from sickness or other infirmity, unfit to be removed, or

(b) where the person named in any such order is under committal for trial, or

(c) where the person named in any such order is under a remand pending trial or pending a preliminary investigation, or

(d) where the person named in any such order is in custody for a period which would expire before the expiration of the time required for removing him under this Part and for taking him back to the prison in which he is confined

the officer in charge of the prison shall abstain from carrying out the order, and shall send to the Court from which the order has been issued a statement of the reason for so abstaining

Provided that such officer as aforesaid shall not so abstain where—

(i) the order has been made under s 37, and

(ii) the person named in the order is confined under committal for trial, or under a remand pending a preliminary investigation, and does not appear to be from sickness or other infirmity, unfit to be removed, and

(iii) the place, where the evidence of the person named in the order is required, is not more than five miles distant from the prison in which he is confined

COMMISSION FOR EXAMINATION OF PRISONERS

Commissions for examination of prisoners

44. In any of the following cases that is to say,—

(a) Where it appears to any Civil Court that the evidence of a person confined in any prison within the local limits of the appellate jurisdiction of such Court, if it is a High Court, or if it is not a High Court, then within the local limits of the appellate jurisdiction of the High Court to which it is subordinate, who for any of the causes mentioned in s 42 or s 43, cannot be removed, is material in any matter pending before it or

(b) where it appears to any such Court as aforesaid that the evidence of a person confined in any prison so situate and more than ten miles distant from the place at which such Court is held, is material in any such matter, or

(c) where the District Judge declines, under s 36 to countersign an order for removal

the Court may, if it thinks fit, issue a commission under the provisions for the Code of Civil Procedure for the examination of the person in the prison in which he is confined

Commissions for examination of prisoners beyond limits of appellate jurisdiction of High Court.

45. Where it appears to a High Court that the evidence of a person confined in prison beyond the local limits of its appellete jurisdiction is material in any civil matter pending before it, or before any Court subordinate to it, the High Court may, if it thinks fit, issue a commission, under the provisions of the Code of Civil Procedure for the examination of the person in the prison in which he is confined.

Commission how to be directed

46. Every commission for the examination of a person issued under s. 44 or s. 45 shall be directed to the District Judge within the local limits of whose jurisdiction the prison in which the person is confined is situate, and the District Judge shall commit the execution of the commission to the officer in charge of the prison, or to such other person as he may think fit.

SERVICE OF PROCESS ON PRISONERS.

Process how served on prisoners.

47. When any process directed to any person confined in any prison is issued from any Criminal or Revenue Court, it may be served by exhibiting to the officer in charge of the prison the original of the process, and depositing with him a copy thereof.

Process served to be transmitted at prisoner's request.

48. (1) Every officer in charge of a prison upon whom service is made under s. 47 shall, as soon as may be, cause the copy of the process deposited with him to be shown and explained to the person to whom it is directed, and shall thereupon endorse upon the process, and sign a certificate to the effect that such person has aforesaid is confined in the prison under his charge, and has been shown and had explained to him a copy of the process.

(2) Such certificate as aforesaid shall be *prima facie* evidence of the service of the process, and, if the person to whom the process is directed requests that the copy shown and explained to him be sent to any other person, and provides the cost of sending it by post, the officer in charge of the prison shall cause it to be so sent.

Note.—The Court will take judicial notice of the signature of the jailor under this section. **4 B. L. R. O. C. 51.**

Application of Part in certain cases

49.* (2) For the purposes of this Part, the Courts of Small Causes established in the Presidency towns and the Courts of Presidency Magistrates shall be deemed to be subordinate to the High Court of Judicature at Fort William, Madras or Bombay, as the case may be.

Deposit of costs

50. No order in any civil matter shall be made by a Court under any of the provisions of this Part until the amount of the costs and charges of the execution of such order (to be determined by the Court) is deposited in such Court:

Provided that, if, upon any application for such order, it appears to the Court to which the application is made that the applicant has not sufficient means to meet the said costs and charges, the Court may pay the same out of any fund applicable to the contingent expenses of such Court, and every sum so expended may be recovered by the Government from any person ordered by the Court to pay the same, as if it were costs in a suit recoverable under the Code of Civil Procedure.

Power to make rules under this Part.

51. (1) The Local Government, and, in cases arising under s. 40, the Governor-General in Council, may make rules—

(*a*) for regulating the escort of prisoners to and from Courts in which their attendance is required, and for their custody during the period of such attandance;

(*b*) for regulating the amount to be allowed for the costs and charges of such escort, and

(*c*) for the guidance of officers in all other matters connected with the enforcement of this Part.

(2) All rules made under sub-sec. (1) shall be published in the local *Official Gazette*, or the *Gazette of India*, as the case may be, and shall, from the date of such publication, have the same force as if enacted by this Act.

Power to declare who shall be deemed officer in charge of prison.

52. The Local Government may declare what officer shall, for the purposes of this Part, be deemed to be the officer in charge of a prison.

Note.—For Notification issued by the Government of Bombay under this section, see *Bombay Gazette*, 1902, Part I, p. 1729.

* Paragraphs 2 and 3 of this section were repealed by the *Lower Burma Courts Act* VI of 1900.

Repeals

53 The enactments in the third schedule or hereby repealed to the extent specified in the last column thereof

THE FIRST SCHEDULE

(See *Sections 35 and 37*)

Court of

To the officer in charge of the (*state name of prison*)

You are hereby required to produce now a prisoner in *under safe and sure conduct* before the Court of at on the day of next by of the clock in the forenoon of the same day, there to give evidence in *a matter now pending before the said Court* and after the said has then and there given his evidence before the said Cou t or the said Court has dispensed with his further attendance cause him to be conveyed under safe and sure conduct back to the said prison

The day of

A F

(Countersigned) *C D*

THE SECOND SCHEDULE

(*See Section 37*)

Court of

To the officer in charge of the (*state name of prison*)

You are hereby required to produce , now a prisoner in under safe and sure conduct before the Court of at on the day of next by of the clock in the forenoon of the same day there to answer a charge now pending before the said Court and *after such charge has been disposed of or the said Court has dispensed with his further* attendance cause him to be conveyed under safe and sure conduct back to the said prison

The day of

A B

(Countersigned) *C D*

THE THIRD SCHEDULE

(*See Section 53*)

Year	No	Title	Extent of Repeal.
1869	XV	The Prisoners Testimony Act 1869	The whole Act
1871	V	The Prisoners Act 1871	Do except s. 15.*
1882	IX	Act 1882	Do
1886	X		Section 25
1889	XI		Do 96†
1891	XII		So much as relates to Act V of 1871
1893	V	The Foreign Jurisdiction (Capital Sentences) Act 1893	The whole Act
1894	VII	*The Prisoners* Act (1871) Amendment Act 1894	Do
1897	VIII	The Reformatory Schools Act 1897	Section 30

* Section 15 of Act V of 1871 runs as follows —

"... ...egulations for confinement of State Prisoners — 15 Any warrant of comm t nent under Regulat on III of ... *Code (for the confin ment of State ... and for the ... achment of the Lands* ... anner as the same might have been ... Act No III of 1858 (*to amend the Law relat ng to the ar e t and detention of ...*

† The whole Act has since been repea ed by *the Lower Bu ma Cou t A t* VI of 1900

APPENDIX X.

PRISONS' ACT No. IX of 1894.

Passed 22nd March, 1894.

AN ACT TO AMEND THE LAW RELATING TO PRISONS.

CONTENTS.

CHAPTER IV

ADMISSION REMOVAL AND DISCHARGE OF PRISONERS

SECTIONS

CHAPTER V

DISCIPLINE OF PRISONERS

CHAPTER VI

FOOD, CLOTHING AND BEDDING OF CIVIL AND UNCONVICTED CRIMINAL PRISONERS

CHAPTER VII

EMPLOYMENT OF PRISONERS.

CHAPTER VIII

HEALTH OF PRISONERS

CHAPTER IX.

VISITS TO PRISONERS

CHAPTER X

OFFENCES IN RELATION TO PRISONS

CHAPTER XI

PRISON-OFFENCES

CHAPTER XII.

MISCELLANEOUS.

WHEREAS it is expedient to amend the law relating to prisons in British India, and to provide rules for the Regulation of such prisons; it is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Title, extent and commencement.

1. (1) This Act may be called the Prisons' Act, 1894.

(2) It extends to the whole of British India, inclusive of Upper Burma, British Baluchistan, the Sonthal Purgannas and the Purgannas of Spiti, and

(3) it shall come into force on the first day of July, 1894.

(4) Nothing in this Act shall apply to civil jails in the Presidency of Bombay outside the City of Bombay, and those jails shall continue to be administered under the provisions of ss. 9 to 16 (both inclusive) of Bombay Act II of 1874, as amended by subsequent enactments.

Repeal.

2. (1) On and after the said first day of July, 1894, the enactments mentioned in the schedule shall be repealed to the extent specified in the fourth column thereof.

(2) But all rules and appointments made, directions given and orders issued under any of those enactments shall, so far as they are consistent with this Act, be deemed to have been respectively made, given and issued under this Act.

(3) Any enactment or document referring to any of those enactments shall, so far as may be, be construed to refer to this Act, or to the corresponding portion thereof.

Notes.—1. For rules for the management and superintendence of jails in the Madras Presidency, see *List of Local Rules and Orders*, Edition 1903, Vol. I, p. 162, and also see *ibid.* for notification prescribing a new Jail Code.

2. For rules made by the Bombay Government for the classification and treatment of prisoners under Bombay Act II of 1874, which is saved by this section, see *Bombay Local Rules and Orders*, Edition 1897, Vol. I, pp. cxlix and cliv.

Definitions.

3. In this Act—

(1) "Prison" means any jail or place used permanently or temporarily under the general or special orders of a Local Government for the detention of prisoners, and includes all lands and buildings appurtenant thereto, but does not include—

(*a*) any place for the confinement of prisoners who are exclusively in the custody of the Police;

(*b*) any place specially appointed by the Local Government under s. 541 of the Code of Criminal Procedure, 1882; or

(*c*) any place which has been declared by the Local Government, by general or special order to be a subsidiary jail.

Note.—A *havalat* (lock up is a prison within the meaning of the Act — *Per* SPANKIE and OLDFIELD, JJ., (STUART, C.J, *doubting*), **2 A. 301.** In **7 L. B. R. 62 = 16 Cr. L. J. 10;** it was *held* that a Police lock up did not come within the terms "prison" and "jail" But it is now *held* that a judicial lock up used for the detention of under trial prisoners is a prison within the meaning of s 3 sub-sec 1 of this Act It is also *held* that a person, committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction though not convicted, is a criminal prisoner within sub-sec 2 of s 3 of the Act **4 Lahore 443.**

(2) "criminal prisoner" means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction or by order of a Court martial,

(3) "convicted criminal prisoner" means any criminal prisoner under sentence of a Court or Court martial, and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1882, or under the Prisoners' Act, 1871,

(4) "civil prisoner" means any prisoner who is not a criminal prisoner,

(5) "remission system" means the rules for the time being in force regulating the award of marks to, and the consequent shortening of sentences of prisoners in jail,

(6) "history ticket" means the ticket exhibiting such information as is required in respect of each prisoner by this Act or the rules thereunder,

(7) "Inspector General" means Inspector General of Prisons,

(8) "Medical Subordinate" means an Assistant Surgeon, Apothecary or qualified Hospital Assistant, and

(9) "prohibited article" means an article the introduction or removal of which into or out of a prison is prohibited by any rule under this Act

CHAPTER II.

MAINTENANCE AND OFFICERS OF PRISONS

Accommodation for prisoners

4. The Local Government shall provide for the prisoners in the territories under such Government, accommodation in prisons constructed and regulated in such manner as to comply with the requisitions of this Act in respect of the separation of prisoners

Inspector-Gen

5. [illegible] ect to each Local Government, and [illegible] vernment, the general control and [illegible] ones under such Government

Officers of prisons

6. For every prison there shall be a Superintendent, a Medical Officer (who may also be the Superintendent) a Medical Subordinate a Jailor and such other officers as the Local Government thinks necessary

Provided that the Governor of Bombay in Council may, with the previous sanction of the Governor-General in Council, declare by order in writing that in any prison specified in the order the office of jailor shall be held by the person appointed to be Superintendent

Temporary accommodation for prisoners

7. Whenever it appears to the Inspector General that the number of prisoners in any prison is greater than can conveniently or safely be kept therein, and it is not convenient to transfer the excess number to some other prison,

or whenever from the outbreak of epidemic disease within any prison, or for any other reason, it is desirable to provide for the temporary shelter and safe custody of any prisoners,

provisions shall be made, by such officer and in such manner as the Local Government may direct for the shelter and safe custody in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in the prison

CHAPTER III.

DUTIES OF OFFICERS

Generally.

Control and duties of officers of prisons

8. All officers of a prison shall obey the directions of the Superintendent, all [illegible] imposed on them by [illegible] under s. 60.

Officers not to have business dealings with prisoners.

9. No officer of a prison shall sell or let, nor shall any person in trust for or employed by himself or let, or derive any benefit from selling or letting, any article to any prisoner or have any money or other business dealing directly or indirectly with any prisoner.

Officers not to be interested in prison-contracts.

10. No officer of a prison shall, nor shall any person in trust for or employed by him, have any interest, direct or indirect, in any contract for the supply of the prison: nor shall he derive any benefit, directly or indirectly, from the sale or purchase of any article on behalf of the prison or belonging to a prisoner.

Superintendent.

Superintendent.

11. (1) Subject to the orders of the Inspector-General, the Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control.

(2) Subject to such general or special directions as may be given by the Local Government, the Superintendent of a prison other than a central prison or a prison situated in a Presidency town shall obey all orders not inconsistent with this Act or any rule thereunder which may be given respecting the prison by the District Magistrate, and shall report to the Inspector-General all such orders and the action taken thereon.

Records to be kept by Superintendent

12. The Superintendent shall keep, or cause to be kept, the following records:—

(1) a register of prisoners admitted;

(2) a book showing when each prisoner is to be released;

(3) a punishment book for the entry of the punishments inflicted on prisoners for prison offences;

(4) a visitor's book for the entry of any observations made by the visitors touching any matters connected with the administration of the prison;

(5) a record of the money and other articles taken from prisoners,

and all such other records as may be prescribed by rules under s. 59 or s. 60.

Medical Officer.

Duties of Medical Officer.

13. Subject to the control of the Superintendent, the Medical Officer shall have charge of the sanitary administration of the prison, and shall perform such duties as may be prescribed by rules made by the Local Government under s. 60.

Medical Officer to report in certain cases.

14. Whenever the Medical Officer has reason to believe that the mind of a prisoner is, or is likely to be, injuriously affected by discipline or treatment to which he is subjected, the Medical Officer shall report the case in writing to the Superintendent, together with such observations as he may think proper.

This report, with the orders of the Superintendent thereon shall forthwith be sent to the Inspector-General for information.

Report on death of prisoner.

15. On the death of any prisoner, the Medical Officer shall forthwith record in a register the following particulars, so far as they can be ascertained, *viz.*:—

(1) the day on which the deceased first complained of illness or was observed to be ill,

(2) the labour, if any, on which he was engaged on that day,

(3) the scale of his diet on that day,

(4) the day on which he was admitted to hospital,

(5) the day on which the Medical Officer was first informed of the illness,

(6) the nature of the disease,

(7) when the deceased was last seen before his death by Medical Officer or Medical Subordinate,

(8) when the prisoner died and

(9) (in cases where a *post-mortem* examination is made) an account of the appearances after death together with any special remarks that appear to the Medical Officer to be required.

Jailor.

Jailor

16. (1) The Jailor shall reside in the prison, unless the Superintendent permits him in writing to reside elsewhere

(2) The Jailor shall not, without the Inspector-General's sanction in writing, be concerned in any other employment.

Jailor to give notice of death of prisoner

17. Upon the death of a prisoner, the Jailor shall give immediate notice thereof to the Superintendent and the Medical Subordinate

Note.—*See* also s 9 of *the Coroner's Act* IV of 1871, *supra.*

Responsibility of Jailor

18. The Jailor shall be responsible for the safe custody of the records to be kept under s 12, for the commitment warrants and all other documents confided to his care, and for the money and other articles taken from prisoners

Jailor to be present at night

19. The Jailor shall not be absent from the prison for a night without permission in writing from the Superintendent, but, if absent without leave for a night from unavoidable necessity he shall immediately report the fact and the cause of it to the Superintendent

Powers of Deputy and Assistant Jailors

20. Where a Deputy Jailor or Assistant Jailor is appointed to a prison, he shall, subject to the order of the Superintendent be competent to perform any of the duties and be subject to all the responsibilities of a Jailor under this Act or any rule thereunder

Subordinate Officer.

Duties of gate keeper

21. The officer acting as gate-keeper, or any other officer of the prison may examine anything carried in or out of the prison, and may stop and search or cause to be searched any person suspected of bringing any prohibited article into or out of the prison, or of carrying out any property belonging to the prison, and, if any such article or property be found, shall give immediate notice thereof to the Jailor

Subordinate officers not to be absent without leave

22. Officers subordinate to the Jailor shall not be absent from the prison without leave from the Superintend or from the Jailor

Convict officer

23. Prisoners who have been appointed as officers of prisons shall be deemed to be public servants within the meaning of the Indian Penal Code

CHAPTER IV.

Admission, Removal and Discharge of Prisoners

Prisoners to be examined on admission

24. (1) Whenever a prisoner is admitted into prison, he shall be searched, and all weapons and prohibited articles shall be taken from him

(2) Every criminal prisoner shall also as soon as possible after admission, be examined under the general or special orders of the Medical Officer, who shall enter or cause to be entered in a book, to be kept by the Jailor, a record of the state of the prisoner's health, and of any wounds or marks on his person, the class of labour he is fit for if sentenced to rigorous imprisonment, and any observations which the Medical Officer thinks fit to add

(3) In the case of female prisoners the search and examination shall be carried out by the matron under the general or special orders of the Medical Officer

Effect of prisoners

25. All money or other articles in respect whereof no order of a competent Court has been made and which may with proper authority be brought into the prison by any criminal prisoner or sent to the prison for his use, shall be placed in the custody of the Jailor

Removal and discharge of prisoners.

26. (1) All prisoners, previously to being removed to any other prison, shall be examined by the Medical Officer

(2) No prisoner shall be removed from one prison to another unless the Medical Officer certifies that the prisoner is free from any illness rendering him unfit for removal

(3) No prisoner shall be discharged against his will from prison, if labouring under any acute or dangerous distemper, nor until, in the opinion of the Medical officer such discharge is safe.

CHAPTER V.

DISCIPLINE OF PRISONERS.

Separation of prisoners.

27. The requisitions of this Act with respect to the separation of prisoners are as follows:—

(1) in a prison containing female as well as male prisoners the females shall be imprisoned in separate buildings, or separate parts of the same building, in such manner as to prevent their seeing, or conversing or holding any intercourse with, the male prisoners;

(2) in a prison where male prisoners under the age of eighteen are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not;

(3) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners, and

(4) civil prisoners shall be kept apart from criminal prisoners.

Association and segregation of prisoners.

28. Subject to the requirements of the last foregoing section, convicted criminal prisoners may be confined either in association or individually in cells or partly in one way and partly in the other.

Solitary confinement.

29. No cell shall be used for solitary confinement unless it is furnished with the means of enabling the prisoner to communicate at any time with an officer of the prison, and every prisoner so confined in a cell for more than twenty-four hours, whether as a punishment or otherwise shall be visited at least once a day by the Medical Officer or Medical Subordinate.

Prisoners under sentence of death

30. (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of the Jailor, and all articles shall be taken from him which the Jailor deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner shall be confined in a cell apart from all other prisoners and shall be placed by day and by night under the charge of a guard.

CHAPTER VI.

FOOD, CLOTHING AND BEDDING OF CIVIL AND UNCONVICTED CRIMINAL PRISONERS.

Maintenance of certain prisoners from private sources.

31. A civil prisoner or an unconvicted criminal prisoner shall be permitted to maintain himself, and to purchase, or receive from private sources at proper hours, food, clothing, bedding or other necessaries, but subject to examination and to such rules as may be approved by the Inspector-General.

Restriction on transfer of food and clothing between certain prisoners

32. No part of any food, clothing, bedding or other necessaries belonging to any civil or unconvicted criminal prisoner shall be given, hired or sold to any other prisoner; and any prisoner transgressing the provisions of this section shall lose the privilege of purchasing food or receiving it from private sources, for such time as the Superintendent thinks proper.

Supply of clothing and bedding to civil and unconvicted criminal prisoners.

33. (1) Every civil prisoner and unconvicted criminal prisoner unable to provide himself with sufficient clothing and bedding shall be supplied by the Superientendent with such clothing and bedding as may be necessary.

(2) When any civil prisoner has been committed to prison in execution of a decree in favour of a private person, such person, or his representative, shall within forty-eight hours after the receipt by him of a demand in writing, pay to the Superintendent the cost of the clothing and bedding so supplied to the prisoner; and in default of such payment the prisoner may be released.

CHAPTER VII.

EMPLOYMENT OF PRISONERS.

Employments of civil prisoners.

34. (1) Civil prisoners may, with the Superintendent's permission, work and follow any trade or profession.

(2) Civil prisoners finding their own implements, and not maintained at the expense of the prison shall be allowed to receive the whole of their earnings; but the earnings of such as are furnished with implements or are maintained at the expense of the prison shall be subject to a deduction, to be determined by the Superintendent, for the use of implements and the cost of maintenance.

35. (1) No criminal prisoner sentenced to labour or employed on labour at his own desire shall the Superintendent be kept

Employment of criminal prisoners

(2) The Medica ing prisoners while they are employed, and shall at least once in every fortnight cause to be recorded upon the history ticket of each prisoner employed on labour the weight of such prisoner at the time

(3) When the Medical Officer is of opinion that the health of any prisoner suffers from employment on any kind or class of labour such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the Medical Officer may consider suited for him.

Employment of criminal prisoners sentenced to simple imprisonment

36 Provision shall be made by the Superintendent for the employment (as long as they so desire) of all criminal prisoners sentenced to simple imprisonment but no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such a prisoner

CHAPTER VIII

HEALTH OF PRISONERS

Sick prisoners

37. (1) The names of prisoners desiring to see the Medical Subordinate or appearing out of health in mind or body shall without delay be reported by the officer in immediate charge of such prisoners to the Jailor

(2) The Jailor shall without delay, call the attention of the Medical Subordinate to any prisoner desiring to see him or who is ill or whose state of mind or body appears to require attention and shall carry into effect all written directions given by the Medical Officer or Medical Subordinate respecting alterations of the discipline or treatment of any such prisoner

Record of directions of Medical Officers

38. All directions given by the Medical Officer or Medical Subordinate in relation to any prisoner with the exception of orders for the supply of medicines or directions relating to such matters as are carried into effect by the Medical Officer himself or under his superintendence shall be entered day by day in the prisoner's history ticket or in such other record as the Local Government may by rule direct and the Jailor shall make an entry in its proper place stating in respect for each direction the fact of its having been or not having been complied with accompanied by, such observation if any as the Jailor thinks fit to make and the date of the entry

Hospital

39. In every prison an hospital or proper place for the reception of sick prisoners shall be provided

CHAPTER IX

VISITS TO PRISONERS

Visits to civil and unconvicted criminal prisoners

40 Due provision shall be made for the admission at proper times and under proper restrictions into every prison of persons with whom civil or unconvicted criminal prisoners may desire to communicate care being taken that so far as may be consistent with the interests of justice prisoners under trial may see their duly qualified legal adviser without the presence of any other person

Search of visitors

41. (1) The Jailor may demand the name and address of any visitor to a prisoner and when the Jailor has any ground for suspicion may search any visitor, or cause him to be searched but the search shall not be made in the presence of any prisoner or of another visitor

(2) In case of any such visitor refusing to permit himself to be searched the Jailor may deny him admission and the grounds of such proceeding with the particulars thereof shall be entered in such record as the Local Government may direct

CHAPTER X.

Offences in Relation to Prisons.

Penalty for introduction or removal of prohibited articles into or from prison and communication with prisoners.

42. Whoever, contrary to any rule under s. 60, introduces or removes or attempts by any means whatever to introduce or remove, into or from any prison, or supplies or attempts to supply to any prisoner outside the limits of a prison, any prohibited article,

and every officer of a prison who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any prison to be possessed by any prisoner, or to be supplied to any prisoner outside the limits of a prison,

and whoever, contrary to any such rule, communicates or attempts to communicate with any prisoner,

and whoever abets any offence made punishable by this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both.

Note.—Conveyance of food to under-trial prisoners.—It was *held* in **2 A. 301** by STUART, C.J., and OLDFIELD, J., that the conveyance of *food* into a *havalat* (lock-up) to an under-trial prisoner is not an offence punishable under this section. *See* also s. 31, *supra.*

In the Allahabad case cited above, it was further *held* by STUART, C.J., that the fact that a person who entered a *havalat* to convey or attempt to convey food to an under-trial prisoner was acquitted of house-trespass, was no bar to his being tried subsequently for an offence under this section. In the Lahore case cited under s. 3 above it was held that conversation with under-trial prisoners in the judicial lock-up was an offence under s. 42 of this Act. **4 Lahore 448.** A person who carries a bundle of newspapers from a prisoner inside a jail to some one outside the jail premises commits the offence punishable under s. 42 of the Prisons' Act 1894 read with article 485 of the Bombay Jail Manual, 1911. **26 Bom. L. R. 267.**

Power to arrest for offence under s. 42.

43. When any person, in the presence of any officer of a prison, commits any offence specified in the last foregoing section, and refuses on demand of such officer to state his name and residence, or gives a name or residence which such officer knows, or has reason to believe, to be false, such officer may arrest him, and shall without unnecessary delay make him over to a Police-officer, and thereupon such Police-officer shall proceed as if the offence had been committed in his presence.

Publication of penalties.

44. The Superintendent shall cause to be affixed, in a conspicuous place outside the prison, a notice in English and the Vernacular setting forth acts prohibited under s. 42 and the penalties incurred by their commission.

CHAPTER XI.

Prison-Offences.

Prison-offences.

45. The following acts are declared to be prison offences when committed by a prisoner:—

(1) such wilful disobedience to any regulation of the prison as shall have been declared by rules made under s. 59 to be a prison-offence;

(2) any assault or use of criminal force;

(3) the use of insulting or threatening language;

(4) immoral or indecent or disorderly behaviour;

(5) wilfully disabling himself from labour;

(6) contumaciously refusing to work;

(7) filing, cutting, altering or removing handcuffs, fetters or bars without due authority;

(8) wilful idleness or negligence at work by any prisoner sentenced to rigorous imprisonment;

(9) wilful mismanagement of work by any prisoner sentenced to rigorous imprisonment;

(10) wilful damage to prison property;

(11) tampering with or defacing history-tickets, records or documents;

(12) receiving, possessing or transferring any prohibited article;

(13) feigning illness;

(14) wilfully bringing a false accusation against any officer or prisoner;

(15) omitting or refusing to report as soon as it comes to his knowledge the occurrence of any fire, any plot or conspiracy, any escape, attempt or preparation to escape, and any attack or preparation for attack upon any prisoner or prison-official, and

(16) conspiring to escape, or to assist in escaping, or to commit any other of the offences aforesaid

Punishment of such offences

46. The Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence by—

(1) a formal warning

EXPLANATION —A formal warning shall mean a warning personally addressed to a prisoner by the Superintendent and recorded in the punishment book and on the prisoner s history ticket

(2) change of labour to some more irksome or severe form

(3) hard labour for a period not exceeding seven days in the case of convicted criminal prisoners not sentenced to rigorous imprisonment,

(4) such loss of privileges admissible under the remission system for the time being in force as may be prescribed by rules by the Governor General in Council,

(5) the substitution of gunny or other coarse fabric for clothing of other materials not being woollen a period which shall not exceed three months,

(6) imposition of handcuffs of such pattern and weight, in such manner and for such period as may be prescribed by rules made by the Governor General in Council,

(7) imposition of fetters of such pattern and weight in such manner and for such period as may be prescribed by rules made by the Governor General in Council

(8) separate confinement for any period not exceeding six months

EXPLANATION —Separate confinement means such confinement with or without labour as secludes a prisoner from communication with, but not from sight of, other prisoners, and allows him not less than one hour's exercise per diem and to have his meals in association with one or more other prisoners,

(9) penal diet,—that is, restriction of diet in such manner and subject to such conditions regarding labour as may be prescribed by the Local Government

Provided that such restriction of diet shall in no case be applied to a prisoner for more than ninety six consecutive hours, and shall not be repeated except for a fresh offence nor until after an interval of one week,

[illegible] confinement for any period not exceeding fourteen days

[illegible] such period

EXPLANATION —Cellular confinement [illegible] r as entirely secludes a prisoner from communication with, but not from sight of, other prisoners,

(11) solitary confinement for any period not exceeding seven days

Provided that after each period of solitary confinement an interval of not less duration than such period must elapse before the prisoner is again sentenced to solitary or cellular confinement

EXPLANATION —Solitary confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with other prisoners,

(12) penal diet as defined in clause (9) combined with solitary confinement as defined in clause (11),

[illegible] the number of stripes shall not exceed thirty

[illegible] to the imposition

Note.—For rules under this section [illegible] it of prison-offences, the award of marks, etc.—See *Home Department, Resolution* No 2, Jail, 500—510, dated 31st August, 1896 (*not published*).

Plurality of punishments under s 46

47. Any two of the punishments enumerated in the last foregoing section may be awarded for any such offence in combination, subject to the following exception, *viz* —

(1) formal warning shall not be combined with any other punishment, except loss of privileges under clause (4) of that section,

(2) penal diet shall not be combined with change of labour under clause (2) of that section, nor shall any additional period of penal diet awarded singly be combined with any period of penal diet awarded in combination with solitary confinement,

(3) solitary confinement shall not be combined with cellular confinement or with separate confinement nor cellular confinement with separate confinement, so as to prolong the total period of seclusion to which the prisoner shall be liable ;

(4) whipping shall not be combined with any other form of punishment except cellular or separate confinement and loss of privileges admissible under the remission system.

Award of punishment under ss. 46 and 47.

48. (1) The Superintendent shall have power to award any of the punishments enumerated in the two last foregoing sections, subject, in the case of separate confinement for a period exceeding one month, to the previous confirmation of the Inspector-General.

(2) No officer subordinate to the Superintendent shall have power to award any punishment whatever.

Punishment to be in accordance with foregoing section.

49. Except by order of a Court of Justice, no punishment other than the punishment specified in the foregoing sections shall be inflicted on any prisoner, and no punishment shall be inflicted on any prisoner otherwise than in accordance with the provisions of those sections.

Medical Officer to certify to fitness of prisoner for punishment.

50. (1) No punishment of penal diet, either singly or in combination, or of whipping, or of change of labour under s. 46, clause (2), shall be executed until the prisoner to whom such punishment has been awarded has been examined by the Medical Officer, who, if he considers the prisoner fit to undergo the punishment shall certify accordingly in the appropriate column of the punishment-book prescribed in s. 12

(2) If he considers the prisoner unfit to undergo the punishment, he shall in like manner record his opinion in writing and shall state whether the prisoner is absolutely unfit for punishment of the kind awarded, or whether he considers any modification necessary.

(3) In the latter case he shall state what extent of punishment he thinks the prisoner can undergo without injury to his health.

Entries in punishment-book.

51. (1) In the punishment-book prescribed in s. 12 there shall be recorded, in respect of every punishment inflicted, the prisoner's name, register number and the class (whether habitual or not) to which he belongs, the prison offence of which he was guilty, the date on which such prison-offence was committed, the number of previous prison-offences recorded against the prisoner, and the date of his last prison-offence, the punishment awarded, and the date of infliction.

(2) In the case of every serious prison-offence, the names of the witnesses proving the offence shall be recorded, and, in the case of offences for which whipping is awarded, the Superintendent shall record the substance of the evidence of the witnesses, the defence of the prisoner, and the finding with the reasons therefor

(3) Against the entries relating to each punishment the Jailor and Superintendent shall affix their initials as evidence of the correctness of the entries.

Procedure on committal of heinous offence

52. If any prisoner is guilty of any offence against prison discipline which, by reason of his having frequently committed such offences or otherwise, in the opinion of the Superintendent, is not adequately punishable by the infliction of any punishment which he has power under this Act to award the Superintendent may forward such prisoner to the Court of the District Magistrate or of any Magistrate of the first class "*or Presidency Magistrate*" having jurisdiction, together with a statement of the circumstances, and such Magistrate shall thereupon inquire into and try the charge so brought against the prisoner, and, upon conviction, may sentence him to imprisonment which may extend to one year, such term to be in addition to any term for which such prisoner was undergoing imprisonment when he committed suce offence, or may sentence him to any of the punishments enumerated in s. 46:

Provided that "*any such case may be transferred for inquiry and trial by the District Magistrate to any Magistrate of the first class and by a Chief Presidency Magistrate to any other Presidency Magistrate*;" and provided also that no person shall be punished twice for the same offence.

Note.—The words, 'or Presidency Magistrate' were inserted and corresponding change was made in the first proviso by Act XIII of 1910 in order to meet the judgment in **32 M. 303** where it was held before the amendment that ordinarily a Presidency Magistrate would not be included in the terms "District Magistrate" or "Magistrate of the first class" A Presidency Magistrate, therefore, had no jurisdiction to try offences under s. 52 of Act IX of 1894.

Whipping

53 (1) No punishment of whipping shall be inflicted in instalments or except in the presence of the Superintendent and Medical Officer or Medical Subordinate.

(2) Whipping shall b inflicted with a light rattan not less than half an inch in diameter on the buttocks and in case of prisoners under the age of sixteen it shall be inflicted in the way of school discipline with a lighter rattan

Offences by prison subordinates

54 (1) Every jailor or officer of a prison subordinate to him who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority or who shall withdraw from the duties of his office without permission or without having given previous notice in writing of his intention for the period of two months or who shall wilfully overstay any leave granted to him or who shall engage without authority in any employment other than his prison duty or who shall be guilty of cowardice shall be liable on conviction before a Magistrate to fine not exceeding two hundred rupees or to imprisonment for a period not exceeding three months or to both

(2) No person shall under this section be punished twice for the same offence

Notes.—1 *See* 4 N L P H C P 4

. . . . rs made by the

made penal by this section 7 B L R 49 = 14 Cr L J 619

CHAPTER XII

MISCELLANEOUS

Extramural custody control and employment of prisoners

55. Any prisoner when being taken to or from any prison in which he may be lawfully confined or whenever he is working outside or is otherwise beyond the limits of any such prison in or under the lawful custody or control of a prison-officer belonging to such prison shall be deemed to be in prison and shall be subject to all the same incidents as if he were actually in prison

Confinement in irons

56 Whenever the Superintendent considers it necessary (with reference either to the state of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons he may subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the Local Government so confine them

Confinement of prisoners under sentence of transportation in irons

57 (1) Prisoners under sentence of transportation may subject to any rules made under s 60 be confined in fetters for the first three months after admission to prison

(2) Should the Superintendent consider it necessary either for the safe custody of the prisoner himself or for any othe [illegible] such prisoner for more than three months he shall apply to [illegible] ntion for the period for which he considers their retention necessary and the Inspector [illegible] uch retention accordingly

Note.—For rules made under this section for laying down what are prison offences etc., *see* General Statutory Rules and Orders Vol III

For subsidiary rules made by the Government of the United Provinces *see* G O No 2975 and No 2399 VI 25 B dated 20th July 1894 and 7th August 1896

Prisoners not to be ironed by Jailor except under necessity

58 No prisoner shall be put in irons or under mechanical restraint by the Jailor on his own authority except in case of urgent necessity in which case notice thereof shall be forthwith given to the Superintendent

Power to make rules.

59. The Governor-General in Council may for any part of British India, and each Local Government with the previous sanction of the Governor-General in Council may for the territories under its administration, make rules consistent with this Act—

(1) defining the acts which shall constitute prison-offences;

(2) determining the classification of prison-offences into serious and minor offences;

(3) fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof;

(4) declaring the circumstances in which acts constituting both a prison-offence and an offence under the Indian Penal Code may or may not be dealt with as a prison-offence;

(5) for the award of marks and the shortening of sentences;

(6) regulating the use of arms against any prisoner or body of prisoners in the case of an outbreak or attempt to escape;

(7) defining the circumstances and regulating the conditions under which prisoners in danger of death may be released;

(8) regulating the transfer from one part of British India to another of prisoner whose term of transportation or imprisonment is about to expire, and

(9) generally, for carrying into effect the purposes of this Act.

Note.—For Rules for Inspection, Superintendence and Management of Jails in the Madras Presidency, see *G.O. No.* 1655, *Judicial, dated* 17*th October*, 1901.

Power of Local Government to make rules.

60. The Local Government may, subject to the control of the Governor-General in Council, make rules consistent with this Act—

(*a*) for the classification of prisons, and description and construction of wards, cells and other places of detention;

(*b*) for the regulation by numbers, length or character of sentences, or otherwise, of the prisoners to be confined in each class of prisons;

(*c*) for the government of prisons and for the appointment, guidance, control, punishment and dismissal of all officers appointed under this Act:

(*d*) as to the food, bedding and clothing of criminal prisoners and of civil prisoners maintained otherwise than at their own cost;

(*e*) for the employment, instructions and control of convicts within or without prisons;

(*f*) for defining articles the introduction or removal of which into or out of prisons without due authority is prohibited;

(*g*) for classifying and prescribing the forms of labour and regulating the periods of rest from labour;

(*h*) for regulating the disposal of the proceeds of the employment of prisoners;

(*i*) for regulating the confinement in letters of prisoners sentenced to transportation;

(*j*) for the classification and the separation of prisoners;

(*k*) for regulating the confinement of convicted criminal prisoners under s. 28;

(*l*) for the preparation and maintenance of history-tickets;

(*m*) for the selection and appointment of prisoners as officers of prisons;

(*n*) for rewards for good conduct;

(*o*) for regulating the transfer of prisoners whose term of transportation or imprisonment is about to expire;

(*p*) for the treatment, transfer and disposal of criminal lunatics or recovered criminal lunatics confined in prisons;

(*q*) for regulating the transmission of appeals and petitions from prisoners and their communications with their friends;

(*r*) for the appointment and guidance of visitors of prisons;

(*s*) for extending any or all of the provisons of this Act and of the rules thereunder to subsidiary jails or special places of confinement appointed under s. 541 of the Code of Criminal Procedure, 1882, and to the officers employed, and the prisoners confined therein, and

(*t*) generally, in regard to the admission, custody, employment, dieting, treatment and release of prisoners, and for other purposes consistent with this Act.

Note—There is no provision of law empowering a Criminal Court passing a sentence of imprisonment, to divide the imprisonment between different jails It would seem from s 541 Cr P C this section and *the Prisoners Act* that this power belongs to the Local Government and Inspector General of Prisons **Ratanlal 827**

Exhibition of copies of rules

61. Copies of rules under ss 59 and 60 so far as they affect the government of prisons shall be exhibited both in English and in the Vernacular in some place to which all persons employed within a prison have access

Exercise of powers of *Superintendent* and Medical Officer

62. All or any of the powers and duties conferred and imposed by this Act on a Superintendent or Medical Officer may in his absence be exercised and performed by such other officer as the Local Government may appoint in this behalf either by name or by his official designation

THE SCHEDULE

Enactments Repealed

(See *Section* 2)

Year	No	Title or Short Title	Extent of Repeal
1	2	3	4
		Acts of the Governor General in Council	
1856	VIII	An Act for the better control of the Jails within the Presidency of Bombay	So much as has not been repealed
1870	XXVI	*Prisons Act 1870*	Do do
1874	XV	Laws Local Extent Act 1874	So much of Part (*b*) of the third Schedule as relates to Act VIII of 1856
1878	XIV	An Act to assimilate certain powers of the Local Government of the North Western Provinces and Oudh	Section 2
*	*	*	*
1891	XII	Repealing and Amending Act 1891	So much of the second Schedule as relates to Acts VIII of 1856 and XXVI of 1870
		Acts of the Governor of Fort St George in Council	
1869	V	Madras Jails Act 1869	So much as has not been repealed
1882	VII	Madras Jails Act Amendment Act 1882	The whole
1889	II	An Act to amend the Madras Jails Act 1869	Do
		Acts of the Governor of Bombay in Council	
1874	II	An Act for the regulation of Jails in the City and Presidency of Bombay and the enforcement of discipline therein	So much as has not been repealed except ss 9 to 16 (both inclusive) as amended by Bombay Act II of 1882.
1882	II	An Act to amend Bombay Act II of 1874	Section 3
1883	IV	An Act to amend the Law concerning the confinement of civil prisoners liable to imprisonment under the Criminal Procedure Code	The whole.
1887	I	An Act to further amend Bombay Act II of 1874	Do

THE SCHEDULE—ENACTMENTS REPEALED—(*contd.*)

Year.	No.	Title or Short Title.	Extent of Repeal.
1	2	3	4
		Acts of the Lieutenant-Governor of Bengal in Council.	
1864	II	An Act for the regulation of Jails and the enforcement of discipline therein.	So much as has not been repealed.
1865	V	An Act to amend Act II of 1864, passed by the Lieutenant-Governor of Bengal in Council, and to extend the provisions thereof to the Presidency Jail.	Do. do.
		Regulations made under the Statute, 33 Victoria, Chapter 3.	
1872	III	Sonthal Purgannas Settlement Regulations ...	So much of the Schedule (as amended by Regulation III of 1886) as relates to Bengal Acts II of 1864 and V of 1865.
1874	IX	Arakan Hill District Laws Regulation, 1874 ...	So much as relates to Act XXVI of 1870.
1875	II	Assam Prisons' Regulations, 1875	The whole.
1890	I	British Baluchistan Laws Regulation, 1890 ...	So much as relates to Act XXVI of 1870.

APPENDIX XI.

INDIAN OATHS' ACT No. X OF 1873.

(*Received the Governor-General's assent on the 8th April*, 1873.)

CONTENTS.

V.—MISCELLANEOUS.

SCHEDULE

[*Repealed by the Repealing Act XII of* 1873]

AN ACT TO CONSOLIDATE THE LAW RELATING TO JUDICIAL OATHS AND FOR OTHER PURPOSES

Preamble

WHEREAS it is expedient to consolidate the law relating to judicial oaths affirmations and declarations and to repeal the law relating to official oaths affirmations and declarations It is hereby enacted as follows —

Note —For a discussion of the nature of judicial oaths and affirmations and the history of Indian Legislation on the subject *see* **10 A 207**

I.—PRELIMINARY

Short title

1. This Act may be called The Indian Oaths Act 1873

Local extent

It extends to the whole of British India and so far as regards subjects of Her Majesty to the territories of Native Princes and States in alliance with Her Majesty

Note —By notification under s 3 (a) of *the Schedule District Act* XIV of 1874 this Act has been declared to be in force (i) in the Districts of Hazaribag Lohardaga Manbhum Purganna Dhalbhum and the Kolhan in the District of Singbhum—*Gazette of India* 1881 Part I p 504 (ii) in the North Western Provinces Tarai *ibid* 1876 Part I p 505 (iii) in Ganjam and Vizagapatam—*Gazette of India* 1898 Part I p 869 *Fort St George Gazette* 1898 Part I p 666 Under s. 5 of the same Act this Act has been extended to Coorg—*Gazette of India* 1876 Part I, p 417

2. [*Repealed by Act* XII of 1873]

Saving of certain oaths and affirmation

3 Nothing herein contained applies to proceedings before Court martial * or to oaths affirmations or declarations prescribed by any law which under the provisions of the Indian Councils Act 1861 the Governor General in Council has not power to repeal

II.—AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS

Authority to administer oaths and affirmations

4. The following Courts and persons are authorised to administer by themselves or by an officer empowered by them in this behalf oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law —

(a) All Courts and persons having by law or consent of parties authority to receive evidence

(b) The Commanding Officer of any Military Station occupied by troops in the service of Her Majesty, provided

(1) that the oath or affirmation be administered within the limits of the station and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India

Note.—A Magistrate acting under s 164 Cr P C is a Court acting in the discharge of the duty imposed on him by law and is therefore authorised to administer oaths under this section. **29 M 89** *following* **16 M. 421**, and *see* Notes to s 164 Cr P C

III.—PERSONS BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

Oaths or affirmations to be made by

5 Oaths or affirmations shall be made by the following persons —

Witnesses

(a) All witnesses that is to say all persons who may lawfully be examined or give or be required to give evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence

Interpreters

(b) interpreters of questions put to and evidence given by witnesses and

Jurors

(c) Jurors

* See the Indian Articles of War (Act V of 1869) the Indian Volunteers Act XX of 1869 and the Indian Marine Act XVI of 1887

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath of affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Notes.—1. Intentional omission to administer oath.—*See* Notes to ss. 6 and 13 below.

2. **Where Courts have no authority to administer oath.**—(i) No oath can be administered to an accused; s. 342 (4), Cr. P. C., *supra*, and notes thereto. An accused cannot, therefore, be prosecuted for having sworn to a false affidavit in support of an application for transfer, **Weir I, 822**; and *see* also **26 A. 705; 19 A. 200.** (ii) Where the petitioner made certain allegations against a Munsiff before a Judge and on examination by the Judge made a statement on affirmation in support of his allegations which were subsequently found to be false, he could not be proceeded against for perjury because the Judge had not authority to examine him on oath and the oath having been made and the evidence given *coram non judice*, could not form the subject of a prosecution for perjury. **1864 W. R. Gap. 45.** (iii) Similarly a pleader giving a false explanation on solemn affirmation when asked to explain his conduct under the Legal Practitioners' Act. **6 M. 252.** (iv) An heir of an employee in the Telegraph Department supporting his claim before the District Judge by false witnesses under an oath which the Judge was not competent to administer. **6 A. 103.** (v) A Native Christian giving false evidence, though solemnly affirmed under Act V of 1840 not applicable to Christians. **4 M. H. C. R. 185.** (vi) A person making a false statement before a person purporting to act under the Registration Act but not legally authorised to do so. **20 C. 719.** (vii) A person making false statement in a verified petition presented under s. 19 of the Income-tax Act to a Tahsildar who was not an officer competent to receive such a petition. **5 M. H. C. R. 326**, were all held not guilty of giving false evidence. *See* also **11 Bom. H. C. R. 11; 12 B. H. C. R. 1; 20 C. 724; 5 A. 17; 14 C. 653; 24 C. 755; 6 M. 252; 11 B. 702 (F.B.)** and *see* Notes to ss. 4 (*m*) and 476 of the Code.

3. **Where oath could legally be administered.**—In proceedings under s. 153, Cr. P. C., since a party to such a *quasi* Civil Proceeding is not an accused person, within the meaning of s. 369, Cr. P. C., an oath could be legally administered. **2 C. L. J. 149.** An oath could also validly be administered to a witness making a statement under s. 164 Cr. P. C. **16 M. 421** at p. **423; 29 M. 89**, but not where the person examined is an accused person. **27 C. 455.** *See* s. 342, Cr. P. C. An accomplice, if he is not an accused under trial in the same case, is a competent witness, and may be examined on oath, **4 Cr. L. J. 155 — 10 C. W. N. 962** and *see* s. 4 (*m*) of the Cr. P. Code and Notes thereto. *See* also **37 C. 52.**

4. **Oath or solemn affirmation.**—A witness may be examined on oath or solemn affirmation, but he cannot be both sworn and put on solemn affirmation at the same time. **13 W. R. 17.**

5. **Effect of omission or irregularity.**—The omission to take any oath or any irregularity in the form in which it is administered does not invalidate the proceedings. **21 W. R. 31; 20 W. R. 19.** *See* s. 13 *infra* and s. 537, Cr. P. C.

6. **Omission to administer oath to interpreter.**—The omission to administer an oath to an interpreter under s. 5 (*b*) of the Oaths' Act (X of 1873), does not, by reason of s. 13, render the evidence of a witness whose evidence was interpreted by him inadmissible against the latter on his subsequent trial for giving false evidence. The only effect of the omission is to make it incumbent on the prosecution to prove the accuracy of the translation. **20 W. R. 19**, *approved* **36 C. 808.**

Affirmation by natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindu or a Muhammadan, or has an objection to making an oath, he shall instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror, shall make an oath.

Notes.—1. Effect of omitting to administer oath intentionally.—This section imperatively requires that no person shall testify as a witness except on oath or affirmation, and notwithstanding s. 13, the evidence of a child of 8 or 9 years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. **10 A. 207**; *contra see* **14 B. L. R. 294; 23 W. R. 12; 14 B. L. R. 295 n; 22 W. R. 1; 16 B. 359; 10 Ou. Ca. 67 = 7 Cr. L. J. 89; 18 C. W. N. 1323.** (*See* Note 4 to s. 13.) **25 Cr. L. J. 317.**

2. Having regard to the language of the Act, a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require In a trial for murder before the Court of Session one of the witnesses was a boy of 12 years of age, and in answer to questions put by the Sessions Judge he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here or hereafter of telling lies, but that he would tell the truth The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation *Held* that there was nothing in the law to sanction this procedure on the part of the Judge **11 A. 183.**

3. The evidence of a witness who was examined on simple affirmation under the direction of the Judge is admissible as evidence (JACKSON, J, *dissenting*), **23 W. R. 12; 14 B. L. R. 294; 22 W. R. 14.**

IV.—FORMS OF OATHS AND AFFIRMATIONS.

Forms of oaths and affirmations

7. All oaths and affirmations made under s 5 shall be administered according to such forms as the High Court may from time to time prescribe

And, until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Explanation.—Repealed by the Lower Burma Courts Act VI of 1900 *Sch II*

Note.—Forms.—For forms of oaths prescribed in Bombay, see *Bombay Local Rules and Orders,* Edition 1896 Vol I, p xxxii

Burma, see *Burma Laws List*, Edition 1897, p 47

Madras, see *Madras Local Rules and Orders* Edition 1903 Vol I p 15

United Provinces, see *N W P and Oudh Local Rules and Orders,* Edition 1894, p 24

Central Provinces, see *Central Provinces List of Local Rules and Orders* Edition 1896, p 18

Power of Court to tender certain oaths

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him

Note.—Provisions of this Act do not apply to criminal proceedings.—The expression party to a
a criminal case, and a Magis-
s the *special oath* **13 B. 339;**
oceedings in which the matters
i the Courts are competent to
enforce a renunciation **Weir I, 823.**

Court may ask party or witness whether he will make oath proposed by opposite party

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in s 8, if such oath or affirmation is made by the other party to or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Note.—A party who has agreed to be bound by the oath of a witness under this section ought not to be allowed to withdraw arbitrarily from the agreement. **1906 A. W. N. 280,** where **4 A. 302** and **18 A. 46** are referred to

Administration of oath if accepted

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorise him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Evidence conclusive as against person offering to be bound

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

Note.—Conclusive proof.—This expression must be understood in the sense in which it is defined by s. 4 of *the Indian Evidence Act.* **8 Bom. L. R. 19,** where **4 B. L. R. 97 (F.B.)** is *followed.*

In a proceeding under s. 144, Cr. P. C., one of the parties undertook to withdraw his claim to the matter in dispute if the other party should take an oath. The latter took the oath in the form proposed. *Held* that the oath is not binding as conclusive proof in any proceeding other than that in which it was taken, there being nothing to indicate that it was intended that the oath should bind the person at whose instance it was made, as being conclusive in any proceeding other than the one which the parties had in their minds when the challenge was accepted, **33 C. 386.** In **24 M. L. J. 321,** it was *held,* distinguishing **33 C. 386** and approving **25 M. 444,** that the effect of taking the oath was merely to furnish conclusive evidence on the matter to which it relates, whether the matter would be decisive of the whole controversy or not. In a pre-emption suit the guardian *ad litem* of one of the defendants who was a minor, agreed that if the plaintiff took an oath, etc., then his suit should be decreed. The plaintiff took an oath. *Held* that so far as the statement of fact—that the plaintiff had not refused to purchase the property—was concerned the minor defendant was bound, but not with regard to the agreement that the suit should be decreed. **44 All. 117.**

Procedure in case of refusal to make oath

12. If the party or witness refuses to make the oath or solemn affirmation referred to in s. 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason, which he may assign for his refusal.

V.—Miscellaneous.

Proceedings and evidence not invalidated by omission of oath or irregularity.

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Notes.—1. Scope of the Section.—"This section is only one of many instances indicating the settled policy of the Indian Legislature to prevent justice being defeated by a technical irregularity. It maintains the legal obligation of a witness to speak the truth while at the same time it provides against the possible failure of justice through a technical irregularity."—*Per* Parker, J., in **16 M. 105** at p. **116.** "It is clear there is a difference between acts of *omission,* and acts of *commission,* and as this section mentions only acts of omission, I decline to extend the section to acts of commission." = *Per* Collins, C.J., in *ibid.* at p. 113.

2. "Omission."—This word is not limited to accidental or negligent omissions, **19 C. 355.** It includes any kind of omission, **16 B. 359,** *per* Jardine, J.; also *see* **14 B. L. R. 294 (F.B.).** It also refers to omissions to administer oaths to interpreters and jurors, as well as to witnesses. **36 C. 808.** *See* s. 537, Cr. P. Code.

3. Oath not a (sine qua non) to the offence of giving false evidence.—The omission to administer the oath or affirmation though intentional was an irregularity cured by s. 13. **16 B. 359; 21 W. R. 31; 18 C. W. N. 1323 = 16 Cr. L. J. 151.** The offence of *perjury* as defined in s. 193, I.P.C., may be committed, although the person giving evidence has neither been sworn nor affirmed. **19 C. 355; 18 C. W. N. 1323 = 16 Cr. L. J. 151.**

4. Presumption regarding administering of oath.—Where it does not appear from the record that oath was administered to a witness the reasonable presumption would be, in the absence of any suggestion to the contrary that the proper procedure in respect to the administering of the oath was followed. There is no provision of law requiring a Court to record the fact that an oath was administered to the witness. **11 A. L. J. 933; 18 C. W. N. 1323.**

5. Intentional omission to administer oath or affirmation.—Even in the case of a child, if the Judge elects to take his statements as evidence, he should proceed to administer oath or affirmation. But if he deliberately refrains from doing so on the ground that the child cannot understand the nature of a solemn affirmation, the deposition of the child will nevertheless be admissible. **5 Bom. L. R. 551.** In **41 C. 406,**

MOOKERJEE, J, observed that there was divergence of judicial opinion on this point and that the question was by no means free from difficulty The case was however decided on other grounds. *See* also **14 B. L R. 295** (footnote) and **16 M. 105.** In **15 Cr L J 161 (M)** it was *held following* **16 M 105**, and *dissenting* from **10 A 207,** that though s 5 was imperative, the failure to administer the oath was an irregularity cured by this section

The competency of a person to testify as a witness is the condition precedent to the administration to him of an oath or affirmation and is a question distinct from his credibility when he has been sworn or affirmed In determining the question of competency the Court under s 118 of *the Indian Evidence Act* has not to enter into inquiries as to the witness's religious belief or as to his knowledge of the consequences of falsehood in this world or the next It has to ascertain in the best way it can whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he had seen or heard on a particular occasion If a person of tender years or of a very advanced age can satisfy these requirements his competency as a witness is established **11 A 183** Where a person is competent to testify according to the provisions of s 118 Indian Evidence Act but is unable owing to his tender age to comprehend the nature of an oath or affirmation this section relieves the Court of the necessity of administering an oath or affirmation to him and the evidence of such a person recorded without oath or affirmation may be admitted **10 Ou. Ca. 337 = 7 Cr L. J. 89** Where in a trial for murder the Sessions Judge deliberately abstained from administering an oath or affirmation to the only eye-witness to the murder on the ground that she was only six or seven years of age, *held* that the evidence was admissible **6 Patna L J 147**

Persons giving evidence bound to state the truth

14. Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject

Note —Nullity of trial does not exempt from liability for giving false evidence —The verdict of a jury in a dacoity case was set aside and trial *de novo* was directed on the ground that one of the jurors originally empanelled was deaf and partially blind *Held* that the nullity of the original trial did not exonerate a witness from the obligation to speak the truth at the first trial imposed by this section **Weir I, 831** *See* also **19 M 375, 10 C. 604**

Amendment of Penal Code ss 178 and 181

15 The Indian Penal Code ss 178 and 181 shall be construed as if after the word oath the words or affirmation were inserted

Official oaths abolished

16. Subject to the provision of ss 3 and 5 no person appointed to any office shall before entering on the execution of the duties of his office be required to make any oath or to make or subscribe any affirmation or declaration whatever

APPENDIX XII.

INDIAN CRIMINAL LAW (AMENDMENT) ACT No XIV OF 1908

[*Received the assent of the Governor General on the* 11*th December* 1908]

An Act to provide for the more speedy trial of certain offences and for the prohibition of associations dangerous to the public peace

CONTENTS

SECTIONS.

Evidence conclusive as against person offering to be bound

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

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V.—MISCELLANEOUS.

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13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Notes.—1. Scope of the Section.—"This section is only one of many instances indicating the settled policy of the Indian Legislature to prevent justice being defeated by a technical irregularity. It maintains the legal obligation of a witness to speak the truth while at the same time it provides against the possible failure of justice through a technical irregularity."—*Per* PARKER, J., in **16 M. 105** at p. **116.** "It is clear there is a difference between acts of *omission*, and acts of *commission*, and as this section mentions only acts of omission, I decline to extend the section to acts of commission." = *Per* COLLINS, C.J., in *ibid.* at p. 113.

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APPENDIX XII.

INDIAN CRIMINAL LAW (AMENDMENT) ACT No XIV OF 1908

[Received the assent of the Governor General on the 11th December 1908]

An Act to provide for the more speedy trial of certain offences and for the prohibition of associations dangerous to the public peace

CONTENTS

SECTIONS.

WHEREAS it is expedient to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace; It is hereby enacted as follows:—

Note.—*See* the remarks of JENKINS, C.J., in **38 C. 559** at **579** where, owing to the course adopted by the prosecution, most of the accused were in custody for over a year and without the benefit of any legal adviser. The learned Chief Justice doubted whether when the Act XIV of 1908 was passed, it could have been contemplated that a procedure was being sanctioned that would render it possible for accused persons to be incarcerated for months without any access to legal advice.

Short title and extent.

1. (1) This Act may be called the Indian Criminal Law Amendment Act, 1908.

(2) It extends to the Provinces of Bengal and of Eastern Bengal and Assam; but the Governor-General in Council may, at any time, by notification in the *Gazette of India* extend the whole or any part thereof to any other province.*

PART II.

Unlawful Associations.

Definitions.

15. In this Part—

(1) "association" means any combination or body of persons, whether the same be known by any distinctive name or not, and

(2) "unlawful association" means an association.

(*a*) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or

(*b*) which has been declared to be unlawful by the Governor-General in Council under the powers hereby conferred.

Power to declare association unlawful.

16. If the Governor-General in Council is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Governor-General in Council may, by notification in the *Official Gazette* declare such association to be unlawful.

Penalties.

17. (1) Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Continuance of association.

18. An association shall not be deemed to have ceased to exist by reason only of any formal act of its dissolution or change of title, but shall be deemed to continue so long as any actual combination, for the purpose of such association continues between any members thereof.

Notes.—1. *Held* that the accused's act did not come within the purview of either clause (1) or (2) of s. 17 of the Act as he did not contribute to the funds or assist in the management of an existing association.

Held however, that the accused instigated the formation of an association which was unlawful under s. 15 (2) (*a*) of this Act and therefore abetted its formation and as any one becoming a member of that association or contibuting funds to it would be guilty of an offence under s. 17 (1) of this Act, accused's act amounted to an abetment of an offence. **5 Lah. 1.** *See* also **26 P. L. R. 409** and **411.**

2. A person convicted and punished under s. 6 of the Prevention of Seditious Meetings Act cannot be convicted subsequently for the same acts under s. 17 (2) of this Act.

Held also that an ordinary procession in which no members of an unlawful association take part does not fall within the definition of a meeting of unlawful association. **25 Cr. L. J. 225.**

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* *See* the Criminal Law Amendment Act V of 1922. By this Act sub-sec. 3 of s. 1, and the whole of Part I of, and the Schedule to the Act XIV of 1908, are repealed.

APPENDIX XIII.

GENERAL POLICE ACT No V OF 1861.

(As modified up to 7th March, 1903)

Received the Governor General's assent on the 22nd March, 1861.

CONTENTS.

Slaughtering cattle, furious riding, etc.
Cruelty to animals.
Obstructing passengers.
Exposing goods for sale.
Throwing dirt into street.
Being found drunk or riotous.
Indecent exposure of person.
Neglect to protect dangerous places.

35. Jurisdiction.
36. Power to prosecute under other law not affected.
Proviso.
37. Recovery of penalties and fines imposed by Magistrates.
38.
39. } [*Repealed.*]
40.
41. Rewards to pol ce and informers payable to General Police Fund.
42. Limitation of actions.
Tender of amends.
Proviso.
43. Plea that act was done under warrant.
Proviso.
44. Police-officers to keep diary.
45. Local Government may prescribe form of returns.
46. Scope of Act.
47. Authority of District Superintendent of Police over village police.

AN ACT FOR THE REGULATION OF POLICE.

Preamble.

WHEREAS it is expedient to re-organise the Police and to make it a more efficient instrument for the prevention and detection of crime; It is enacted as follows:—

Note.—Extent of the Act.—The Act has been applied to UPPER BURMA generally (except the Shan States) by the *Burma Laws Act* XIII of 1898, s. 4 (1) and Sch. I; to SONTHAL PURGANNAS by the *Sonthal Purgannas Settlement Regulation* III of 1872, s. 3, as amended by Regulation III of 1899; to ARAKAN HILL DISTRICT, by the *Arakan Hill District Regulation* I of 1890, s. 3; to BRITISH BALUCHISTAN, by *British Baluchistan Laws Act*, Regulation I of 1894, s. 3; to ANGUL AND KHOND MAHALS, by the *Angul District Regulation* I of 1894, s. 3; to CHITTAGONG HILL TRACTS, by the *Chittagong Hill Tracts Regulation* I of 1900; to BALUCHISTAN AGENCY TERRITORIES, by the *Baluchistan Agency Territories Laws Act*, 1890; to the Town of Calcutta and its suburbs, as modified by the Calcutta Police Act I of 1898 (B.C.). By notification under s. 3 (*a*) of the Scheduled Districts Act XIV of 1874, the Act has also been extended to HAZARIBAGH AND LOHARDAGGA (now Ranchi District). See *Calcutta Gazette*, 1899, Pt. I, p. 44; to MANBHUM, PURGANNA OF DALBHUM AND THE KOLHAN in the district of Singbhum (*Gazette of India*, 1881, Pt. I, p. 504), PORABAT ESTATE in the Singbhum District (*Gazette of India*, 1897, Pt. I, p. 1059), under ss. 3 and 5-A of the same Act, to the Purganna of MANPUR (*Gazette of India*, 1899, Pt. II, p. 419).

For the purposes of this Act, the powers of the Local Government and those of the High Court have been conferred on the Agent to the Governor-General in Central India.

By notification under s. 5 of the Scheduled Districts Act, this Act was extended to COORG (*Gazette of India*, 1888, Pt. I, pp. 88 and 323), ss. 15, 15-A, 16, 30, 30-A, 31 and 32 have been extended to the SCHEDULED DISTRICTS IN GANJAM AND VIZAGAPATAM (*Fort St. George Gazete*, 1898, Pt. I, p. 667).

N.B.—See Note to s. 46, *infra* as to special enactments in force in Madras, Bombay and Bengal and for the extensions of this Act under the powers conferred by that section.

As to the relaxation of the provisions of this Act which restrict the employment of Police-officers to the Presidency, Province or place of the Police establishment of which they are members, *see* Police Act III of 1868 printed as Appendix XV.

Interpretation clause

1. The following words and expressions in this Act shall have the meaning assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say —

The words "Magistrate of the district" shall mean the chief officer charged with the executive administration of a district and exercising the powers of a Magistrate, by whatever designation the chief officer charged with such executive administration is styled —

The word "Magistrate" shall include all persons within the general Police district exercising all or any of the powers of a Magistrate

The word "Police' shall include all persons who shall be enrolled under this Act

The words "General Police District" shall embrace any Presidency, Province or place, or any part of any Presidency, Province or place, in which this Act shall be ordered to take effect.

[The words "District Superintendent' and ' District Superintendent or Police shall include any Assistant District Superintendent or other person appointed by general or special order of the Local Government to perform all or any of the duties of a District Superintendent of Police under this Act in any district]*

The word "property" shall include any movable property, money or valuable security

Words importing the singular number shall include the plural number and words importing the plural number shall include the singular number

Word importing the masculine gender shall include females

The word "person" shall include a company or corporation

The word "month" shall mean a calendar month

The word "cattle" shall, besides horned cattle, include elephants camels horses asses, mules, sheep, goats and swine

Notes.—Notwithstanding this provision the Governor General in Council may under s 2 of the Police Act III of 1888, create a General Police District consisting of parts of two or more Presidencies, Provinces or places

Constitution of the Force

2. The entire Police establishment under a Local Government shall for the purposes of this Act, be deemed to be one Police Force, and shall be formally enrolled, and shall consist of such number of officers and men, and shall be constituted in such manner and the members of such Force shall receive such pay, as shall from time to time be ordered by the Local Government, subject to the sanction of the Governor General of India in Council

Notes.—1. This section so far as it relates to Bengal, was repealed by Act VII of 1869

2. **Shall be deer** ... the General Police Force,

Superintendence in the Local Government

3. The Superintendence of the Police throughout a General Police District shall vest in and subject to the general control of the Governor General of India in Council shall be exercised by the Local Government to which such district is subordinate, and except as authorised under the provisions of this Act, no person, officer or Court shall be empowered by the Local Government to appoint, supersede or control any Police functionary

Inspector General of Police etc

4. The administration of the Police throughout a General Police District, shall be vested in an officer to be styled the Inspector-General of Police, and in such Deputy Inspectors General and Assistant Inspectors-General as to the Local Government shall seem fit

The administration of the Police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent and such Assistant District Superintendents as the Local Government shall consider necessary

The Inspector General and other officers abovementioned shall from time to time be appointed by the Local Government, and may be removed by the same authority

* Added by s 1 of Act VII of 1893

Note.—Power of Magistrate to give sanction.—The Magistrate of the District in whom are vested under this section powers of a general control and direction over the Police in his District, may sanction prosecution under s 195 (1), Cr. P. C. for the offence of preferring a false complaint to the Police. **6 P. R. 1910.** *See* also **47 P. R. 1867; 9 P. R. 1868; 27 A. 292; 32 C. 180;** *contra* **27 C. 452.** *See* Notes under heading '*Superior Officer*' to s. 195 of the Code.

Powers of Inspector-General, Exercise of powers

5. The Inspector-General of Police shall have the full powers of a Magistrate* throughout the General Police District; but shall exercise those powers subject to such limitation as may from time to time be imposed by the Local Government.

Note.—Complaint to Inspector-General against Subordinate Police-officer would amount to instituting a false charge.—Where a person sent to the Inspector-General of Police a few specific charges of bribery against a Sub-Inspector of Police, and asked for investigation—the Inspector-General who is a Magistrate under this section and is empowered by s. 36, *infra* to inquire into and determine as a Magistrate any charge against a Police-officer above the rank of a Constable, ordered the District Superintendent of Police to investigate, and that officer forwarded the result of his investigation to the District Magistrate, *held,* that a false charge of an offence preferred to a person empowered to order investigation by the Police, though not followed by further proceedings in any Court, brings the matter of the charge within the first part of s. 211, I.P.C. **26 P. R. 1908 = 7 Cr. L. J. 291.**

6. [*Magisterial powers of Police-officers*] *Repealed by Act X of* 1882.

Appointment, dismissal, etc, of inferior officer.

7. The appointment of all Police-officers other than those mentioned in s. 4 of this Act shall, under such rules as the Local Government shall from time to time sanction, rest with the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police, who may, under such rules as aforesaid, at any time dismiss, suspend or reduce any Police-officer whom they shall think remiss or negligent in the discharge of his duty or unfit for the same; [or may award any one or more of the following punishments to any Police-officer who shall discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof, namely:—(*a*) fine to any amount not exceeding one month's pay; (*b*) confinement to quarters for a term not exceeding fifteen days, with or without punishment, drill, extra-guard, fatigue or other duty; (*c*) deprivation of good conduct pay; (*d*) removal from any office of distinction or special emolument.] †

Note.—Appointment under wrong section not invalid.—Where certain persons were granted certificates of appointments as Police-officers under this Act and in the form attached to this Act, with the modification of the words 'cl. (2), section 34 of' before Act V of 1861, the words 'for the detection and prosecution of cases of cruelty to animals under s. 34 of Act V of 1861,' were added at the end of the certificate after the words "Police-officer." *Held* that the insertion of the words 'cl. 2, s. 34 of' was clearly due to a mistake, as the appointment could only have been made under this section; but the appointments were not rendered invalid by the mistake. **10 C. W. N. 727 = 3 C. L. J. 475 = 3 Cr. L. J. 420.**

Certificates to Police-officers.

8. Every Police-officer so appointed shall receive on his appointment a certificate in the form annexed to this Act, under the seal of the Inspector-General or such other officer as the Inspector-General shall appoint, by virtue of which the person holding such certificate shall be vested with the powers, functions and privileges of a Police-officer.

Surrender of certificate.

[Such certificate shall cease to have effect whenever the person named in it ceases for any reason to be a Police-officer, and, on his ceasing to be such an officer, shall be forthwith surrendered by him to any officer empowered to receive the same. A Police-officer shall not, by reason of being suspended from office, cease to be a Police-officer. During the term of such suspension the powers, functions and privileges vested in him as a Police-officer shall be in abeyance, but he shall continue subject to the same responsibilities, discipline and penalties and to the same authorities, as if he had not been suspended.] ‡

Notes.—Defect in Certificate.—*See* **10 C. W. N. 727 = 3 C. L. J. 475 = 3 Cr. L. J. 420** noted under s. 7, *supra.*

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* *I.e.*, the powers of a Magistrate of the first class. *See* s. 3 (2) of the Criminal Procedure Code

† Substituted by s 2 of Act VIII of 1895.

‡ Substituted by s 3 of Act VIII of 1895.

2. Scope of authority—Where the superior authority appoints a constable at all he can only appoint him under this section, and in that case he appoints him a constable for all purposes whatever, and his power cannot be limited, but it is open to the superior officer to give a direction not to act in certain cases The act does not sanction the appointment by the Police authority of any person who is not to be under his order and for whose conduct he is not, from a disciplinary point of view, to be responsible **10 C. W. N 727 = 3 C. L. J. 475 = 3 Cr. L J. 420.**

3. Suspension and confinement for unlimited term—An order for suspension and confinement of a Police-officer for an unlimited period of time exceeding the limits laid down in clause (*b*) of this section is illegal and is not such an order which a District Superintendent of Police can legally pass at all nor one which he can pass in the alternative under this section *Held* therefore, that no conviction under s 29 *infra* for disobeying such order is maintainable **2 C. L. J 616**

4. Effect of suspension.—On suspension the powers functions and privileges vested in a Police officer by the certificate under this section cease to have effect He is no longer a Police officer and his disobedience to the order of the District Superintendent to remain in the Police lines during suspension is not punishable under s 29, *infra* **8 B L. R. Appx 53,** *followed in* **10 A. 459.**

Police-officer not to resign without leave or two months notice

9. No Police-officer shall be at liberty to withdraw himself from the duties of his office unless expressly allowed to do so by the District Superintendent or by some other officer authorised to grant such permission or, without the leave of the District Superintendent, to resign his office unless he shall have given to his superior officer notice in writing, for a period of not less than two months of his intention to resign

Police officers not to engage in other employment

10. No Police officer shall engage in any employment or office whatever other than his duties under this Act, unless expressly permitted to do so in writing by the Inspector General

11. [*Police Superannuation Fund*] *Repealed by Act XVI of* 1874

Power of Inspector General to make rules

12. The Inspector-General of Police may from time to time subject to the approval of the Local Government, frame such orders and rules as he shall deem expedient relative to the organisation, classification and distribution of the Police Force the places at which the members of the Force shall reside and the particular services to be performed by them, their inspection the description of arms accoutrements and other necessaries to be furnished to them, the collecting and communicating by them of intelligence and information, and all such other orders and rules relative to the Police Force as the Inspector General shall from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such Force efficient in the discharge of its duties

Additional Police-officers employed at cost of individuals

13. It shall be lawful for the Inspector General of Police or any Deputy Inspector General, or Assistant Inspector General or for the District Superintendent subject to the general direction of the Magistrate of the District on the application of any person showing the necessity thereof to depute any additional number of Police-officers to keep the peace at any place within the general Police district and for such times as shall be deemed proper Such Force shall be exclusively under the orders of the District Superintendent and shall be at the charge of the person making the application

Provided that it shall be lawful for the person on whose application such deputation shall have been made, on giving one month's notice in writing to the Inspector General, Deputy Inspector General or Assistant Inspector General, or to the District Superintendent to require that the Police-officers so deputed shall be withdrawn, and such person shall be relieved from the charge of such additional Force from the expiration of such notice

Note—Jurisdiction of Magistrate to recover costs—A Magistrate has no power to realise from any individual the cost of deputing a Police constable He must act either under this section when the party makes an application for deputation of special Police Force or under s 15 *infra*, obtain the sanction of Government for deputation of extra Police and for the assessment of charges. **1 W R. 15.**

Appointment of additional Force in the neighbourhood of railway and other works

14. Whenever any railway, canal or other public work, or any manufactory or commercial concern, shall be carried on or be in operation in any part of the country, and it shall appear to the Inspector-General that employment of an additional Police Force in such place is rendered necessary by the behaviour or reasonable apprehension of the behaviour of the persons employed upon such work, manufactory or concern, it shall be lawful for the Inspector-General with the consent of the Local Government, to depute such additional Force to such place and to employ the same so long as such necessity shall continue, and to make orders, from time to time, upon the person having the control or custody of the funds used in carrying on such work, manufactory or concern, for the payment of the extra Force so rendered necessary and such person shall thereupon cause payment to be made accordingly.

Quartering of additional Police in disturbed or dangerous districts.

* **15.** (1) It shall be lawful for the Local Government, by proclamation to be notified in the *Official Gazette*, and in such other manner as the Local Government shall direct, to declare that any area subject to its authority has been found to be in a disturbed or dangerous state, or that, from the conduct of the inhabitants of such area or of any class or section of them, it is expedient to increase the number of Police.

(2) It shall thereupon be lawful for the Inspector-General of Police, or other officer authorised by the Local Government in this behalf, with the sanction of the Local Government, to employ any Police Force in addition to the ordinary fixed compliment to be quartered in the area specified in such proclamation as aforesaid.

(3) Subject to the provisions of sub-sec. (5) of this section, the cost of such additional Police Force shall be borne by the inhabitants of such area described in the proclamation.

(4) The Magistrate of the District, after such enquiry as he may deem necessary, shall apportion such cost among the inhabitants who are, as aforesaid, liable to bear the same and who shall not have been exempted under the next succeeding sub-section. Such apportionment shall be made according to the Magistrate's judgment of the respective means within such area of such inhabitants.

(5) It shall be lawful for the Local Government, by order, to exempt any persons or class or section of such inhabitants from liability to bear any portion of such cost.

(6) Every proclamation issued under sub-sec. (1) of this section shall state the period for which it is to remain in force, but it may be withdrawn at any time or continued from time to time for a further period or periods as the Local Government may in each case think fit to direct.

Explanation.—For the purposes of this section, "inhabitants" shall include persons who themselves or by their agents or servants occupy or hold land or other immovable property within such area, and landlords who themselves or by their agents or servants collect rents direct from ryots or occupiers in such area notwithstanding that they do not actually reside therein.

Note.—Apportionment must be made by District Magistrate.—Where the number of coolies has been increased under sub-sec. (2), it becomes the duty of the District Magistrate under sub-sec. 4 to apportion the cost among the inhabitants. Where, therefore, the apportionment was made by the Deputy Magistrate and on appeal, the District Magistrate refused to alter the apportionment and dismissed the appeal, *held*, that such apportionment was illegal. **18 In. Ca. 112.**

Awarding compensation to sufferers from misconduct of inhabitants or persons interested in land.

† **15-A.** (1) If, in any area in regard to which any proclamation notified under the last preceding section is in force, death or grievous hurt or loss of, or damage to, property has been caused by or has ensued from the misconduct of the inhabitants of such area or any class or section of them, it shall be lawful for any person, being an inhabitant of such area, who claims to have suffered injury from such misconduct to make within one month from the date of the injury or such shorter period as may be prescribed, an application for compensation to the Magistrate of the district or of the sub-division of a district within which such area is situated.

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* Substituted s. 4 of Act VIII of 1895.

† Added by s. 5 of Act VIII of 1895.

(2) It shall thereupon be lawful for the Magistrate of the district, with the sanction of the Local Government, after such enquiry as he may deem necessary, and whether any additional Police Force has or has not been quartered in such area under the last preceding section, to—

(a) declare the persons to whom injury has been caused by or has ensued from such misconduct;

(b) fix the amount of compensation to be paid to such persons and the manner in which it is to be distributed among them, and

(c) assess the proportion in which the same shall be paid by the inhabitants of such area other than the applicant who shall not have been exempted from liability to pay under the next succeeding sub-section

Provided that the Magistrate shall not make any declaration or assessment under this sub-section, unless he is of opinion that such injury as aforesaid has arisen from a riot or unlawful assembly within such area, and that the person who suffered the injury was himself free from blame in respect of the occurrences which led to such injury

(3) It shall be lawful for the Local Government, by order, to exempt any persons or class or section of such inhabitants from liability to pay any portion of such compensation

(4) Every declaration or assessment made or order passed by the Magistrate of the district under sub-section (2) shall be subject to revision by the Commissioner of the Division or the Local Government, but save as aforesaid, shall be final

(5) No civil suit shall be maintainable in respect of any injury for which compensation has been awarded under this section

(6) *Explanation*—In this section the word "inhabitants" shall have the same meaning as in the last preceding section

Recovery of moneys payable under ss 13 14 15 and 15 A, and disposal of same when recovered

***16.** (1) All moneys payable under ss 13 14 15 and 15-A shall be recoverable by the Magistrate of the district in the manner provided by ss 386 and 387 of the Code of Criminal Procedure, 1882, for the recovery of fines, or by suit in any competent Court.

(2) All moneys paid or recovered under ss 13, 14 and 15 shall be credited to a fund to be called "The General Police Fund," and shall be applied to the maintenance of the Police Force under such orders as the Local Government shall pass

Special Police-officer

17. When it shall appear that any unlawful assembly, or riot or disturbance of the peace has taken place, or may be reasonably apprehended and that the Police Force ordinarily employed for preserving the peace is not sufficient for its preservation and for the protection of the inhabitants and the security of property in the place where such unlawful assembly, or riot or disturbance of the peace has occured, or is apprehended, it shall be lawful for any Police-officer not below the rank of Inspector to apply to the nearest Magistrate to appoint so many of the residents of the neighbourhood as much Police-officer may require, to act as special Police-officers for such time and within such limits as he shall deem necessary, and the Magistrate to whom such application is made shall, unless he sees cause to the contrary, comply with the application

Notes.—1. Scope of Section—The section refers to cases of unlawful assembly, riot or disturbance of the peace only and not to other classes of crime The order of an Assistant Magistrate *therefore directing* certain villagers to show cause within ten days why special constables should not be quartered in their village, as two travellers were robbed and brutally murdered in broad daylight while passing through the village was held illegal because the circumstances which alone could *render* such order legal did not arise, nor was any one of those circumstances reasonably to be apprehended at the time of making the order. **10 B. L. R Appx. 4**

* Substituted by s 6 of Act VIII of 1895

2. **When special constables may be appointed.**—The circumstances which justify the appointment of special constables are (*i*) that a disturbance of the peace is apprehended and (*ii*) that the Police Force available is insufficient to preserve the peace and protect the inhabitants of the place where the disturbance is apprehended. Whereupon the report of a Sub-Inspector of Police that there was a dispute about certain land in which the petitioners were concerned, which was likely to lead to a breach of the peace, the Magistrate appointed them special constables under this section and they refused to receive their letters of appointment, but were afterwards told that their services would not be necessary, *held*, that the order of appointment of the petitioners under this section and their convictions under s. 19, *infra* were illegal. **35 C. 454** *followed in* **12 C. W. N. 727 = 8 C. L. J. 66 = 7 Cr. L. J. 507.** *See* Note 2 to s. 19, *infra.*

3. **High Court's powers of interference.**—An order passed by a Magistrate under this section is a purely *executive* one, which the High Court has no power to interfere, even though such order is illegal. **10 B. L. R. Appx. 4**, but *see* Note 2 above.

Powers of special Police-officers.

18. Every special Police-officer so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalties, and be subordinate to the same authorities, as the ordinary officers of Police.

Note.—For effect of this section on s. 29, *see* **10 C. W. N. 322** and Note (12) under s. 29, *infra.*

Refusal to serve a special Police-officers.

19. If any person being appointed a special Police-officer as aforesaid shall, without sufficient excuse neglect or refuse to serve as such, or to obey such lawful order or direction as may be given to him for the performance of his duties, he shall be liable, upon conviction before a Magistrate, to a fine not exceeding fifty rupees for every such neglect, refusal or disobedience.

Notes.—1. What does not constitute 'refusal to serve.'—Refusal to accompany a Police-officer to the Police-station, situated at some distance, not for any purpose of Police duty, but simply to obtain the authority of appointment to serve as special constables, and the necessary badges and arms, does not constitute a refusal to serve as special constable, and is not therefore an offence under this section. **28 C. 411.**

2. **Refusal to serve where appointment is bad is no offence.**—Where it was not clear that there was any danger of a disturbance of the peace or that if there was such a danger, the ordinary Police Force was not sufficient to cope with it; *held* that the appointment of the accused was unnecessary and inexpedient and that he could not be prosecuted under this section for not complying with such appointment. **12 C. W. N. 727 = 8 C. L. J. 66 = 7 Cr. L. J. 507** *following* **35 C. 454.** Note 2 to s. 17 above. *See* also **10 C. W. N. 82 = 2 C. L. J. 555 = 3 Cr. L. J. 169.**

Authority to be exercised by Police-officers.

20. Police-officers enrolled under this Act shall not exercise any authority, except the authority provided for a Police-officer under this Act and any Act which hereafter be passed for regulating criminal procedure.

Note.—This section has been declared not to apply to an Assistant District Superintendent of Police, whose duties are exercised in connection with the unenrolled Border Police Force. *See* s. 2 of the *Punjab Frontier Police-officers Regulation* VII of 1893 (*Gazette of India*, 1895, Pt. I, p. 285).

Village Police-officers.

21. Nothing in this Act shall affect any hereditary or other village Police-officer, unless such officer shall be enrolled as a Police-officer under this Act. When so enrolled such officer shall be bound by the provisions of the last preceding section. No hereditary or other village Police-officer shall be enrolled without his consent and the consent of those who have the right of nomination.

Police-Chaukidars in the Presidency of Fort William.

If any Police officer appointed under Act XX of 1856 (*to make better provision for the appointment and maintenance of Police-Chaukidars in Cities, Towns, Stations, Suburbs and Bazaars in the Presidency of Fort William in Bengal*) is employed out of the district for which he shall have been appointed under that Act, he shall not be paid out of the rates levied under the said Act for that district.

Police-officers always on duty and may be employed in any part of district.

22. Every Police-officer shall, for all purposes in this Act contained, be considered to be always on duty, and may at any time be employed as a Police-officer in any part of the general Police district.

Duties of Police officers

23. It shall be the duty of every Police-officer *promptly* to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient ground exists and it shall be lawful for every Police-officer for any of the purposes mentioned in this section without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters

Notes.—1. Police-officer not bound to arrest if no sufficient grounds.—Under this section a Police-officer is not bound to arrest a person against whom no proceedings have been directed, if he believes that he has not sufficient grounds for apprehending him **25 W R. 8.**

2. Police-officer liable for defamation.—A Police officer is liable to be prosecuted and convicted under s 500, I P C, if he maliciously makes to his superior a defamatory report against any person, unless he can show that he is protected by some statutory privilege such a case is not covered by the maxim "*omnia presumantur rite esse acta*" **4 P. W. R. 1910 = 11 Cr. L. J. 205** where **23 P. R. 1890** is *distinguished.*

Police-officers may lay information, etc

24. It shall be lawful for any Police-officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence *

Note.—A Police-officer making a defamatory report to his superior—a Superintendent of Police is not protected under this section which deals only with information before Magistrates **4 P. W. R. 1910 = 11 Cr. L. J. 205.**—*Per* JOHNSTON, J

Police-officers to take charge of unclaimed property and be subject to Magistrate's orders as to disposal

25. It shall be the duty of every Police-officer to take charge of all unclaimed property, and to furnish an inventory thereof to the Magistrate of the district.

Note.—The Police officers shall be guided as to the disposal of such property by such orders as they shall receive from the Magistrate of the district

Magistrate may detain property and issue proclamation

26. (1) The Magistrate of the district may detain the property and issue a proclamation, specifying the articles of which it consists, and requiring any person who has any claim thereto to appear and establish his right to the same within six months from the date of such proclamation

[(2) The provisions of s 525 of the Code of Criminal Procedure, 1882, shall be applicable to property referred to in this section] †

Notes.—1. S 525 deals with power to sell perishable property

2. Effect of order of Civil Court in execution of decree on jurisdiction of District Magistrate.—An application made by a decree-holder against certain absconders for sale of the goods, which had already been detained by the order of the District Magistrate, and in respect of which no action had been taken under the provisions of ss 87 and 88 of the Cr P C, established a right to have the right, title and interest of the judgment-debtor or the absconders to be sold by the Civil Court. **5 Bur. L. T. 113 = 13 Cr. L. J. 863.**

Confiscation of property if no claimant appears

‡ **27.** (1) If no person shall within the period allowed claim such property, or the proceeds thereof, if sold, it may, if not already sold under sub-sec (2) of the last preceding section, be sold under the orders of the Magistrate of the district

(2) The sale-proceeds of property sold under the preceding sub-section and the proceeds of property sold under s 26 to which no claim has been established shall be at the disposal of Government

Persons refusing to deliver up certificates, etc, on ceasing to be Police officers

28. Every person, having ceased to be an enrolled Police-officer under this Act, who shall not forthwith deliver up his certificate, and the clothing, accoutrements, appointments and other necessaries which shall have been supplied to him for the execution of his duty shall be liable, on conviction before a Magistrate, to a penalty not exceeding two hundred rupees, or to imprisonment with or without hard labour, for a period not exceeding six months or to both

* The words " *and to prosecute such person up to final judgment* " were repealed by Act X of 1882 (Cr P Code)
† Added by s 7 of Act VIII of 1895
‡ Substituted by s 8 of Act VIII of 1895

29. Every Police-officer who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority, or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months, * [or who, being absent on leave, shall fail, without reasonable cause, to report himself for duty on the expiration of such leave], or who shall engage without authority in any employment other than his Police duty, or who shall be guilty of cowardice, or who shall offer any unwarrantable personal violence to any person in his custody, shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both.

Penalties for neglect of duty, etc.

Notes.—1. Section must be cautiously applied.—'This section is an extremely stringent provision of the law which should not be put in force except in extreme cases and where milder remedies have been tried and failed.' **10 C. W. N. 79 = 2 C. L. J. 565 = 3 Cr. L. J. 178.**

2. **Offence Magisterial.**—A Magistrate alone has power under this section to try cases and not a Sessions Judge. **1 W. R. 5; 9 W. R. 36.** A Deputy Magistrate exercising powers of the first class has jurisdiction to fine Police-officers for violation of duty. **4 W. R. 2.** So, too, a Cantonment Magistrate has power to try cases under this section without complaint. But the summary conviction of two Police-officers under this section by a Cantonment Magistrate without formal trial was held irregular and illegal. **1 Agra H. C. R. Cr. 24.**

3. **Convictions appealable.**—Convictions under this Act are appealable like other convictions. **5 W. R. 32.**

4. **No jurisdiction over European British subjects.**—This section does not give jurisdiction to a Magistrate over European British subjects. If prisoner raises a plea of jurisdiction, the Magistrate is bound to take it into his consideration and determine the same. **3 N. W. P. H. C. R. 128.**

5. **Section applies only to Police-officers.**—The section is not applicable to persons who are not Police-officers. In **20 C. L. R. 521** where a Magistrate, acting merely on certain information contained in a letter addressed to him, convicted the Secretary of the *Chittagong Brahmo Samaj* for obstruction and nuisance, the High Court set aside the conviction on the ground that there was no complaint and no evidence.

6. **Disobedience of lawful order.**—Refusing to turn out for drill on being ordered to do so by the Head Constable in charge of the *Tana* is punishable under this section. **1896 A. W. N. 105.** A Police-officer negligently or improperly submitting an incorrect report of local investigation, may be punished under this section in cases where proof is insufficient to bring home a charge under s. 218, I.P.C. **15 W. R. 17.**

7. **Disobedience of illegal orders, no offence.**—Where a Police constable failed to attend an extra drill imposed upon him by the District Superintendent for refusing to comply with the order to cut down the jungle in the vicinity of Police lines, *held*, that the omission to attend such extra drill does not amount to an offence under this section as it did not appear that the Superintendent's order was lawful. **12 C. 427.** The words "lawful order" mean an order which the authority mentioned therein is competent to make. Therefore the order of a Superintendent of Police directing constables to cut down jungle in the vicinity of their line, not being such as he was competent to make, conviction for its disobedience is not punishable under this section. **12 C. 427.** An order for suspension and confinement of a Police-officer for an unlimited period of time is illegal and the Police-officer cannot be convicted under this section for disobeying such order. **2 C. L. J. 616.** An order directing a Police-constable to purchase rafters and bamboos for repair of the *Tana* is not lawful. **1891 A. W. N. 179.** Rules made by District Superintendent of Police (and not by Inspector-General of Police under s. 12) requiring constables to be within the lines at the time of the roll-call are illegal and disobedience to such rules is not an offence under this section. **15 C. 194.** A Police constable was convicted of an offence under this section for disobeying an order directing him to join fatigue party for the purpose of removing certain articles from the office of the Inspector-General of Police. This conviction was confirmed by the Sessions Judge on Appeal. On revision to the Chief Court, it was contended that the order which the petitioner refused to comply with was not a lawful order, and that, therefore, no offence had been committed as the work he was called upon to do was of penal character, which he was not legally bound to carry out, being one specified in the 'Table of punishments' given in Chapter XVI of the Punjab Police Rules. *Held*, that the conviction was not illegal as there was nothing unreasonable or unlawful in an order of this kind, because it was not outside the scope of a constable's duties to perform work of this nature when necessary. **15 P. W. R. 1911 = 184 P. L. R. 1911 = 12 Cr. L. J. 153.**

* Words in brackets were added by s. 9, Act VIII of 1895

8. Wilful breach or neglect of duty.—Before a Police-officer can be convicted of an offence under this section, it must be found that he is guilty, not of mere neglect, but of deliberate and intentional violation of duty 8 B. L. R. Appx. 60 = 17 W. R. 34, 19 W. R. 7; 1883 A. W. N. 42. The accused were Police constables taking under trial prisoner by a Camel Cart on a dark night At night the prisoner wanted to get down to make water and was permitted to do so and then he got himself free from the rope which was tied to his handcuffs and bolted *Held* that there was no wilful breach or neglect of any rule to come under s. 29 89 I. C. 263, *see* also 103 I. C. 200 = 28 Cr. L. J. 664.

9. Whether section applies to special constables.—In 10 C. W. N. 79 = 2 C. L. J. 555 = 3 Cr. L. J. 178, the Judges were of opinion that it was very doubtful if the provisions of this section were applicable to special constables, but the point was not decided

10. Refusal to act as Special Police—A person who refused to act as a special constable cannot be prosecuted under this section as the provisions of this section were not intended to apply to special constables and cannot be interpreted as so applying by the operation of the provisions of s 18 *supra*. 10 C. W. N. 322, and *see* Note 2 to s 19 above A Police-officer (Chief constable) being authorised by law to depute his subordinate to proceed to the place where crime is reported to have been committed cannot be convicted under this section of wilful violation of duty, if he fails to proceed himself to such spot. 1 Agra H. C. R. Cr. 1.

11. Overstaying leave without permission.—The failure of a Police constable to resume his duty on the expiration of his leave, does not constitute an offence under this section 6 C. 625 = 8 C. L. R. 56 *See* also 6 A. 495. But in 29 M. 192 it was *held* that a Police-officer who having obtained casual leave does not return to duty on the expiration of the period of leave, but stays behind without fresh leave is guilty under s 44 of Act XXIV of 1859 (*Madras District Police Act*) of the offence of "*ceasing to perform the duties of his office without leave*" The additional words introduced by Act VIII of 1895 s 9 leave now no room for any doubt on the point

12. Trial for offences under this section, regulated by the Code of Criminal Procedure—Acts or omissions punishable under this section come within the category of "offences punishable under any law other than the Indian Penal Code (s 5 of the 1898 Code) and these offences likewise fall within the terms of s 204 of the present Code (s 148 of the 1872 Code) 25 W R. 20.

13. Officer under suspension.—A Police-officer under suspension cannot be convicted under this section of withdrawing from the duties of his office without permission 8 B L. R. Appx. 58 = 17 W. R. 12, *followed in* 10 A. 459.

Regulation of public assemblies and processions and licensing of same

***30.** (1) The District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass

(2) He may also on being satisfied that it is intended by any persons or class of persons to convene or collect an assembly in any such road street or thoroughfare, or to form a procession which would in the judgment of the Magistrate of the district or of the sub-division of the district if uncontrolled be likely to cause a breach of the peace, require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a license.

(3) On such application being made he may issue a license specifying the names of the licensees and defining the conditions on which alone such assembly or such procession is to be permitted to take place and otherwise giving effect to the section

Provided that no fee shall be charged on the application for, or grant of, any such license

Music in the Streets

(4) He may also regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies

Note—The object of a license under this Act is the preservation of public order Consequently where the license contained a condition that no member was to carry a lathi or sword the licensee must undertake to see not only that no member of the procession carried them when it started but also that no one joined the same subsequently with a lathi or a sword 6 Pat. 763

* Substituted by s 10 Act VIII of 1895

Powers with regard to assemblies and processions violating conditions of license.

*30-A. (1) any Magistrate or District Superintendent of Police or Assistant District Superintendent of Police or Inspector of Police or any Police-officer in charge of a station may stop any procession which violates the conditions of a license granted under the last foregoing section, and may order it or any assembly which violates any such conditions as aforesaid to disperse.

(2) Any procession or assembly which neglects or refuses to obey any order given under the last preceding sub-section shall be deemed to be an unlawful assembly.

Police to keep order in public roads, etc

31. It shall be the duty of the Police to keep order on the public roads, and in the public streets, thoroughfares, ghâts and landing-places, and at all other places of public resort, and to prevent obstructions on the occasions of assemblies and processions on the public roads and in the public streets, or in the neighbourhood of place of worship, during the time of public worship, and in any case when any road, street, thoroughfare, ghât or landing-place may be thronged or may be liable to be obstructed.

Penalty for disobeying orders issued under last three sections, etc.

†**32.** Every person opposing or not obeying the orders issued under the last [three] preceding sections or violating the conditions of any license granted by the District Superintendent or Assistant District Superintendent of Police for the use of music, or for the conduct of assemblies and processions, shall be liable, on conviction before a Magistrate, to a fine not exceeding two hundred rupees.

Notes.—1. Merely playing music at night in a house is not an offence and does not therefore require any license as this Act does not apply. **5 C. P. L. R. 92.**

After an application for license to take out a procession is made under s. 30 of this Act the applicant is free to take out the procession whether the license applied for is issued or not. If the license has been "issued" the licensee is bound to obey the conditions upon which it is granted whether it has been delivered or not; if, on the other hand, it has not been issued he is only bound to see that the general law is not broken, where therefore the petitioner applied for a license to take out a religious procession, but the license was not in fact delivered to the applicant who, without waiting for delivery of license took out the procession, *held* that no offence punishable under s. 32 of this Act was committed as there was neither failure to apply for license nor a violation of an order issued under s. 30. *Held* also that the word "issued" in that section signifies that if the District Superintendent of Police, etc., signs the license and delivers it to some one with directions that it shall in due course be delivered to the applicant, the license has been issued within the meaning of s. 30. **4 Pat. 795.**

Saving of control of Magistrate of district.

33. Nothing in the last [four] preceding sections, shall be deemed to interfere with the general control of the Magistrate of the district over the matters referred to therein.

Punishment for certain offences on roads, power of Police-officers, etc

34. Any person who, on any road in any [open place] or street or thoroughfare within the limits of any town to which this section shall be specially extended by the Local Government, commits any of the following offences, to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, shall, on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or to imprisonment [with or without hard labour ‡] not exceeding eight days; and it shall be lawful for any Police-officer to take into custody, without a warrant, any person who within his view commits any of such offences, namely:—

Slaughtering cattle, furious riding, etc

First.—Any person who slaughters any cattle or cleans any carcass; any person who rides or drives any cattle recklessly, or furiously, or trains or breaks any horse or other cattle;

Cruelty to animals.

Second.—Any person who wantonly or cruelly beats, abuses or tortures any animal;

Obstructing passengers.

Third.—Any person who keeps any cattle or conveyance of any kind standing longer than is required for loading, or unloading, or for taking up or setting down passengers, or who leaves any conveyance in such a manner as to cause inconvenience or danger to the public;

Exposing goods for sale.

Fourth.—Any person who exposes any goods for sale;

* Added by s. 11, Act VIII of 1895.
† Inserted by Act I of 1903, s. 3, Sch. II.
‡ NOTE.—The words in brackets in ss. 32, 33 and 34 are substituted or added by Act VIII of 1895, ss. 12 and 13

Fifth — A— —

Throwing d street

\ — — — — y, dung heap or the like,

Being found drunk or riotous

Sixth —Any person who is found drunk or riotous or who is incapable of taking care of himself

Seventh —Any person who wilfully and indecently exposes his person, or any offensive deformity or disease, or commits nuisance by easing himself or by bathing or washing in any tank or reservoir not being a place set apart for that purpose

Indecent exposure of person

Eighth —Any person who neglects to fence in or duly to protect, any well, tank or other dangerous place or structure

Neglect to protect dangerous places

Notes.—1. Slaughtering of Cattle, etc.—The slaughtering of a cow in an open verandah so as to cause annoyance to the residents of the locality, and in spite of their remonstrance is a breach of the law, being an act in an 'open place' within the terms of this section as amended by Act VIII of 1895 The words 'open space' coupled with "road, street or thoroughfare" should be interpreted *ejusdem generis* It seems rather that the addition of these words was intended to have a wider significance and this is shown by another amendment in the same section made at the same time, by which annoyance etc., caused must be not to the residents and passengers, but to the residents or passengers The intention of the Legislature was to extend the Act not only to passengers who would be on such a road, street or thoroughfare but to the residents who are not passengers. **27 C. 655.** *See* also **1887 A. W. N. 67.** Overloading a horse by allowing a greater number of men to sit in an *ekka* is not an offence under this section **28 P. R. 1885.**

2. Obstruction.—Placing *tanbans* in a public thoroughfare is an offence under this section **2 N. W. P. H. C. R. 5.** Even if the obstruction, such as placing a board in front of one s house over a water channel thereby temporarily diminishing the width of a public road, be not punishable under this section, the obstructor would be liable under ss 283 and 290, I P C. **1906 A. W. N 317 = 4 A. L. J. 44 = 4 Cr. L. J. 492** In this case the point was also discussed whether vouchers for bets regarding Government opium sales would be "good within the meaning of cl (4) of this section

3. Limits of any town —*Town* here includes a Cantonment See *Cantonments Act* XIII of 1889 s. 12 (2).

4. Specially extended —In the Presidencies of Madras and Bombay there are special Acts *See* Note to s 46 *infra*

5 A sentence of imprisonment under this section whether substantive or in default of payment of fine, must be simple **1 Burma S R. 57.**

6. What amounts to exposing Goods for Sale —*Held* the expression "exposes for sale' in sub clause 4 implies that every person taking any quantity of the article exposed has to pay for it. So erecting a chowki at a public place to supply water freely to all who wanted it and some, however, used to give tips but there was no evidence that the chowki obstructed the passers by, was held not to amount to exposing any goods for sale within the meaning of sub-clause (4) 30 **24 A. L. J R 292.**

35. Any charge against a Police-officer above the rank of a constable under this Act shall be enquired into and determined only by an officer exercising the power of a Magistrate

Jurisdiction

Note.—*See* Note under s 5 above

36. Nothing contained in this Act shall be construed to prevent any person from being prosecuted under any other Regulation or Act for any offence made punishable by this Act or from being liable under any other Regulation or Act, to any other or higher penalty or punishment than is provided for such offence by this Act.

Power to prosecute under other law not affected

Provided that no person shall be punished twice for the same offence.

Proviso

***37.** The provisions of s 64 to s 70, both inclusive, of the Indian Penal Code and of s. 386 to s. 389, both inclusive of the Code of Criminal Procedure, 1882, with respect to fines, shall apply to penalties and fines imposed under this Act on conviction before a Magistrate

Recovery of Penalties and fines imposed by Magistrate

Provided that, notwithstanding anything contained in s. 65 of the first mentioned Code, any person sentenced to fine under s 34 of this Act may be imprisoned in default of payment of such fine for any period not exceeding eight days

* Substituted by s 14 Act VIII of 1895

38. [*Procedure until return is made to warrant of distress.*]	*Repealed by s.* 14 *of Act VIII of* 1895.
39. [*Imprisonment if distress not sufficient.*]	
40. [*Levy of fines from European British subjects.*]	

Rewards to Police and informers payable to General Police Fund.

41. [All sums paid for the service of process by Police-officers and rewards, forfeitures and penalties or shares of rewards, forfeitures and penalties, which by law are payable to informers, shall, when the information is laid by a Police-officer, be paid into the General Police Fund.

Limitation of actions.

42. [*All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general Police powers hereby given, shall be commenced within three months after the Act complaint of which shall have been committed, and not otherwise*] and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the District Superintendent or an Assistant District Superintendent of the district in which the act was committed, one month at least before the commencement of the action.

Tender of amends.

No plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought by or on behalf of the defendant, and, though a decree shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial is held shall certify his approbation of the action:

Proviso.

Provided always that no action shall in any case lie where such officers shall have been prosecuted criminally for the same Act.

Notes.—1. Limitation.—So much of this section as relates to the limitation of suits was repealed by s. 2 of the old Limitation Act XV of 1871. The present Limitation Act IX of 1908, now applies; *see* s. 3 and Sch. I, Art. 2.

2. This section has no bearing on or connection with s. 29 *supra.* **7 N. W. P. H. C. R 237.**

3. **Effect of want of notice.**—The suit against a Police-officer under this Act should not be dismissed merely because notice under this section has not been given, unless the objection be taken in the first Court. **8 W. R. 425 (Civ.).**

4. **Notice unnecessary.**—If the Police-officer does not purport to act in good faith in pursuance of law, but takes advantage of his position as a Police-officer to commit illegal and tortious acts maliciously and without cause is not entitled to any notice. **26 A. 220.**

Plea that act was done under warrant.

43. When any action or prosecution shall be brought or any proceedings held against a Police-officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate.

Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate, and the defendant shall thereupon be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine:

Proviso.

Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section.

Police-officers to keep diary.

44. It shall be the duty of every officer in charge of a Police-station to keep a general diary in such form as shall, from time to time, be prescribed by the Local Government, and to record therein all complaints, and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined.

The Magistrate of the district shall be at liberty to call for and inspect such diary.

Note.—Under the Act, a Police-officer is bound to communicate information to his superior officer regarding the commission of a riot affecting the public peace and to make an entry thereof in the diary; and the omission to give such information brings him within the purview of s. 177, I.P.C. **21 W. R. 30.** *See* also **20 A. 151.**

Local Government may prescribe form of returns

45. The Local Government may direct the submission of such returns by the Inspector General and other Police-officers as to such Local Government shall seem proper, and may prescribe the form in which such returns shall be made

Scope of Act

***46.** (1) This Act shall not by its own operation take effect in any Presidency, Province or place. But the Governor-General in Council by an order to be published in the *Gazette of India*, may extend the whole or any part of this Act to any Presidency, Province or place, and the whole or such portion of this Act as shall be specified in such order shall thereupon take effect in such Presidency, Province or place

(2) When the whole or any part of this Act shall have been so extended, the Local Government may from time to time, by notification in the *Official Gazette*, make rules consistent with this Act—

(*a*) to regulate the procedure to be followed by Magistrates and Police-officers in the discharge of any duty imposed upon them by or under this Act,

(*b*) to prescribe the time, manner and conditions within and under which claims for compensation under s. 15 A are to be made the particulars to be stated in such claims, the manner in which the same are to be verified, and the proceedings (including local enquiries if necessary) which are to be taken consequent thereon, and

(*c*) generally for giving effect to the provisions of this Act.

(3) All rules made under this Act may, from time to time be amended, added to or cancelled by the Local Government

Note.—There are special Police Acts for Madras (Act XXIV of 1859). Bombay (Acts VII of 1867 and *IV of 1870*) and Bengal (Ac[illegible]) The Bengal Act is to be read and taken as part of this Act by virtue of s 6 of the former Act [illegible]
throughout British India

For notifications extending this Act under the powers conferred by this section to—

(i) *U P of Agra and Oudh* (including *Ajmere-Merwara* then under that Government). See *N W P. Gazette*, 1861, p 634 *See* also N W.P and Oudh *List of Local Rules and Orders* Edition 1894, pp 31-32 for orders (still kept in force by s 16 of Act VIII of 1895) as to the enforcement of this Act in 27 districts of U P of Agra and Oudh in Hamirpur, Jalaun, Jhansi, Lalitpur, Naini Tal, Almora and Garhwal (ii) Oudh, see *N W P Gazette*, 1861, p 1758 (iii) Tract of land between Allahabad and Jubbulpore ceded in full sovereignty by certain Native States See *List of Local Rules and Orders* Central Provinces, Edition 1896 p 13. (vi) Districts in Burma—*Pegu and Irrawady* Divisions See *Burma Gazette*, 1861 Pt I, p 2340; *Tenasserim and Martaban, Burma Gazette*, 1861, Pt. I p. 45 (v) Central Provinces. See *List of Local Rules and Orders*, Edition 1896, p 4 (vi) *Bengal and Assam* See *Assam Local Rules and Orders* Edition 1893, p 3. (vii) Several districts of the Punjab See *Calcutta Gazette* dated 18th May, 1861, p 1302.

[illegible] section as it now stands, the Act has also been extended to Upper [illegible]

Authority of District Superintendent of Police over Village Police

47. It shall be lawful for the Local Government in carrying this Act into effect in any pa[illegible] territories subject to such Local Government, to declare that any authority which now [illegible] the Magistrate of the district over any village watchman or [illegible]

FORM

(See *Section* 8)

A B has been appointed a member of the Police Force under Act V of 1861, and is vested with the powers functions and privileges of a Police-officer

* Substituted by s 15 Act VIII of 1895

APPENDIX XIV.

POLICE ACT No. III OF 1888.

(*Received the Governor-General's assent on the 17th February*, 1888.)

AN ACT TO AMEND THE LAW RELATING TO THE REGULATION OF POLICE.

Preamble.

WHEREAS it is expedient to relax those provisions of Acts, for the regulation of Police which restrict the employment of Police-officers to the Presidency, Province or place of the Police establishment of which they are members; It is hereby enacted as follows :—

Title, extent and commencement.

1. (1) This Act may be called the Police Act, 1888;

(2) it extends to the whole of British India, and

(3) it shall come into force at once.

Constitution of Police Forces for special purposes.

2. (1) Notwithstanding anything in Act XXIV of 1859 (*an Act for the better Regulation of the Police within the territories subject to the Presidency of Fort St. George*), Act V of 1861 (*an Act for the Regulation of Police*)* [or the corresponding law for the time being in force in the territories administered by the Governor of Bombay in Council], or any Act relating to the Police in any Presidency town, the Governor-General in Council may, by notification in the *Gazette of India*, create a general Police district embracing parts of two or more Presidencies, Provinces or places, and direct the enrolment under Act V of 1861 of a Police Force for service therein.

(2) With respect to such a district and the Police Force enrolled therefor the functions of the Local Government under Act V of 1861, the Code of Criminal Procedure, 1882, and any other enactment for the time being in force relating to Police shall, subject to any orders which the Governor-General in Council may make in this behalt, be discharged by the Governer-General in Council, or by such Local Government or other authority as the Governor-General in Council may appoint, and the functions of the Inspector-General of Police, Deputy Inspectors-General, Assistant Inspectors-General, District Superintendents of Police and Assistant District Superintendents under Act V of 1861 and any other enactment for the time being in force shall, subject as aforesaid, be discharged by such officer or officers as may be appointed by the authority ordinarily discharging under this sub-section the functious of the Local Government with respect to the district and Force.

(3) Subject to any orders which the Governor-General in Council may make in this behalf, members of a Police Force enrolled for service in a general Police district created under sub-sec. (1) shall have within every part of any Presidency, Province or place of which any part is included in the district, the powers, duties, privileges and liabilities which, as Police-officers appointed under Act V of 1861, they have within the district.

(4) Any member of such a Force whom the authority discharging with respect thereto the functions of the Local Government under sub-sec. (2) has generally or specially empowered to act under this sub-section may, subject to any orders which the Governor-General in Conncil may make in this behalf, exercise in any part of the local area in which he has the powers of a Police-officer under sub sec. (3) any of the powers which an officer in charge of a Police-station has in that part, and, when so exercising any such power, shall, subject as aforesaid, be deemed to be an officer in charge of a Police-station discharging the functions of such an officer within the limits of his station.

(5) Subject to any orders which the Governor-General in Council may make in this behalf, a part of a Presidency, Province or place included in a general Police district under sub-sec. (1) shall not by reason of being included therein cease for the purposes of any enactment relating to Police to be part of the Presidency, Province or place of which it forms part.

(6) For the purposes of this section, and subject to the provisions thereof, Act V of 1861 shall, not withstanding anything in s. 46 of that Act, be deemed to take effect throughout the whole of British India.

* These words were substituted for the original words "*the Bombay District Police Act*, 1867," by Act XII of 1891, Schedule II.

3. Notwithstanding anything in any of the Acts mentioned or referred to in the last foregoing section but subject to any orders which the Governor General in Council may make in this behalf a member of the Police establishment of any Presidency Province or place may discharge the functions of a Police-officer in any part of British India beyond the limits of the Presidency Province or place and shall while so discharging such functions be deemed to be a member of the Police establishment of that part and be vested with the powers functions and privileges and be subject to the liabilities of a Police-officer belonging to that establishment

Employment of Police officers beyond the Presidency Province or place to which they belong

APPENDIX XV.

BOMBAY DISTRICT POLICE ACT No IV OF 1890 *

AN ACT TO AMEND THE LAW FOR THE REGULATION OF THE DISTRICT POLICE IN THE PRESIDENCY OF BOMBAY

(Received the Governor General's assent on the 4th September, 1890)

WHEREAS it is expedient to amend the law for the regulation of the District Police of the Presidency of Bombay, It is enacted as follows —

CHAPTER I

PRELIMINARY

Short title

† 1 (1) This Act may be cited as the Bombay District Police Act 1890

(2) It extends to the whole of the Presidency of Bombay except the city of Bombay Sindh and Aden but Government may at any time by notification in the *Bombay Government Gazette* extend it or any part of it to any portion of either Sindh or Aden

Extent

Note —Jurisdiction of Mofussil Courts over European British subjects —In 7 Bom H C. Cr 5 it was *held* under Bombay Act VII of 1867 that that Act was *ultra vires* in so far as it conferred criminal jurisdiction upon Magistrates in the Mofussil over British born subjects. Now *see* Cr Pro Code Chapter XXXIII and Notes thereunder

Repeal of enactments

2 Subject to the provision in section 1 ‡ sub-section (2) ‡ the enactments mentioned in schedule A are repealed to the extent specified in the third column thereof §

All references made in any enactment of the Governor of Bombay in Council to any enactment hereby repealed shall be read as if made to the corresponding portion of this Act.

All rules prescribed appointments made powers conferred and orders and certificates issued under any such enactment shall so far as they are consistent with this Act be deemed to have been respectively prescribed made conferred and issued hereunder

DEFINITIONS

Definition

3 In this Act unless there be something repugnant in the subject or context —

(*a*) Inspector General Deputy Inspector General District Superintendent and Assistant Superintendent mean respectively the Inspector General of Police a Deputy Inspector General of Police a District Superintendent of Police and an Assistant Superintendent of Police appointed under this Act

(*b*) 'Police-officer means any member of a Police Force appointed under this Act

(*c*) 'Constable means a Police-officer of the lowest grade

* Bombay Act IV of 1890 with certain restrictions and modifications has been extended by notification under the Scheduled Districts Act 1874 to Aden—*see* Notification No 19 1 dated 29th February 1892 *B G G* 892 Pt I p 18, and to Sindh—*see* Notification No 1858 dated 14th March 1902 *B G G* 1902 Pt I p 478

† This section was substituted for the original section 1 by Bombay Act V of 1909 s 1

‡ This word and figure were substituted for the original word and figure by Bombay Act V of 1909 s 2

§ Words repealed by Act XVI of 1895 are omitted

(d) "district" means a territorial division constituting a district for the purpose of the Code of Criminal Procedure, 1898:*

(e) "street" includes any highway and the way over any causeway, bridge, viaduct, arch, quay or wharf, and any road, lane, footway, square, court, alley or passage accessible to the public, whether a thoroughfare or not:

Note.—The definition of 'street' in cl. (e) of this section is inclusive in its terms and includes a place accessible to the public. The words 'accessible to the public' mean that any member of the public as such has access to the land; 'by access to' would ordinarily be understood unimpeded entrance to the land. **14 Bom. L. R. 599 = 13 Cr. L. J. 518.**

(f) "cattle" includes elephants, camels, horses, asses, mules, sheep, goats and swine;

(g) words and expressions which are defined in the Code of Criminal Procedure, 1898,* have the same meaning as in that Code.

CHAPTER II.

ORGANISATION OF THE POLICE.

General.

Police Force to be entertained in each district.

4. In each district of the Presidency of Bombay to which this Act extends, Government may, subject to the control of the Governor-General in Council, establish and entertain a Police Force or such number in the several ranks and having such an organisation and such duties, rights and authority as are hereinafter prescribed and provided for and receiving such salaries and allowances as shall from time to time be directed and approved by the authorities aforesaid.

Appointment and authority of Inspector-General of Police

5. (1) For the direction and supervision of the Police Force of every portion of the Presidency to which this Act extends, Government shall appoint an Inspector-General of Police, who shall have such functions, authority and responsibility as are hereinafter provided, subject to the provisions of this Act, and to such rules and orders as may be made by Government in this behalf.

and of Deputy Inspector-General

(2) Subject to the previous approval of the Governor-General in Council, Government may appoint one or more Deputy Inspectors-General of Police, to whom Government may assign such duties being amongst the lawful duties of the Inspector-General of Police, or in aid and furtherance thereof, as shall to Government seem expedient.

Their suspension or removal.

(3) The Inspector-General and Deputy Inspector-General may be suspended or removed from office by Government.

Appointment of District and Assistant Superintendents

6. Government may appoint for each district a Superintendent and such Assistant Superintendents of Police as it may think expedient, and may dismiss, suspend, reduce, remove or transfer any of such officers as it may think fit.

Commissioners and Inspector-General to have magisterial powers to exercise them subject to such limitations as are imposed by Government.

7. Each Commissioner throughout the districts under his control, and the Inspector-General of Police throughout the Presidency, shall have the powers of a Magistrate of the first class, but shall exerise such powers subject to such limitation as may from time to time be imposed by Government.

Appointment of Inspectors.

8. The Inspector-General may, subject to the rules and orders of a Government, appoint such *Sub-Inspectors and Sergeants* † as shall be necessary for the service of each district.

Note.—Sanction for prosecuting Police Inspector.—An Inspector of Police being an officer who may be removed from office under this section without the sanction of Government, the sanction of Government is not necessary in order to give a Magistrate jurisdiction to entertain a complaint against him for an offence committed in his capacity of a Police-officer. **Ratanlal 142.**

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* The reference to Act X of 1882 is altered in accordance with Act V of 1898, s. 3.

† The words in italics were substituted for the word 'Inspector' by the Bombay District Police (Amendment) Act IV of 1912, s. .

Appointment of Police-officers of the grade of Head-constable and constable

9. Police-officers of the grades of *Head* constable and constable* shall be appointed in each district by the District Superintendent, subject to such rules as to sanction, designations, mutual relations and conditions of service as, consistently with the law at the time in force, Government may from time to time prescribe

Certificates of appointment to be given to Inspectors

10. An Inspector shall, on appointment, receive from the Inspector-General a certificate of appointment containing particulars of his race, name, age, caste or religion and of his previous service, if any

Certificates of office to be given to Police-officers below the grade of Inspector

11. (1) Every Police-officer below the grade of Inspector shall, on enrolment, receive a certificate in the form of Schedule B under the seal of the Inspector General, in the case of a Sub-Inspector, of the District Superintendent of the district in which he is enrolled, in the case of Police officers below the *rank of a Sub-Inspector and not in the Criminal Investigation Department, and of the Deputy Inspector General, Criminal Investigation Department, in the case of Police-officers in the Criminal Investigation Department below the rank of a Sub-Inspector* †

Powers etc of persons appointed as aforesaid

(2) Every person appointed as aforesaid shall, in virtue of such appointment be vested with the powers, functions, privileges and responsibilities of a Police-officer

Such certificates when to become null and void.

(3) (*a*) Every certificate of appointment shall become null and void whenever the person named therein for any reason ceases to belong to the Police

Temporary suspension of powers, etc, of Police officers

(*b*) The powers, functions and privileges vested in a Police-officer shall be temporarily suspended whilst such Police officer is suspended from office Such Police-officer shall not by reason of such suspension cease to be a Police-officer but shall continue subject to the same responsibilities and subject to the same authorities as if no such suspension had taken place

General powers of District Superintendent

12. The District Superintendent shall, subject to the orders of the Inspector General and of the Magistrate of the district, within their several spheres of authority direct and regulate all matters of arms, drill exercise observation of persons and events mutual relations, distribution of duties, study of laws, orders and modes of proceeding and all matters of executive detail in the fulfilment of their duties by the Police Force of his district

Control by Magistrate of the district

13. (1) The District Superintendent and the Police Force of a district shall be under the command and control of the Magistrate of the district

Subject to rules and orders of Government and lawful orders of the Commissioner

(2) In exercising authority under the preceding sub-section the Magistrate of the district shall be governed by such rules and orders as Government may from time to time make in this behalf, and shall be subject to the lawful orders of the Commissioner

Inspector General, in issuing rules and orders, to give furtherance to purposes of sub-section (1)

(3) The Inspector General shall be bound, in the rules and orders issued by him under this Act, to give furtherance to the purposes of sub-section (1).

Additional Police Force to be furnished to any district by the Inspector General on requisition on District Magistrate

14. If the Magistrate of the district considers that there is, or on any particular occasion, will be pressing need for a Police Force that cannot be furnished by his own district, he shall communicate with the Inspector General, who shall as far as possible, and subject to the orders of Government, with the requisitions of the Magistrate of the district.

District Superintendent may be required by District Magistrate to furnish reports

15. The Magistrate of the district may require from the District Superintendent reports, either particular or general, on any matter connected with crimes, the condition of the criminal classes, the prevention of disorder, the regulation of assemblies and amusements, the distribution of the Police Force, *the conduct and character of any Police-officer subordinate to the District Superintendent* ‡ the utilisation of auxiliary means and all other matters in furtherance of his control of the Police Force and maintenance of order

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* The words in italics were substituted for the words 'below the grade of Inspector' by the Bombay District Police (Amendment) Act IV of 1912, s 2

† Substituted by Bombay Act III of 1915.

‡ The words in italics were newly inserted by the Bombay District Police (Amendment) Act IV of 1912 s 3

District Magistrate's general powers of supervising the Police Force of his district.

16. If the Magistrate of the district observes marked incompetence, or unfitness for the locality or for his particular duties, in any officer subordinate to the District Superintendent, he may call on the Superintendent to substitute another officer for any officer whom he has power to remove, and the Superintendent shall be bound to comply with such requisition. In the case of an Inspector or officer of higher grade, the Magistrate of the district may communicate with the Inspector-General, who shall thereon determine the measures to be taken with careful attention to the views of the Magistrate of the district and shall inform him of the orders he may issue.

Power of Commissioner to issue directions in respect of Police Force.

17. (1) A Commissioner may make any order with respect to the Police Force in any district within the division subject to his authority which the Magistrate of the district might make, and any order which he may be authorised to make by any rule lawfully made by Government under the provisions of this Act or other law in force, and may also in case of emergency direct any portion of such force appointed for one district to be employed in any other district in such division.

Such direction ordinarily to be to the District Magistrate and to be communicated to the Inspector-General

(2) An order under sub-section (1) shall ordinarily be directed to the Magistrate of the district concerned, but may when necessary be addressed directly to the District Superintendent, in which case it shall be communicated to the Magistrate of the district. The order shall in each case be communicated by the Commissioner to the Inspector-General.

Commissioner may call Inspector-General's attention to defects in the Police of his division, which shall be remedied.

18. In such matters falling under his observation as lie within the sphere of authority of the Inspector-General, a Commissioner may call the Inspector-General's attention to defects of system or of personal competence in the Police of any portion of the division subject to his authority. It shall be incumbent on the Inspector-General in every such case to remedy defects, and to remove causes of complaint and to conform to the requests of the Commissioner where the same shall be lawful and consistent with the orders of Government and other lawful commands, requests and instructions. He shall communicate the steps taken by him to the Commissioner.

Commissioner may call on District Magistrate for reports on state of crime, etc., and issue orders thereon.

19. A Commissioner may call on the Magistrate of a district for such reports and information connected with the state of crime in his district and with the distribution of the Police therein and on the arrangements for repressing offences and disorder as he may think necessary, as a means towards the good administration of the division subject to his authority, and may thereon issue such orders as shall be conformable to law. Every such order shall be directed to the Magistrate of the district and shall be communicated to the Inspector-General.

Inspector-General may investigate and regulate all matters of Police accounts.

20. The *Inspector-General* * shall, subject to the orders of Government, have authority to investigate and regulate all matters of account connected with the Police subject to his authority, and all persons concerned shall be bound to give him reasonable aid and facilities in conducting such investigation, and to conform to his lawful orders consequent thereon.

Appointment of special Police-officers.

21. (1) Whenever it shall appear to a Magistrate of the second class or of higher rank having jurisdiction at a town or place, that any unlawful assembly, riot or other disturbance of the peace has taken place or is reasonably apprehended and that the avilable Police Force is not sufficient for the preservation of the peace and for the protection of the inhabitants and the security of property in the local area in which such unlawful assembly, riot or other disturbance has taken place or is apprehended, such a Magistrate may, on the application of any Police-officer not lower in rank than a *Sub-Inspector* † by a written order signed by himself and sealed with his official seal appoint, to be special Police-officers for such time and within such limits as he shall think necessary, so many persons fit and willing to act as such officers as he shall think proper.

* The word 'Inspector-General' was substituted for 'Commissioner' and the words 'within the division' were repealed by the Bombay District Police (Amendment) Act, IV of 1912, s. 4

† The word 'Sub-Inspecor' was substituted for 'Chief Constable' by Bombay District Police (Amendment) Act, IV of 1921, s. 5.

Powers and responsibilities of special Police officers

(2) Every special Police-officer so appointed shall have the same powers, functions, privileges and immunities and be liable to the same duties and responsibilities and be subject to the same authorities as an ordinary Police-officer, but it shall not be necessary for him to receive a certificate of office under section 11

Additional

Employment of additional Police at request of persons showing the necessity therefor

22. (1) Any District Superintendent on the application of any person showing the necessity therefor, may depute any additional number of Police to keep the peace or to perform other Police duties at any place within the district

Cost thereof

(2) Such additional Police shall be employed at the charge of the person making the application, but shall be subject to the orders of the Police authorities and shall be employed for such period as the District Superintendent thinks fit.

Proviso regarding relief from cost

(3) Provided that, if the person upon whose application such additional Police are employed shall at any time make a written requisition to the District Superintendent for the withdrawal of the said Police, he shall be relieved from the charge therefor on the expiration of such period, not exceeding one month from the date of delivery of such requisition, as the District Superintendent shall determine

(4) In acting under this section the District Superintendent shall be subject to the provisions of section 13 (1).

Employment of additional Police near large works

23. (1) Whenever it shall appear to any Magistrate of a district that the behaviour, or a reasonable apprehension of the behaviour, of the persons employed on any railway canal or other public work or in or upon any manufactory or other commercial concern under construction or in operation at any place within his district, necessitates the employment of additional Police at such place, such Magistrate may with the sanction of the Commissioner,* depute such additional Police to the said place as he shall think fit and keep the said Police employed at such place for so long as such necessity shall appear to him to continue

Cost thereof

(2) Such additional Police shall be employed at the charge of the person by whom the work, manufactory or concern, is being constructed or carried on, and the said person shall pay the charges therefor at such rates and at such times as the Magistrate of the district, with the sanction of the Commissioner,* shall from time to time require

Disputes as to payment of cost

24. In case of any dispute in any case under section 22 or section 23 the decision of the Magistrate of the district shall be conclusive as to the amount to be paid and as to the person by whom it is to be paid and the sum so ascertained may, on the requisition of the Magistrate of the district be levied by the Collector as if it were an arrear of land revenue due by the person found to be answerable therefor

Employment of additional Police in cases of special danger to the public peace

25. (1) Government may, from time to time by notification, direct the employment of additional Police for such period as it shall think fit in any local area which shall appear to be in a disturbed or dangerous state or in which the conduct of the inhabitants or of any particular section of the inhabitants shall in its opinion, render it expedient temporarily to increase the strength of the Police

Cost thereof

†(2) The cost of such additional Police shall, if Government so direct, be either in whole or in part defrayed by a tax imposed on the person herein below mentioned, or by a rate assessed on the property of such persons, or both by a tax and by a rate so imposed and assessed and charged—

(a) either generally on all persons who are inhabitants of the local area to which such notification applies, or

(b) specially on any particular section or sections or class or classes of such persons, and Govern[illegible] tax or rate shall be charged.

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* [illegible] Bombay Act III of 189[illegible]

† Sub-section (2) of section 25 was substituted for the [illegible]

Explanation.—For the purposes of this section and of section 25-A " inhabitants " shall include persons, who themselves or by their agents or servants occupy or hold land or other immovable property within such area, and landlords who themselves or by their agents or servants collect rents or revenue direct from ryots or occupiers in such area, notwithstanding that they do not actually reside therein.

Extension of period for payment of cost.

*(3) It shall be lawful for Government to extend, for a term not exceeding in any case five years, the period for the payment of such tax or rate beyond the period for which such additional Police are actually employed.

Assessment of cost.

†(4) The said tax shall be imposed, or the said rate shall be assessed, except in a Municipal district, by the Collector at his discretion. If the local area in which any such tax is to be imposed or any such rate is to be assessed, is a Municipal district, the amount of the charge shall be paid by the Municipality from the Municipal fund or the rate shall be assessed by the Municipality conformably to the direction given by Government under sub-section (2). **31 Bom. 725.**

Exemption from liability to bear cost.

‡(5) It shall be lawful for Government, by order, to exempt any persons from liability to bear any portion of such cost.

Notes.—1. A Collector of revenue has no power to recover the cost of punitive post from the talukdar of the village if he was not an inhabitant of the village, because such cost could only be defrayed, by a local rate imposed on the inhabitants of the place in which the punitive post was established. **16 Bom. 455.**

2. After the serious riots which broke out at Malegaon on 25th April, 1921, much property and life was lost. The Commissioner authorised the District Magistrate under s. 25-A of this Act to determine the amount of compensation for damage caused by the riots and to recover the amount from the adult male Mahomedan inhabitants of the area. Side by side with this Government also took action under s. 25 of this Act.

Held, that neither of the taxes levied was wanton, arbitrary or oppressive; but was purely within the exercise of the discretion vested by ss. 25 and 25-A of this Act.

Held also, that Government notification of 6th June, 1922, was not *ultra vires*, for it was competent to Government to decide to levy the police charges from the male adult Mahomedans, and then to direct the whole of it to be levied from the shopkeepers under s. 21 of the Bombay General Clauses Act. **26 Bom. L. R. 1.**

Compensation for injury caused by an unlawful assembly how recoverable.

§ **25-A.** (1) With the previous sanction of the Commissioner ‖ the Magistrate of the district may—

(*a*) after such inquiry as he deems necessary,

(i) determine the amount of the compensation which, in his opinion, should be paid to any person or persons, in respect of any loss or damage caused to any property, or in respect of death or grievous hurt caused to any person or persons, by anything done in the prosecution of the common object of an unlawful assembly, and

(ii) declare the local area the inhabitants of which have, in his opinion, by their conduct caused or contributed to the holding of such assembly;

(*b*) require the Collector to recover the amount so determined in such proportions as the Magistrate of the district may with the like sanction direct from all inhabitants of the locality also declared as aforesaid, or from any section or sections or class or classes of such persons;

(*c*) if such area is a Municipal district, at his discretion require the Municipality to assess and recover such amount by a tax or by a rate which the Municipality shall impose and levy from such persons and in such proportions in accordance with such directions, and

(*d*) require the Collector or the Municipality, as the case may be, to award or apportion all or any moneys so recovered to any person or among all or any persons whom the Magistrate of the district considers entitled to compensation in respect of the loss or damage or death or grievous hurt as aforesaid.

* Sub-section (3) of section 25 was inserted by Bombay Act III of 1898, s. 4.
† Sub-section (5) of section 25 was substituted for the original sub-section (3) by Bombay Act III of 1893, s 5.
‡ Sub-section (5) of section 25 was inserted by Bombay Act III of 1898, s. 6.
§ Section 25-A was inserted by Bombay Act III of 1898, s. 7.
‖ Substituted by Bombay Act III of 1915.

Exemption from liability to pay compensation.

(2) It shall be lawful for the Commissioner * by order, to exempt any persons from liability to pay any portion of such compensation.

Conditions under which compensation recoverable

(3) No recovery shall be made and no compensation shall be granted under this section except upon a claim made within one month from the date of the death, grievous hurt, loss or damage as aforesaid, in respect of which such claim is made and unless the District Magistrate is satisfied that the person claiming compensation is himself free from blame in respect of the occurrences which led to the death, grievous hurt, loss or damage as aforesaid.

Orders of District Magistrate subject to revision

(4) Every declaration, assessment, direction and order made by the Magistrate of the district under sub-section (1) shall be subject to revision by the Commissioner † as aforesaid, shall be final

Bar to maintaining civil suit

(5) No civil suit shall be maintainable in respect of any loss or injury for which compensation has been granted under this section

Recovery of rates and charges under sections 25 and 25 A by a Municipality

26. (1) Every ‡ tax imposed or ‡ rate assessed under § the last two preceding sections § or other provision of this Act by a Municipality shall be recovered by such Municipality from each person answerable therefor in the same manner as a Municipal tax due by him

‖ Provided always that, in default of such recovery it shall be lawful for the Government to direct the Collector to recover such tax or rate in the manner prescribed in the following sub-section, as if it were a tax imposed or a rate assessed by him

By the Collector

Every ¶ tax imposed or ¶ rate assessed, or ¶ amount recoverable ¶ by the Collector as aforesaid shall be recoverable by the Collector as if it were an arrear of land revenue due by the person answerable therefor

Effect of introduction of last three sections in Sindh

** **26-A.** On the last three preceding sections coming into force in Sindh, the provisions, so far as they are inconsistent therewith, of sections 16 and 17 of the Bombay District Police Act, 1867, shall be deemed to have been repealed in that Province

CHAPTER III.

Regulation, Control and Discipline of the Police Force

Framing of rules for administration of the Police

27. Subject to the orders of Government, the Inspector General may from time to time make rules or orders not inconsistent with this Act or with any other enactment at the time in force—

(a) relating to the recruitment, organisation classification and discipline of the Police,

(b) regulating the inspection of the Police by the subordinates,

(c) determining the description and quantity of arms accoutrements clothing and other necessaries to be furnished to the Police,

(d) for the institution management and regulation of any Police found for any purpose connected with Police administration,

(e) regulating, subject to the provisions of section 13, clause (1), and section 17, the distribution movements and location of the Police,

(f) regulating the duties of Police officers of different grades,

(g) regulating the collection and communication by the Police of intelligence and information,

(h) generally for the purpose of rendering the Police efficient and preventing abuse or neglect of their duties

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* Omitted by Bombay Act III of 1915

8 (1) (a)
Bombay Act III 1898 s 8 (1) (b)
s 8 (1) (c)
1898, s 8 (2)
s 9

Note.—The duties of the Police are divisible into three heads:—(1) those imposed upon them by the rules framed by the Commissioner and approved by the Government; (2) those imposed by rules or orders which the Commissioner may make preventing abuse or neglect of duty, and (3) those imposed by law. **Ratanlal 107.** *See* also Chap. 5, *infra*.

Inspector-General may call for returns, etc.

28. The Inspector-General of Police may, subject to the rules and orders of Government, call for such returns, reports and statements on subjects connected with the suppression of crime, the maintenance of order and the performance of their duties, as his subordinates may be able to furnish to him He will communicate to the Magistrate of the district and the Commissioner any general orders issued by him for the purposes aforesaid or in consequence of the information furnished to him and also any orders which Government may direct.

Punishment of Police-officers departmentally for neglect of duty, etc.

29. (1) The Governor in Council or any officer authorsied by sub-section (3) in that behalf, may suspend, reduce or dismiss any Police-officer whom he shall think cruel, perverse, remiss or negligent in the discharge of his duty or unfit for the same, and may fine to an amount not exceeding one month's pay, any Police-officer below the grade of Assistant Superintendent who is guilty of any breach of discipline or misconduct which does not require his suspension or dismissal or who, by any act of his own, renders himself unfit for the discharge of his duty.

Punishment under this section to be in addition to penalty under sections 36, 63 or 64.

(2) Any punishment inflicted on a Police-officer under this section shall be in addition to the penalty to which such officer is liable under sections 36, 63 or 64 of this Act or any other law in force.

Punitive powers of Inspector-General and Superintendent.

(3) The Inspector-General shall have authority to punish an Inspector under sub-section (1). A District Superintendent shall have the like authority in respect of any Police-officer subordinate to him below the grade of Inspector and may suspend an Inspector who is subordinate to him, pending inquiry into a grave complaint against such Inspector and until an order of the Inspector-General can be obtained. But the exercise of any power conferred by this subject shall be sub section always to such rules and orders as may be made by Government in that behalf.

Procedure to be observed in awarding punishment.

30. When any officer passes an order for fining, suspending, reducing or dismissing a Police-officer, he shall record such order or cause the same to be recorded, together with reasons therefor and a note of the inquiry made in writing under his signature in the language of the district or in English.

Departmental punishment for insubordination

31. (1) The Inspector-General and any District Superintendent and any Assistant Superintendent in charge of a portion of a district may punish, by confinement for a period not exceeding three days, any Police-officer below the rank of head-constable who is, in his presence, grossly insubordinate or who is insolent to him.

Procedure to be observed in awarding such punishment.

(2) Every order for punishing a Police-officer as aforesaid shall be recorded in the manner prescribed in section 30, and a copy of every such order made by a District Superintendent or an Assistant Superintendent shall be forwarded by him to his immediate superior.

Police-officers to be deemed to be always on duty and to be liable to employment on any part of the Presidency

32. (1) Every Police-officer, shall, for all purposes of this Act, be deemed to be always on duty in the area for which he is appointed or to which he is lawfully transferred, and any Police-officer and any number or body of Police-officers appointed for one part of the Presidency may, if Government or the Inspector-General so direct, at any time be employed on Police duty in any other part of the Presidency for so long as the services of the same may be there required.

Intimation of proposed transfers to be given by the Inspector General to the Commissioner and District Magistrate.

(2) Timely intimation shall, except in cases of extreme urgency, be given to the Commissioner and Magistrate of the district by the Inspector-General of any proposed transfer under this section, and except where secrecy is necessary, the reasons for the transfer shall be explained; whereupon the officers aforesaid and their subordinates shall give all reasonable furtherance to such transfer.

Note.—Under s. 32 of the District Police Act every Police-officer shall for all purposes of this Act be deemed to be always on duty in the area for which he is appointed, *i.e.*, he is to be deemed to have been appointed for the entire district and not to the particular taluks or sub division of the district. **A. I. R. (1925) Sindh 280.**

Police-officer not to engage in trade, etc

33. (1) No Police-officer shall engage in trade or be in any way concerned, either as principal or agent, in the purchase or sale of land within the district wherein he is employed or in any commercial transaction whatever, without the permission of the Magistrate of the district or of Government.

Police-officers under the rank of Assistant Superintendent not to be employed on other than Police duties

(2) ... the w ... profes ... employment whatever, other than his office or duties as such Police-officer.

These prohibitions to apply also when a Police-officer is on leave or under suspension

(3) The ... when a Police-officer is on leave or

Note.—Clause (3) is ... was held that there was no o ... work

Under what conditions Police-officer may resign

34. (1) Unless with the written ... officer empowe ... under the rank ... from the duties

(a) the expiration of two months after written notice of his intention so to do has been given by him to the District Superintendent, and until

(b) he has fully discharged any debt due by him as such Police-officer, to Government or to any Police fund

Proviso

(2) Provided that if any such Police-officer produces a certificate signed by the C ... ing him ... vice in ... to him on his discharging or giv ... for the payment of any debt due by him as aforesaid.

Arrears of pay of a Police officer contravening this section may be forfeited

(3) If any such Police-officer as aforesaid resigns or withdraws himself from the duties of his office in contravention of this section, he shall be liable on the order of the District Superintendent to forfeit all arrears of pay then due to him This forfeiture shall be in addition to the penalty to which the said officer is liable under section 36 of this Act or other law in force

Certificate arms etc, to be delivered up by person ceasing to be a Police officer and

35. (1) Every person who for any reason ceases to be a Police-officer shall forthwith deliver up to some officer empowered by the District Superintendent to receive the same his certificate of appointment or of office and the arms, accoutrements clothing and other necessaries which have been furnished to him for the execution of his office

If not delivered up may be seized under a search warrant.

(2) Any Magistrate and, for special reasons which shall be recorded in writing at the time any District Superintendent, Assistant Superintendent or Deputy Superintendent * may issue a warrant to search for and seize wherever they may be found, any certificate arms accoutrements, clothing or other necessaries not so delivered up Every warrant so issued shall be executed in accordance with the provisions of the Code of Criminal Procedure, 1898 † by a Police-officer or, if the Magistrate or District Superintendent,* Assistant Superintendent or Deputy Superintendent* issuing the warrant so directs, by any other person.

Saving of certain articles

(3) Nothing in this section shall be deemed to apply to any article which under the orders of the Inspector General has become the property of the person to whom the same was furnished

Penalty for making false statement etc and for misconduct of Police-officers.

36. (1) Any person who makes a false statement or uses a false document for the purpose of obtaining employment or release from employment as a Police officer, or

(2) any Police-officer who—

(a) contravenes any provision of section 33, or

(b) is guilty of cowardice, or

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* Substituted by Bombay Act III of 1915

† The reference to Act X of 1882 is altered in accordance with Act V of 1898 s. 3

(c) resigns his office or withdraws himself from the duties thereof in contravention of section 34, or

(d) is guilty of any wilful breach or neglect of any provision of law or of any rule or order which, as such Police-officer, it is his duty to observe or obey, or

(e) is guilty of any violation of duty for which no punishment is expressly provided by any other law in force,

shall be punished with imprisonment for a term which may extend to three months or with fine which may extend to one hundred rupees, or with both.

Consequence of failure to return to duty after leave.

(3) A Police-officer who, being absent on leave, fails, without reasonable cause, to report himself for duty on the expiration of such leave shall, for the purpose of clause (c) be deemed to withdraw himself from the duties of his office within the meaning of section 34.

Notes.—1. Police-officer—overstaying leave.—A Police-officer by staying without permission beyond the period of leave granted him, commits an offence within the meaning of this section. **Ratanlal 279, 585.**

2. Not obeying the order of transfer.—A Police-officer who, having been transferred from one place to another, disobeys the order and remains performing his duties at the former place pending reply to a petition addressed by him to his superior does not "withdraw from duties" within the meaning of this section. **Ratanlal 555.**

Penalty for failure to deliver up certificate of appointment or of office or other article.

37. Any Police-officer who wilfully neglects or refuses to deliver up his certificate of appointment or of office or any other article in accordance with the provision of sub-section (1) of section 35, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Government may make order under section 144, Code of Criminal Procedure.

38. Government, whenever it shall seem necessary, may by notification make an order to such effect as any order which if made by a Magistrate under section 144 of the Code of Criminal Procedure could be continued in force by Government under the enactment aforesaid.

CHAPTER IV.

POLICE REGULATIONS.

Rules may be made by District Magistrate regarding use of streets, etc.

39. (1) In any town or other place in which he thinks fit, the Magistrate of the district may, from time to time and subject to such orders as may have been made by a Municipal or other authority empowered in that respect, make rules or orders—

(a) closing certain streets or places temporarily, in cases of danger from ruinous buildings or other cause, with such exceptions as shall appear reasonable;

(b) for guarding against injury to persons and property in the construction, repair and demolition of buildings, platforms and other structures from which danger may arise to passengers, neighbours or the public;

(c) regulating the leading, driving, conducting or conveying of any elephant or wild or dangerous animal through or in any street;

(d) prohibiting the hanging or placing of any cord or pole across a street or part thereof, or the making of a projection or structure so as to obstruct traffic or the free access of light and air;

(e) prescribing certain hours of the day during which odour and offensive matter or objects shall not be taken from or into houses or buildings in certain streets or conveyed through such streets, and during which cattle shall not be driven along the streets, or along certain specified streets except subject to such reasonable regulations as he may prescribe in that behalf;

(f) prohibiting the setting fire to or burning any straw or other matter, or lighting a bonfire, or wantonly discharging a fire-arm or air-gun, or letting off or throwing a fire-work, or sending up a fire-balloon in or upon or within fifty feet of a street or building, or the putting up of any post, or other thing on the side or across a street for the purpose of affixing thereto lamps or other contrivances for illumination, except subject to such reasonable regulations as he may prescribe in that behalf;

(*g*) prohibiting, except under such reasonable regulations as the Magistrate of the district may impose, the making of any excavation the placing of building materials or other articles or the fastening, or detention of any horse or other animal in any street,

(*h*) prohibiting save under such regulations as aforesaid, the exposure or movement in any street of persons or animals suffering from contagious or infectious diseases and the carcasses of animals or parts thereof and the corpses of persons deceased,

(*i*) setting apart places for the slaughtering of animals the cleaning of carcasses or hides the deposit of noxious or offensive matters, and for obeying calls of nature,

(*j*) in cases of existing or apprehended epidemic or infectious disease of men or animals with respect to cleanliness and disinfection of premises by the occupier thereof, and residents therein and as to the segregation and management of the persons or animals diseased or supposed to be diseased, as may have been directed or approved by Government with a view to prevent the disease or to check the spreading thereof,

(*k*) directing the closing or disuse, wholly or for certain purposes or limiting to certain purposes only the use of any source supply or receptacle of water, and providing against pollution of the same or of the water therein,

(*l*) regulating the hours during which and the manner in which any place for the disposal of the dead, any dharmasala, village gate or other place of public resort may be used, so as to secure the equal and appropriate application of its advantages and accommodation and to maintain orderly conduct amongst those who resort thereto,

(*m*) regulating * the movement of persons, animals and vehicles at such times and such places at which, in the opinion of the Magistrate, special regulation may be necessary by the public safety and convenience

Manner of publication of such rules

(2) Every regulation made under clause (*h*) or made under clause (*l*) with respect to the use of a place for the disposal of the dead shall be framed with due regard to ordinary and established usages and to the necessities of prompt disposal of the dead in certain cases, and every rule or order made by the Magistrate of the district under clauses (*c*), (*e*), (*f*), (*g*), (*h*) or (*i*) shall be published by affixing a copy thereof in the language of the district, in the chavadi or in some other public building in the town or place in which the same is to have operation and a copy, in the language of the district, of every rule or order made under clauses (*a*), (*b*) (*j*) (*k*) or (*l*) shall be kept affixed in a conspicuous spot near to the building, structure, work or place to which the same specially relates

Rules under clause (*j*) to be reported to Government

(3) Every rule promulgated under the authority of article (*j*) of clause (1) of this section shall be forthwith reported to the Commissioner † and shall be in force for not more than fifteen days unless extended by the Commissioner † for a longer period and, in such case, for so long as the Commissioner † directs

(4) It shall be the duty of all persons concerned to conform to any order duly made as aforesaid so long as the same shall be in operation

Notes.—1. Clause (a)—The structure contemplated by the section must be on the road itself and cause some nuisance to the public If no part of the structure touched the road it could not be said to be constructed on the road **22 Bom. 742.**

2. Clause (m)—Illegal Orders—Orders forbidding sticks to be carried by persons attending a certain jatra (fair) **Ratanlal 394**, and a warning or advice given by the Police not to go alone on a particular road as the country was believed to be infested with dacoits, are not legal orders. Hence persons disobeying these are not guilty of offences under this section

3. Legal Orders—Issuing a notification ordering people to drive on the proper side of the road **Ratanlal 35.** *See* s. 61, clause (*b*) *infra.*

4. Operation of Orders.—The orders of Magistrates issued under this section become at once operative in all places within the jurisdiction of the Magistrate, without having been specifically extended thereto by Government notification **5 Bom. H. C. Cr. 100.**

* Certain words after this were repealed by the Bombay District Police (Amendment) Act IV of 1912, s. 6 (1)

† Substituted by Bombay Act III of 1915

*39-A. With the previous sanction of the Governor in Council, the Magistrate of the district may from time to time make rules for licensing and controlling theatres and other places of public amusement, entertainment or assembly, including the entrance and exit of persons thereat, and the decent and orderly conduct of proceedings therein; and in order to prevent obstruction, inconvenience, annoyance, risk, danger, or damage of the residents or passengers in the vicinity, prohibiting the keeping of places of public amusement entertainment or assembly.

District Magistrates may make rules for blasting and excavation.

40. Every Magistrate of a district may from time to time make rules for the blasting of rocks or for making excavations in nor near any street in any town or village in his district and may provide in such rules for the grant of licenses or such operations.

Discontinuance of brothels.

41. On complaint being made to a Magistrate of a district or of a sub-division that any house in a town or village in his district or sub-division to which Government has by notification extended this section is used as a common brothel or lodging-house or place of resort for prostitutes or disorderly persons of any description, to the annoyance of the respectable inhabitants of the vicinity, the said Magistrate may summon the owner or tenant of the house to answer the complaint, and on being satisfied that the house is so used may order the owner or tenant, within a reasonable period which shall be set forth in the order, to discontinue such use of it.

Notes.—1. Ingredients of an offence under this section.—To constitute an offence under this section two ingredients are necessary: (i) the character of the *house, i.e.*, the use of the house as 'common brothel or lodging-house or place of resort for prostitutes or disorderly persons of any description'; (ii) the *nuisance, i.e.*, it must be to 'the annoyance of the respectable inhabitants of the vicinity.' **6 S. L. R. 224 = 14 Cr. L. J. 282.**

2. Complaint under this section, no offence within meaning of s. 4 (o) of the Code.—The complaint filed under this section is not a complaint of an offence as defined under s. 4 (*o*) of the Code, as this section does not make the use of a house as a brothel an offence, the only order which a Magistrate can pass under this section being the discontinuance of the user. A Magistrate has therefore no jurisdiction to award compensation under s. 250 of the Code. **6 S. L. R. 264 = 14 Cr. L. J. 320.**

Issue of orders by Magistrates for prevention of disorder.

42. (1) The Magistrate of the district, or in his absence and subject to his order the Magistrate of the first class having jurisdiction in any town or village and present therein or in the neighbourhood thereof, may, whenever and for such time as it shall appear necessary, by a notification publicly promulgated or addressed to individuals, prohibit in such town or village or the vicinity thereof the carrying of arms, cudgels or other weapons, the carrying, collection and preparation of stones or other missiles or instruments or means of casting or impelling missiles, the exhibition of persons or of corpses or figures thereof, the public utterance of cries, singing of songs,† playing of music, delivery of harangues and use of gestures or mimetic representations and the preparation, exhibition or dissemination of pictures, symbols, placards or of any other object or thing, which may be of a nature to outrage morality or decency or, in the opinion of such Magistrate, may probably inflame religious animosity or hostility between different classes or incite to the commission of an offence, to a disturbance of the public peace or to resistance to or contempt of the law or of a lawful authority.

Any one of several Magistrates having jurisdiction may issue order.

(2) If in any town or village or the vicinity thereof there are two or more Magistrates of the first class having jurisdiction therein, a prohibition as aforesaid may be made by any one of them.

Orders by Subordinate Magistrate to be communicated to the District Magistrate.

(3) An order made under this section by a Subordinate Magistrate shall be forthwith communicated to the Magistrate of the district, who shall thereupon confirm, cancel or modify the same as shall seem expedient.

Note.—Scope of this Section.—This section is of a penal character and must be strictly construed as it affects the liberty of the subject.

Accused was found to have sold almanacs containing pictures of a certain person in disobedience of an order of the District Magistrate, promulgated only at the *Taluka* head-quarters and containing no reference to period of time or the geographical area, at a village twelve miles away from where the District Magistrate was.

* This section was newly inserted by the Bombay District Police (Amendment) Act IV of 1912, s. 6 (2).
† These words were inserted by Bombay Act III of 1898, s. 10.

Held, that the District Magistrate was not empowered by the section to pass such an order and that a conviction for disobedience of such order was illegal **14 Bom. L R. 188 = 13 Cr. L. J. 430.** *Per Chandavarkar, J*—'The section is not clearly worded, but the preliminary conditions essential for the exercise of the jurisdiction are first, the jurisdiction is conferred on the Magistrate of the district or in his absence and subject to his own order, the Magistrate of the first class, secondly, these must have jurisdiction in the town or village where the jurisdiction is intended to operate, thirdly, they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction is set in motion' *Per Batchelor, J*—The words 'having jurisdiction in any town' or village refer equally to the Magistrate of the first class as well as to the District Magistrate To hold otherwise would be simply to enact a new section in substitution for this section A distance of twelve miles from where the Magistrate is present, cannot be regarded as either 'neighbourhood or 'vicinity'

Issue of orders by Magistrate of the district for prevention of riot or grave disturbance of the peace

43. In order to prevent an impending or apprehended riot or grave disturbance of the peace the Magistrate of the district may temporarily close or take possession of any building or place, and may exclude all or any persons therefrom or may allow access thereto such persons only and on such terms as he shall deem expedient. All persons concerned shall be bound to conduct themselves in accordance with such order as the Magistrate may make and notify in the exercise of the authority hereby vested in him.

Issue of orders by Magistrate of the district for maintenance of order at religious ceremonials, etc

44. (1) In any case of an actual or intended religious or ceremonial or corporate display or exhibition or organised assemblage in any street as to which or the conduct of or participation in which it shall appear to the Magistrate of the district that a dispute or contention exists which is likely to lead to grave disturbance of the peace, such Magistrate may give such orders as to the conduct of the persons concerned towards each other and towards the public as he shall deem necessary and reasonable under the circumstances, regard being had to the apparent legal rights and to any established practice of the parties and of the persons interested Every such order shall be published in the town or place wherein it is to operate, and all persons concerned shall be bound to conform to the same

Orders to be subject to decrees etc, of Courts

(2) Any order made under the foregoing sub-section shall be subject to a decree, injunction or order made by a Court having jurisdiction, and shall be recalled or altered on its being made to appear to the Magistrate of the district that such order is inconsistent with a judgment, decree, injunction or order of such Court, on the complaint suit or application of any person interested as to the rights and duties of any persons affected by the order aforesaid

Notes.—1. Scope of Section.—The Bombay District Police Act is not intended to confer any right upon any individual or class of His Majesty's subjects which had not been given by the common law The Act was passed in the interests of public peace All that section 44 of the Act contemplates is that where a District Magistrate has passed an order in the interests of peace, it is open to any party to go to a Civil Court and get an adjudication in favour of his right, if any The legislature merely assumes that there is a right which the District Magistrate's order has opposed and which can be vindicated in a Court of law **11 Bom. L. R. 372 = 2 In. Ca. 494.**

2. An order issued under this section need not be in writing Disobedience to a verbal order is also punishable **7 Bom. H. C. Cr. 2.**

3. An order under this section is merely an executive Police order and not a judicial one.—An order under this section is not an order by an inferior Criminal Court or by any Court at all, but is a mere executive Police order This section empowers the 'Magistrate of the District to issue orders for the maintenance of order at religious ceremonials and processions. Such an order is made for the purpose of temporarily safeguarding the public peace. No judicial inquiry is prescribed as a condition precedent to making the order sub-sec.(2) leaves unaffected all questions of civil right. The proper remedy for any person considering himself aggrieved by such an order is to appeal to the executive Government, or if so advised to establish his claim in a Civil Court **12 Bom L. R. 1029 = 11 Cr. L. J. 705.**

4. Section empowers Magistrate to give directions for regulation of procession.—It is competent to a District Magistrate acting under this section to give to persons forming a religious procession, in the interests of the public, directions as to carrying a particular emblem as to the time and route of the procession, and to the presence of the Police. **12 Bom. L. R. 1029 = 11 Cr. L. J. 705.**

45. (1) Whenever it shall appear to the Magistrate of a district that any place in the district, at which on account of a fair, pilgrimage or other such occurrence, large bodies of persons have assembled or are likely to assemble, is visited or will probably be visited with an outbreak of any epidemic disease, he may take such special measures and may by public notice prescribe such regulations to be observed by the residents of the said place and by persons present thereat or repairing thereto or returning therefrom as he shall deem necessary to prevent the outbreak of such disease or the spread thereof.

District Magistrate may take special measures to prevent outbreak of epidemic disease at fairs, etc.

(2) It shall be lawful for the Magistrate of the district or for the Collector on the requisition of the Magistrate of the district, subject to the orders of the Commissioner* to assess and levy such reasonable fees on persons falling under the provisions of sub-section (1) as will provide for the expenses of the arrangements for sanitation and the preservation of order at and about the place of assemblage.

Levy of fees in such causes.

(3) When the place of assemblage is within the limits of a Municipality, such sums as shall be necessary for the purposes aforesaid may be recovered from the Municipality.

Recovery of expenses, Municipalities

46. Whenever it shall appear to the Magistrate of a district or to any Sub-divisional Magistrate that the movement or encampment of any gang or body of persons in the district is causing or is calculated to cause danger or alarm or reasonable suspicion that unlawful designs are entertained by such gang or body or by members thereof, such Magistrate may, by notification addressed to the persons appearing to be the leaders or chief men of such gang or body and published by beat of drum or otherwise as such Magistrate thinks fit, direct the members of such gang or body so to conduct themselves as shall seem necessary in order to prevent violence and alarm, or to disperse and each of them to remove himself to such place by such route as such Magistrate shall prescribe.

Dispersal of gangs and bodies of persons.

47. (1) For the purpose of preventing serious disorder or breach of the law or manifest any imminent danger to the persons assembled at any public place of amusement or at any assembly or meeting to which the public are invited or which is open to the public, the senior Police-officer of highest rank, superior to that of constable, present in the town or village where such place of amusement is situate or such assembly or meeting is to be held, may, subject to such rules and orders as may have been lawfully made, give such reasonable directions as to the mode of admission of the public to, and for securing the peaceful and lawful conduct of the proceedings at such place of amusement or such assembly or meeting, as he thinks necessary; and all persons shall be bound to conform to every such reasonable direction.

Police to provide against disorder, etc., at public places of amusement and public meetings.

(2) The Police shall have free access to every such place of amusement, assembly or meeting, for the purpose of giving effect to the provisions of sub-section (1) and to any direction made thereunder.

Police to have free access thereto.

Note.—Any person who obstructs free access of the Police to a place of amusement makes himself liable to an offence under the Indian Penal Code. **22 Bom. 746.**

48. (1) The District Superintendent or an Assistant Superintendent may, subject to any rule or order which may at any time be legally made by any Magistrate, or other authority duly empowered in this behalf—

Police to regulate assemblies, etc., in public street.

(*a*) make rules for and direct the conduct of † and behaviour or actions of persons constituting † assemblies and processions and moving crowds or assemblages on or along the streets, and prescribe, in the case of processions, the routes by which, the order in which, and the times at which, the same may pass;

(*b*) regulate and control, by the grant of licenses or otherwise, the playing of music, the beating of drums, tom-toms or other instruments and the blowing or sounding of horns or other noisy instruments in or near a street;

(*c*) make reasonable orders subordinate to, and in furtherance of, any order made by a Magistrate under sections 39—46 of this Act.

* Substituted by Bombay Act III of 1915.

† These words were inserted by Bombay Act III of 1898, s. 11.

Manner of publication of such rules and orders

(2) Every rule and order made under this section shall be published at or near the place where it is to operate, or shall be notified to the person affected thereby, and all persons concerned shall be bound to act conformably thereto

Notes.—1. Music at private houses —A District Superintendent or Assistant Superintendent of Police cannot stop music in private houses the words 'near a street' intending to mean only open spaces by the sides or at the ends of streets **19 Bom. 787.** *See* also **9 Bom H C R 153**

2. Presence at music does not constitute abetment —Mere presence of a person at a procession in which music was played in contravention of an order of the District Magistrate does not by itself constitute an abetment of an offence under this section **Ratanlal 703**

Provisions as to dogs

49. (1) The Magistrate of the district may, by public notice extending to such place or places within the district as shall therein be named, require every dog while in the street and not led by some person to be muzzled in such a manner as will admit of the animal breathing and drinking without obstruction and effectually prevent it from biting and the Police may, except as is hereinafter in sub-section (2) provided, destroy any dog found loose in any place beyond the premises of the owner thereof during the currency of such order or may take possession of any such dog and detain the same until the owner has claimed it, has provided a proper muzzle, and has paid all expenses connected with such detention.

When dogs may be destroyed or sold by the Police

(2) The Police shall not destroy any dog which wears a collar bearing a known owner's name unless such dog is rabid, until the same has remained in their possession for three clear days without the owner claiming it and paying all expenses incurred by its detention but may sell or destroy any dog which has remained in their possession for the said period without the owner claiming it and paying the said expenses

How expenses may be recovered

(3) For the expenses incurred under the preceding sub-sections, the owner of the dog shall be answerable as for an arrear of land revenue

Provision in case of dog wearing a collar with owner's address

(4) When any dog taken possession of by the Police wears a collar with the apparently genuine address of any person inscribed thereon a letter stating the fact of such dog having been taken possession of shall be forthwith sent by post to the said address

Power under this Chapter to be exercised by District Superintendent subject to control of District Magistrates and by District Magistrates subject to control of Government

50. Every power conferred by this Chapter on a District Superintendent or officer subordinate to him shall be exercised by him subject to the orders of the Magistrate of the district and all rules regulations and orders made by the Magistrate of the district under this Chapter shall be subject to the provisions of section 13 (2)

Note.—Revision by High Court of Magistrate's orders —The High Court has no jurisdiction to interfere with an order duly made by a District Magistrate under this Chapter **Ratanlal 840.** Neither has the Sessions Court, **Ratanlal 892**

CHAPTER V

Executive Powers and Duties of the Police

Duties of Police-officer

51. (1) Every Police-officer shall—

(*a*) promptly obey and execute every warrant or other order lawfully issued to him by competent authority, and shall by all lawful means endeavour to give effect to the commands of his superior,

(*b*) to the best of his ability, obtain intelligence concerning the commission of congnisable offences or designs to commit such offences and lay such information and take such other steps, consistent with law and with the orders of his superiors as shall be best calculated to bring offenders to justice or to prevent the commission of offences;

(*c*) to the best of his ability prevent the commission of public nuisances,

(*d*) apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension there is sufficient reason,

(e) aid another Police-officer when called on by him or in case of need in the discharge of his duty in such ways as would be lawful and reasonable on the part of the officer aided;

(f) discharge such duties as are imposed upon him by any law relating to revenue or other law at the time in force.

Power to enter place of public resort.

(2) Every Police-officer may, subject to the rules and orders made by Government or by a person lawfully authorised, enter for any of the said purposes, without a warrant, and inspect any place of public resort and any place which he has reason to believe is used as a drinking-shop, or a shop for the sale of intoxicating drugs or a place of resort of loose and disorderly characters.

Power to search suspected persons in the streets.

(3) When in a street or place of public resort a person has possession or apparent possession of any article which a Police-officer in good faith suspects to be stolen property, such Police-officer may search for and examine the same and may require an account thereof and, should the account given by the possessor be manifestly false or suspicious, may detain such article and report the facts to a Magistrate, who shall thereon proceed according to sections 523 and 525 of the Code of Criminal Procedure or other law in force.

Notes.—1. Breach of order.—A Police-officer enrolled under Bombay Act VII of 1867 (District Police) permitted two reputed thieves to escape from his custody and failed to make any report to his superior, as in duty bound, and was convicted of the offence of wilful breach or neglect of orders made by competent authority under s. 26 (corresponding to the section), by the Superintendent of Police, who was also a Magistrate, F. P. *Held*, that the Superintendent of Police, although he was a Magistrate, F. P., had no authority to try the case. **Ratanlal 29.**

2. Neglect of duty by Railway Police.—Members of the Police Force who are styled the Railway Police and are in the pay of a Railway Company are amenable for neglect of duty to the provisions of s 27 of Act XVIII of 1854 (*Railway Act*), notwithstanding that they hold commission from the Inspector-General. **Ratanlal 51.**

3. Clause (c)—Public Nuisance.—*See* the definition of the term in s. 268 of the Indian Penal Code.

Duties of Police-officer towards the public.

52. It shall be the duty of every Police-officer—

(a) to afford every assistance within his power to disabled or helpless persons in the streets, and to take charge of intoxicated persons and of lunatics at large who appear dangerous or incapable of taking care of themselves;

(b) to take prompt measures to procure necessary help for any person under arrest or in custody, who is wounded or sick, and whilst guarding or conducting any such person, to have due regard to his condition;

(c) to arrange for the proper sustenance and shelter of every person who is under arrest or in custody;

(d) in conducting searches, to refrain from needless rudeness and the causing of unnecessary annoyance;

(e) in dealing with women and children, to act with strict regard to decency and with reasonable gentleness;

(f) to use his best endeavours to prevent any loss or damage by fire;

(g) to use his best endeavours to avert any accident or danger to the public.

Notes.—1. Clause (c)—Duty of Police-officer to shelter a person in custody.—A Policeman who stands by acquiescing in an assault on a prisoner committed by another Policeman for the purpose of extorting a confession, is guilty of an abetment of an offence under s. 330, I.P.C. **20 Bom. 394.**

2. Illegal omission to perform an act of duty is an offence.—When the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment. **20 Bom. 394.**

Police to regulate traffic, etc., in streets.

53. (1) It shall be the duty of a Police-officer—

(a) to regulate and control the traffic in the streets, to prevent obstructions therein and to the best of his ability, to prevent the infraction of any rule or order made under this Act or any other law in force for observance by the public in or near the streets;

to keep order in the streets and other public places and

(b) to keep order in the streets and at, and within, public bathing, washing and landing places, fairs, temples and all other places of public resort and in the neighbourhood of places of public worship during the time of public worship,

to regulate resort to public places

(c) to regulate resort to public bathing, washing and landing places, to prevent overcrowding thereat and in public ferry boats and, to the best of his ability, to prevent the infraction of any rule or order lawfully made for observance by the public at any such place or on any such boat

Persons bound to conform to reasonable orders of Police

(2) All persons shall be bound to conform to the reasonable directions of a Police-officer given in fulfilment of any of the said duties

Police-officer may restrain or remove contumacious persons

(3) A Police-officer may restrain or remove any person resisting or refusing or omitting to conform to any such direction as aforesaid, and may either take such person before a Magistrate or, in trivial cases, may release him when the occasion is past

Notes.—Clause 2.—Refusal to attend in order to make a Panchnama.—A non attendance to make a Panchnama regarding an obstruction to a public road caused by a grain dealer by keeping his grain bags on the road is not an offence punishable under the Police Act **22 Bom. 170.**

2-A.—The word "control in clause (a) of this section certainly implies very large powers, where owing to rival processions the Police officers apprehending a riot directed one party to pass along a by lane instead of the main street, but the order was not obeyed with the result that a riot ensued *Held*, that the order of the Police was justified under clause (a) or clause (b) of section 53 (1) andthat the accused were guilty of an offence under section 153 I P C. **30 Bom. L. R. 367=29 Crl. L. J. 489.**

Enforcement of orders issued under sections 42, 43 or 44

54. Whenever a notification has been duly issued under section 42, or an order has been made under s 43 or s 44, it shall be lawful for any Magistrate or Police-officer to require any person acting or about to act contrary thereto to desist or to abstain from so doing, and, in case of refusal or disobedience, to arrest the person offending Such Magistrate or Police-officer may also seize any object or thing used or about to be used in contravention of such notification or order as aforesaid, and the thing seized shall be disposed of according to the order of any Magistrate having jurisdiction at the place

Duty of the Police to see orders issued under s 45 or s 46 carried out

55. It shall be the duty of the Police to see that every regulation and notification made by the Magistrate of the district under section 45, or by the Magistrate of the district or a Sub-divisional Magistrate under section 46, is duly obeyed, to warn persons who, from ignorance, fail to obey the same, and to arrest any person who wilfully disobeys the same.

Police-officer may take charge of stray cattle

56. A Police-officer may take charge of any animal falling under the provisions of the Cattle Trespass Act which may be found straying in a street, and may take or send the same to the nearest pound, and the owner and other persons concerned shall thereon become subject to the provisions of the said Act

Duty of Police with regard to unclaimed property

57. The Police shall take temporary charge of all unclaimed property found by, or made over to them, and shall deliver all such property to the Police-patel, if any, of the town or village in which the same was found and take a receipt therefor from the patel, who shall forward such property to the Magistrate to whom such Police patel is subordinate If, in any such case, there be no Police patel of such town or village, the Police shall forthwith report to such Magistrate as the Magistrate of the district shall, from time to time, appoint in this behalf, and act thereafter as the said first mentioned Magistrate shall direct

Procedure by Magistrate when property exceeds ten rupees in value

58. (1) If the property regarding which a report is made to a Magistrate under the last preceding section or under section 19 of the Bombay Village Police Act, 1867, appears to such Magistrate to have been left by a person who has died intestate and without known heirs and to be likely, if sold in public auction, to realise more than ten rupees net proceeds, he shall communicate with the District Judge with a view to its being dealt with under the provisions of section 10 of Regulation VIII of 1827 (*a Regulation to provide for the formal recognition of heirs, etc*) or other law in force

Procedure in other cases.

(2) In any other case the Magistrate shall issue proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto to appear before himself or some other officer whom he appoints in this behalf and establish his

claim within six months from the date of such proclamation. If no person within such period establishes his claim to such property, it shall be at the disposal of Government, and may be sold in public auction under the orders of the Magistrate.

(3) The provisions of section 10 of the Regulation aforesaid shall be deemed not to apply to intestate property which is dealt with by a Magistrate under sub-section (2).

Note.—A person who finds property is entitled to it, when after a proclamation issued under section 58 (2) of the Bombay District Police Act, 1890, by a Magistrate, no one comes forward to claim it as his own. **47 Bom. P. 71 = 24 Bom. L. R. P. 707.**

Power to sell perishable property at once.

59. If the property regarding which a report is made as aforesaid is subject to speedy and natural decay or consists of live-stock, or appears to be of less value than five rupees, the Magistrate may at once direct it to be sold in public auction, and the provisions of the last preceding section shall, as nearly as may be practicable, apply to the net proceeds of such sale.

Note.—The provisions of this section and s. 58 do not apply to a case where the finder handed over the property on requisition by a Police but had not waived his rights as a finder. ***14 Bom. L. R. 304=13 Cr. L. J. 503.***

A superior Police-officer may himself perform duties imposed on his inferior, etc.

60. A Police-officer of rank superior to that of constable may perform any duty assigned by law or by a lawful order to any officer subordinate to him; and, in case of any duty imposed on such subordinate, a superior, where it shall appear to him necessary, may aid, supplement, supersede or prevent any action of such subordinate by his own action or that of any person lawfully acting under his command or authority, whenever the same shall appear necessary or expedient for giving more complete or convenient effect to the law or for avoiding an infringement thereof.

CHAPTER VI.

OFFENCES AND PUNISHMENTS.

Punishment of certain street offences and nuisances,

61. In any local area to which the commission * by notification from time to time extends this section or any part thereof, whoever contrary thereto—

driving on dark nights without a light;

(*a*) without lawful excuse drives along, or keeps standing in any street a vehicle of any description at any time between three-quarters of an hour after sunset and one hour before sunrise, without a sufficient light, or lights, except when there is sufficient moonlight to render such light unnecessary;

disregarding the rule of the road;

† (*b*) ***drives a** vehicle of any description along a street and, except in cases of actual necessity or of some sufficient reason for deviation, does not keep on the left side of such street and when passing any other vehicle proceeding in the same direction, does not keep in the right side of such vehicle.*

leaving cattle, etc., insufficiently tended;

(*c*) leaves in any street insufficiently tended or secured any animal or vehicle;

causing obstruction or mischief by animals;

(*d*) causes obstruction, injury, danger or alarm in any street, or mischief, by any misbehaviour, negligence or ill-usage in the driving, management or care of any animal or vehicle, or by driving any vehicle or animal laden with timber, poles, or other unwieldy articles through a street contrary to any regulation made in that behalf and published by the Magistrate of the district;

exposing animal for hire or sale, etc.;

(*e*) exposes for hire or sale any animal or vehicle, claims any furniture or vehicle, or cleans, grooms, trains or breaks in any horse or other animal or makes or repairs any vehicle or any part of a vehicle in any street (unless when in the case of an accident repairing on the spot is necessary) or carries on therein any manufacture or operation so as to be a serious impediment to traffic or a serious annoyance to residents or to the public;

causing any obstruction in a street;

(*f*) causes obstruction in any street by allowing any animal or vehicle which has to be loaded or unloaded or to take up or set down passengers remain or stand therein longer than may be necessary for such purpose, or by leaving any vehicle standing or fastening cattle therein, or using any part of a street as a halting-place for vehicles or cattle, or by leaving any box, bale, package or other thing whatsoever in or upon a street for an unreasonable length of

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* Substituted by Bombay Act III of 1915.
† This sub-section was substituted for the old by the Bombay Police (Amendment) Act IV of 1912, s. 7.

time, or contrary to any regulation made and published by the Magistrate of the district by exposing anything for sale or setting out anything for sale nor upon any stall, booth board, cask basket or in any other way whatsoever causes obstruction

obstructing a footway

(g) causes obstruction on any footway, or danger, alarm or annoyance by driving riding or leaving any animal or driving or drawing any vehicle thereupon or fastening an animal so that the same can stand across or upon such footway,

exhibiting mimetic, musical or other performances etc

(h) exhibits, contrary to any regulation made and notified by the Magistrate of the district, any mimetic, musical or other performances of a nature to attract crowds, or carries or places bulky advertisements, pictures, figures or emblems in any street whereby an obstruction to passengers or annoyance to the inhabitants may be occasioned,

gambling in a street;

(i) assembles with others or joins any assembly in a street assembled for the purpose of gaming or wagering,

doing offensive acts on or near public streets;

(j) slaughters any animal, cleans a carcass or hide, obeys a call of nature or causes a child to do so, or bathes or washes his person in or near to and within sight of a street (except in some place set apart or the purpose by order of the District Magistrate or some other person having lawful authority in that behalf) so as to cause annoyance to the neighbouring residents or to passers by

letting loose horses etc and suffering ferocious dogs to be at large

(k) negligently lets loose any horse or other animal so as to cause danger, injury, alarm or annoyance, or suffers a ferocious dog to be at large without a muzzle, or sets on or urges a dog or other animal to attack, worry or put in fear any person or horse or other animal,

bathing or washing in places not set apart for those purposes

(l) bathes or washes in or by the side of a public well, tank or reservoir, not set apart for such purpose by order of the Magistrate of the district or of some other person having lawful authority in that behalf or in or by the side of any pond pool, aqueduct, part of a river, stream nala or other source or means of water-supply in which such bathing or washing is forbidden by order of the Magistrate of the district or other person having lawful authority in that behalf,

defiling water in public wells, etc,

(m) defiles or causes to be defiled, the water in any public well tank reservoir, pond pool, aqueduct or part of a river, stream, nala or other source or means of water supply, so as to render the same less fit for any purpose for which it is set apart as aforesaid,

obstructing bathers

(n) obstructs or incommodes a person bathing at a place set apart for that purpose as aforesaid, by wilful intrusion or by using such place for any purpose for which it is not so set apart,

behaving indecently in public,

(o) wilfully and indecently exposes his person, uses indecent language or behaves indecently or riotously or in a disorderly manner in a street or place of public resort or in any public office, station or station house,

being drunk and incapable,

(p) is drunk and incapable of taking care of himself in a street or place of public resort,

obstructing or annoying passengers in the streets

(q) wilfully pushes, presses hustles or obstructs any passenger in a street or by violent movements menacing gestures wanton personal annoyance, screaming shouting, wilfully frightening horses or cattle or otherwise disturbs the public peace or order,

misbehaviour with intent to provoke a breach of the peace;

(r) uses in any street any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned,

begging and exposing offensive ailments

(s) begs importunately for alms, or exposes or exhibits, with the object of exciting charity, any deformity or disease or any offensive sore or wound, in or near to and within sight of any street shall be punished with fine which may extend to fifty rupees

Notes.—1. A conviction under this section is illegal, if the prohibitory notice has not been issued. **Ratanlal 85.**

2. **Clause (h).—Expediency of order not to be inquired into.**—It is not necessary for a Magistrate trying an accused, under this section, for disobedience of an order issued in proper form by the District Magistrate, to inquire into the expediency of the order, it being only necessary to prove the disobedience and not the existence of the danger or other occasion for making the order as is essential under s. 188, I.P.C. But mere presence of a person at a procession in which music was played in contravention of an order of the District Magistrate, does not by itself constitute an abetment of an offence under the Act. **Ratanlal 708.**

3. **Clause (j).**—In s. 31 of Bombay Act No. VII of 1867, the words "commits nuisance" had been used in place of "obeys a call of nature." In **Ratanlal 134** those words were construed to include the offence of making water in a public gutter. To make water in a public street is an offence, provided there be evidence of annoyance to residents or passengers. **Ratanlal 305.**

4. **School-master's responsibility for nuisance committed by his boys.**—In **Ratanlal 291** it was *held* that children once outside the school are not so under the control of the master as to make the latter criminally responsible, as their parents might be, for nuisance created by their children. If a school is so conducted as to be a nuisance, the complainant can get a remedy by injunction.

5. **Clause (l).**—The corresponding expression for the words "Magistrate having lawful authority in that behalf" in the earlier Act was "Resident Magistrate," and that expression was held not to include a Magistrate who happens on his tour to stay a few days at the place, mere presence not being the same thing as residence. **Ratanlal 483.**

6. **Clause (m).**—The mere act of fishing in a public tank, without proof that something that would defile the water was used as bait, cannot sustain a conviction under this clause. **Ratanlal 865.**

Punishment for cruelty to animals.

62. (1) Whoever cruelly beats, goads, overworks, ill-treats or tortures or causes or procures to be cruelly beaten, goaded, overworked, ill-treated or tortured any animal, shall be punished with imprisonment which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

(2) Jurisdiction in cases arising under this section shall not be exercised by a Magistrate of lower rank than the second class unless such Magistrate be specially invested with jurisdiction for that purpose by Government.

Notes.—1. Cruelty, what is.—A man who after firing at a dog refrains from again firing at it to put it out of pain, does not commit an offence under this section. **Ratanlal 183.** To support a conviction for cruelty, it should be found as a fact that pain or suffering has been inflicted. **Ratanlal 738.**

2. Imprisonment in default of payment of a fine inflicted under the Act, ought to be simple, not rigorous. **5 Bom. H. C. Cr. 43.**

3. Bombay Act III of 1915 has substituted the word "second" for the word "first" in sub-section (2) of this section.

Where the provisions of the prevention of cruelty to Animals Act, 1890, are extended by the Bombay Government to a certain district under sub-section (2) of section 1 of the Act, the extension does not by itself operative to repeal section 62 of the District Police Act (Bombay Act IV of 1890) within that district. **I. L. R. 45 Bom. P. 203 Cr. Reference.**

Penalty for vexatious search, arrest, etc., by the Police.

63. Any Police-officer who—

(*a*) without lawful authority or reasonable cause enters or searches or causes to be entered or searched any building, vessel, tent or place; or

(*b*) vexatiously and unnecessarily seizes the property of any person; or

(*c*) vexatiously and unnecessarily detains, searches or arrests any person; or

(*d*) offers any unwarrantable personal violence to any person in his custody;

(*e*) holds out any threat or pr mise not warranted by law to a person accused;

shall for every such offence be punished with imprisonment for a term not exceeding two months, or with fine which may extend to five hundred rupees, or both.

Penalty for vaxatious delay in forwarding a person arrested.

64. Any Police-officer who vexatiously and unnecessarily delays forwarding any person arrested to a Magistrate or to any other authority to whom he is legally bound to forward such person, shall be punished with fine which may extend to two hundred rupees.

Penalty for contravention of rules under section 39 & 39 A or of directions under section 53

65. Whoever—

(*a*) contravenes any rule made under section 39 or s 39 A,* or

(*b*) opposes or fails to conform to any direction given by the Police under section 53

(*c*) abets the commission of any offence under clause (*a*) or (*b*) shall be punished with fine which may extend to fifty rupees

Note —*See* Note to s 53 above

Penalty for contravening rules etc under section 40

66 Whoever contravenes any rule made under section 40 or any condition of any license granted under the said rules shall be punished with fine which may extend to one hundred rupees

Penalty for failure to comply with order under section 41

67 Whoever fails to comply with an order made under section 41 shall be punished with fine which may extend to twenty five rupees for every day that such order continues to be disobeyed by him

Penalty for contravention of rules or direction under sections 42 43 44 47 and 48

68. Whoever—

(*a*) disobeys an order lawfully made under sections 42 43 or 44 or

(*b*) opposes or fails to conform to any direction given by the Police under section 47 or

(*c*) opposes or disobeys any rule made or direction given by the Police under section 48 or

(*d*) contravenes any condition of a license granted under clause (*b*) of the said section or

(*e*) abets the commission of any offence under clauses (*a*) (*b*) (*c*) or (*d*) shall be punished with fine which may extend to two hundred rupees

Penalty for contravention of a regulation made under section 45

69. Whoever contravenes or abets the contravention of any regulation made under section 45 shall be punished with imprisonment which may extend to three months or with fine which may extend to two hundred rupees or with both

Penalty for contravention of direction given under section 46

70 Whoever opposes or disobeys any direction given by a Magistrate of a district or a Sub-divisional Magistrate under section 46 or abets opposition to or disobedience of, any such direction shall be punished with imprisonment which may extend to one month or with fine which may extend to one hundred rupees or with both

Penalty for opposing or not complying with direction given under section 54

71 Whoever opposes or fails forthwith to comply with any reasonable direction given by a Magistrate or a Police-officer under section 54 or abets opposition thereto or failure to comply therewith shall be punished with imprisonment which may extend to three months or with fine which may extend to five hundred rupees or with both

Note —For imprisonment for default of payment of fine inflicted under this Act *see* Note 2 to s 62 *supra*

Jurisdiction when offender is a Police officer above the rank of constable

72. Offences against this Act when the accused person or any one of the accused persons is a Police-officer above the rank of a constable shall not be cognisable by a Magistrate below the second class.

Prosecution for certain offences against the Act to be in the discretion of the Police

73 It shall not except in obedience to a rule or order made by Government or by the Magistrate of the district be incumbent on the Police to prosecute for an offence punishable under sections 61 62 65 67 68 69 or 70 when such offence has not occasioned serious mischief and has been promptly desisted from on warning given

Prosecution for offences under other enactments not affected by the Act

74. Nothing in this Act shall be construed to prevent any person from being prosecuted and punished under any other enactment for any offence made punishable by this Act or from being prosecuted and punished under this Act for an offence punishable under any other enactment

Provided that all such cases shall be subject to the provisions of section 403 of the Code of Criminal Procedure

* Newly inserted by the Bombay District Police (Amendment) Act IV of 1912 s 8

2. **Clause (h).—Expediency of order not to be inquired into.**—It is not necessary for a Magistrate trying an accused, under this section, for disobedience of an order issued in proper form by the District Magistrate, to inquire into the expediency of the order, if being only necessary to prove the disobedience and not the existence of the danger or other occasion for making the order as is essential under s. 188, I.P.C. But mere presence of a person at a procession in which music was played in contravention of an order of the District Magistrate, does not by itself constitute an abetment of an offence under the Act. **Ratanlal 708.**

3. **Clause (j).**—In s. 31 of Bombay Act No. VII of 1867, the words "commits nuisance" had been used in place of "obeys a call of nature." In **Ratanlal 134** those words were construed to include the offence of making water in a public gutter. To make water in a public street is an offence, provided there be evidence of annoyance to residents or passengers. **Ratanlal 305.**

4. **School-master's responsibility for nuisance committed by his boys.**—In **Ratanlal 291** it was *held* that children once outside the school are not so under the control of the master as to make the latter criminally responsible, as their parents might be, for nuisance created by their children. If a school is so conducted as to be a nuisance, the complainant can get a remedy by injunction.

5. **Clause (l).**—The corresponding expression for the words "Magistrate having lawful authority in that behalf" in the earlier Act was "Resident Magistrate," and that expression was held not to include a Magistrate who happens on his tour to stay a few days at the place, mere presence not being the same thing as residence. **Ratanlal 483.**

6. **Clause (m).**—The mere act of fishing in a public tank, without proof that something that would defile the water was used as bait, cannot sustain a conviction under this clause. **Ratanlal 865.**

Punishment for cruelty to animals.

62. (1) Whoever cruelly beats, goads, overworks, ill-treats or tortures or causes or procures to be cruelly beaten, goaded, overworked, ill-treated or tortured any animal, shall be punished with imprisonment which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

(2) Jurisdiction in cases arising under this section shall not be exercised by a Magistrate of lower rank than the second class unless such Magistrate be specially invested with jurisdiction for that purpose by Government.

Notes.—1. Cruelty, what is.—A man who after firing at a dog refrains from again firing at it to put it out of pain, does not commit an offence under this section. **Ratanlal 183.** To support a conviction for cruelty, it should be found as a fact that pain or suffering has been inflicted. **Ratanlal 738.**

2. Imprisonment in default of payment of a fine inflicted under the Act, ought to be simple, not rigorous. **5 Bom. H. C. Cr. 43.**

3. Bombay Act III of 1915 has substituted the word "second" for the word "first" in sub-section (2) of this section.

Where the provisions of the prevention of cruelty to Animals Act, 1890, are extended by the Bombay Government to a certain district under sub-section (2) of section 1 of the Act, the extension does not by itself operative to repeal section 62 of the District Police Act (Bombay Act IV of 1890) within that district. **I. L. R. 45 Bom. P. 203 Cr. Reference.**

Penalty for vexatious search, arrest, etc., by the Police.

63. Any Police-officer who—

(*a*) without lawful authority or reasonable cause enters or searches or causes to be entered or searched any building, vessel, tent or place; or

(*b*) vexatiously and unnecessarily seizes the property of any person; or

(*c*) vexatiously and unnecessarily detains, searches or arrests any person; or

(*d*) offers any unwarrantable personal violence to any person in his custody;

(*e*) holds out any threat or promise not warranted by law to a person accused;

shall for every such offence be punished with imprisonment for a term not exceeding two months, or with fine which may extend to five hundred rupees, or both.

Penalty for vexatious delay in forwarding a person arrested.

64. Any Police-officer who vexatiously and unnecessarily delays forwarding any person arrested to a Magistrate or to any other authority to whom he is legally bound to forward such person, shall be punished with fine which may extend to two hundred rupees.

Penalty for contravention of rules under section 39, s 39 A, or of directions under section 53

65. Whoever—

(*a*) contravenes any rule made under section 39 or s 39 A,* or

(*b*) opposes or fails to conform to any direction given by the Police under section 53,

(*c*) abets the commission of any offence under clause (*a*) or (*b*) shall be punished with fine which may extend to fifty rupees

Note.—*See* Note to s 53 above

Penalty for contravening rules, etc, under section 40

66. Whoever contravenes any rule made under section 40 or any condition of any license granted under the said rules shall be punished with fine which may extend to one hundred rupees

Penalty for failure to comply with order under section 41

67. Whoever fails to comply with an order made under section 41 shall be punished with fine which may extend to twenty five rupees for every day that such order continues to be disobeyed by him

Penalty for contravention of rules or direction under sections 42, 43 44 47 and 48

68. Whoever—

(*a*) disobeys an order lawfully made under sections 42 43 or 44, or

(*b*) opposes or fails to conform to any direction given by the Police under section 47, or

(*c*) opposes or disobeys any rule made or direction given by the Police under section 48, or

(*d*) contravenes any condition of a license granted under clause (*b*) of the said section, or

(*e*) abets the commission of any offence under clauses (*a*) (*b*), (*c*) or (*d*), shall be punished with fine which may extend to two hundred rupees

Penalty for contravention of a regulation made under section 45

69. Whoever contravenes or abets the contravention of any regulation made under section 45 shall be punished with imprisonment which may extend to three months or with fine which may extend to two hundred rupees, or with both.

Penalty for contravention of direction given under section 46

70. Whoever opposes or disobeys any direction given by a Magistrate of a district or a Sub-divisional Magistrate under section 46 or abets opposition to, or disobedience of, any such direction, shall be punished with imprisonment which may extend to one month, or with fine which may extend to one hundred rupees, or with both

Penalty for opposing or not complying with direction given under section 54

71. Whoever opposes or fails forthwith to comply with any reasonable direction given by a Magistrate or a Police-officer under section 54, or abets opposition thereto or failure to comply therewith, shall be punished with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both

Note.—For imprisonment for default of payment of fine inflicted under this Act, *see* Note 2 to s 62, *supra*

Jurisdiction when offender is a Police officer above the rank of constable

72. Offences against this Act, when the accused person or any one of the accused persons is a Police-officer above the rank of a constable, shall not be cognisable by a Magistrate below the second class.

Prosecution for certain offences against the Act to be in the discretion of the Police

73. It shall not, except in obedience to a rule or order made by Government or by the Magistrate of the district, be incumbent on the Police to prosecute for an offence punishable under sections 61, 62, 65, 67, 68, 69 or 70, when such offence has not occasioned serious mischief and has been promptly desisted from on warning given

Prosecution for offences under other enactments not affected by the Act

74. Nothing in this Act shall be construed to prevent any person from being prosecuted and punished under any other enactment for any offence made punishable by this Act or from being prosecuted and punished under this Act for an offence punishable under any other enactment

Provided that all such cases shall be subject to the provisions of section 403 of the Code of Criminal Procedure

* Newly inserted by the Bombay District Police (Amendment) Act IV of 1912, s 8.

CHAPTER VII.

MISCELLANEOUS.

Disposal of rewards, etc., payable to Police-officers.

75. All sums paid for the service of process by Police-officers, and all rewards, forfeitures and penalties or shares thereof which are by law payable to Police-officers as informers, shall, except as hereinafter in this section provided, be credited to Government:

Provided that with the sanction of Government, or under any rule made by Government in that behalf, the whole or any portion of any such reward, forfeiture or penalty may, for special services, be paid to a Police-officer or be divided amongst two or more Police-officers.

District Magistrate's authority over village Police-officers may be delegated to District Superintendent and may be withdrawn.

76. Any Magistrate of a district may delegate to the District Superintendent any authority which such Magistrate himself possesses for police purposes over any village Police-officer, and may withdraw such authority.

Note.—*Cf.* ss. 3 and 4 of *the Bombay Village Police Act* No. VIII of 1867, *infra.*

No Municipal or other rates to be payable by Government on Police buildings.

77. (1) No Municipal or other local rates shall be payable by Government on account of the occupation or use of any house or place by members of the Police Force for the convenient performance of their duties.

Municipalities may be required to provide accommodation for the Police.

(2) It shall be the duty of a Municipality within the limits of which a Police Force is stationed for the service of such Municipality in preserving the peace, public order and safety and preventing crime, to provide on the requisition of Government such accommodation for the Police so employed as shall be reasonably necessary or such portion thereof as to Government shall seem just and expedient.

Provision of such accommodation to be a purpose of the Bombay District Municipal Acts.

(3) The provision of such accommodation or other fulfilment of the requirement of this section shall be deemed a purpose of the Bombay District Municipal Act,* 1901.

Method of proving orders and notification issued under this Act.

78. Any order or notification published or issued by Government or by a Magistrate or officer under any provision of this Act, and the due publication and issue thereof, may be proved by the production of a copy thereof in *the Bombay Government Gazette* or of a copy thereof signed by such Magistrate or officer and by him certified to be a true copy of an original published and issued according to the provisions of the section of this Act applicable thereto.

Rules and orders not to be deemed invalid on account of defect of form or irregularity in procedure.

79. No rule, order, direction, adjudication, inquiry or notification made or published, and no act done under any provision herein contained or in substantial conformity to the same, shall be deemed illegal, void, invalid or insufficient for any defect of form or publication or any irregularity of procedure.

Note.—The Act prescribes no forms and few formalities. Where there has been a substantial compliance with the provisions of this Act, mere irregularities in the form of the notification do not vitiate the proceedings. In any case, errors and irregularities are cured by this section. **51 Bom. 725.**

No Commissioner, Magistrate or Police-officer to be liable to penalty or damages for act done in good faith in pursuance of duty.

80. (1) No Commissioner, Magistrate or Police-officer shall be liable to any penalty or to payment of damages on account of any act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of this Act or of any rule, order or direction lawfully made or given thereunder.

No public servant liable as aforesaid for giving effect in good faith to any rule, order or direction issued with apparent authority.

(2) No public servant or person duly appointed or authorised shall be liable as aforesaid for giving effect in good faith to any such order or direction issued with apparent authority by Government or by a person empowered in that behalf under this Act or any rule made under any provision thereof.

Suits or prosecutions in respect of acts done under colour of duty as aforesaid not to be entertained or to be dismissed, if not instituted within six months.

(3) In any case of an alleged offence by a Magistrate, Police-officer or other person or of a wrong alleged to have been done by such Magistrate, Police-officer or other person by any act done under colour or in excess of any such duty or authority as aforesaid, or where it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed if instituted more than six months after the date of the act complained of.

* The reference to Bombay Act VI of 1873 and Bombay Act II of 1884 is altered in accordance with Bombay Act III of 1901, s. 2 (*c*).

In suits as aforesaid one month's notice of suit to be given with sufficient description of wrong complained of

(4) In the case of an intended suit on account of such a wrong as aforesaid, the person intending to sue shall be bound to give to the alleged wrong doer one month's notice at least of the intended suit with a sufficient description of the wrong complained of, failing which such suit shall be dismissed

Plaint to set forth service of notice and tender of amends

(5) The plaint shall set forth that a notice as aforesaid has been served on the defendant and the date of such service, and shall state whether any, and, if any, what tender of amends has been made by the defendant A copy of the said notice shall be annexed to the plaint endorsed or accompanied with a declaration by the plaintiff of the time and manner of service thereof

Notes.—1. Sanction of Government is not necessary in order to give a Magistrate jurisdiction to entertain complaint against an Inspector of Police of an offence committed in his capacity of a Police-officer **Ratanlal 142.** *See* Note to s 8 above

2. Notice—The protection intended to be afforded to Police-officers by the Act by means of notice, is not a condition precedent to a prosecution relating to a violent assault by a Police-officer The protection extends to official acts done in good faith and which may reasonably be supposed to be done in pursuance of official duty, even though legal powers may be exceeded, but not to acts for which there is a total absence of authority **Ratanlal 486.**

2-A. Where a Police Sub-Inspector in the course of an investigation, summoned a person and questioned him with regard to the offence and in the course of his examination committed various acts of battery and assault on him and at his instance another Police-officer also assaulted the person *Held* that the defendants were acting in the discharge of the duty imposed and authority conferred on them by s 51 (1), cl. (*b*) of this Act when they summoned the person and questioned him as regards the offence, but that the alleged assault and battery could not be said to have been committed by them under colour or in excess of such duty or authority. Consequently an action against the Police-officers for damages for assault and battery was maintainable without notice under this section or under section 80 of the Civil Pro Code **30 Cr. L. J. 278.**

3. Protection to apply to criminal prosecutions as well as civil actions.—Under the corresponding section of Bombay Act VII of 1867 it was *held* that these provisions applied to criminal prosecutions as well as to civil actions **Ratanlal 220.**

4. Limitation.—In **10 Bom. H. C 204,** it was *held* under s 42 of Bombay Act VII of 1867 (corresponding to this section) that the period provided in that section applied to suits brought against a Police-officer and not those in the Limitation Act XIV of 1859

Person interested may apply to Government to annul reverse or alter any rule or order

81. (1) In the case of any rule or order made by Government under an authority conferred by this Act and requiring the public or a particular class of persons to perform some duty or act, or to conduct or order themselves or those under their control in a manner therein described, it shall be competent to any person interested to apply to Government by a memorial given to a Secretary to Government to annul, reverse or alter the rule or order aforesaid on the ground of its being unlawful, oppressive or unreasonable

When suit shall lie to the District Court to declare a *rule or order unlawful*

(2) After such an application as aforesaid and the rejection thereof wholly or in part, or after the lapse of four months without an answer to such application or a decision thereon published by Government, it shall be competent to the person interested and deeming the rule or order contrary to law to institute a suit against Government in the District Court of the district wherein the rule or order operates, for a declaration that the rule or order is unlawful either wholly or in part. The decision in such a suit shall be subject to appeal, and a rule or order finally adjudged to be unlawful shall by Government be annulled or reversed or so altered as to make it conformable to law.

82. [*Saving of certain Acts*] *Repealed by Act XVI of* 1895



SCHEDULE A.

(See *Section* 2.)

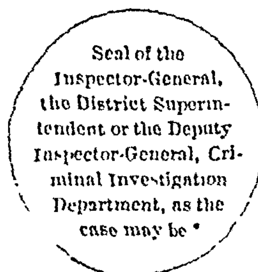
ENACTMENTS REPEALED.

No. and Year of Enactment.	Title or Subject.	Extent of Repeal.
Bombay Regulation No. XII of 1827.	For the establishment of a system of Police throughout the Bombay Presidency.	So much of clauses 1, 6, 7 and 8 of section 19 as has not already been repealed.
	Acts of the Governor of Bombay in Council.	
VII of 1867	The Bombay District Police Act ...	The whole Act, except sections 33 and 34.
III of 1886	The Bombay General Clauses Act ...	So much of schedule B as relates to clauses 1, 6, 7 and 8 of section 19 of Regulation XII of 1827 and to any section of Bombay Act VII of 1867, except section 34.

SCHEDULE B.

(See *Section* 11.)

FORM OF CERTIFICATE FOR POLICE-OFFICER BELOW THE GRADE OF INSPECTOR.



A.B. has been appointed to the Police of the district of..................and is vested with the powers functions and privileges of a Police-officer under the Bombay District Police Act, 1890.

* Substituted by Bombay Act III of 1915.

APPENDIX XVI.

THE CALCUTTA POLICE ACT, 1866.

(BENGAL ACT IV OF 1866 *)

[28*th March*, 1866]

[AS MODIFIED UP TO THE END OF APRIL, 1910.]

An Act to amend and consolidate the provisions of Act XIII of 1856 (*for regulating the Police of the towns of Calcutta Madras and Bombay*) *and of Act XLVIII of* 1860 (*to amend Act XIII of* 1856)

Preamble

WHEREAS it is expedient to amend and consolidate the provisions of Act XIII of 1856 and of Act XLVIII of 1860, so far as the said Acts are applicable to the town of Calcutta, It is enacted as follows —

Short title

1. This Act may be cited as the Calcutta Police Act, 1866

2. [*Repeal of Act XIII of* 1856 *and XLVIII of* 1860 *in Calcutta*] *Rep by the Repealing Act*, 1873 (*XII of* 1873)

Interpretation

3. The following words and expressions in this Act shall have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction (that is to say) —

"Town of Calcutta" — the words "town of Calcutta" shall include all places within the local limits of the jurisdiction of Her Majesty's High Court of Judicature at Fort William in Bengal,

"Magistrate" — the word "Magistrate" shall mean any Magistrate of Police † acting for the said town,

"Property" — the word "property" shall include any chattel money or valuable security

"Month" — the word "month" shall mean calendar month,

"Oath" — the word "oath" shall include any affirmation or declaration lawfully substituted for an oath,

‡ "gaming" includes wagering or betting [except wagering or betting upon a horse race, when such wagering or betting takes place—

(*a*) on the day on which such race is to be run, and

(*b*) in an enclosure which the Stewards controlling such race have, with the sanction of the Local Government, set apart for the purpose]

but does not include a lottery,

‡ "instruments of gaming" includes any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming, and

‡ "common gaming house" means any house, room, tent or walled enclosure, or space, or vehicle, or any place whatsoever, in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room tent, enclosure, space, vehicle or place, whether by way of charge for the use of such house, room tent enclosure, space, vehicle, place or instruments or otherwise howsoever

Note.—1. Cotton gambling:—In **33 C. 963,** betting on cotton figures was held not to come under the definition of 'gaming' and the following ordinance was promulgated pending legislation, consequent on this decision, making such wager an offence within the meaning of this section

* LOCAL EXTENT—This Act extends only to the town of Calcutta, *see* the preamble and ss 1, 3 and 4

† "Now Presidency Magistrate" —*See* the Code of Criminal Procedure, 1898 Act V of 1898, s 3 (2)

‡ These definitions of "gaming," "instruments of gaming" and "common gaming house" were substituted for the former definitions by Act IV of 1913 (Bengal Act)

Bengal Ordinance No. V of 1912.

1. (1) This Ordinance may be called the Bengal Cotton Gambling Ordinance, 1912, and

(2) it extends to the Presidency of Fort William in Bengal.

2. The definitions of "gaming," "instruments of gaming," and "common gaming-house" in s. 59 of the Howrah Offences Act, 1857, s. 3 of the Calcutta Police Act, 1866, and s. 1 of the Bengal Police Gambling Act, 1867, as amended by the Bengal Rain Gambling Act, 1897, shall respectively be deemed to include—

Cotton-gambling (that is to say, wagering on a number to be arrived at by a manipulation of figures showing rates for the sale of cotton or other marketable commodity),

books or registers in which cotton-gambling wagers are entered, all other documents containing evidence of such wagers, and anything used as a means of cotton-gambling, and

any house, room, tent, enclosure, vehicle, vessel or place in which cotton-gambling is carried on for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, vehicle, vessel or place. *Bengal Cotton-Gambling Ordinance* (*I of* 1912), promulgated Governor-General under s. 23 of the Indian Councils Act, 1861, pending the consideration by the Governor in Council of a law to prohibit the practice of cotton-gambling in the Presidency of Fort William—see *Calcutta Gazette*, Extraordinary, dated 13th December, 1912.

3. Is there gambling when there is element of skill in the play?—In **6 C. L. J. 708 = 6 Cr. L. J. 421**, it was *held* that where the chief element of the game was one of skill, it was not an offence under *the Bengal Gaming Act*, although there was an element of chance in it. Consequently playing "ring-game" was held not to amount to gambling. But this case was *dissented* from in a later case in (*c*) **15 Cr. L. J. 276** where the words "mere skill" in *the Gambling Act* were interpreted to mean "pure skill" and it was *held* that no form of ring-game could be a game of pure skill, as it was kept for the profit of a man who does not play himself and does not put his skill against any other party at all.

"Cattle."

The word "cattle," shall, besides horned cattle, include horses, asses, mules, sheep, goats and swine.

* * * * * * *

Definitions.

† The phrases "investigation," "offence," "cognisable offence" and "non-cognisable offence" shall respectively have the meanings assigned thereto by the Code of Criminal Procedure, 1898;

"Officer in charge of a Police-station."

"Officer in charge of a Police-station" shall include, when the officer in charge of the Police-station is absent from the station-house or unable from illness or other cause to perfrom his duties, the Police-officer present at the station-house who is next in rank to such officer and is above the rank of constable;

"Explosive substance"

"explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;

"Place of public amusement."

"place of public amusement" shall mean any place, enclosure, building, tent, booth or other erection whether permanent or temporary, where music, singing, dancing or any diversion or game or the means of carrying on the same, is provided, and to which the public are, admitted either on payment of money or with the intention that money may be collected from those admitted, otherwise than for a *bona fide* charitable purpose; and shall include a race-course, circus, theatre, music-hall, billiard-room, bagatelle-room, gymnasium and fencing school;

"Place of public entertainment."

"place of public entertainment" shall mean any place, whether enclosed or open, to which the public are admitted, and where any kind of food, drink or drug is supplied for consumption on the premises for the profit or gain of any person owning or having an interest in, or managing, such place; and shall include a refreshment-room, eating-house, coffee-house, tea-shop, liquor-house, boarding-house, lodging-house, hotel, restaurant, tavern, wine-shop, beer-shop, spirit-shop, arrack-shop, toddy-shop, ganja-shop and opium-shop;

* Clauses as to number and gender, which were repealed by the Repealing and Amending Act, 1903 (I of 1903), are omitted. *See* now the Bengal General Clauses Act, 1899(Ben. Act I of 1899), s. 14.

† These expressions were added to the section by the Calcutta and Suburban Police (Amendment) Act III of 1910, ss. 3 and 4.

"Police-officer" — "Police-officer" shall mean any member of the Calcutta Police Force, and shall include the Commissioner of Police and a Deputy Commissioner of Police ,

"Police-station" — "Police-station" shall mean any post or place declared, generally or specially, by the Lieutenant-Governor to be a Police-station, and shall include any local area specified by the Lieutenant Governor in this behalf,

"Public place" — "public place" shall include the banks of the river the docks the jetties, warehouses to which the public have access, every public building and monument and the precincts thereof, and all places accessible to the public for drawing water, washing or bathing or for purposes of recreation,

"Street" — "street" shall mean any road lane footaway, square court, alley or passage whether a thoroughfare or not, to which the public have permanently or temporarily, a right of access,

"Vehicle" — "vehicle" shall include any locomotive automobile tram-car, carriage cart van dray truck, hand-cart, bicycle tricycle motor cycle, or other wheeled conveyance of any description capable of being used on the streets

Appointment and removal of Commissioner of Police

4. The administration of the Police in the town of Calcutta shall be vested in an officer to be styled the Commissioner of Police for such town who shall from time to time be appointed by the * Lieutenant-Governor of Bengal and may be removed by the same authority and who shall receive such salary as the † Lieutenant Governor subject to rules made under section 45-A, of Government of India Act" shall allow

Appointment of deputies to Commissioner

5. The said Lieutenant-Governor may from time to time appoint one or more deputies to the Commissioner of Police who shall be competent to perform any of the duties assigned to that officer under his orders.

The Deputy Commissioner may be removed at any time by order of the said Lieutenant Governor

Note.—Powers of Deputy Commissioner of Police.—A Deputy Commissioner of Police appointed under s 5 of the Act has all the powers of the Commissioner of Police, subject to the control of the latter and no specific direction of the Commissioner is necessary to render his acts valid He has power to issue search warrants under s 46 of the Act. **20 C. 670.**

Commissioner shall not ordinarily be a Magistrate

6. The Commissioner of Police shall not ordinarily be a Magistrate of Police under this Act,‡ but,§ * * * may be appointed to that office when the said Lieutenant-Governor for special reasons may deem it expedient.

Commissioner to be Justice of the Peace, but to act only in certain cases

7. The Commissioner of Police shall be appointed a Justice of the Peace, ‖ but unless he is vested with the jurisdiction of a Magistrate of Police ¶ he shall act as a Justice only so far as may be necessary for the preservation of the peace, the prevention of crimes, and detection apprehension and detention of offenders in order to their being brought before a Magistrate of Police ¶ and so far as may be necessary for the performance of the duties assigned to the Commissioner by this Act.

The deputies to the Commissioner of Police may be appointed Justices of the Peace, ‖ and if so appointed, shall act in that capacity subject to the above restriction.

Constitution of Police Force

8. For the said town of Calcutta there shall be a Police Force which shall consist of such number of officers and men, and shall be otherwise constituted in such manner, as shall be from time to time, ordered by the said ** Lieutenant Governor, with the sanction of the Governor-General of India in Council

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* *See* Bengal Act VII of 1912 section 3 and Sch D item 1 (now the Governor in Council of Fort William in Bengal

† The words in inverted commas was substituted by Act XXXVIII of 1920

‡ This *reference is to* section 22, which has been repealed—*see post* Presidency Magistrates are now appointed under the Code of Criminal Procedure, 1898 (Act V of 1898) s 14

§ The words with the sanction of the Governor General of India in Council were repealed by Bengal Act V of 1[illegible]

‖ Justices of the Peace for the Presidency towns are now appointed under Code of Criminal Procedure 1898 (Act V of [illegible]

¶ Now ' Presidency Magistrate —*see* the Code of Criminal Procedure 1898 (Act V of

** Now the Governor in Council of Fort William in Bengal (*see* Bengal Act VII of 19

Police to be under control of Commissioner, Rules for Government of Police to be made by Commissioner and approved by Government

9. The Police Force shall be under the exclusive direction and control of the Commissioner of Police who may from time to time, subject to the * control of the said Lieutenant-Governor, frame such orders and regulations as he shall deem expedient, relative to the general government of the Force, the places of residence, the classification, rank, distribution and particular service of the several numbers thereof; their inspection, the description of arms, accoutrements and other necessaries to be furnished to them; and all such other orders and regulations relative to the said Police Force as the said Commissioner shall from time to time deem expedient for preventing neglect or abuse, and for rendering such Force efficient in the discharge of all its duties.

Note.—Where a circular order, issued by the Commissioner of Police in Calcutta, authorised the Police to make investigations, *held* that the circular order was one issued for the purpose of "rendering the Police Force efficient in the discharge of all its duties" within the meaning of this section. **7 C. W. N 893.**

Appointment, etc., of Police to rest with Commissionor.

† **10.** (1) The appointment of the members of the Police Force shall rest with the Commissioner of Police and he may at any time suspend or dismiss any member of the Force whom he shall think remiss or negligent in the discharge of his duty, or otherwise unfit for the same.

(2) A Police-officer shall not by reason of being suspended from office cease to be a Police-officer. During the term of such suspension the powers, privileges and duties conferred or imposed upon him as a Police-officer shall be in abeyance, but he shall continue subject to the same responsibilities, discipline and penalties and to the same authorities, as if he had not been suspended.

Duties of Police-officers.

‡ **10-A.** (1) It shall be the duty of every Police-officer—

(*a*) promptly to serve every summons and obey and execute every warrant or other order lawfully issued to him by competent authority, and to endeavour by all lawful means to give effect to the lawful commands of his superiors;

(*b*) to the best of his ability, to obtain intelligence concerning the commission of cognisable offences or designs to commit such offences, and to lay such information and to take such other steps, consistent with law and with the orders of his superiors, as are best calculated to bring offenders to justice or to prevent the commission of cognisable offences, or the commission of non-cognisable offences with his views;

(*c*) to the best of his ability, to prevent the commission of public nuisances;

(*d*) to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension there is sufficient reason;

(*e*) to aid any other Police-officer, when called on by him or in case of need in the discharge of his duty, in such ways as would be lawful and reasonable on the part of the officer aided;

(*f*) to discharge such duties as are upon him by any law for the time being in force;

(*g*) to afford every assistance within his power to disabled or helpless persons in the streets, and to take charge of intoxicated persons and of lunatics at large who appear to be dangerous or to be incapable of taking care of themselves;

(*h*) to take prompt measures to procure necessary help for any person under arrest or in custody who is wounded or sick, and, while guarding or conducting any such person, to have due regard to his condition;

(*i*) to arrange for the proper sustenance and shelter of every person who is under arrest or in custody;

(*j*) in conducting searches, to refrain from needless rudeness and the causing of unnecessary annoyance;

(*k*) in dealing with women and children, to act with strict regard to decency and with reasonable gentleness;

(*l*) to use his best endeavours—

(*i*) to prevent any loss or damage by fire, and

(*ii*) to avert any accident or danger to the public;

* The word "control" was substituted for "approbation by Ben Act VII of 1919.

† Section 10 was re-numbered sub-section (1) of section 10 and sub-section (2) was added by the Calcutta and Suburban Police (Amendment) Act, 1919 (Ben. Act VII of 1919), s. 3

‡ Section 10 A was newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 100

(*m*) to regulate and control the traffic in the streets, to prevent obstruction therein and to the best of his ability to prevent the infraction of any rule or order made under this Act or under any other law for the time being in force for observance by the public in or near the streets

(*n*) to keep order in the streets and at and within public bathing washing and landing places, fairs and all other places of public resort and in the neighbourhood of places of public worship during the time of public worship,

(*o*) to regulate resort to public bathing, washing and landing places to prevent overcrowding thereat and in public ferry boats, and, to the best of his ability, to prevent the infraction of any rule or order lawfully made for observance by the public at any such place or on any such boat, and

(*p*) to perform all duties imposed on him by rules for the time being in force under this Act, in the manner and subject to the conditions therein prescribed

(2) All persons shall be bound to conform to the reasonable directions of a Police-officer given in fulfilment of any of the said duties

(3) A Police-officer may restrain or remove any person resisting or refusing or omitting to conform to any such direction as aforesaid

Power to fine members of Police

11. For any lesser breach of discipline or other misconduct not requiring the suspension or dismissal of the offender, a member of the Police Force may be fined by the Commissioner in any sum not exceeding one half of his monthly pay

12. [*Repealed by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

Members to receive certificates vesting them with powers of constable

13. Every member of the Police Force shall receive on his enrolment a certificate (A), under the signature of the Commissioner of Police by virtue of which he shall be vested with the powers functions and privileges of a Police-officer

Such certificate shall cease to have effect whenever the person named in it is suspended or dismissed, or otherwise removed from employment in the Force

Police officers prohibited from other employment

* **13-A.** The Commissioner or a Deputy Commissioner of Police shall not, without the permission of the † Lieutenant Governor, and a Police-officer of lower rank than that of Deputy Commissioner shall not without the permission of the Commissioner of Police

either as principal or agent —

(*a*) engage in any trade, or

(*b*) be in any way concerned in the purchase or sale of any immovable property within the town or suburbs of Calcutta or any interest therein or

(*c*) hold any office or practise any profession or engage in any employment whatever other than his office or duties as such Police-officer

Offences by Police-officer

‡ **13-B.** Any Police-officer who—

(*a*) contravenes any provision of the last foregoing section, or

(*b*) is guilty of cowardice, or

(*c*) is guilty of any wilful breach or neglect of any provision of law or of any rule or order which it is his duty as such Police-officer to observe or obey, or

(*d*) is guilty of any violation of duty for which no punishment is expressly provided by any other law for the time being in force,

shall be liable to imprisonment, with or without hard labour, for a term which may extend to three months, or to fine which may extend to one hundred rupees and which may be deducted from any salary, due to him or to both.

Vexatious entry search, seizure arrest detention, etc by Police officers

‡ **13-C.** Any Police-officer who—

(*a*) without lawful authority or reasonable cause, enters or searches, or causes to be entered or searched any building, vessel, tent or place, or

* ... 1910, s 7

‡ Sections 13 B and 13 C were newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910 s 7

(*c*) vexatiously and unnecessarily detains, searches or arrests any person, or

(*d*) vexatiously and unnecessarily delays forwarding any person arrested to a Magistrate or to any other authority to whom he is legally bound to forward such person, or

(*e*) offers any unnecessary personal violence to any person in his custody, or

(*f*) holds out to an accused person any threat or promise not warranted by law, shall be liable to imprisonment, with or without hard labour, for a term which may extend to six months or to fine which may extend to five hundred rupees, or to both.

Members not to resign without leave or notice

14. No member of the Police Force, to be enrolled under this Act, shall be at liberty to resign his office, or to withdraw himself from the duties thereof, unless expressly allowed so to do in writing by the Commissioner, or unless he shall have given to the Commissioner six months' notice of his intention, if a member of the mounted branch of the said Force, and two months' notice if a member of any other branch; and every member of the said Force, who shall so resign or withdraw himself without such leave or notice, shall be liable, on the order of the Commissioner, to forfeit all arrears of pay then due to him; and, on the sentence of a Magistrate, if such Magistrate shall think fit, to pay a fine not exceeding fifty rupees, or to be imprisoned, with or without hard labour, for any term not exceeding two months.

False Statement to obtain employment or release.

***14-A.** Any person who knowingly makes a false statement or uses a false document for the purpose of obtaining for himself or any other person employment or release from employment as a Police-officer, shall be liable to imprisonment, with or without hard labour, for a term which may extend to three months, or to fine which may extend to one hundred rupees, or to both.

Penalty for dismissed members not delivering up clothing, accoutrements, etc.

15. Every member of the Police Force who shall be dismissed from, or shall cease to hold and exercise, his office, and who shall not forthwith deliver up his certificate, and all the clothing, accoutrements and other necessaries which may have been supplied to him for the execution of his duty, to the Commissioner, or to such person, and at such time and place, as shall be directed by the said Commissioner, shall be liable, on summary conviction before a Magistrate, to imprisonment, with or without hard labour, for any term not exceeding one month.

And it shall be lawful for the Commissioner, or for any Magistrate, to issue his warrant to search for and seize all the clothing, accoutrements, appointments and other necessaries which shall not be so delivered over, wherever the same may be found.

16. [*Police Superannuation Fund.*] *Rep. by the Calcutta and Suburban Police* (*Superannuation Fund*) *Act*, 1925 (*Ben. Act VI of* 1905).

17. [*Disposal of proceeds of certain fines, etc.*] *Rep. by the Calcutta and Suburban Police* (*Superannuation Fund*) *Act*, 1890 (*Ben. Act I of* 1890), *s.* 3.

Power to appoint special constables.

18. The Commissioner of Police may, of his own authority, appoint special constables to assist the Police Force on any temporary emergency.

Powers of special constables

19. Every special constable so appointed shall have the same power, privileges and protection, and shall be liable to perform the same duties and shall be amenable to the same penalities, and be subordinate to the same authorities, as the ordinary officers of Police.

Penalty of special constable neglecting or refusing to serve, etc.

20. If any person being appointed a special constable as aforesaid, shall without sufficient excuse, neglect or refuse to serve as such, or to obey such lawful order or direction as may be given to him for the performance of his duties he shall be liable, upon conviction before a Magistrate, to a fine not exceeding fifty rupees for every such neglect, refusal or disobedience.

* Section 14-A was newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 8.

Appointment of additional constables on application of private individuals

21. The Commissioner of Police may also if he shall think fit on the application of any person showing the necessity of it appoint any additional number of constables to keep the peace at any place within his jurisdiction at the charge of the person applying, but subject to the orders of the said Commissioner, and for such time as he shall think fit and every such constable shall receive a certificate, by virtue of which he shall be vested with all the powers privileges and duties of the constable belonging to the Police Force

Proviso

Provided that the person upon his application such appointment shall have been made may, upon giving one month's notice in writing to the Commissioner of Police, require that the constables so appointed at his expense shall be discontinued, and thereupon the said Commissioner shall discontinue such additional constables and all moneys received by the Commissioner for the payment of any such additional constables shall be accounted for by him

Constitution of divisions and sections

* **21-A.** (1) Subject to the control of the Lieutenant Governor, † the Commissioner of Police shall by order,—

(*a*) constitute such and so many Police divisions as he thinks fit and

(*b*) sub-divide such divisions into such and so many sections as he thinks fit and

(*c*) define the limits and extent of such divisions and sections

(2) Every such order shall be published in the *Calcutta Gazette* and the manner prescribed by this Act for the publication of public notices

22-24. [*Police districts appointment of Police Magistrates attendance of Police-officers at Police Courts, service of criminal process by Police-officers*] *Rep by the Presidency Magistrates Act* 1877 (*IV of* 1877).

Execution of warrants

25. When any warrant shall be directed or delivered to any * [officer of the Police Force] unless the authority issuing it shall order that it be executed without delay, such Police-officer shall deliver the same to the superior officer in charge of the division to which he belongs, who shall appoint by endorsement thereon one or more Police-officers to execute the same, and every Police-officer whose name shall be so endorsed thereon shall have the same powers, privileges and protection as if the same had been originally directed to him by name

26-28. [*Offences summarily triable by Magistrates, summary jurisdiction of two Magistrates, restitution of stolen property*] *Rep by the Presidency Magistrates Act* 1877 (*IV of* 1877).

Wrongfully entering or remaining in or on building, land vehicle, etc

29. ‡ Whoever, without satisfactory excuse, wilfully enters or remains in or upon any dwelling house or private premises or any land or ground attached thereto, or any ground, building monument or structure belonging to the Government or appropriated to public purposes, or any vehicle boat or vessel, shall, whether he causes any actual damage or not be liable to fine which may extend to twenty rupees

30-31. [*Order of maintenance for wife or child, restoration of woman or child detained for unlawful purpose*] *Rep by the Presidency Magistrates Act* 1877 (*IV of* 1877)

Apprehension and punishment of reputed thieves etc

32. Any person found between sunset and sunrise armed with any dangerous or offensive instrument, whatsoever, with intent to commit any criminal act, any reputed thief found between sunset and sunrise on board any vessel or boat, or lying or loitering in any bazaar, street, yard, thoroughfare or other place, who shall not give a satisfactory account of himself,

any person found between sunset and sunrise having his face covered or otherwise disguised, with intent to commit any offence, any person found between sunset and sunrise in any dwelling-house or other building whatsoever, without being able satisfactorily to account for his presence therein, and

any person having in his possession, without lawful excuse (the proof of which excuse shall be on such person), any implement of house-breaking—

may be taken into custody by any Police-officer without a warrant, and shall be liable, on summary conviction before a Magistrate, to imprisonment with or without hard labour, for any term not exceeding three months.

* Newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, s 9

† Now the Governor in Council of Fort William in Bengal (*see* Ben Act VII of 1912)

‡ Substituted for old s 29 by the Calcutta and Suburban Police (Amendment) Act III of 1910 s 10

33. Whoever, not being amenable to* [the Naval Discipline Act, the Army Act, or the Indian Articles of War] takes, or attempts to take, into Fort William at Calcutta, or into any military barracks, guard-rooms or encampments within the town of Calcutta, or on board or alongside of any vessel of war belonging to Her Majesty in the port of the said town, any spirits or spirituous or fermented liquors, or intoxicating drugs or preparations, without the license in writing of the Commanding Officer (unless such articles are intended for some persons above the rank of non-commissioned Officer), shall be liable, on summary conviction before a Magistrate, to a fine not exceeding one hundred rupees or imprisonment for any term not exceeding two months, with or without hard labour; and such liquors, drugs or preparations, and the vessels containing the same, shall be forfeited.

Penalty for taking spirits into barracks or on board vessels of war.

34. Whoever takes, or attempts to take, without due permission, or throws or attempts to throw, into any jail or house of correction or into any public hospital, any spirit or spirituous or fermented liquors or intoxicating drugs or preparations, shall be liable, on summary conviction before a Magistrate, to a fine not exceeding fifty rupees, or to imprisonment with or without hard labour, for any term not exceeding two months.

Penalty for taking spirits, etc., into jail.

35. Whoever in the town of Calcutta has or keeps any hotel, tavern, punch-house, ale-house, arrack or toddy-shop, or place for the sale or consumption of ganja, chandu or other preparation of opium, hemp or other intoxicating drug, plant or substance, or has or keeps any coffee-house, boarding-house, eating-house, lodging-house or other place of public resort and entertainment, wherein provisions, liquors or refreshments are sold or consumed (whether the same be kept or retailed therein) or procured elsewhere, without a license to be obtained in the manner hereinafter mentioned, shall be liable, on summary conviction before a Magistrate, to a fine not exceeding fifty rupees for every day that the said house or place of entertainment is kept open, or the sale of provisions, liquors or refreshment is continued without the necessary license:

Penalty for keeping hotel, etc., without license.

Provided that nothing in this Act shall apply to the sale in reasonable quantities of any drug, plant or substance in any chemist's or druggist's shop for medicinal purposes only.

36. No license shall be granted under the provisions of Act XI of 1849† (*for securing the Abkari Revenue of Calcutta*) unless the person applying for such license shall produce a certificate from the Commissioner of Police stating that a license may be granted to him for the sale of spirituous liquors or intoxicating drugs, as the case may be, without risk or detriment to the preservation of peace and good order, and containing a full statement of such conditions as may have been imposed, and shall have remained in force under the provisions hereinafter contained at the date when such license shall be granted.

Excise license not to be granted without certificate of Commissioner.

No license so granted shall be renewable without a fresh certificate as aforesaid previously obtained from the Commissioner of Police. ‡ "The Commissioner of Police shall, in granting or refusing certificates under this section, be subject to the direction and control of the Lieutenant-Governor." §

37. It shall be competent to the Commissioner of Police, subject to the direction and control of the said Lieutenant-Governor, to limit, in such certificate as aforesaid, the period for which the license may be granted, and also to fix such conditions as he may deem necessary for securing the good behaviour of the keepers of the houses and places of entertainment as aforesaid, and for the prevention of drunkenness and disorder among the persons frequenting or using the same, and from time to time to vary such conditions subject to such direction and control as aforesaid; and no license granted under the said Act XI of 1849† shall be valid unless it shall contain such conditions as shall have been imposed and shall remain in force for the time being under this section.

Duration and conditions of license.

* These words in square brackets in s. 3 were substituted for the words "The Articles of War for Her Majesty's Army, or Her Majesty's Navy, or for the Native Officers or Soldiers in Her Majesty's Indian Army" by the Repealing and Amendment Act (I of 1903, Schedule I).

† Act XI of 1849 was repealed by the Bengal Excise and Licensing Act, 1878 (Bengal Act VII of 1878), and this reference should now be deemed to be made to the latter Act.—*See* s. 3 of that Act.

‡ Substituted for the words subject to the order and control of the Lieutenant-Governor of Bengal by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 11.

§ Now the Governor in Council of Fort William in Bengal (*see* Ben. Act VIII of 1912).

Note.—Breach of license under ss 36 and 37—*A*, who held a certificate under Act VII of 1878 (Excise Act) from the Deputy Commissioner of Police that he was entitled to a license from the Collector to sell *Muddut* upon the conditions set forth therein obtained such a license from the Collector under Act I of 1878 (The Opium Act) upon the conditions mentioned No license was granted by the Deputy Commissioner *A* was charged under s 40 of this Act with a breach of the conditions not of the license but of the certificate, *held*, that the sale of *Muddut* is regulated by Act I of 1878 and therefore no license from the Commissioner of Police for the sale of *Muddut* was requisite under ss 36 and 37 but the same was required under s 39 *infra* **18 C. L. R. 336** *See* also **11 C. L R. 464.**

Penalty for keeping up signboard or notice after expiry of license

38. Whenever any license granted as aforesaid shall have ceased to have effect it shall be lawful for the Commissioner of Police to order the person to whom such license shall have been granted to remove or cause to be removed any signboard or other notice which such person might have been therefore bound under the conditions of his said license to affix on or near the house or place of public resort or entertainment for which such license had been granted and any person who shall fail to obey any such order forthwith shall be liable on summary conviction before a Magistrate, to a fine of ten rupees for every day thereafter during which he shall so fail

Commissioner of Police may grant licenses for places for which no licenses are required under Act XI of 1849

39. The Commissioner of Police may at his discretion from time to time grant licenses to the keepers of such houses or places of public resort and entertainment as aforesaid for which no license as is specified in the said Act XI of 1849 * is required, upon such conditions to be inserted in every such license, as he, with the sanction of the said Lieutenent Governor from time to time, shall order, for securing the good behaviour of the keepers of the said houses or places of public resort or entertainment, and the prevention of drunkenness and disorder among the persons frequenting or using the same, and the said licenses may be granted by the said Commissioner for any time not exceeding one year.

Penalty for breach of conditions of license

40. † Any person committing a breach of any of the conditions which in accordance with section 37 of this Act, are included in a license granted under the said Act XI of 1849* or of any of the conditions subject to which a license is given under section 39 of this Act, shall on summary conviction before a Magistrate, be liable to a fine not exceeding one hundred rupees, and such fine shall be recovered from the person licensed, notwithstanding that such breach may have been caused by the default or carelessness of the servant or other person in charge of the shop or place of sale

Any person so convicted shall also be liable to the forfeiture of his license, at the discretion of the Commissioner of Police subject to the direction and control of the said Lieutenant Governor ‡

Notes.—1. Liability for breach of the conditions of license.—*See* **13 C L. R 336** and Note to s. 37

2. Liability of Master for servant's breach of license.—In **13 C. L. R. 336,** the master was convicted for the act of his servant in having sold *Muddut* without a certificate from the Deputy Commissioner of Police for the same *See* s 23 of Bengal Act II of 1866 (Calcutta Suburban Police).

Fee for certificate and license

41. For every certificate or license granted by the Commissioner of Police under this Act there shall be levied a fee of two rupees

Penalty for harbouring and concealing deserters from merchant vessels

42. Whoever, in any place within the said town wilfully harbours or conceals any seaman or apprentice belonging to any vessel other than a vessel of the Navy of the Queen, knowing or having reason to believe, such seaman or apprentice to be a deserter shall be liable, on summary conviction before a Magistrate, to a fine not exceeding one hundred rupees

Power to order discontinuance of use of house room or place as brothel, disorderly house or place of assignation in certain cases

§43. (1) When the Commissioner of Police receives information that any house, room or place—

(*a*) is used as a brothel or disorderly house, or for the purpose of carrying on the business of a common prostitute, in the vicinity of any educational institution or of any boarding house, hostel or mess used or occupied by students or of any place of public worship or recreation or

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* Act XI of 1849 was repealed by the Bengal Excise and Licensing Act 1878 (Bengal Act VII of 1878) and this reference [illegible]

[illegible] (Amendment) Act 1878 (Bengal Act III of 1878) s 12 [illegible] VII of 1812 [illegible]

[illegible] by the Calcutta and Suburban Police (Amendment) [illegible]

(*b*) is used as, or for the purpose, aforesaid to the annoyance of respectable inhabitants of the vicinity, or

(*c*) is used as, or for the purpose, aforesaid on any main thoroughfare which has been notified in this behalf by the Lieutenant-Governor * on the recommendation of the Municipal Commissioners or

(*d*) is used as a common place of assignation,

he may cause a notice to be served on the owner (if in occupation), lessor, manager or occupier of the house, room or place to appear before him either in person or by agent on a date to be fixed in such notice, and to show cause why, on the grounds to be stated in the notice, an order should not be passed for the discontinuance of such use of the house, room or place.

(2) If on the date fixed, or on any subsequent date to which the hearing may be adjourned, the Commissioner of Police is satisfied, after making such inquiry as he deems fit, that the house, room or place is used as described in clauses (*a*), (*b*), (*c*) or (*d*) of sub-section (1), as the case may be,

he may by written order direct such owner, lessor, manager or occupier, within a period to be stated in such order, not less than ten days from the date thereof, to discontinue such use.

(3) For the purposes of an inquiry under sub-section (2), the Commissioner of Police may depute a Deputy Commissioner of Police to make a local investigation, and may take into consideration his report thereon.

(4) The decision of the Commissioner of Police that a house, room or place is used in any manner, or for any purpose, described in clauses (*a*), (*b*), (*c*) or (*d*) of sub-section (1) shall be final, and the legality or propriety thereof shall not be questioned in any trial or judicial proceeding in any Court.

Penalty for breach of order.

† **43-A.** If any person against whom an order has been passed by the Commissioner of Police under sub-section (2) of the preceding section, uses the house, room or place in a manner which contravenes such order after the period stated therein, he shall be punished, on summary conviction before a Magistrate, with a fine which may extend to twenty-five rupees for every day after the expiration of the said period during which the breach continues, and shall, on second conviction, be liable to simple imprisonment which may extend to three months in addition to, or in lieu of, any fine which is imposed under this section.

Power of owner or lessor to determine lease or tenancy.

‡ **43-B.** Notwithstanding anything contained in any other law for the time being in force, the owner or lessor of any house, room or place against the lessee, tenant or occupier of which an order has been passed directing the discontinuance of the use thereof as a brothel or disorderly house or for the purpose of carrying on the business of a common prostitute or as a common place of assignation, shall be entitled forthwith to determine such lease, tenancy or occupation.

Power to order discontinuance of music in certain cases.

‡ **43-C.** (1) The Commissioner of Police may, upon complaint made to him in writing by any person by written order direct the discontinuance in any place of music or singing, the beating of drums or tom-toms, and the blowing or sounding of horns or other noisy instruments, if he is satisfied that the same is a nuisance and ought to be summarily stopped either on account of the dangerous illness of, or because it seriously interferes with the reasonable occupation of any person resident or lawfully engaged in the neigbourhood:

Provided that in any case where the discontinuance of music, or other sounds as aforesaid, is so ordered it shall be lawful for a Magistrate, upon the complaint of any person aggrieved, and if satisfied that the order complained of is unreasonable under the circumstances, to alter or reverse such order as he deems fit, and the Commissioner of Police shall give effect to any such alteration or reversal:

Provided also that nothing in this section shall apply to music or other sounds as aforesaid in any place of public worship, or on the occasion of any religious observance or ceremony.

(2) Any person who contravenes an order of the Commissioner of Police passed under sub-section (1) shall be punished with a fine which may extend to one hundred rupees.

Penalty for owning or keeping, or being employed in a gaming-house, etc.

44. Whoever, being the owner, occupier, or having the use of any house, room or place, opens, keeps or uses the same as a common gaming-house; and whoever, being the owner or occupier of any house or room, knowingly and wilfully permits the same to be opened, kept or used by any other person as a common gaming-house; and whoever has the care or management of, or in any manner assists in conducting, the business of any

* Now the Governor in Council of Fort William, Bengal. (*See* Ben. Act III of 1912).
† *Section 43-A is new. See* the above footnote.
‡ Sections 43-B and 43-C are new *See* last footnote in previous page.

house, room or place so opened kept or used; and whoever advances or furnishes money for the purposes of gaming with persons frequenting such house room or place, shall be liable, on summary conviction before a Magistrate, to a fine not exceeding five hundred rupees, or to imprisonment, with or without hard labour, for any term not exceeding three months

Penalty for being found playing in gaming house

45. Whoever is found in any such house, room or place playing or gaming with cards, dice counters, money or other instruments of gaming or is found there present for the purpose of gaming whether playing for any money, wager, stake or otherwise, shall be liable, on summary conviction before a Magistrate, to a fine not exceeding two hundred rupees, or to imprisonment, with or without hard labour for any term not exceeding one month, and any person found in any common gaming house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming

Commissioner or Magistrate may grant warrants to Police-officers to enter gaming house for search and seizure

46. If the Commissioner of Police or a Magistrate upon information on oath, and after such inquiry, as he may think necessary, has reason to believe that any house, room or place is used as a common gaming house, he may, by his warrant, give authority to any (Sub-Inspector) * or superior officer of Police to enter, with such assistance as may be found necessary, by night or by day, and force, if necessary, any such house, room or other place, and to take into custody all persons whom he finds therein whether or not then actually gaming and to seize all instruments of gaming, and all moneys and securities for money and article of value, reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and to search all parts of the house, room or place which he shall have so entered, when he has reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he so takes into custody and to seize and take possession of all instruments of gaming found upon such search.

Notes —1. A Deputy Commissioner of Police has power to issue search warrants under this section, **20 C. 670.** *See* Note to s 5, *supra*

2. When presumption of a common gaming-house, cannot arise.—The presumption referred to under this section cannot arise in a case where the arrest is not made on a warrant. **5 C. L. J. 92 = 4 Cr. L. J. 71.**

3 Formalities necessary for issuing warrant to search a house under s 46—the issuing officer must have information on oath on which he may have reason to believe that the house to be searched is used as a common gaming house Mere suspicion is not sufficient and a warrant issued on mere suspicion is invalid under this section **30 C. W. N. 718.**

Common gaming house

47. When, under the provisions of the last preceding section, any cards, dice, gaming table or cloth, board or other instruments of gaming, are found in any house, room or place, or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such a house, room or place is used as common gaming-house, and that the persons found therein were there present for the purpose of gaming although no play was actually seen by the Police-officer or any of his assistants

On conviction for keeping common gaming house, instruments of gaming to be destroyed, etc.

48. On conviction of any person, for keeping any such common gaming house, or being present therein for the purpose of gaming, all the instruments of gaming found therein shall be destroyed by order of the Magistrate, who may also order all or any of the securities for money, and other articles seized, not being instruments of gaming, to be sold and converted into money, and the proceeds thereof, with all money seized therein, to be forfeited, or, in his discretion, may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled.

Proof of playing for stakes unnecessary

49. It shall not be necessary, in order to convict any person of keeping a common gaming house or of being concerned in the management of any common gaming house, to prove that any person found playing at any game, was playing for any money, wager or stake

* This word 'Sub Inspector' in s 46 was substituted for the word 'Inspector" by the Calcutta and Suburban Police (Amendment) Act, 1907 (Bengal Act III of 1907), s 4

Witnesses indemnified.

50. Any person who shall have been concerned in gaming contrary to this Act, and who shall be examined as a witness before a Magistrate on the trial of any person for a breach of any of the provisions of this Act relating to gaming, and who, upon such examination shall make true and faithful discovery, to the best of his knowledge, of all things as to which he shall be so examined, and who shall thereupon receive from the said Magistrate a certificate in writing to that effect, shall be freed from all prosecutions under this Act for anything done before that time in respect of such gaming.

* **50-A.** Nothing in sections 44 to 50 shall apply to any game of mere skill, wherever played.

Portion of fine may be paid to informer.

51. The Magistrate may direct any portion † * * * * of any fine which shall be levied under sections 44 and 45 of this Act, or any part of the moneys or proceeds of articles seized and ordered to be forfeited under section 48 to be paid to [any person who has contributed in any way to the conviction.] ‡

52. [*Gambling in the streets.*] *Rep. by the Bengal Public Gambling Act,* 1867 (*Ben. Act II of* 1867), *s.* 17.

Pawn-brokers and money-changers to report stolen property under penalty for neglect.

53. If any property answering the description set forth in any information which shall be given by any Police-officer to any pawn-broker or dealer in second-hand property, or money-changer, regarding property stolen or fraudulently obtained, shall then be or thereafter come into the possession of, or be offered in pawn, or for sale or change to such pawn-broker, dealer or money-changer, he shall, without unnecessary delay, give information to that effect at the nearest Police-station, and shall also state the name and address given by the party by whom the same was offered, or from whom the same was received, under a penalty, to be imposed by a Magistrate on summary conviction, not exceeding fifty rupees for each and every such neglector's offence:

Provided always that, in the case of wearing-apparel or other articles which it may be difficult for such pawn-broker or dealer to trace out and identify, no fine shall be exigible in respect of not reporting such articles unless it shall appear to the Magistrate that such articles had been knowingly concealed by such pawn-broker or dealer.

Taking pledge from child under age of fourteen.

54. Whoever takes from any child, apparently under the age of fourteen years, any article whatsoever as a pawn, pledge or security for any sum of money lent or advanced to such child, or without the knowledge and consent of the owner of the article, buys from any child any article whatsoever, shall be liable, on summary conviction before a Magistrate, to a penalty not exceeding one hundred rupees.

Possession or dealing with thing stolen or fraudulently obtained.

§ **54-A.** (1) Whoever has in his possession, or conveys in any manner, or offers for sale or pawn anything which there is reason to believe to have been stolen or fraudulently obtained, shall, if he fails to account for such possession or act to the satisfaction of the Magistrate, be liable to fine which may extend to one hundred rupees, or to imprisonment, with or without hard labour, for a term which may extend to three months.

(2) If any person charged under sub-section (1) in respect of anything declares that he received such thing from some other person, or that he was employed as a carrier, agent or servant to convey such thing for some other person,

the Magistrate, after such further inquiry (if any) as he may deem necessary, may summon such other person, and any former or pretended purchaser or other person through whose possession such thing is alleged to have passed, to appear before him, and may examine such person and any witnesses who are produced to testify to such receipt, employment or possession,

and, if it appears to the Magistrate that any such person had possession of such thing and had reasonable cause to believe that it was stolen or fraudulently obtained, the Magistrate may punish him with fine which may extend to one hundred rupees or with imprisonment, with or without hard labour, for a term which may extend to three months.

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* This new section 50-A was inserted by the Bengal Public Gambling (Amendment) Act (IV of 1913).

† The words "not exceeding one-fourth" in section 51 were repealed by the Calcutta and Suburban Police (Amendment) Act, 1907 (Bengal Act III of 1907), s. 5 (*a*), and are omitted.

‡ These words in square brackets in section 51 were substituted for the words "an informer" by section 5 (*b*) of the same Act.

§ Section 54-A was newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, ss. 12 and 13.

C W N, Vol 25, p 712—*Held* that for the purpose of section 54 A of the Calcutta Police Act it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained and the mere fact that the articles in question were recovered from the house of the accused does not warrant the conclusion that they had been stolen or fraudulently obtained and in this view the conviction was bad

Standard weights and measures

55 The Commissioner of Police shall keep in his office standard weights and measures * and weights and measures shall be held to be false when they do not agree with such standards.

Powers of Inspector etc to enter shops to seize false weights and measures

56. Any Inspector or superior officer of Police may enter any shop or premises for the purpose of inspecting the weights and measures and instruments for weighing kept or used therein and may seize any weight measure or instrument for weighing which he may have reason to believe is false

Manufacture or possession of gunpowder

57. Whoever manufactures gunpowder or without a license from the Commissioner of Police has in his possession in any house shop warehouse or other building at any one time a greater quantity of gunpowder than ten pounds shall be liable on a summary conviction before a Magistrate to a fine not exceeding five hundred rupees and also to forfeit such gunpowder so manufactured or possessed together with the vessel or receptacle in which it may be contained

58. [*Repealed by the Calcutta and Suburban Police (Amendment) Act of* 1910]

Licenses for conveying and removing gunpowder

59. The Commissioner of Police may grant to any person a license for the transit and carrying of gunpowder from one place to another in such manner and in such quantity as he may deem advisable and any person not being duly licensed in that behalf who carries or conveys a greater quantity of gunpowder than one pound from one place to another shall be liable on summary conviction before a Magistrate to a fine not exceeding fifty rupees.

Commissioner may issue warrant to search for gunpowder etc

60. The Commissioner of Police on credible information laid before him on oath †*and reduced to writing* may issue his warrant authorising a Police-officer †*not below the rank of Sub Inspector* to search any house shop magazine or other building or place in which he has reasonable ground to suspect that any †*explosive substance* is manufactured sold or kept or any boat carriage cart or other vehicle in which any †*explosive substance* may be suspected to be carried or any person suspected of carrying the same contrary to the provisions of this Act †*or any other law or any rule made thereunder* and all †*explosive substance* found in such search shall together with the vessels or receptacles in which it may be stored be immediately seized and kept pending the judgment of a Magistrate

Act not to apply to Government gunpowder etc

61. Note of the † *three* last preceding sections shall extend to any Government magazine or store or building for the making or deposit of †*explosive substances* under the authority or for the use of the Government or to any †*explosive substances* belonging to Her Majesty

Power of Commissioner to make rules for regulation of traffic etc

62. (1) With the previous sanction of the Lieutenant-Governor, ‡ the Commissioner of Police may after previous publication from time to time make rules—

(*a*) for licensing and controlling persons offering themselves for employment at quays wharves or landing-places for the carriage of passengers baggage, and fixing and providing for the enforcement of a scale of charges for the labour of such persons when so employed

(*b*) regulating traffic of all kinds in streets and public places, and the use of streets and public places by persons riding or driving leading or riding in vehicles or leading or accompanying cattle or walking so as to prevent danger obstruction or inconvenience to the public

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* As to duty of Commissioner of Police under s 55 to keep certified measure of the standard yard standard foot and standard inch under the Measure of Length Act 1889 (III of 1889) *see* s 7 of that Act in General Acts 1885—90 Ed 1898 p 281

† The words in italics in ss 60 and 61 were substituted by the Calcutta and Suburban Police (Amendment) Act III of 1910 ss 14 and 15

‡ Now the Governor in Council of Fort William in Bengal (*See* Ben Act VII of 1912)

(c) regulating the conditions under which vehicles may remain standing in streets and public places, and the use of streets as halting places for vehicles or cattle;

(d) prescribing the number and position of lights to be used on vehicles in streets and public places;

(e) regulating and controlling the conveyance of timber, bamboos, scaffold-poles, ladders, iron girders, beams or bars, boilers or other unwieldy articles, or coal, or bricks, lime or other building materials, through the streets, and the route and hours for such conveyance;

(f) for licensing, controlling, or, in view to preventing obstruction, inconvenience or annoyance to residents or passengers in the vicinity, prohibiting the playing of music in streets or in public places other than public buildings and the precincts thereof;

(g) for licensing, controlling, or, in view to preventing risk, danger or damage to residents or passengers in the vicinity, prohibiting the carrying of any explosive substance in streets or public places;

(h) for controlling, in the interests of the public convenience and safety, the illumination of streets and public places, and the erection of structures on or over any street or public place, or against the exterior of any building abutting thereon, for the purposes of illumination;

(i) for authorising and regulating the removal by the Police, of any structures referred to in clause (h) of this section, or any appliances for illumination placed on or over any street or public place or against the exterior of any building abutting thereon when the Commissioner of Police considers that the same are likely to cause obstruction, danger or damage to residents or passengers in the vicinity; or

(j) regulating the means of entrance and exit at places of public amusement, entertainment and assembly, and the lighting thereof when used by the public, and providing for the maintenance of public safety and the prevention of disturbance therein:

Provided that nothing in this section shall affect the provisions of the Indian Arms Act, 1878, or the Indian Explosives Act, 1884.

(2) Any rules made under this section may, with the like sanction, be altered or rescinded by the Commissioner of Police after previous publication of the alteration or rescission.

(3) Every rule and alteration of a rule made under this section and every rescission of any such rule shall be published in the *Calcutta Gazette* and in the manner prescribed by this Act * for the publication of public notices.

(4) Whoever contravenes any rule made under this section shall be liable—

(i) if the rule were made under clauses (a), (b) (c) or (f) of sub-section (1)—to fine which may extend to fifty rupees, or

(ii) if the rule were made under clauses (d), (e) or (g) of sub-section (1)—to imprisonment, with or without hard labour, for a term which may extend to eight days, or to fine which may extend to fifty rupees or to both, or

(iii) if the rule were made under clauses (h), (i) or (j) of sub-section (1)—to fine which may extend to one hundred rupees.

Power of Commissioner and other officers to give directions to the public.

† 62-A. (1) The Commissioner of Police, and, subject to the orders of the Commissioner of Police every Police-officer of a rank not inferior to that of Sub-Inspector, may, with a view to securing the public safety or convenience, but not so as to contravene any rule, made under the last foregoing section or the provisions of any license granted under any such rule, give all such directions, either orally or in writing, as he may consider necessary to—

(a) secure the orderly conduct of persons constituting procession and assemblies in streets;

* Now the Governor in Council of Fort William in Bengal. (*See* Ben. Act VII of 1912.)

† Sections 62, 62-A were substituted for old s. 62 by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 16.

(*b*) prescribe the routes by which and the times at which any such procession may, or may not, pass,

(*c*) prevent obstructions on the occasion of all processions and assemblies and in the neighbourhood of all places of worship during the time of public worship, and in all cases when any street or public place or place of public resort may be thronged or liable to be obstructed,

(*d*) keep order on and in all streets quays, wharves and landing places, and all other public places or places of public resort, or

(*e*) regulate and control music, the beating of drums, tom toms and other instruments, and the blowing or sounding of horns or other noisy instruments in any street or any public place other than public buildings and the precincts thereof

(2) The Commissioner of Police may also, subject to the control of the Lieutenant Governor,* whenever and for such time as he may consider it necessary to do so for the preservation of the public peace or public safety, by notification publicly promulgated, or addressed to individuals, prohibit—

(*i*) the carrying of swords, spears, bludgeons, guns or other offensive weapons in any public place,

(*ii*) the carrying, collection and preparation of stones or other articles intended to be used as missiles, or of instruments or means of casting or impelling missile,

(*iii*) the exhibition of persons corpses, figures or effigies in any public place, and

(*iv*) the public utterance of cries singing of songs or playing of music

(3) The Commissioner of Police may also, subject to the control of the Lieutenant Governor, whenever and for such time as he may consider necessary, by notification, publicly promulgated or addressed to individuals, prohibit the delivery of public harangues, the use of gestures or mimetic representations, and the preparation, exhibition or dissemination of pictures, symbols, placards or any other object or thing which—

(*i*) may be of a nature to outrage morality or decency, or

(*ii*) are likely, in the opinion of the Commissioner of Police, to inflame religious animosity or hostility between different classes, or to incite to the commission of an offence, to a disturbance of the public peace, or to resistance to, or contempt of, the law or lawful authority

(4) The Commissioner of Police may also, by order in writing, prohibit any procession or public assembly, whenever and for so long as he considers such prohibition to be necessary for the preservation of the public peace or public safety

Provided that no such prohibition shall remain in force for more than seven days without the sanction of the Lieutenant-Governor *

(5) The Commissioner of Police may also, subject to the orders of the Lieutenant Governor, by public notice, temporarily reserve for any public purpose any street or public place, and prohibit persons from entering the area so reserved save under such conditions as may be prescribed by the Commissioner of Police

(6) Whoever contravenes any direction, order or prohibition lawfully given or made under this section shall be liable,—

(*i*) if the direction order or prohibition were given or made under sub-section (1) or (5)—to fine which may extend to one hundred rupees, or

(*ii*) if the prohibition, were made under sub-sections (2), (3) or (4)—to imprisonment, with or without hard labour, for a term which may extend to one month or to fine which may extend to one hundred rupees, or to both.

Notes.—Scope of Section.—Cl 4 of this section and cl. 4 of s. 39-A of the Suburban Police Act must be exercised strictly according to the terms of the statute It is one thing to say that a procession will not be allowed and quite another thing to say that if a procession is formed, particular individuals are not to join them. Law does not give the Commissioner power to discriminate between individuals in this way Therefore where

* Now the Governor in Council of Fort William in Bengal (*See* Ben Act VII of 1912)

(*c*) regulating the conditions under which vehicles may remain standing in streets and public places, and the use of streets as halting places for vehicles or cattle;

(*d*) prescribing the number and position of lights to be used on vehicles in streets and public places;

(*e*) regulating and controlling the conveyance of timber, bamboos, scaffold-poles, ladders, iron girders, beams or bars, boilers or other unwieldy articles, or coal, or bricks, lime or other building materials, through the streets, and the route and hours for such conveyance;

(*f*) for licensing, controlling, or, in view to preventing obstruction, inconvenience or annoyance to residents or passengers in the vicinity, prohibiting the playing of music in streets or in public places other than public buildings and the precincts thereof;

(*g*) for licensing, controlling, or, in view to preventing risk, danger or damage to residents or passengers in the vicinity, prohibiting the carrying of any explosive substance in streets or public places;

(*h*) for controlling, in the interests of the public convenience and safety, the illumination of streets and public places, and the erection of structures on or over any street or public place, or against the exterior of any building abutting thereon, for the purposes of illumination;

(*i*) for authorising and regulating the removal by the Police, of any structures referred to in clause (*h*) of this section, or any appliances for illumination placed on or over any street or public place or against the exterior of any building abutting thereon when the Commissioner of Police considers that the same are likely to cause obstruction, danger or damage to residents or passengers in the vicinity; or

(*j*) regulating the means of entrance and exit at places of public amusement, entertainment and assembly, and the lighting thereof when used by the public, and providing for the maintenance of public safety and the prevention of disturbance therein:

Provided that nothing in this section shall affect the provisions of the Indian Arms Act, 1878, or the Indian Explosives Act, 1884.

(2) Any rules made under this section may, with the like sanction, be altered or rescinded by the Commissioner of Police after previous publication of the alteration or rescission.

(3) Every rule and alteration of a rule made under this section and every rescission of any such rule shall be published in the *Calcutta Gazette* and in the manner prescribed by this Act * for the publication of public notices.

(4) Whoever contravenes any rule made under this section shall be liable—

(*i*) if the rule were made under clauses (*a*), (*b*) (*c*) or (*f*) of sub-section (1)—to fine which may extend to fifty rupees, or

(*ii*) if the rule were made under clauses (*d*), (*e*) or (*g*) of sub-section (1)—to imprisonment, with or without hard labour, for a term which may extend to eight days, or to fine which may extend to fifty rupees or to both, or

(*iii*) if the rule were made under clauses (*h*), (*i*) or (*j*) of sub-section (1)—to fine which may extend to one hundred rupees.

Power of Commissioner and other officers to give directions to the public.

† **62-A.** (1) The Commissioner of Police, and, subject to the orders of the Commissioner of Police every Police-officer of a rank not inferior to that of Sub-Inspector, may, with a view to securing the public safety or convenience, but not so as to contravene any rule, made under the last foregoing section or the provisions of any license granted under any such rule, give all such directions, either orally or in writing, as he may consider necessary to—

(*a*) secure the orderly conduct of persons constituting procession and assemblies in streets;

* Now the Governor in Council of Fort William in Bengal (*See* Ben. Act VII of 1912.)

† Sections 62, 62-A were substituted for old s 62 by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 16.

(*b*) prescribe the routes by which and the times at which any such procession may, or may not, pass,

(*c*) prevent obstructions on the occasion of all processions and assemblies and in the neighbourhood of all places of worship during the time of public worship, and in all cases when any street or public place or place of public resort may be thronged or liable to be obstructed,

(*d*) keep order on and in all streets, quays, wharves and landing places, and all other public places or places of public resort, or

(*e*) regulate and control music, the beating of drums, tom toms and other instruments, and the blowing or sounding of horns or other noisy instruments in any street or any public place other than public buildings and the precincts thereof

(2) The Commissioner of Police may also, subject to the control of the Lieutenant-Governor,* whenever and for such time as he may consider it necessary to do so for the preservation of the public peace or public safety, by notification, publicly promulgated, or addressed to individuals, prohibit—

(*i*) the carrying of swords, spears, bludgeons, guns or other offensive weapons in any public place,

(*ii*) the carrying, collection and preparation of stones or other articles intended to be used as missiles, or of instruments or means of casting or impelling missile,

(*iii*) the exhibition of persons corpses, figures or effigies in any public place, and

(*iv*) the public utterance of cries singing of songs or playing of music

(3) The Commissioner of Police may also, subject to the control of the Lieutenant-Governor, whenever and for such time as he may consider necessary, by notification, publicly promulgated or addressed to individuals, prohibit the delivery of public harangues, the use of gestures or mimetic representations, and the preparation, exhibition or dissemination of pictures, symbols placards or any other object or thing which—

(*i*) may be of a nature to outrage morality or decency, or

(*ii*) are likely, in the opinion of the Commissioner of Police, to inflame religious animosity or hostility between different classes, or to incite to the commission of an offence, to a disturbance of the public peace, or to resistance to, or contempt of, the law or lawful authority

(4) The Commissioner of Police may also, by order in writing, prohibit any procession or public assembly, whenever and for so long as he considers such prohibition to be necessary for the preservation of the public peace or public safety

Provided that no such prohibition shall remain in force for more than seven days without the sanction of the Lieutenant-Governor*

(5) The Commissioner of Police may also, subject to the orders of the Lieutenant Governor, by public notice, temporarily reserve for any public purpose any street or public place, and prohibit persons from entering the area so reserved save under such conditions as may be prescribed by the Commissioner of Police

(6) Whoever contravenes any direction, order or prohibition lawfully given or made under this section shall be liable,—

(*i*) if the direction order or prohibition were given or made under sub-section (1) or (5)—to fine which may extend to one hundred rupees, or

(*ii*) if the prohibition, were made under sub-sections (2) (3) or (4)—to imprisonment, with or without hard labour, for a term which may extend to one month or to fine which may extend to one hundred rupees, or to both.

Notes.—Scope of Section.—Cl 4 of this section and cl 4 of s. 39-A of the Suburban Police Act must be exercised strictly according to the terms of the statute It is one thing to say that a procession will not be allowed and quite another thing to say that if a procession is formed, particular individuals are not to join them. Law does not give the Commissioner power to discriminate between individuals in this way Therefore where

* Now the Governor in Council of Fort William in Bengal (*See* Ben Act VII of 1912)

an order was to the following effect, *viz.*,—'Whereas it appears to the Commissioner of Police that it is necessary for the preservation of the public peace that he should prohibit any procession or public assembly in which you, *L*, have or may have any concern whatsoever on 7th August, 1912, within the town and suburbs of Calcutta, the Commissioner of Police hereby prohibits you, the said *L*, from having any concern whatsoever with any procession or any public assembly on the 7th day of August, 1912, within the said limits, was promulgated *Held*, that such an order was beyond the powers conferred by the section. **17 C. W. N. 505 = 13 Cr. L. J. 125.**

2.—The carrying of a sword by calling it a kirpan exceeding 9 inches in length in the town of Calcutta is an offence under s. 62-A read with the notification of the Commissioner of Police, **A. I. R. (1924) Cal. 231.**

Enforcement of orders issued under the last foregoing section

* **62-B.** (1) Whenever a notification, order in writing or public notice has been duly issued under sub-sections (2), (3), (4) or (5) of the last foregoing section, then—

(*a*) in the case of a notification issued under clauses (*i*), (*ii*) or (*iii*) of the said sub-section (2), or in the case of a public notice issued under the said sub-section (5),—any Magistrate or any Police-officer, or

(*b*) in the case of a notification issued under clause (*iv*) of the said sub-section (2), or under the said sub-section (3), or in the case of an order issued under the said sub-section (4),—any Magistrate or any Police-officer of or above the rank of Sub-Inspector,

may require any person acting or about to act contrary thereto desist or to abstain from such action, and in case of refusal or disobedience, may arrest such person.

(2) Any Magistrate or Police-officer acting under sub-section (1) may also seize anything used or about to be used in contravention of such notification, order or notice as aforesaid; and anything so seized shall be disposed of as any Magistrate having jurisdiction may order.

Power to give directions to prevent disorder at places of public amusement, etc.

* **62-C.** (1) For the purpose of preventing serious disorder or manifest any imminent danger to the persons assembled at any place of public amusement, or at any assembly or meeting to which the public are invited or which is open to the public,

the Police-officer of highest rank, superior to that of Head Constable, who is present, may, subject to such rules, directions and orders as may have been lawfully made,

give such reasonable directions as he may think necessary as to the mode of admission of the public to, and for securing the peaceful and orderly conduct of persons attending at, such place, assembly or meeting,

and all persons shall be bound to conform to such directions.

(2) The Police shall have free access to every such place of public amusement, assembly or meeting, for the purpose of giving effect to the provisions of sub-section (1) and to any direction given thereunder.

(3) Whoever, disobeys or fails to conform to any lawful and reasonable direction given by any Police-officer under sub-section (1) shall be liable to fine which may extend to one hundred rupees.

63-65. [*Passenger-boats to be registered; power to refuse or cancel registration; penalty for neglecting or delaying to report accident attended with loss of life.*] *Rep. by Bengal Act IV of* 1879.

Penalty for committing in public streets the offence of

66. Whoever, within such limits † as shall be from time to time defined by the Commissioner of Police with the sanction of the said Lieutenant-Governor, ‡ in any street, thoroughfare or place of public resort, commits any of the following offences, shall be liable, on summary, conviction before a Magistrate, to a fine not exceeding fifty rupees:—

driving, etc., elephant or camel.

(1) whoever drives, rides, or leads any elephant or camel without permission from the Commissioner of Police;

driving vehicle without a sufficient light;

(2) whoever drives any vehicle at any time between three-quarters of an hour after sunset, and one hour before sunrise without a sufficient light;

driving on other than left side of road;

(3) whoever, without reasonable cause, shall drive a vehicle otherwise than on the left or near side of the road;

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* Sections 62-B and 62-C were substituted for old s. 62 by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 16.

† These have been defined to be "the limits of the town of Calcutta as declared by the Proclamation of the Governor General in Council on the 10th September, 1794, by virtue of the Statute 33, George, Chap 52, section 159"—See the *Calcutta Gazette*, 18th April, 1866, p. 632.

‡ Now the Governor in Council of Fort William in Bengal (*see* Ben Act VII of 1912)

(4) whoever exposes for show hire or sale any horse or other animal or any carriage or cleans or dresses any horse or other animal or cleans any carriage or other conveyance, or makes or repairs any part of any cart or carriage except in cases of accident where repair on the spot is necessary or trains or breaks any horse except in such place and at such times as may be allowed by the Commissioner

exposing for show or training horses or cleaning conveyances in places not allowed

exposing or keeping articles so as to cause obstruction

*(4 A) whoever exposes or keeps any article so as to cause obstruction in any public thoroughfare

(5) [*Rep by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

(6) [*Rep by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

(7) [*Rep by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

(8) [*Rep by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

(9) [*Rep by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

(10) whoever by driving a hackery or cart with insufficiently greased wheels shall create a noise which is reasonably calculated to cause annoyance to persons frequenting or residing near the thoroughfare in which such hackery or cart is driven

driving cart with insufficiently greased wheels

(11) whoever sets fire to or burns any straw or other matter or lights any bonfire or wantonly discharges any fire-arm or air gun or lets of or throws any fire-work or sends up any fire-balloon in or near any public street road or thoroughfare except at such times and places as shall from time to time be allowed by the Commissioner of Police

lighting fires and discharging guns fire-works etc

(12) [*Rep by the Calcutta and Suburban Police (Amendment) Act III of* 1910]

(13) whoever without the consent of the owner or occupier affixes any bill or notice or any paper against or upon any building wall †[tree fence post pole or other erection] or writes upon, defaces or marks any such building wall †[tree, fence post pole or other erection] with chalk or paint, or in any way whatsoever

affixing bills or otherwise defacing houses etc

bathing etc in public street or aqueduct

(14) whoever bathes or washes himself in any street or in upon or by the side of, any public tank reservoir or acqueduct not being a place set apart for such purpose

(15) whoever obstructs or incommodes a person bathing at any place set apart as a bathing-place by wilful intrusion or by using such place as a landing place or by anchoring or otherwise fastening or keeping boats or by washing cattle or dogs at or near such place or in any other way

obstructing persons at bathing places

67. [*Cruelty to animals*] *Rep by the Bengal Cruelty to Animals Act* 1869 (*Bengal Act I of* 1869) s 8

‡**68.** Whoever is found drunk and is incapable of taking care of himself or is guilty of any riotous or indecent behaviour in any public street or thoroughfare or in any place of public amusement or resort shall be liable on summary conviction before a Magistrate, to a fine not exceeding twenty rupees or to imprisonment with or without hard labour for a term not exceeding eight days

Penalty for drunkenness or riotous or indecent behaviour in public

§**68-A.** Whoever wilfully and indecently exposes his person or commits a nuisance by easing himself in or by the side of or near to any public street or thoroughfare or place shall be liable on summary conviction before a Magistrate to a fine not exceeding ten rupees or, in default thereof, to imprisonment with or without hard labour for a term not exceeding three days

Penalty for committing a nuisance in streets

* Inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, s 17

† These words in square brackets in clause 13 s. 66 were substituted for the words "or fence by the Calcutta and Suburban Police (Amendment) Act 1907 [Bengal Act III of 1907] s 7

‡ This section was substituted for the repealed s 68 by the Calcutta and Suburban Police (Amendment) Act 1888 Bengal Act II of 1888 s 2

§ Section 68 A was added by s. 3 of the Calcutta and Suburban Police (Amendment) Act III of 1910

Penalty for solicitation in a public place.

* **68-B.** Whoever, in a public place, solicits any person to immorality to the annoyance of the person solicited or of any two or more of the inhabitants or passers-by, shall be liable, on summary conviction before a Magistrate, to a fine not exceeding fifty rupees, or to imprisonment, with or without hard labour, for any period not exceeding eight days.

69. [*Penalty for committing a nuisance in streets.*] *Rep. by the Presidency Magistrates Act*, 1877 (*IV of* 1877).

Beggars.

70. Whoever in any public street, thoroughfare or place begs or applies for alms, or exposes or exhibits any sores, wounds, bodily ailment or deformity, with the object of exciting charity or of obtaining alms; or whoever seeks for or obtains alms by means of any false statement, or pretences shall be liable, on summary conviction before a Magistrate, to imprisonment, with or without hard labour for any term not exceeding one month.

Refuges for reception of certain classes of convicted beggars.

† **70-A.** (1) The Lieutenant-Governor ‡ may, by notification in the *Calcutta Gazette*, declare any institution, situated either in the town of Calcutta or the suburbs thereof, to be a refuge for the reception of aged, infirm or incurably diseased persons convicted and sentenced to imprisonment under section 70;

and may, by like notification, cancel any such declaration.

(2) When any such person is so convicted and sentenced to imprisonment for any term, the Magistrate may, by written order, direct that he be taken to, and detained for the said term in, any Refuge notified under sub-section (1), instead of being imprisoned.

(3) If any such person escapes, before the expiration of the said term, from a Refuge to which he has been so taken, the Magistrate may cancel the order made under sub-section (1), and may direct that the said person shall be imprisoned, with or without hard labour, for the unexpired portion of the said term.

Stray animals to be impounded and sold unless redeemed within ten days.

71. It shall be lawful for all persons, and it is hereby declared to be the special duty of all Police-officers, to seize all cattle or other animals found straying upon the streets or thoroughfares, or trespassing on any of the grounds or property of the inhabitants, or of the Government, and to confine such animals in any public pound which shall for such purpose be from time to time appointed by the Commissioner of Police;

and if such animals shall not be respectively redeemed by the owners of the same within ten days after being so impounded, by paying to the person to be appointed by the said Commissioner to have charge of such pound the fee of eight annas for every goat, sheep or hog, and one rupee for every other animal, together with the expenses of feeding the same while impounded, according to a daily rate to be settled by the said Commissioner, such animals so impounded shall be publicly sold, and the produce of such sale, after paying the said fee, and also the expenses of feeding, shall be paid to the owners of such animal, or, in default of their claim in such produce for the space of fifteen days after such sale shall be retained by the said Commissioner, and credited to any fund applicable to Police purposes.

Power to arrest without warrant.

§ **72.** (1) Subject to the restrictions imposed by clause (*b*) of sub-section (1) of section 62-B in the case of offence there referred to, any Police-officer may arrest without a warrant any person committing in his presence in any street or public place any offence punishable under—

(*a*) any section of this Act other than section 68-B, or

(*b*) any rule made under this Act, or

(*c*) any other law for the time being in force,

if such person—

(*i*) after being warned by a Police-officer, persists in committing such offence, or

(*ii*) is unknown to such Police-officer and; when asked by such Police-officer to give his name and address, refuses to give the same, or gives a name or address which such Police-officer has reason to believe to be false or cannot then and there ascertain to be true, or

* Section 68-B was inserted by the Calcutta and Suburban Police (Amendment) Act, 1895 [Bengal Act I of 1895], s. 2.

† Section 70-A was newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, ss. 18 and 20.

‡ Now the Governor in Council of William in Bengal (*see* Bengal Act VII of 1912).

§ Substituted for old s. 72 by the C and Suburban Police (Amendment) Act III of 1910, ss 21 and 23.

(iii) is unknown to such Police-officer, and his name and address cannot be ascertained then and there, and he refuses to accompany the Police-officer to a Police station on being required so to do

Explanation —This sub-section does not restrict the exercise by any Police-officer of any power of arrest conferred upon him by any other law

(2) Should the true name and residence of any such person not be ascertained within twenty four hours from the time of arrest, or should he fail to execute a recognisance for his appearance before a Magistrate, or, if so required, to furnish sureties he shall forthwith be forwarded to a Magistrate having jurisdiction.

Notes.—1. Justification for arrest.—When a person is arrested for an offence not really under a warrant, the mere fact that a warrant had been issued for his arrest which warrant had been executed against other persons, who have since been convicted, can hardly be put forward as a justification for the arrest. **4 C. L. J. 93 = 4 Cr. L. J. 71.**

2. There must be finding that the place was a common gaming-house—Where an arrest of a person who was gambling in an open place in view of the Police is sought to be justified, it must be found that the place where the gambling was taking place was a common gaming house **4 C. L. J. 93 = 4 Cr. L. J. 71.**

Arrest without warrant for solicitation

***72-A.** Any Police-officer, above the rank of a native constable, and such other officer as the Local Government or the Commissioner of Police may specially appoint in that behalf, may, at the instance of any person aggrieved arrest without warrant any person who, in his sight and in a public place solicits any person to immorality to the annoyance of the person solicited or of two or more of the inhabitants or passers by if the name and address of such person be unknown to him, and cannot be ascertained by him then and there

73. [*Power to take into custody without warrant*] *Rep by the Presidency Magistrates Act*, 1877 (*IV of* 1877)

Apprehension of offenders by private individuals

74. Whoever commits an offence on or with respect to the person or property of another, or, in committing any of the offences described or referred to in this Act, injures or damages the person or property of another, may if his name and address be unknown be apprehended by the person injured, or by any person who may be using the property to which the injury may be done, or by the servant of either of such persons or by any persons authorised by or acting in aid of him, and may be detained until he gives his name and address and satisfy such person that the name and address so given are correct, or until he can be delivered into the custody of a Police-officer

Penalty for assaulting or resisting person apprehending under section 74

75. If any person lawfully apprehended under the last preceding section shall assault or forcibly resist the person by whom he shall be so apprehended or any person acting in his aid he shall be liable to a fine not exceeding two hundred rupees.

Detention of person taken into custody by Police without warrant

76. Every person taken into custody without a warrant by a Police-officer shall be taken to the Police-station in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognisances, with or without sureties, for his appearance before a Magistrate

Power to take recognisances at station house

77. Whenever any person is brought to a Police-station charged with any offence against this Act †or whenever a person is in the custody of any Police-officer without a warrant, it shall be lawful for the officer in charge of such Police-station or any superior officer of Police, if he shall deem it prudent, to enlarge such person on his own recognisance, with or without sureties, conditioned as hereinafter mentioned.

Condition of recognisance

78. Every recognisance so taken shall be without fee or reward, and shall be conditioned for the appearance of the person thereby bound before the Magistrate at his next sitting, and all persons executing the said recognisance shall acknowledge themselves jointly and [illegible]

and the

† The words and figures " or with any of the offences numbered 1, 2, 3 4, 5, 6, 7, 8, 9 10 11 12 13 14, 20, 21, 22, 23, 24 and 25, in section 26 of this Act," which were repealed by the Repealing and Amending Act, 1903 (I of 1903), are omitted

and the officer taking the recognisance shall enter in a book, to be kept for the purpose, the name, residence and occupation of the party, and his surety or sureties (if any) entering into such recognisance, together with the condition thereof, and the sum thereby acknowledged, and shall return every such recognisance to the Magistrate present at the time and place when and where the party is bound to appear.

Power of Commissioner of Police to require attendance and obtain statements of witnesses

***78-A.** (1) If, in the course of any investigation, the Commissioner of Police has reason to believe that a cognisable offence has been committed, he may, by order in writing, require the attendance, before himself or before any officer serving *under him, not below the rank* of Sub-Inspector, who is investigating a cognisable offence, of any person then being within the limits of the town or suburbs of Calcutta, or within thirty miles of such limits who, from the information given or otherwise, appears to be acquainted with the facts, or circumstances of the case: and such person shall attend as so required.

(2) The Commissioner of Police, or any officer aforesaid, may examine orally any person so attending, and may reduce into writing any statement made by him; and such person shall be bound to answer all questions relating to the case put to him by the Commissioner or such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The Commissioner of Police may, in any case, forward to the Superintendent of Police of the district in which any person, from whom any information is required relating to the facts or circumstances of the case under investigation, is believed to be, such questions and such statement as may be necessary for the purpose of obtaining the information desired; and such Superintendent shall, on receipt thereof, cause such person to be examined orally, and his statement to be reduced into writing, in the same manner and subject to the same provisions as if an investigation were being made into such offence in such district, and shall forward the statement reduced into writing to the Commissioner of Police.

(4) Subject to any rules made by the † Lieutenant-Governor ‡ the Commissioner of Police may, if he thinks fit, order payment, on the part of the Government, of the reasonable expenses, of any person residing in the town or suburbs of Calcutta who attends for the purposes of any investigation before himself or any other Police-officer under this section, and shall order payment as aforesaid of the reasonable expenses of any person not so residing who attends as aforesaid.

In **30 C. W. N. 427** the question arose whether the Police in Calcutta have got inherent powers in matters of investigation. In a case of inquiry the investigating Police-officer went to Howrah from one *S.* No requisition was made to the Superintendent of Police, Howrah, in this behalf under s. 78-A, sub-clause 3 of the Calcutta Police Act. On this evidence the Magistrate committed *S* to the High Court Sessions: *Held,* the evidence was inadmissible and the commitment was bad. All investigations of the Police must be controlled in Calcutta by the Calcutta Police Act and by any circular issued on that behalf and in the mofussil by the Code of Criminal Procedure; apart from these Acts and circular the Police have no such general inherent powers in these matters, therefore the statement in the case was illegally taken and so inadmissible in evidence.

On suspicion of goods being stolen or unlawfully obtained, Commissioner may grant search-warrant

79. If information shall be given on oath to the Commissioner of Police § § § § that there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any dwelling-house, building or other place, or any ship or vessel,

the Commissioner § § § § by special warrant under his hand directed to any Police-officer, may cause such dwelling-house, building or other place, or ship or vessel to be entered and searched at any time of the day or by night, if power for that purpose be given by such warant:

|| *Provided that no such warrant shall authorise any Police-officer below the rank of Sub-Inspector to make any entry or search at night.*

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* Section 78-A was newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 25.

† Now the Governor in Council of Fort William in Bengal (*see* Ben Act VII of 1912).

‡ The words "with the previous sanction of the Governor-General in Council" were repealed by Act XXXVIII of 1920 and are omitted.

§ The words "or to a Magistrate," "or the Magistrate", and "or Magistrate," repectively, were repealed by the Presidency Magistrates Act, 1877 (IV of 1877), and are omitted.

|| Newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, s. 26.

and the said Commissioner * * * *, if it shall appear to him necessary, may empower such Police-officer, with such assistance as may be found necessary (such officer having previously made known his authority), to use force for the effecting of such entry whether by breaking open doors or otherwise, and if, upon search thereupon made, such thing shall be found, then to convey the same before a Magistrate, or to guard the same on the spot until the offenders are taken before a Magistrate, or otherwise dispose thereof in some place of safety, and moreover to take into custody, and carry before the said Magistrate, every person found in such house or place, or ship or vessel, who shall appear to have been privy to the deposit of any such thing knowing or having reasonable cause to suspect the same to have been stolen or otherwise unlawfully obtained

Power to search houses for stolen property without warrant

80. If information shall be given to any officer of Police not below the rank of † [Sub-Inspector] that there is reasonable cause for suspecting that any stolen property is concealed or lodged in any dwelling house or other place and he shall have good grounds for believing that by reason of the delay in obtaining a search warrant the property is likely to be removed the said officer in virtue of his office, may search for specific articles, alleged to have been stolen in the houses and places specified

Provided always, that a list of articles stolen or missing be delivered or taken down in writing, with a declaration stating that the robbery has been committed and that the informant has good ground to believe that the property is deposited in such house or place and provided further that the person who lost the goods or his representative accompany the officer in the search

Power to search for persons wrongfully confined

‡ **80-A.** If information is given on oath to the Commissioner of Police that any person is confined under such circumstances that the confinement amounts to an offence and if it is for any reason impracticable to make an application to a Magistrate under section 100 or section 552 of the Code of Criminal Procedure, 1898 the Commissioner may issue a search warrant to any Police-officer not below the rank of Sub-Inspector, and the officer to whom such warrant is directed may search for the person indicated in such warrant in accordance with such directions as may be given therein, and the person, if found, shall immediately be taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper

When officer in charge of Police-station may require another to issue search warrant

‡ **80-B.** (1) An officer in charge of a Police-station in the town of Calcutta may require any officer in charge of a Police-station in any part of Bengal, whether within or without the town of Calcutta, to cause a search to be made in any place in any case in which the former officer might cause such search to be made within the limits of his own station

(2) Such officer, on being so required shall proceed in accordance with the provisions of section 80 of this Act or section 165 of the Code of Criminal Procedure, 1898, whichever is applicable, and shall forward the thing found (if any) to the officer at whose request the search was made

Procedure in making searches

‡ **80-C.** (1) Before any officer makes a search under this Act, he shall call upon two or more respectable persons to attend and witness the search

(2) The search shall be made in the presence of such persons, and a list of all things seized in the course of the search, and of the places in which they are respectively found, shall be prepared by the said officer and signed by the said witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall in every instance, be permitted to attend during the search, and a copy of the list prepared under sub-section (2) signed by the said witnesses, shall be delivered to such occupant or person at his request

* The words ' or to a Magistrate, ' " or the Magistrate " and " or Magistrate, respectively, were repealed by the Presidency Magistrates Act, 1877 (IV of 1877) and are omitted

† This word ' Sub-Inspector" in section 80 was substituted for the word " Inspector" by the Calcutta and Suburban Police (Amendment) Act, 1907 (Ben Act III of 1907), s 4

‡ Sections 80-A 80 B and 80-C were newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910, ss 27, 28 and 29

Seizure of stolen property.

81. It shall be lawful for any Police-officer to seize any property or thing which may be found in the possession of any person, where the possession by such person of such property or thing creates a reasonable suspicion of the committal of an offence; and such seizure shall be forthwith reported to the Commissioner of Police, who shall thereupon make such order respecting the custody or production of the property as he shall think proper.

82-94. [*Disposal of stolen porperty in custody of Police; Magistrate's power to summon persons charged; summons how served; power to issue warrant; power to enforce attendance of witnesses; fees; power to order prisoner to be brought up; giving false evidence; power to adjourn hearing; power to award costs and amends; levy of fines; distress not unlawful for want of form.*] *Rep. by the Presidency Magistrates Act*, 1877 (*IV of* 1877).

If Magistrate certifies non-appearance of person pursuant to recognisance, sum acknowledged may be recovered as fine

95. If any person, upon entering into such recognisance as is by this Act authorised to be taken, do not afterwards appear pursuant to such recognisance, the Magistrate before whom he ought to have appeared shall certify the fact of such non-appearance on the back of the recognisance and thereupon the sum thereby acknowledged shall be recoverable in the manner provided by * [sections 64 and 67 to 70 of the Indian Penal Code] and sections 386, 387 and 389 of the Code of Criminal Procedure, 1898, for levying fines.

96-98. [*Recognisance; form of judgment; grounds for quashing a conviction.*] *Rep. by the Presidency Magistrate's Act*, 1877 (*IV of* 1877)

Limitation of action

Notice of action

99. *Clause* 1.—All actions and prosecutions against any person, which may be lawfully brought for anything done, or intended to be done under the provisions of this Act shall be commenced within three months after the act complained of shall have been committed, and not otherwise; and notice in writing of such action, and of the causes thereof, shall be given to the defendant one month at least before the commencement of the action;

and in every such action it shall be expressly alleged in the plaint that the act complained of was done maliciously and without reasonable or probable cause;

and if at the trial of any such action, upon the general issue being pleaded as hereinafter provided, the plaintiff shall fail to prove such allegation, he shall be non-suited, and a verdict shall be given for the defendant.

Plea.

Clause 2.—The defendant in any such action may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon;

Tender of Amends

and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought, by or on behalf of the defendant;

Costs.

and if a verdict shall pass for the defendant, or the plaintiff shall become non-suit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases;

and, though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the Judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon.

Notes.—1. Meaning of "prosecution" in clause (1)—The word "prosecution" in cl. (1) of s. 99 of the C.P. Act means "criminal prosecution"; and the clause, so far as the rule of limitation goes, applies to criminal prosecution as well as to civil action. **7 C. W. N. 883** where **23 C. 55** and *Sutton* v. *Sutton*, (1882) **L. R. 22 Ch. D. 511** are *referred to.*

2. What are "acts done or intended to be done" under the Act.—Where a circular order issued by the Commissioner of Police in Calcutta, authorised the Police to make investigations, and an Inspector attached to a Thana in Calcutta detained a person in custody for the purpose of a Police inquiry, and it was not shown that he did so in abuse of his authority and under colour of it for the purpose of harassing or injuring him, *held* that the act of the Inspector detaining such person in custody was done or at least intended to be done, under the provisions of the Act, within the meaning of this section. **7 C. W. N. 883.**

* These words and figures in square brackets in s 95 were substituted for the words "this Act," by the Repealing and Amending Act, 1903 (I of 1903), Sch II.

3 **Period of limitation for instituting prosecutions**—It was *held* in 3 C. W N 883 that criminal prosecution under s 342 I P C instituted against a Police Inspector for unlawfully detaining a person after the expiry of three months was time-barred

4. Objection to prosecution on ground of law was allowed to be raised for the first time in appeal 7 C. W N 883

Police to take charge of unclaimed movable property

***100** (1) The Police shall for the purpose of safe custody take temporary charge of—

(a) all unclaimed movable property found by them and

(b) all movable property found lying in any public street, if the owner or the person in charge of such property on being directed to remove the same refuses or omits to do so within a reasonable time

and may for the said purpose take temporary charge of any unclaimed movable property made over to them

(2) Property of which the Police have taken charge under sub section (1) shall be handed over to the Commissioner of Police

Disposal of such property

***101.** (1) If the said property appears to have been left by a person who has died intestate and not to be under two hundred rupees in value the Commissioner of Police shall communicate with the Administrator General with a view to its being dealt with under the Administrator General s Act 1874 or any other law for the time being in force

(2) In every other case the Commissioner of Police shall issue a proclamation specifying the articles of which such property consists and requiring any person who may have a claim thereto to appear before himself or some other officer whom he appoints in this behalf and establish his claim within six months from the date of such proclamation

(3) If the property or any part thereof is subject to speedy and natural decay or consists of live-stock or if the property appears to be of less value than five rupees it may forthwith be sold by auction under the orders of the Commissioner of Police and the net proceeds of such sale shall be dealt with in the same manner as is hereinafter provided for the disposal of the said property

(4) The Commissioner of Police shall on being satisfied of the title of any claimant to the possession or administration of any property referred to in sub-section (2) order the same to be delivered to him after deduction or payment of the expenses properly incurred by the Police in the seizure and detention thereof.

(5) The Commissioner of Police may at his discretion before making any order under sub-section (4), take such security as he may think proper from the persons to whom the said property is to be delivered and nothing hereinbefore contained shall affect the right of any person to recover the whole or any part of such property from the person to whom it may have been delivered pursuant to such order

(6) If no person establishes his claim to such property within the period prescribed in sub-section (2) *it shall* be at the disposal of the Government and *the property or such part thereof as has not already been* sold under sub-section (3) may be sold by auction under orders of the Commissioner of Police

Stray dogs to be killed at certain appointed periods

102. It shall be lawful for the Commissioner of Police by order in writing to be affixed at the principal Police stations and also to be published in some public newspaper to appoint from time to time certain period within which any dogs found straying in the streets or beyond the enclosures of the houses of the owners of such dogs may be destroyed

Public notices how to be given

†102-A Any public notice required to be given under any of the provisions of this Act shall be in writing shall be signed by the Commissioner of Police and shall be published in the locality to be affected thereby by affixing copies thereof in conspicuous public places or by proclaiming the same with beat of drum or by advertising the same in such local newspapers English or Vernacular as the Comissioner of Police may deem fit or by any two or more of these means and by any other means he may think suitable

* Substituted for old ss 100 and 101 by the Calcutta and Suburban Police (Amendment) Act III of 1910

† Sections 102 A, 102 B and 102-C were newly inserted by the Calcutta and Suburban Police (Amendment) Act III of 1910 ss 31 and 32

Consent, etc., of Commissioner of Police or Police-officer how to be proved.

*102-B. Whenever under this Act or any rule made hereunder the doing or the omitting to do * anything or the validity of anything depends upon the consent, approval, declaration, opinion or satisfaction of the Commissioner of Police or of any other Police-officer, a written document signed by the Commissioner of Police or by such officer, purporting to convey or set forth such consent, approval, declaration, opinion or satisfaction, shall be sufficient evidence thereof.

Stamping of signature.

†102-C. Every license, written permission, notice, or other document [not being a summons or warrant or search-warrant or a notification issued under sub-section (3) of section 62-A, or an order made under sub-section (4) of that section, or an order made under section 78-A] required by this Act, or any rule made hereunder, to bear the signature of the Commissioner of Police, shall be deemed to be properly signed if it bears a facsimile of his signature stamped thereon.

103. [*Foreign deserters.*] *Rep. by the Indian Ports Act*, 1875 (*XII of* 1875).

SCHEDULE OF FORMS.

FORM A—(*referred to in section* 13).

† *A.B.* has been appointed a member of the Calcutta Police Force, and is vested with the powers, functions and privileges of a Police-officer.

CALCUTTA,

The 19 . *Commissioner of Police.*

FORM B—[*Rep. by the Repealing and Amending Act*, 1903 (*I of* 1903)].

APPENDIX XVII.

BENGAL POLICE ACT No. VII OF 1869.

PASSED BY THE LIEUTENANT-GOVERNOR OF BENGAL IN COUNCIL.

Received the assent of the Lieutenant-Governor on the 26*th August*, 1869, *and of the Governor-General on the* 18*th September*, 1869.

An Act to amend the Constitution of the Police Force in Bengal.

Preamble.

WHEREAS it is expedient that the entire Police establishment in the Provinces under the control of the Lieutenant-Governor of Bengal should cease to be one Police Force, and that the said Provinces should cease to be one General Police District under one Inspector-General; It is enacted as follows:

Repeal of section 2, Act V of 1861.

1. Section 2 of Act V of 1861 is repealed, so far as it relates to the Provinces under the control of the Lieutenant-Governor of Bengal.

Power to divide the Provinces into Police Districts.

2. It shall be lawful for the Lieutenant-Governor of Bengal, from time to time to divide the said Provinces into as many General Police Districts as he may think fit, and from time to time to vary and alter any of such General Police Districts or to consolidate two or more of such General Police Districts into one district, as he may think fit.

* Sections 102-A, 102-B and 102-C were newly inserted by the Calcutta and Suburban Police (Amendment) Act, III of 1910, ss. 31 and 32.
† Substituted for old form by the Calcutta and Suburban Police (Amendment) Act of 1910, s. 33

Power to appoint in districts persons to execute duties of Inspector-General

3. It shall be lawful for the Lieutenant Governor in each such General Police District, to appoint some person to exercise in such district the powers of an Inspector-General of Police whether such person shall or shall not hold any other office under the said Lieutenant-Governor, and the administration of the Police throughout such General Police District, and all powers and authorities by the said Act V of 1861 or any other Act conferred on an Inspector General of Police, shall be vested in such person.

Police establishment in each district to be considered one Police Force

4. The entire Police establishment in every such district shall, for the purpose of the said Act V of 1861, be deemed to be one Police Force, and shall be formally enrolled, and shall consist of such number of officers and men, and shall be constituted in such manner, and the members of such Force shall receive such pay, as shall from time to time be ordered by the said Lieutenant-Governor, subject to the sanction of the Governor-General of India in Council

Power to employ Police out of the district

5. It shall be lawful for the Lieutenant Governor to employ members of the Police Force who have been enrolled in or appointed to, any one General Police District, in any other General Police District within the Provinces subject to this control and the powers conferred on Police-officers by the Code of Criminal Procedure may be by them exercised in any portion of the said Provinces without reference to the local limits of the General Police District to which they may respectively belong

Construction of Act

6. This Act shall be read and taken in the Provinces under the control of the Lieutenant Governor of Bengal as part of the said Act V of 1861

APPENDIX XVIII.

CALCUTTA POLICE ACT No. I OF 1898.

PASSED BY THE LIEUTENANT GOVERNOR OF BENGAL IN COUNCIL

Received the assent of the Lieutenant Governor on the 30*th April*, 1898, *and of the Governor General on the* 17*th May*, 1898

[First published in the *Calcutta Gazette* of the 25th May, 1898]

An Act to extend certain portions of the Police Act, 1861 *to the Town and Suburbs of Calcutta.*

Whereas it is expedient to extend certain portions of the Police Act, 1861, as amended by the Police Act (1861) Amendment Act, 1895, to the Town and Suburbs of Calcutta, subject to the modifications hereinafter appearing,

And whereas, the said Acts having been passed by the Governor General of India in Council, the previous sanction of the Governor General has been obtained, under section 5 of the Indian Council Act, 1892, to the passing of this Act,

It is hereby enacted as follows —

Short title and commencement

1. (1) This Act may be called the Calcutta Police Act, 1898, and

(2) it shall come into force on the day on which it is first published in the *Calcutta Gazette* after having received the asssent of the Governor-General

Extension of portions of the Police Act 1861 to Town and Suburbs of Calcutta

2. The portions of the Police Act, 1861, as amended by the Police Act (1861) Amendment Act, 1895, which are specified in the first column of the Schedule to this Act are hereby extended, subject to the modifications set forth in the second column of that Schedule to —

(1) the Town of Calcutta, as defined in section 3 of the Calcutta Police Act, 1866, and

(2) the area to which Bengal Act II of 1866 (*an Act to provide for the better Regulation of the Police within the Suburbs of the Town of Calcutta*) for the time being applies by virtue of any notification published under section 1 thereof.

THE SCHEDULE.

1	2
Portions of the Police Act, 1861, extended.	Modifications.
So much of section 1 as— (*a*) defines "property," "person" and "month," and (*b*) relates to number and gender	
Section 15	In sub-section (1), *after* "them" *insert* "or of any person resorting to such area." In sub-section (2), *for* "the Inspector-General of Police or other officer authorised by the Local Government in this behalf" *read* "the Commissioner of Police."
Section 15	In sub-section (4), *for* "The Magistrate of the district" *read* "such officer as the Local Government may appoint in this behalf, or, in the suburbs, the Magistrate of the 24 Purgannas," *and for* "the Magistrate's" *read* "such officer's or Magistrate's."
Section 15-A	In sub-section (1), *after* "them" *insert* "or of any persons resorting to such area"; *omit* the words "being an inhabitant of such area"; *and for* "the Magistrate of the district or of the sub-division of a district within which such area is situated" *read* "the officer appointed under section 15, sub-section (4), or, in the suburbs, the Magistrate of the 24 Purgannas." In sub-section (2), *for* "the Magistrate of the district" *read* the officer appointed as aforesaid, or, in the suburbs, the Magistrate of the 24 Purgannas; *and for* clause (*c*) *read*— (*c*) "asess the proportion in which the same shall be paid— (*i*) by the inhabitants of the area specified in the proclamation (other than the applicant), or (*ii*) by the inhabitants of the area of which the persons resorting as aforesaid are inhabitants, or (*iii*) by the inhabitants of both the said areas who shall not have been exempted from liability to pay under the next succeeding sub-section." In the proviso the sub-section (2), *before* "Magistrate" *insert* "said officer or," *and for* "such area" *read* "the area specified in the proclamation." In sub-section (4), *for* "the Magistrate of the distirict" *read* "the officer appointed as aforesaid or the Magistrate of the 24 Purgannas." In sub-section (1), *for* "sections 13, 14, 15 and 15-A" *read* "sections 15 and 15-A."
Section 16	In sub-sections (1) and (3), *for* "the Magistrate of the district" *read* "the officer appointed under section 15, sub-section (4), or the Magistrate of the 24 Purgannas as the case may be."

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Portions of the Police Act, 1861, extended	Modifications.
	In sub-section (1), *for* ' in the manner provided by sections 386 and 387 of the Code of Criminal Procedure, 1882, for the recovery of fines" *read* "under the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and execution of warrants for the levy of fines."
	In sub-section (2), *for* "All moneys paid or recovered under sections 13, 14 and 15 shall be credited to a fund to be called the General Police Fund' and *read* " All moneys paid or recovered under section 15."
	In sub section (6), *for* ' that section" *read* ' the said section 15-A "
Section 46 Sub-sections (2) and (3)	In sub section (2), *omit* the words ' When the whole or any part of this Act shall have been so extended '
	In clause (*a*) of sub-section (2) *for* "Magistrates" *read* ' the officer appointed under section 15, sub-section (4), the Magistrate '

The following paper is published for general information

Sections of the Police Act, 1861, *in the form in which they are extended to the Town and Suburbs of Calcutta by Bengal Act I of* 1898

Definitions

1. The following words and expressions in this Act shall have the meaning assigned to them unless there be something in the subject or context repugnant to such construction that is to say

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the word " property ' shall include any movable property money or valuable security

words importing the singular number shall include the plural number and words importing the plural number shall include singular number

words importing the masculine gender shall include females

the word "person' shall include a company or corporation

the word " month' shall mean a calendar month

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Quartering of additional Police in disturbed or dangerous area at cost of inhabitants

15. (1) It shall be lawful for the Local Government, by proclamation to be notified in the *Official Gazette* and in such other manner as the Local Government shall direct to declare that any area subject to its authority has been found to be in a disturbed or dangerous state, or that from the conduct of the inhabitants of such area or of any class or section of them, or of any persons resorting to such area, it is expedient to increase the number of Police

(2) It shall thereupon be lawful for the Commissioner of Police, with the sanction of the Local Government, to employ any Police Force in addition to the ordinary fixed complement, to be quartered in the area specified in such proclamation as aforesaid

(3) Subject to the provisions of sub-section (5) of this section, the cost of such additional Police Force shall be borne by the inhabitants of such area described in the proclamation.

(4) Such officer as the Local Government may appoint in this behalf, or, in the suburbs, the Magistrate of the 24 Purgannas, after such enquiry as he may deem necessary, shall apportion such cost among the inhabitants who are, as aforesaid, liable to bear the same and who shall not have been exempted under the next succeeding sub-section. Such apportionment shall be made according to such officer's or Magistrate's judgment of the respective means within such area of such inhabitants.

(5) It shall be lawful for the Local Government, by order, to exempt any person or class or section of such inhabitants from liability to bear any portion of such cost.

(6) Every proclamation issued under sub-section (1) of this section shall state the period for which it is to remain in force, but it may be withdrawn at any time, or continued from time to time for a further period or periods as the Local Government may in each case think fit to direct.

Explanation.—For the purposes of this section, "inhabitants" shall include persons who themselves or by their agents or servants occupy or hold land or other immovable property within such area, and landlords who themselves or by their agents or servants collect rents direct from raiyats or occupiers in such area, notwithstanding that they do not actually reside therein.

Award of compensation to sufferers from misconduct of inhabitants or persons interested in land.

15-A. (1) If, in any area in regard to which any proclamation notified under the last preceding section is in force, death or grievous hurt, or loss of or damage to property, has been caused by or has ensued from the misconduct of the inhabitants of such area or any class or section of them, or of any persons resorting to such area, it shall be lawful for any person who claims to have suffered injury from such misconduct to make, within one month from the date of the injury, or such shorter period as may be prescribed, an application for compensation to the officer appointed under section 15, sub-section (4), or in the suburbs, the Magistrate of the 24 Purgannas.

(2) It shall thereupon, be lawful for the officer appointed as aforesaid, or, in the suburbs, the Magistrate of the 24 Purgannas, with the sanction of the Local Government, after such inquiry as he may deem necessary, and whether any additional Police Force has or has not been quartered in such area under the last preceding section, to—

(*a*) declare the persons to whom injury has been caused by or has ensued from such misconduct;

(*b*) fix the amount of compensation to be paid to such persons and manner in which it is to be distributed among them; and

(*c*) assess the proportion in which the same shall be paid:—

(i) by the inhabitants of the area specified in the proclamation (other than the applicant), or

(ii) by the inhabitants of the area of which the persons resorting as aforesaid are inhabitants, or

(iii) by the inhabitants of both the said areas, who shall have not been exempted from liability to pay under the next succeeding sub-section:

Provided that the said officer or Magistrate shall not make any declaration or assessment under this sub-section unless he is of opinion that such injury as aforesaid has arisen from a riot or unlawful assembly within the area specified in the proclamation, and that the person who suffered the injury was himself free from blame in respect of the occurrences which led to such injury.

(3) It shall be lawful for the Local Government, by order, to exempt any person or class or section of such inabitants from liability to pay any portion of such compensation.

(4) Every declaration or assessment made or order passed by the officer appointed as aforesaid or the Magistrate of the 24 Purgannas under sub-section (2) shall be subject to revision by the Commissioner of the Division or the Local Government, but save as aforesaid shall be final.

(5) No civil suit shall be maintainable in respect of any injury for which compensation has been awarded under this section.

(6) *Explanation.*—In this section the word "inhabitants" shall have the same meaning as in the last preceding section.

Recovery of moneys payable under sections 15 and 15-A, and disposal of same when recovered.

16. (1) All moneys payable under sections 15 and 15-A shall be recoverable by the officer appointed under section 15, sub-section (4), or the Magistrate of the 24 Purgannas, as the case may be, under the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and execution of warrants for the levy of fines, or by suit in any competent Court.

(2) All moneys paid or recovered under section 15 shall be applied to the maintenance of the Police Force under such orders as the Local Government shall pass.

(3) All moneys paid or recovered under section 15-A shall be paid by the officer appointed under section 15 sub-section (4) or the Magistrate of the 24 Purgannas as the case may be to the persons to whom and in the proportions in which the same are payable under the said section 15-A

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Power to make rules

46 (2) The Local Government may from time to time by notification in the *Official Gazette* make rules consistent with this Act—

(*a*) to regulate the procedure to be followed by the officer appointed under section 15 sub-section (4) the Magistrate and Police-officers in the discharge of any duty imposed upon them by or under this Act

(*b*) to prescribe the time manner and conditions within and under which claims for compensation under section 15 A are to be made the particulars to be stated in such claims the manner in which the same are to be verified and the proceedings (including local enquiries if necessary) which are to be taken consequent thereon and

(*c*) generally for giving effect to the provisions of this Act.

(3) All rules made under this Act may from time to time be amended added to or cancelled by the Local Government.

INDEX.

Acts—(*contd.*)

Acts—(*contd.*)

PAGE